School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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EMILIO AGUSTÍN MAFFEZINI
v.
THE KINGDOM OF SPAIN
(ICSID CASE NO. ARB/97/7)
DECISION OF THE TRIBUNAL ON OBJECTIONS TO JURISDICTION

Case Report by Charles B. Rosenberg**
Edited by Loukas Mistelis***

A Decision on Jurisdiction rendered on January 25, 2000, under the Argentina-Spain BIT, and in accordance with the ICSID Convention and Arbitration Rules.

Tribunal:	Professor Francisco Orrego Vicuña (President), Judge Thomas Buergenthal, Mr. Maurice Wolf
Claimant's counsel:	Dr. Raúl Emilio Vinuesa, Dra. María Cristina Brea, Dra. Silvina González Napolitano, and Dra. Gisela Makowski, ESTUDIO VINUESA Y ASOCIADOS.
Defendant's counsel:	Mr. Rafael Andrés León Cavero, ABOGADO DEL ESTADO, SUBDIRECCIÓN GENERAL DE LOS SERVICIOS CONTENCIOSOS DEL MINISTERIO DE JUSTICIA.

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INDEX OF MATTERS DISCUSSED

Digest

1. Facts of the Case

In 1989, Mr. Emilio Agustín Maffezini, a national of Argentina, embarked on the production of various chemical products in Galicia, Spain, by establishing Emilio A. Maffezini S. A. ("EAMSA"), a corporation incorporated under the laws of Spain. Mr. Maffezini subscribed to 70% of the capital, while the Sociedad para el Desarrollo Industrial de Galicia ("SODIGA"), a Spanish entity, subscribed to the remaining 30% of the capital.

In 1992, EAMSA began to experience financial difficulties and Mr. Maffezini ordered the construction of the chemical plant to stop and the dismissal of EAMSA employees. In 1997, Mr. Maffezini commenced ICSID arbitration against the Kingdom of Spain under the Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Argentine Republic (the "Argentina-Spain BIT"). The Kingdom of Spain objected to the jurisdiction of the tribunal.

2. Legal Issues Discussed in the Decision

(a) Exhaustion of domestic remedies (paras. 19-37)

The tribunal rejected Respondent's objection that Article X(3)(a) of the Argentina-Spain BIT requires the exhaustion of certain domestic remedies in Spain and that Claimant failed to comply with this requirement. Article X(3)(a) of the BIT provides that a dispute between an Argentinean investor and the Kingdom of Spain "may be submitted to international arbitration . . . at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the [domestic Spanish] proceedings referred to in paragraph 2 of this Article have been initiated, or if such decision has been rendered, but the dispute between the parties continues."[1]

The tribunal began its analysis by examining Article 26 of the ICSID Convention, which permits Contracting States to condition their consent to ICSID arbitration on the prior exhaustion of domestic remedies. The tribunal noted that Article 26 makes clear that, contrary to the traditional international law rule that implies an exhaustion requirement unless expressly or implicitly waived, an exhaustion

[1] Award ¶ 19.

requirement will not be applicable unless a Contracting State had conditioned its consent to ICSID arbitration on the prior exhaustion of domestic remedies. The tribunal found that in ratifying the ICSID Convention, Spain did not attach any such condition to its acceptance of Article 26.

The tribunal then proceeded to examine Article X of the Argentina-Spain BIT to determine whether it required the prior exhaustion of domestic remedies. Applying Article 31 of the Vienna Convention on the Law of Treaties, which provides that a treaty is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," the tribunal noted:

> "Article X(3)(a) does not say that a case may not be referred to arbitration if a domestic court has rendered a decision on the merits of the dispute within a period of eighteen months. It provides merely that if such a decision has been rendered and if the dispute continues, the case may be referred to arbitration."[2]

Accordingly, the tribunal found that Article X(3)(a) of the BIT does not require the exhaustion of domestic remedies. But even if Article X(3)(a) of the BIT was to be characterized as requiring the exhaustion of domestic remedies, the tribunal reasoned that it would not prevent the subsequent reference of the case to international arbitration under the BIT. According to the tribunal:

> "This is so because, where a treaty guarantees certain rights and provides for the exhaustion of domestic remedies before a dispute concerning these guarantees may be referred to an international tribunal, the parties to the dispute retain the right to take the case to that tribunal as long as they have exhausted the available remedies, and this regardless of the outcome of the domestic proceeding. They retain that remedy because the international tribunal rather than the domestic court has the final say on the meaning and scope of the international obligations—in this case the BIT—that are in dispute."[3]

The tribunal also noted that Article X(3)(a) of the BIT does not contain any guidelines for deciding whether or under what circumstances a dispute may be deemed to continue. The tribunal remarked that "the absence of such objective

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[2] *Id.* ¶ 27.

