

DEFINITION

Case Summary: *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, 23 July 2001 (Case No. ARB/00/4)

Facts

The Société Nationale des Autoroutes du Maroc (“ADM”), operated highways and various road-works on behalf of the State of Morocco. In August 1994, ADM issued an international invitation to tender for the construction of a highway. Salini Costruttori S.P.A. and Italstrade S.P.A., Italian companies, were awarded a joint tender for the construction of a section of the highway. The works took 36 months to complete, 4 months longer than originally set out in the contract.

The Italian companies explained why the contract terms were not met but the claims were rejected by ADM's head engineer. Following this, the Italian companies sent a memorandum relating to the final account to the Minister of Infrastructure. No reply was received from either the Minister of Infrastructure or ADM. The Italian companies then filed a Request for Arbitration against Morocco with ICSID alleging breaches of the Morocco-Italy bilateral investment treaty. Morocco raised an objection to jurisdiction.

Issue

Morocco viewed the grounds for complaint as not relating to violations of the BIT, but mere contractual breaches, and therefore not within ICSID jurisdiction. Morocco argued that the Tribunal lacked jurisdiction because, under Moroccan law a contract for the construction of a highway could not be characterized as an investment but as a contract for services, therefore the transaction here should be characterized as a contract for services, not an investment contract.

The Italian companies characterized the contract as an investment within the meaning of Articles 1(c) and 1(e) of the BIT, which deal with "rights to any contractual benefit having an economic value" and "any right of an economic nature conferred by law or by contract." They argued that the reference to the laws and regulations of the host State only relate to the means of realizing the investment and not to the definition of 'investment'. The notion of investment should, therefore, not be limited by reference to the laws and regulations referred to in Article 1 paragraph 1, but by reference to Article 1(g), which requires that the rights referred to in Articles 1(c) and 1(e) should have been the object of contracts approved by the competent authorities. This would seem to be satisfied in the present case. The Kingdom of Morocco contested this.

Award on Jurisdiction

The ICSID Tribunal held that the contract concluded between ADM and the Italian companies constituted an investment both under Articles 1 and 8 of the Morocco-Italy BIT, as well as Article 25 of the ICSID Convention.

With respect to the BIT , the construction contract created "a right to a contractual benefit having an economic value" for the Contractor, and the Contractor also benefited from a "right of an

economic nature conferred by contract". The Tribunal found that paragraph 1 of Article 1 of the BIT referred to the validity of the investment and not to its definition, and in both the pre-contractual stage and the stage corresponding to the performance of the contract, the Italian companies did not infringe the laws or regulations of Morocco, so the investment was valid. Finally the Tribunal viewed the contract in question as being the object of an authorization from the competent authority.

Under the Washington Convention 'investment' generally requires:

1. A contribution;
2. A certain duration of performance of the contract, and
3. A participation in the risks of the transaction.

Reading the Convention's preamble, the Tribunal also added that an additional condition may be,

4. The contribution to the economic development of the host State of the investment.

The Tribunal noted that in reality, these various elements may be interdependent. All the criteria were met in this case.

The Tribunal declared that it had jurisdiction over the Italian companies' claims here, but specified that it would not have jurisdiction over mere breaches of the contract concluded between the Italian companies and ADM that did not simultaneously constitute a violation of the BIT.

Reasons

The jurisdiction of the Arbitral Tribunal depended upon the existence of an investment within the meaning of the Bilateral Treaty as well as that of the Washington Convention.

Bilateral Investment Treaty

Article 1 of the BIT provided that

Pursuant to the present Agreement,

1. the term "investment" designates all categories of assets invested, after the coming into force of the present agreement, by a natural or legal person, including the Government of a Contracting Party, on the territory of the other Contracting Party, in accordance with the laws and regulations of the aforementioned party. In particular, but in no way exclusively, the term "investment" includes:

- a) chattels and real estate, as well as any other property rights such as mortgages, privileges, pledges, usufructs, related to the investment;
- b) shares, securities and bonds or other rights or interests and securities of the State or public entities;
- c) capitalised debts, including reinvested income, as well as rights to any contractual benefit having an economic value;
- d) copyright, trademark, patents, technical methods and other intellectual and industrial property rights, know-how, commercial secrets, commercial brands and goodwill;
- e) any right of an economic nature conferred by law or by contract, and any licence or concession granted in compliance with the laws and regulations in force, including the right of prospecting, extraction and exploitation of natural resources;
- f) capital and additional contributions of capital used for the maintenance and/or the accretion of the investment;

g) the elements mentioned in (c), (d) and (e) above must be the object of contracts approved by the competent authority.

