

Emilio Agustín Maffezini v. Kingdom of Spain (ICSID Case No. ARB/97/7)

Introductory Note

On October 30, 1997, the Secretary-General of ICSID registered a request for institution of an arbitration proceeding by Mr. Emilio A. Maffezini, a national of Argentina, against the Kingdom of Spain. The request invoked Spain's consent to ICSID arbitration set forth in the 1991 bilateral investment treaty between Argentina and Spain (the Argentina-Spain BIT). In his request for arbitration, Mr. Maffezini also invoked, by way of a most-favored-nation (MFN) clause in the Argentina-Spain BIT, the provisions of the 1991 bilateral investment treaty between Chile and Spain (the Chile-Spain BIT). The dispute involved a chemical products joint venture between Mr. Maffezini and a Spanish publicly owned entity, and the treatment allegedly received by Mr. Maffezini from Spanish authorities from the time he decided to withdraw from the project and liquidate his investment in Spain.

The Arbitral Tribunal was constituted on June 24, 1998 and consisted of Judge Thomas Buergenthal, a U.S. national, appointed by the Claimant; Mr. Maurice Wolf, also a U.S. national, appointed by Spain; and, in the absence of an agreement between the parties as to the third and presiding arbitrator, Professor Francisco Orrego Vicuña, a Chilean national, appointed by the Chairman of the Administrative Council.¹

¹ Under Article 38 of the ICSID Convention and Rule 4 of the Arbitration Rules, if the Tribunal is not yet constituted within 90 days after the notice of registration of the request has been dispatched, the Chairman of ICSID's Administrative Council shall, at the request of either party, and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed and designate an arbitrator to be the President of the Tribunal.

Under the Argentina-Spain BIT, if a dispute cannot be settled within six months following the date on which it has been raised by either party, it shall be submitted to the courts of the party in whose territory the investment was made (in the present case, the Spanish courts). The dispute may also be submitted to international arbitration by either party, if no decision has been rendered on the merits of the claim after the expiration of an 18-month period from the date on which the local proceedings have been initiated, or, if such decision has been rendered, if the dispute between the parties continues.

In his request for arbitration, the Claimant acknowledged not having resorted to the Spanish courts. He claimed, however, that such condition in the Argentina-Spain BIT had been overridden through the operation of the MFN clause contained in that BIT. He argued that the MFN clause allowed him to invoke more favorable conditions for the submission of a claim to arbitration found in BITs concluded by Spain with other countries (in this case, the Chile-Spain BIT, which does not require the 18-month local remedies period for recourse to ICSID arbitration).

Spain, in turn, contested the Tribunal's jurisdiction, claiming, among other things, that Mr. Maffezini had not submitted the case to Spanish courts before referring it to international arbitration, as required by the Argentina-Spain BIT. Spain also filed an application for provisional measures, requiring Mr. Maffezini to post a guaranty in the amount of the costs expected to be incurred by Spain in defending against this action. The Claimant subsequently filed a request to the Tribunal to dismiss such application.

On October 28, 1999, the Tribunal issued a procedural order addressing Spain's request for provisional measures. In that order, the Tribunal, pointing out that the recommendation of provisional measures seeking to protect mere expectations of success on the side of the Respondent would amount to a pre-judgement of the Claimant's case, unanimously dismissed the request.

On January 25, 2000, the Tribunal issued its decision on jurisdiction, rejecting unanimously Spain's objections. In particular, the Tribunal concluded, in light of the application of the MFN clause included in the Argentina-Spain BIT (and therefore relying on the more favorable arrangements contained in the Chile-Spain BIT), that the Claimant had the right to submit the dispute to arbitration without first accessing the Spanish courts. The Tribunal then issued a procedural order for the continuation of the proceedings on the merits.

At the core of the parties' dispute was the nature of *SODIGA*, the Spanish entity with which Mr. Maffezini dealt while making his investment. While the Claimant characterized it as a public entity, Spain consistently described it as a private company whose acts were not attributable to the State. In its award, rendered on November 13, 2000, the Tribunal concluded that, at the time of the events that gave rise to the dispute, *SODIGA* was in the process of transforming itself from a State-oriented entity to a market-oriented entity, some of its functions to be regarded as essentially governmental in nature and others essentially commercial in character. Under this premise, the Tribunal analyzed each of Mr. Maffezini's claims, unanimously deciding to dismiss most of them.

The Tribunal, however, decided to grant Mr. Maffezini's allegation that a transfer of 30,000,000 Spanish pesetas from his personal account to an account owned by *EAMSA* (the Spanish company created for purposes of implementing the joint venture), was irregularly made; that it had been made by an official of *SODIGA*, in his official capacity, with full knowledge and authorization of the President of *SODIGA* and without the Claimant's consent; and that such transaction, although labeled as a "loan" by the Respondent, was in fact an increase of Mr. Maffezini's investment in Spain, decided by *SODIGA*, the public entity entrusted to promote the industrialization of the Spanish province of Galicia, and as such, attributable to the Kingdom of Spain. The Tribunal accordingly concluded that such conduct constituted a violation of Spain's obligation under the Argentina-Spain BIT to accord Mr. Maffezini's investment full protection and security.

As for the expenses incurred in the proceeding, including the charges for the use of the facilities of the Centre and the fees and expenses of the Tribunal, the Tribunal decided that these expenses should be borne equally by the parties. As for the expenses and legal costs of counsel, the Tribunal decided that each party should bear the entirety of its own expenses and legal fees for its own counsel in view of the fact that each party had been successful on key points of their respective positions.

Following the rendition of the Award, Spain filed, in December 2000, a request for its rectification. The request concerned the Tribunal's description of Spain's contentions. After giving both parties the opportunity to argue the point, the Tribunal decided to grant the request for rectification considering that (a) the rectification appropriately summarized the arguments set forth by Spain during the proceeding; (b) the request sought the rectification of a material error in the Award, as prescribed by Article 49(2) of the ICSID Convention; and (c) no objection was received from the Claimant.

The Decision on Provisional Measures, the Decision on Jurisdiction, the Award and the Rectification of the Award were rendered in Spanish, the procedural language chosen by the parties. The Spanish text of the Decision on Provisional Measures, of the Decision on Jurisdiction, of the Award and of the Rectification of the Award and their translation into English, arranged by the Tribunal with the agreement of the parties, have been posted, with the parties' consent, on ICSID's website at www.worldbank.org/icsid. The English translation of the texts of the Decision on Provisional Measures, of the Decision on Jurisdiction, of the Award and of the Rectification of the Award are reproduced below, with the parties' consent.

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