

Consortium Groupement L.E.S.I.–DIPENTA v. Algeria (ICSID Case No. ARB/03/8)

Introductory Note

The award reproduced below was rendered on January 10, 2005, in the first ICSID proceeding involving Algeria. The Arbitral Tribunal unanimously declined jurisdiction on the ground that the Consortium Groupement L.E.S.I.–DIPENTA (Consortium) did not have standing. On February 3, 2003, the Consortium, registered in Rome, Italy, brought a request for arbitration against Algeria on the basis of the ICSID arbitration clause contained in the 1991 bilateral investment treaty (BIT) between Italy and Algeria. The request was registered on May 20, 2003. The parties agreed that the Arbitral Tribunal would consist of three arbitrators, one arbitrator appointed by each party and the third and presiding arbitrator appointed by the co-arbitrators. The Arbitral Tribunal was constituted on September 3, 2003, and was composed of Mr. André Faurès, a national of Belgium, appointed by the Consortium; Professor Emmanuel Gaillard, a national of France appointed by Algeria, and of Professor Pierre Tercier, a national of Switzerland, as the President of the Tribunal appointed by the co-arbitrators.

The dispute arose out of a concession agreement granted in December 1993 by the *Agence nationale des barrages* (ANB) to the Italian companies L.E.S.I. and DIPENTA (organized under a consortium) for the construction of a dam in the region of Wilaya of Bouira, Algeria. According to the Consortium, the execution of the concession encountered various problems mainly due to the region's lack of security. In 1997, the ANB modified the project and requested a new type of dam which required new financing and the approval of the original financing institution, the African Development Bank. In 2001, the ANB terminated the concession agreement for *force majeure*, the African Development Bank having requested a new international tender. The ANB agreed to offer some compensation to the Consortium, but the parties failed to agree on the amount and no payment had ever been made.

The Consortium brought the request to ICSID and asked the Tribunal to declare that Algeria had breached its obligations under the BIT by not pro-

moting, protecting and affording security to the Consortium's investment; by applying discriminatory measures against it; and by illegally expropriating it.

Algeria raised objections to jurisdiction and admissibility (*fins de non-recevoir*). At the first session, held in October 2003, the parties agreed that the Tribunal would first decide on the issues of jurisdiction and admissibility. The Arbitral Tribunal noted that in ICSID proceedings such distinction is of no practical consequences (Part II, para. 2). However, given the fact that these issues related to different questions and that the parties made this distinction, the Tribunal examined them separately. Algeria raised two objections to jurisdiction and two objections to admissibility developed into alternative arguments. It argued that (i) the conditions required under Article 25(1) of the ICSID Convention had not been fulfilled; (ii) jurisdiction should be limited to the violations of the BIT, if any; (iii) the Consortium did not have standing; and (iv) the conditions for the consent under the BIT had not been met.

On the objection to jurisdiction related to Article 25(1) of the ICSID Convention, the Tribunal examined the four conditions set forth by that provision, *i.e.*, that (i) there was a legal dispute; (ii) arising directly out of an investment; (iii) between a Contracting State and a national of another Contracting State, and (iv) that there was a consent in writing from the parties to submit the dispute to the Centre. With respect to the first condition, the Tribunal decided that a dispute existed regarding the amount of compensation alone, and that it was a legal dispute (Part II, paras. 8 and 9).

Regarding the notion of investment, the Tribunal considered that a construction contract would constitute an investment if three criteria were met: (i) the contracting party made contributions in the host country; (ii) these contributions had a certain duration; and (iii) they involved risks for the contributor. The Tribunal added that it was not required to determine the operation's significance for the host State's economic development as this was difficult to ascertain and as it was implicitly covered by the three other criteria. On these criteria, the Tribunal specified that contributions were not limited to financial commitments and did not necessarily need to be made exclusively in the host country. The Tribunal stated that contributions could partly be made in the home country on the condition that they were allocated to the project to be carried out in the host country. The Tribunal further considered that the notion of duration should be broadly apprehended as long as there were economic commitments of a high value. The Tribunal therefore concluded that in the present case there was an investment (Part II, paras. 13-15).

