CASES

Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka (ICSID Case No. ARB/00/2)

Introductory Note

The Award in *Mihaly International Corporation* v. *Democratic Socialist Republic of Sri Lanka*, reproduced below, was rendered on March 15, 2002 in the second ICSID proceeding involving Sri Lanka. The first such case was *Asian Agricultural Products Limited* v. *Sri Lanka* (ICSID Case No ARB/87/3), which concluded with an award, including a dissenting opinion, rendered on June 27, 1990, reproduced in 6 *ICSID Review—Foreign Investment Law Journal* 526 (1991). Both cases were initiated on the basis of bilateral investment treaties. In the case of *AAPL* v. *Sri Lanka*, this was the Sri Lanka–U.K. treaty of February 18, 1990. In the case of *Mihaly International Corporation* v. *Sri Lanka*, it was the Sri Lanka–U.S. treaty of September 20, 1991. The *AAPL* case was the first ICSID case in which a bilateral investment treaty was invoked as the basis of the State party's consent to arbitration.

The Award reproduced below decided that the dispute was not within the jurisdiction of the Centre because the claimant could not show that, in the circumstances of the case, there had been an investment, either under the ICSID Convention or under the terms of the Sri Lanka–U.S. bilateral investment treaty. Under Article 25 of the Convention, the subject matter jurisdiction of the Centre extends to "any legal dispute arising directly out of an investment." Professor Christoph Schreuer comments fully on this provision at 11 *ICSID Review—Foreign Investment Law Journal* 320, at 355 (1996). The Sri Lanka–U.S. treaty, for its part, entails obligations for each

State party in regard to "every kind of investment in the territory" of that State, belonging to qualifying investors, and contains the consent of each State party to submit to arbitration disputes involving "an alleged breach of any right conferred or created by this Treaty with respect to an investment." Comparable, but somewhat more elaborate, provisions can be seen in Article I (1)(d) & (e) and Article IX (1) of the Nicaragua–U.S. bilateral investment treaty of July 1, 1995, reproduced in 11 *ICSID Review—Foreign Investment Law Journal* 183 (1996).

The Award in *Mihaly International Corporation* v. *Sri Lanka* is thus one of the few ICSID tribunal decisions to find that subject matter jurisdiction under the ICSID Convention is lacking in the case at hand. As will be seen from its background, the Award suggests that expenditures made in furtherance of a prospective investment that does not materialize do not, without more, reach the threshold of investment for the purpose of ICSID jurisdiction. Further discussion on this point is found in the separate opinion attached to the Award. Finally, the Award also examines issues concerning the standing of the claimant and the effectiveness of assignments of claims under the ICSID Convention.

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