[3] *Id.* ¶ 29 (citing Article 22 of the International Law Commission's Draft Articles on State Responsibility).

criteria leaves each party free to decide for itself whether the dispute continues, that is, whether its claim has been vindicated by the domestic court, and to refer the case to international arbitration if it is not satisfied with the domestic court judgment."[4]

Finally, the tribunal clarified that Article X(3)(a) of the BIT serves two important functions. First, it permits either party to a dispute to seek redress from the appropriate domestic court. Second, it ensures that a party accessing the domestic court will not be able to prevent the case from going to international arbitration after the expiration of the eighteen-month period.

The tribunal then turned to Respondent's related objection that Claimant did not submit the case to Spanish courts before referring it to international arbitration as required by Article X(2) of the BIT. The tribunal noted that Article X(2) of the BIT provides that the dispute "shall be submitted" to the competent tribunals of the State Party where the investment was made, and that Article X(3)(a) of the BIT declares that the dispute "may be submitted" to an international arbitration tribunal at the request of a party in the following circumstances: if the domestic court had not rendered a decision on the merits of the case within a period of eighteen months or if, notwithstanding the existence of such a decision, the dispute continues.

The tribunal reasoned that "[t]his language suggest that the Contracting Parties to the BIT—Argentina and Spain—wanted to give their respective courts the opportunity, within the specified period of eighteen months, to resolve the dispute before it could be taken to international arbitration."[5] The tribunal rejected Claimant's argument that this could not have been the intended meaning of Article X(2) of the BIT, noting that "Claimant's interpretation of Article X(2) would deprive this provision of any meaning, a result that would not be compatible with generally accepted principles of treaty interpretation, particularly those of the Vienna Convention on the Law of Treaties."[6] The tribunal then proceeded to analyze Respondent's objection based on the most favored nation clause in the BIT.

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[4] *Id.* ¶ 32.

[5] *Id*.

[6] *Id.* ¶ 37.

(b) Most favored nation clause (paras. 38-64)

The tribunal found that the most favored national clause in Article IV(2) of the Argentina-Spain BIT, which provides that "[i]n all matters subject to this Agreement, this [fair and equitable] treatment shall not be less favorable than that extended by each Party to the investments made in its territory by investors of a third country,"[7] embraces the dispute settlement provisions of the BIT. Therefore, the tribunal concluded that Claimant had the right to submit the present dispute to arbitration without first accessing the Spanish courts.

As noted above, the Argentina-Spain BIT provides domestic courts with the opportunity to deal with a dispute for a period of eighteen months before it may be submitted to arbitration. However, Article 10(2) of the Chile-Spain BIT imposes no such condition. It provides merely that the investor can opt for arbitration after the six-month period allowed for negotiations has expired.

The tribunal began its analysis by asking which treaty was the basic treaty that governs the rights of the beneficiary of the most favored nation clause. The tribunal reasoned:

> "For if, as the Tribunal believes, the right approach is to consider that the subject matter to which the clause applies is indeed established by the basic treaty, it follows that if these matters are more favorably treated in a third-party treaty then, by operation of the clause, that treatment is extended to the beneficiary under the basic treaty. If the third-party treaty refers to a matter not dealt with in the basic treaty, that matter is *res inter alios acta* in respect of the beneficiary of the clause."[8]

The tribunal then asked whether the provisions on dispute settlement contained in the third-party treaty (*i.e.*, the Chile-Spain BIT) can be considered to be reasonably related to the fair and equitable treatment to which the most favored nation clause applies under the basic treaty (*i.e.*, the Argentina-Spain BIT). The tribunal concluded that, notwithstanding the fact that the basic treaty does not refer expressly to dispute settlement as covered by the most favored nation clause, "dispute settlement arrangements are inextricably related to the protection of foreign investors, as they are also related to the protection of rights

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[7] *Id.* ¶ 35.
[8] *Id.* ¶ 45.

of traders under treaties of commerce."[9] The tribunal reasoned:

> "Consular jurisdiction in the past, like other forms of extraterritorial jurisdiction, were considered essential for the protection of rights of traders and, hence, were regarded not merely as procedural devices but as arrangements designed to better protect the rights of such persons abroad. It follows that such arrangements, even if not strictly a part of the material aspect of the trade and investment policy pursued by treaties of commerce and navigation, were essential for the adequate protection of the rights they sought to guarantee. International arbitration and other dispute settlement arrangements have replaced these older and frequently abusive practices of the past. These modern developments are essential, however, to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded."[10]

The tribunal therefore held:

> "[I]f a third-party treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investment or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle."[11]

The tribunal, however, cautioned that "[a]s a matter of principle, the beneficiary of the [most favored nation] clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor."[12] The tribunal outlined four such situations:

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[9] *Id.* ¶ 54.
[10] *Id.* ¶¶ 54-55.
[11] *Id.* ¶ 56.
[12] *Id.* ¶ 62.

