INTRODUCTORY NOTE TO ICSID: SALINI COSTRUTTORI SPA AND ITALSTRADE SPA V. KINGDOM OF MOROCCO (PROCEEDING ON JURISDICTION), BY EMMANUEL GAILLARD AND YAS BANIFATEMI[*]

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The decision on jurisdiction rendered in *Salini v. Morocco* on July 16, 2001 and dispatched to the parties on July 23, 2001[1] is particularly noteworthy, being the first ICSID precedent characterizing a construction contract as an investment within the meaning of Article 25 of the Washington Convention and the applicable Bilateral Investment Treaty.

The facts of the case concern an agreement entered into in 1994 by two Italian companies, Salini Costruttori S.p.A. and Italstrade S.p.A. ("Salini") on the one hand, and the State-controlled Société Nationale des Autoroutes du Maroc ("ADM") on the other hand, for the construction of part of a highway connecting Rabat and Fes in Morocco. After the completion of the work in 1999, Salini submitted claims for compensation to ADM's Engineer, who rejected them in their entirety. Salini then submitted its claims to the Moroccan Minister of Infrastructure, but no reply was received from the Minister. In May 2000, Salini submitted a request for arbitration on the basis of the ICSID arbitration clause contained in Article 8 of the 1990 Treaty between Italy and Morocco for the reciprocal promotion and protection of investments ("BIT").

The Arbitral Tribunal, composed of Dr. Robert Briner (President), Bernardo Cremades and Professor Ibrahim Fadlallah, had to rule on the objections to the admissibility of the claim and the jurisdiction of the Centre raised by the Kingdom of Morocco. Morocco first argued that the dispute was not ripe, given that the Claimant had not complied with the requirement under Article 8 of the BIT that any claim be the subject of an amicable settlement during six months before being submitted to an arbitral tribunal. Morocco further argued that Salini had waived the possibility of pursuing its claims under the BIT by signing the agreement which provided for jurisdiction under Moroccan administrative law in domestic courts. Morocco also claimed that the Tribunal did not have *ratione personae* jurisdiction given that ADM's actions could not be attributed to the Moroccan State. Finally, Morocco alleged that the Tribunal lacked subject matter jurisdiction because, under Moroccan law, which was applicable by reference of the BIT, a contract for the construction of a highway could not be characterized as an investment but as a contract for services (*contrat d'entreprise*).

The admissibility of the claim did not raise difficult issues and was decided by the Tribunal on the facts of the case. Salini had indeed attempted to obtain a settlement of the dispute through the Minister of Infrastructure, who was acting in his capacity as both the Minister and the Chairman of ADM. The request for arbitration had been initiated at least eight months after these attempts, and the six-month cool-off period required by Article 8 of the BIT had therefore been complied with.

Similarly, the issue of the Tribunal's jurisdiction *ratione personae* did not raise particular difficulty. In reality, Morocco's objection that the defendant was ADM, *i.e.,* an entity distinct from the Moroccan State, was ineffective given that the arbitration was initiated against the Moroccan State on the basis of the BIT and not against ADM. The Tribunal however chose to address that issue, which concerned the merits of the case and which was thoroughly debated by the parties, by determining whether the acts of ADM were attributable to the Moroccan State. The Tribunal analyzed the degree of control exercised by the Moroccan State over ADM on the basis of the well-established criteria of ADM's structure and function. It clearly established that, although a private company, ADM was controlled and managed by the State, was carrying out public service projects and was submitted to regulations which are administrative in nature. This analysis was conducted in full compliance with the applicable rules of international law on the attributability to a State of the conduct of its organs or of its entities exercising elements of governmental

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authority, as codified by the International Law Commission (*see* Articles on State Responsibility, Articles 4 and 5, *in* J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, 2002).

It is with respect to the two remaining issues, *i.e.* the definition of an investment and the interaction between the forum clauses respectively contained in the BIT and in the underlying agreement, that the *Salini* decision constitutes an original precedent in ICSID arbitration.

The definition of an investment

In order to establish whether it had subject matter jurisdiction, the Tribunal in the *Salini* case referred to both the definition of investments in the BIT and in the Washington Convention.

Under Article 1 of the BIT, investments are defined very broadly and include *" [. . .] rights to any contractual benefits having an economic value"* (Article 1(c)) and to *"any right of an economic nature conferred by law or by contract* [. . .] *"* (Article 1(e)). Noting that the contract entered into by Salini created such rights of an economic nature, the Tribunal held that the contract constituted an investment within the meaning of the BIT. In this respect, the Tribunal justifiably observed that the fact that Article 1 of the BIT defined investments as *"all categories of assets invested* [. . .] *in accordance with the laws and regulations of the aforementioned party* [Morocco]*"* had no bearing on this conclusion, given that such reference to the legislation of the host country only determined the validity of the investment rather than its definition.

With respect to Article 25 of the Washington Convention, which contains no definition of investments, the Tribunal appropriately focused on the type of activity rather than on the type of contract under analysis.

