

CASES

Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. v. Republic of Peru (ICSID Case No. ARB/03/4)

Introductory Note

On March 24, 2002, the Centre registered a request submitted by Empresas Lucchetti, S.A. and Lucchetti Perú, S.A., two companies organized under the laws of the Republic of Chile and the Republic of Peru, respectively, (hereinafter Lucchetti) for the institution of an arbitration proceeding against the Republic of Peru. The dispute concerned a pasta factory located in the Municipality of Lima. In 1997, Lucchetti had obtained permits for the construction of the factory. These permits were revoked in 1998 and there followed judicial proceedings, which concluded in favor of Lucchetti. In 1999, an operating license was granted to Lucchetti. Following the publication in August 2001 of two Decrees by the Municipality of Lima, the operating license was revoked and the definitive closure of the factory was ordered. Subsequently, the Claimants invoked an ICSID arbitration clause contained in the February 2, 2000 Agreement between Chile and Peru for the Promotion and Protection of Investments (the BIT) to resolve before ICSID their dispute with Peru.

In accordance with the agreement of the parties, the Tribunal consisted of three arbitrators: one appointed by each party, and the third, presiding, arbitrator appointed by the Acting Secretary-General of ICSID, after consulting with the parties. The Tribunal, thus constituted, included Mr. Jan Paulsson, Dr. Bernardo M. Cremades, and Judge Thomas Buergenthal, who served as the President of the Tribunal.

The first session of the Tribunal with the parties was held at The Hague on September 15, 2003. During the session, the Respondent raised

objections to jurisdiction and the Tribunal set up a calendar for the filing of pleadings on jurisdiction. A hearing on jurisdiction was held on September 2–3, 2004.

The Respondent raised three objections to the Tribunal's jurisdiction. The Respondent alleged that: (i) the dispute arose before the entry into force of the BIT; (ii) that the dispute had previously been submitted to local courts and therefore the Claimants were precluded from submitting the dispute to ICSID under the BIT; and (iii) that the investments were not made in accordance with the laws and regulations of Peru and therefore the BIT was not applicable.

By an award rendered on February 7, 2005, the Tribunal dismissed jurisdiction on the basis of the first of the above outlined objections, raised by the Respondent.

In its award, the Tribunal first dealt with the legal meaning of the term *dispute* and indicated that “a dispute can be held to exist when the parties assert clearly conflicting legal or factual claims bearing on their respective rights or obligations or that ‘the claim of one party is positively opposed by the other’” (para. 48). The Tribunal then noted that the parties in this matter had opposing views as to whether there were two disputes or one continued dispute. The Claimants contended that there were two disputes: one which arose in 1998 and ended with the 1999 judgments of the Peruvian Courts; and a second which arose as a consequence of the 2001 Decrees. In contrast, the Respondent claimed that there was only one continued dispute, which had arisen in 1998. The Tribunal considered that “the critical element in determining the existence of one or two separate disputes is whether or not they concern the same subject matter” (para. 50). The Tribunal found that the subject matter of the 1998 dispute did not differ from the subject matter of the 2001 dispute and that therefore “the dispute had crystallized by 1998” (para. 53). The Tribunal thereafter looked at whether there were other “legally relevant elements,” which might have made the Tribunal decide that the 2001 dispute should be treated as a new dispute; it concluded that the dispute arose in 1998 and continued throughout 2001.

The award in this case was rendered in English and in Spanish. The text of the award in both languages is reproduced below with the parties' consent. The award is also available in PDF format on ICSID's website at www.worldbank.org/icsid.

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