- If one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this requirement could not be bypassed by invoking the most favored nation clause in relation to a third-party agreement that does not contain this element since the stipulated condition reflects a fundamental rule of international law.

- If the parties have agreed to a dispute settlement arrangement which includes a "fork in the road" (*i.e.*, a final and irrevocable choice between submission to domestic courts or to international arbitration), this stipulation cannot be bypassed by invoking the clause because it would upset the finality of arrangements that many countries deem important as a matter of public policy.

- If the agreement provides for a particular arbitration forum, such as ICSID, this option cannot be changed by invoking the clause in order to refer the dispute to a different system of arbitration.

- If the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure (*e.g.*, NAFTA), neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties.

Here, however, the tribunal found that the requirement for the prior resort to domestic courts in the Argentina-Spain BIT did not reflect a fundamental question of public policy, given the context of the treaty, the negotiations relating to it, the other legal arrangements, and the subsequent practice of Argentina and Spain. Accordingly, the tribunal ruled that Claimant had the right to submit the present dispute to arbitration without first accessing the Spanish courts.

(c) Claimant's standing (paras. 65-70)

The tribunal rejected Respondent's objection that Claimant lacked standing to file this request for arbitration because he was not an "investor" within the meaning of Article 25(1) of the ICSID Convention, which provides that the Centre has jurisdiction only over disputes arising directly out of an investment "between a Contracting State and a national of another Contracting State."[13] Respondent

[13] *Id.* ¶ 65.

had alleged that a shareholder in Claimant's position has no standing to sue in his personal capacity for damages sustained by the company.

The tribunal noted that Article 25 of the ICSID Convention must be read together with two provisions of the Argentina-Spain BIT. First, Article I(2) of the BIT, which defines an "investment" as "every kind of asset . . . includ[ing] . . . shares in stock or any other form of participation in a company."[14] Second, Article II(2) of the BIT, which provides that the BIT shall apply to "capital investments." The tribunal interpreted these two provisions as providing that capital investments are covered by the BIT and that individuals having the nationality of one of the Contracting Parties, who invest in corporations or similar legal entities created in the territory of the other Contracting Party, are as a general proposition entitled to claim the protection of that treaty.

Accordingly, the tribunal held that, at the jurisdictional stage of the proceedings, Claimant had met its burden because he is an Argentine investor in a Spanish company, who brings this action to protect his investment in that company and for losses incurred by him due to injurious acts he attributes to Respondent. If proved, these facts would entitle Claimant to invoke the protection of the BIT in his personal capacity.

(d) SODIGA's status in the Kingdom of Spain (paras. 71-89)

The Tribunal ruled that Claimant had made out a *prima facie* case that SODIGA is a State entity acting on behalf of the Kingdom of Spain.

The tribunal began its analysis by clarifying that Article 25(1) of the ICSID Convention extends the Centre's jurisdiction only to legal disputes arising directly out of an investment between a "Contracting State" and a "national of another Contracting State." However, neither term is defined in the ICSID Convention. Moreover, the ICSID Convention contains no criteria dealing with the attribution to the State of acts or omissions undertaken by such State entities, subdivisions or agencies. Neither does the Argentina-Spain BIT. As a result, the tribunal determined that it may look to the applicable rules of international law in deciding whether a particular entity is a State body. This test involves an examination of a number of factors, including: ownership, control, the nature, purposes and objectives of the entity, and the character of the actions taken.

[14] *Id.* ¶ 67.