Before this case was decided, precedents relating to certain types of contracts had resulted in the refusal of the registration of a request based on a sales contract by the Secretary-General of the Centre in *Asian Express v. Greater Colombo Economic Commission* (ICSID Annual Report for 1985, p. 6) or, to the contrary, to the admission of a loan contract as an investment in both *Fedax v. Republic of Venezuela* (37 ILM 1387 (1998)) and in *CSOB v. Slovak Republic* (14 ICSID Review 251 (1999)), although in the latter case the loan resulted in no contributions in the host country but consisted fundamentally in the sharing of debts between the Czech Republic and the Slovak Republic in the context of the partition of Czechoslovakia.

In *Salini*, the Tribunal focused on the activity under consideration and espoused the criteria developed in academic writings defining investments as follows: the existence of contributions, a certain duration in the performance of the contract, and participation in the risks of the transaction; the Tribunal further added the condition contained in the Convention's Preamble that the transaction contribute to the economic development of the host State. Applying each of these criteria, the Tribunal found that the agreement entered into by Salini could qualify as an investment within the meaning of Article 25 of the Washington Convention.

The interaction between forum clauses contained in the BIT and in the underlying agreement

The co-existence between the forum clauses contained respectively in the contract underlying the investment and in the BIT is an increasingly important issue in ICSID arbitration. The issue is whether, when the underlying contract refers the parties to the domestic jurisdictions of the host State, the investor may submit its investment dispute to an ICSID tribunal on the basis of a BIT which offers the investor the choice of forum (BITs often offer the choice between the courts of the host State and an international forum such as ICSID or UNCITRAL arbitration).

This issue was raised in the *Salini* decision. The Kingdom of Morocco's position was that under the agreement the administrative courts of Rabat had jurisdiction over the dispute between the parties, who had therefore waived the option of choosing the forum under Article 8 of the BIT. However, the Tribunal gave effect to the forum clause

contained in the BIT, on the basis that *"*[a]*s the jurisdiction of the administrative courts cannot be opted for, the consent to ICSID jurisdiction described above shall prevail over the contents of Article 52 of the CCAG, since this Article cannot be taken to be a clause truly extending the scope of jurisdiction and covered by the principle of the Parties' autonomy."*

This reasoning is drawn from the decision on jurisdiction previously rendered in *Lanco v. Argentina* on July 23, 2001 (40 ILM 457 (2001)), whereby the Tribunal decided that the existence of a forum clause in favor of the administrative courts of Argentina did not constitute an "applicable, previously agreed dispute settlement procedure" under the BIT: *"the parties could not have selected the jurisdiction of the Federal Contentious-Administrative Tribunals of the City of Buenos Aires because it would hardly be possible to select the jurisdiction of courts whose own jurisdictions are, by law, not subject to agreement or waiver, whether territorially, objectively, or functionally. As the contentious-administrative jurisdiction cannot be selected or waived, submission to the contentious-administrative tribunals cannot be understood as a previously agreed dispute-settlement procedure"* (para. 26 of the Decision).

The Tribunal in *Salini* therefore retained its jurisdiction *"in relation to breaches of contract that would constitute, at the same time, a violation of the Bilateral Treaty by the State"*, but excluded *"claims that are based solely on a breach of contract."* (para. 62 of the Decision; *see also* the decision in *Vivendi*, para. 103). However, the decision is ambiguous as to its scope: the Tribunal decided that its jurisdiction was justified by the fact that the jurisdiction of the administrative courts of Morocco could not be opted for by the parties, which seems to suggest that the solution would not have been identical if the jurisdiction clause in the underlying agreement had contained a reference to the civil and commercial, rather than administrative, courts of Morocco. To the contrary, the decision of partial annulment rendered subsequently by the *ad hoc* Committee on July 3, 2002 in *Vivendi v. Argentina* (41 ILM 1135 (2002)) and even the decision in *Lanco* can be invoked to justify the view according to which the reasoning stands even when the underlying investment agreement contains a choice of jurisdiction in favor of civil and commercial courts. In *Vivendi*, the reasons articulated by the Committee to reach the same conclusion are indeed fundamentally different: *"In the Committee's view, it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court. In such a case, the inquiry which the ICSID tribunal is required to undertake is one governed by the ICSID Convention, by the BIT and by applicable international law. Such an inquiry is neither in principle determined, nor precluded, by any issue of municipal law, including any municipal law agreement of the parties"* (para. 102 of the Decision). The same reasoning is found, subsidiarily, in *Lanco*: *"even if it were possible to submit the dispute to a previously agreed system for dispute settlement, which is not the case, the investor has not done so, and consequently the only choice remaining is Article VII(2)(c)* [*i.e.* international arbitration]*"* (para. 28 of the Decision).

The rationale behind the *Vivendi* decision is that a dispute may be brought under a BIT regarding the international liability of the host State without prejudice to any forum selection clause in the contract which refers purely contractual disputes to the courts of the host State. The jurisdiction of an ICSID tribunal therefore depends on whether the purpose of the investor's application before the Centre is the international responsibility of the host State under a BIT and applicable international law. (In the same vein, *see also* the first ASEAN award (ICSID Additional Facility Rules) in *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar*, ASEAN Case No. ARB/01/1 (March 31, 2003), 42 ILM, No. 3 (2003); *see also* E. Gaillard, "L'arbitrage sur le fondement des traités de protection des investissements", para. 20, Revue de l'Arbitrage, 2003, No. 3).

ENDNOTE

1. The original decision was rendered in French and is published in 196 *Journal du Droit International* 2002, with a commentary by E. Gaillard.