

CASES

Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan

(ICSID Case No. ARB/02/13)

Introductory Note

In its Decision on Jurisdiction, the Tribunal composed of Judge Gilbert Guillaume (France) as President, and Professor Bernardo Cremades (Spain) and Sir Ian Sinclair (UK) as co-arbitrators, upheld jurisdiction over a part of the claims by two Italian companies, Salini Costruttori S.p.A. and Italstrade S.p.A., against the Hashemite Kingdom of Jordan. The underlying dispute relates to the amount owed to the Claimants for works done under a contract for dam construction in Jordan.

Jordan objected to the Tribunal's jurisdiction on the basis that the 1996 bilateral investment treaty between Italy and Jordan (the BIT), on which the Claimants relied, required parties to resort to any dispute resolution provisions they may have in their contract. In the present case, the contract between the parties, in turn, provided for arbitration only as a last resort and with the express consent of the Council of Ministers of Jordan, which was not obtained. Jordan further argued that the dispute is one of contract and that the Claimants have not disclosed any arguable case of violation of the BIT.

The Tribunal, having found that the relevant contract was entered into with the Claimants by an entity of the State, concluded that it had no jurisdiction over the contractual dispute between the parties which, according to the BIT, must be resolved in accordance with the provisions of the contract. Referring to the decisions in *Emilio Agustín Maffezini v. Kingdom of Spain* (ICSID Case No. ARB/97/17) and in *Ambatielos* (Judgment on the Merits of 19 May, 1963, *I.C.J. Reports 1953*, p. 10), the Tribunal further concluded that the MFN provisions of the BIT, invoked by the Claimants, would not confer such jurisdiction on the Tribunal, as the Claimants had not shown that those MFN provisions were intended to extend to procedural issues.

According to the Tribunal, it was also not conferred jurisdiction over the contract claims by the "umbrella clause" of the BIT, which it found to be only a commitment by each Party to the BIT to create and maintain in its territo-

ry a “legal framework” favourable to investments. The provision did not guarantee the observance of commitments entered into with respect to the investments of the investors of the other Party. In making this determination, the Tribunal considered the respective decisions on jurisdiction in *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) and in *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (ICSID Case No. ARB/02/6).

Although concluding generally that it would have jurisdiction over any treaty claims arising from the dispute between the parties, the Tribunal decided that it had no jurisdiction over the claim that the manner in which the contract was implemented by Jordan was in violation of provisions of the BIT prohibiting discriminatory measures, since the Claimants did not show how the alleged facts could constitute not only a breach of the contract, but also a breach of the BIT.

On the other hand, the Tribunal decided that it had jurisdiction over the claims that Jordan, by refusing to accede to the Claimants’ request to refer the dispute to arbitration pursuant to the contract, breached provisions of the BIT guaranteeing just and fair treatment of investments. The Tribunal further concluded that any such alleged failure of Jordan to submit the dispute to arbitration arose after the date of entry into force of the BIT in January 2000, and therefore would not be excluded from the jurisdiction of the Tribunal *rationes temporis*.

The Tribunal reserved its decision on costs.

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