The tribunal explained that the question whether or not SODIGA is a State entity must be examined first from a formal or structural point of view. According to the tribunal:

> "Here a finding that the entity is owned by the State, directly or indirectly, gives rise to a rebuttable presumption that it is a State entity. The same result will obtain if an entity is controlled by the State, directly or indirectly. A similar presumption arises if an entity's purpose or objectives is the carrying out of functions which are governmental in nature or which are otherwise normally reserved to the State, or which by their nature are not usually carried out by private businesses or individuals."[15]

The tribunal also explained that an additional test has been developed, a functional test, which looks to the functions of or role to be performed by the entity.[16] For instance, a private corporation operating for profit while discharging essentially governmental functions delegated to it by the State could, under the functional test, be considered as an organ of the State and thus engage the State's international responsibility for wrongful acts. Finally, the tribunal clarified:

> "[A] domestic determination, be it legal, judicial or administrative, as to the judicial structure of an entity undertaking functions which may be classified as governmental, while it is to be given considerable weight, is not necessarily binding on an international arbitral tribunal. Whether an entity is to be regarded as an organ of the State and whether this might ultimately engage its responsibility, is a question of fact and law to be determined under the applicable principles of international law."[17]

In light of these considerations, the tribunal made the following findings regarding SODIGA:

- SODIGA was created by a decree issued by the Ministry of Industry which authorized the National Institute for Industry, a national State agency, to establish SODIGA.

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[15] *Id.* ¶ 77.

[16] *Id.* ¶ 80 (citing *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/97/4, May 24, 1999).

[17] *Id.* ¶ 82 (citing Article 4 of the International Law Commission's Draft Articles on State Responsibility).

- The government chose to create SODIGA in the form of a private commercial corporation, but it did so by providing that the National Institute for Industry would own a majority of the capital. As of December 31, 1990, the percentage of governmentally owned capital of SODIGA was over 88%, including the stock holdings of the state entity in charge of the executive power in the Autonomous Community of Galicia.

- The following participation of government bodies in the creation of SODIGA points to the fact that SODIGA was established to carry out governmental functions: (i) the proposal to create SODIGA originated in the Ministry of Industry; (ii) SODIGA's creation was vetted and approved by the Ministry of Finance; and (iii) SODIGA's creation was discussed and approved at a meeting of the Council of Ministers, which is one of the highest policy organs of the Government of Spain.

- The preamble to the decree that created SODIGA declares that one of the purposes of SODIGA's creation is the promotion of regional industrial development of the Autonomous Region of Galicia.

- SODIGA's functions included the undertaking of studies for the introduction of new industries into Galicia, seeking and soliciting such new industries, investing in new enterprises, processing loan applications with official sources of financing, providing guarantees for such loans, and providing technical assistance. SODIGA was also charged with providing subsidies and offering other inducements for the development of industries.

Accordingly, the tribunal found that SODIGA met both the structural test of State creation and capital ownership and the functional test of performing activities of a public nature. Therefore the tribunal concluded that Claimant had made out a *prima facie* case that SODIGA is a State entity acting on behalf of the Kingdom of Spain. However, the tribunal also ruled that the question of whether the actions and omissions complained of are imputable to the Kingdom of Spain was to be decided during the proceedings on the merits.

(e) Time of the dispute (paras. 90-98)

The tribunal rejected Respondent's objection that the alleged dispute originated before the entry into force of the Argentina-Spain BIT. Article II(2) of the

Argentina-Spain BIT provides that "this agreement shall not apply to disputes or claims originating before its entry into force."[18]

The tribunal noted that the events on which the parties disagreed began as early as 1989. However, this did not mean that a legal dispute, as defined by the International Court of Justice in *Case concerning East Timor* as "a disagreement on a point of law or fact, a conflict of legal views or interests between parties," can be said to have existed at the time.[19] According to the tribunal:

> "[T]here tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them. It has also been rightly commented that the existence of the dispute presupposes a minimum of communications between the parties, one party taking up the matter with the other, with the latter opposing the Claimant's position directly or indirectly. This sequence of events has to be taken into account in establishing the critical date for determining when under the BIT a dispute qualifies as one covered by the consent necessary to establish ICSID's jurisdiction."[20]

The tribunal clarified that the critical date separates the dispute from prior events that do not entail a conflict of legal views and interests. Thus if the dispute arises after the critical date, it will qualify for its transformation into a claim; otherwise, the dispute will be excluded by the terms of the BIT. Accordingly, as the tribunal concluded that the dispute began to take shape in 1994 after both the Argentina-Spain BIT and Chile-Spain BIT had entered into force (although the critical date here is the date of entry into force of the former treaty, since this is the basic treaty in this case), the tribunal rejected Respondent's objection.

3. Decision

The Tribunal held that the dispute was within the jurisdiction of ICSID and within the competence of the Tribunal.

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[18] *Id.* ¶ 91.
[19] *Id.* ¶ 94.
[20] *Id.* ¶ 96.