The construction contract created a right to a "contractual benefit having an economic value" for the Contractor, mentioned in Article 1(c). The Contractor also benefited from a "right of an economic nature conferred ... [...] ... by contract" per Article 1(e).

The Tribunal did not agree with Morocco in its view that paragraph 1 of Article 1 refers to the law of the host State for the definition of "investment". The Tribunal found that, in focusing on "the categories of invested assets...in accordance with the laws and regulations of the aforementioned party," this provision referred to the validity of the investment and not to its definition. More specifically, it the provision was there to prevent the Bilateral Treaty from protecting investments that should not be protected, that is, investments that would be illegal. In the present case, the Italian companies took part in the tender process according to the legal rules applicable to invitations to tender. They also won the bid and concluded the contract for services in conformity with the laws in force at that time. Therefore, in both the pre-contractual stage and the stage corresponding to the performance of the contract, the Italian companies did not infringe the laws or regulations of Morocco.

To be considered as investments, the rights listed under letters (c) and (e) had to be "the object of contracts approved by the competent authority" under the terms of Article 1(g). The Bilateral Treaty did not indicate who the competent authority was, this being likely to vary according to the contract in question. The competent authority was determined according to the laws and regulations of the State on the territory of which the investments are made. The Tribunal viewed the contract in question as being indeed the object of an authorization from the competent authority. As a result, the Tribunal considered the condition of Article 1(g) satisfied. Therefore, the Tribunal held that the contract concluded between ADM and the Italian companies was an investment within the meaning of the Bilateral Treaty.

ICSID Convention

With respect to the ICSID Convention, ICSID jurisdiction is determined by Article 25, which states that,

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of relation to an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the Parties to the dispute consent in writing to submit to the Centre.

No definition of investment is given by the Convention, as this seemed unnecessary given the requirement of consent by the parties as to which classes of disputes they would consider submitting to the Centre.

The Tribunal noted that it would be inaccurate, however, to consider that the requirement that a dispute be "in direct relation to an investment" to be diluted by the consent of the Contracting Parties. To the contrary, ICSID case law and legal authors have agreed that the investment requirement must be respected as an objective condition of the jurisdiction of the Centre.

The doctrine generally considers that investment implies,

...contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.
[Emphasis added.]

The Tribunal noted that in reality, these various elements may be interdependent. Thus, the risks of the transaction may depend on the contributions and the duration of performance of the contract. As a result, the Tribunal noted that these various criteria should be assessed globally even if, for the sake of reasoning, they were considered individually here.

These four criteria were met in this case. First, the Italian companies made contributions in money, in kind, and in industry. Second, with respect to duration, the transaction complied with the minimal length of time upheld by the doctrine (from 2 to 5 years).

Third, the risks incurred by the Italian companies flowed from the nature of the contract. The companies gave a list of the risks taken in the performance of the contract, including:

- The risk associated with the ability of the Owner to prematurely put an end to the contract, and to impose variations within certain limits without changing the manner of fixing prices.
- The risk consisting of the potential increase in the cost of labour, in case of modification of Moroccan law.
- Any accident or damage caused to property during the performance of the works
- Risks relating to problems of co-ordination possibly arising from the simultaneous performance of other projects.
- Any unforeseeable incident that could not be considered as force majeure and which, therefore, would not give rise to a right to compensation.
- Risks related to the absence of any compensation in case of increase/decrease in volume of the workload not exceeding 20 % of the total contract price.

It did not matter that these risks were freely taken, or that the remuneration of the Contractor was not linked to the exploitation of the completed work. A construction that stretches out over many years, for which the total cost cannot be established with certainty in advance, creates an obvious risk for the Contractor.

Fourth, the contribution of the contract to the economic development of the Moroccan State could not seriously be questioned. In most countries, the construction of infrastructure falls under the tasks to be carried out by the State or by other public authorities. It could not be seriously contested that the highway in question would serve the public interest. Finally, the Italian companies were also able to provide the host State of the investment with know-how in relation to the work to be accomplished.