Regarding the involvement of a Contracting State, Algeria argued that the dispute exclusively involved ANB as opposed to the Algerian State. The Tribunal stated that at the jurisdictional stage, its role was limited to a formal

control that the claims were brought against a State, unless it was obvious that there was no link between the underlying contract and the State. The Tribunal recalled that States could be liable for contracts entered into by independent public entities as long as they could exercise their authority over the said entity. The Tribunal considered that, without prejudice to findings on the merits, the dispute was against a State, as the Algerian State participated, at least indirectly, in the negotiations of the contract and had a strong influence on the ANB's decision process (Part II, paras. 19 and 20).

Regarding the issue of Algeria's written consent to submit the particular dispute to ICSID, the Tribunal analyzed the relevant provisions of the BIT. In this context, Algeria argued that there was no investment covered under the BIT, since for an investment to be made in accordance with the laws and regulations in force, it needed to follow specific procedures. The Tribunal rejected that argument on the principal ground that an international treaty should be interpreted in consideration of the meanings given by both State Parties as opposed to a meaning based on one of the State Party's domestic laws. The Tribunal concluded that Algeria had given its written consent, which covered the investment at hand (Part II, para. 24).

However, examining further the scope of Algeria's consent and the second objection to jurisdiction, the Tribunal concluded that the consent was limited to measures which would constitute a breach of the BIT's provisions. The Tribunal reached that conclusion on the basis of the drafting of the BIT, which did not contain any "umbrella clauses" (Part II, paras. 25 and 26).

Having concluded that it had jurisdiction to decide on the Consortium's claims based on a violation of the BIT provisions, the Tribunal examined the objections to admissibility. It first addressed the question of whether the Consortium had attempted to settle the dispute amicably and had respected a cooling-off period of six months before bringing the request for arbitration, as provided by the BIT. The Tribunal concluded that the Consortium had complied with this requirement. It considered that the six-month period should be calculated from the date of the first written request to settle amicably made by the Consortium, which officially explained the claims to Algeria, and that such request need not be drafted in a specific way. The Tribunal further stated that this cooling-off period was not an absolute condition when it was obvious that any conciliation attempt would be doomed given the State party's behavior (Part II, paras. 32 and 33).

Regarding the issue of the Consortium's standing, the Tribunal noted that the concession agreement was originally signed by a "temporary" or "informal consortium" consisting of the two Italian companies L.E.S.I. and DIPENTA. It was only after the Italian companies were granted the bid that

they formally registered as a consortium. However, the Tribunal found that the ANB was never clearly informed of this substitution and, hence, never approved it. The Tribunal considered that under Italian law the registered consortium was an autonomous legal entity, independent of the two companies which were composing it. As such, the Consortium never benefited from the rights of the concession agreement and it could not therefore make any claim in its respect. Since the request was brought by the registered Consortium on its own behalf, it had no standing. In the absence of such standing, the Consortium could not be considered as an investor pursuant to Article 25(1) of the ICSID Convention and therefore the Tribunal concluded it lacked jurisdiction (Part II, paras. 37-41). The Tribunal was aware of the inconvenience triggered by such a decision since a new request for arbitration would have to be brought by the Italian companies on their own behalf. However, the Tribunal pointed out that this solution would have the advantage of clarifying the situation and would eliminate a potential ground for recourse against the eventual award (Part II, para. 40(i)).

As the Consortium had no standing, the Tribunal considered it unnecessary to address the alleged breach by the Consortium of Article 26 of the ICSID Convention for having sued ANB before an Algerian Administrative Court (Part II, para. 42).

On the question of costs, the Tribunal decided that the arbitration costs should be shared equally and that each party should bear its own expenses since most of Algeria's objections were rejected except for the one related to the Consortium's standing (Part II, para. 43).

Following the Tribunal's award, the two Italian companies (L.E.S.I and Astaldi S.p.A, which bought DIPENTA) jointly brought a new request for arbitration, which was recently registered.

The award of January 10, 2005 was rendered in French. The text of the award is reproduced below with the parties' consent. It is also available on ICSID's website at <http://www.worldbank.org/icsid>.

Eloïse M. Obadia
Counsel, ICSID