

Dissenting Opinion from the  
Arbitral Award on Jurisdiction in the Case  
Mytilineos Holdings SA  
(The Claimant) v.

1. The State Union of Serbia and Montenegro
2. Republic of Serbia (Respondents)

1. It is a professional and ethical duty of an arbitrator, in case he disagrees with the arbitral award rendered by the majority of arbitrators, to inform the parties of his legal opinion and the arguments that prevented him from accepting the arbitral award. This is the primary purpose of dissenting opinions, which are widely accepted in international arbitral practice. This dissenting opinion has been written solely for that purpose, without any intention to enter into a discussion with the opinions and arguments of other arbitrators as stated in the Arbitral award.

2. The preliminary issue raised in these proceedings has been whether the Arbitral Tribunal has jurisdiction to resolve a dispute initiated by the Claimant, the Greek Company Mytilineos Holdings SA, against 1. the State Union of Serbia and Montenegro (SMO) and 2. the Republic of Serbia (the Respondents). The preliminary issue was raised by the Respondents. The reason for their contesting jurisdiction of the Arbitral Tribunal was that the Claimant is not an investor in the sense of Articles 1 and 9 of the Agreement between the Federal Republic of Yugoslavia (YU) and the Republic of Greece on the reciprocal promotion and protection of investments (BIT). Since it cannot be considered as an investor, the Claimant, according to the Respondents, had no right to initiate arbitral proceedings against the State Union of Serbia and Montenegro, the legal successor of the FR of Yugoslavia. The Claimant asserted that it has the status of an investor.

In such circumstances, the Claimant must prove his status of an investor in order to be able to invoke the arbitration clause provided in the BIT Article 9. The Claimant must prove this by showing and establishing that the Claimant invested assets in the territory of YU/SMO in accordance with the YU/SMO legislation. The abbreviation YU/SMO is used here to indicate a connection between Yugoslavia and its successor, the State Union of Serbia and Montenegro, i.e. between their legislation. The Claimant stated that, on February 19, 1998, Mytilineos entered into seven individual contracts with the company RTB-Bor, which, taken together, represented, in the Claimant's understanding, an investment. The Claimant did not show or establish that it had made an investment "in

accordance with the YU/SMO legislation”, since it did not refer to any Yugoslav statutory provision that would provide that these named contracts, taken together, must be considered as an investment. It is appropriate to note here, that such a statutory provision cannot be found at all in the YU/SMO legislation. By a detailed analysis of all seven contracts entered into between the Claimant and the RTB-Bor Company, the Respondents showed and established that none of them represented, nor had the features of a foreign investment contract. As is obvious from the title and content of the said contracts, these were purchase and sale contracts, contracts on provision of services, credit contracts and cooperation contracts. Both by their form and by their substance these were regular commercial contracts. None of them provided for investment of the Claimant’s assets into the RTB-Bor Company.

3. Jurisdiction of an arbitral tribunal is founded upon the arbitration agreement. In this case, we have a situation that one Contracting Party in a BIT accepted unilaterally and in advance that an investor from other Contracting Party may initiate a claim against it before an arbitral tribunal envisaged in the BIT for reasons stated therein, without entering into a special arbitration agreement with this Investor. The State Party, in this case SMO, has no knowledge in advance of the identity of the potential Claimant in the arbitral proceedings. SMO, however, stipulated two conditions in the BIT for the Claimant initiating such proceedings against it: 1) that the Claimant is a Greek natural or legal person (BIT, Article 1 para. 3), and 2) that the Claimant invested assets in accordance with YU/SMO legislation (BIT, Article 1.1). By stipulating these two conditions, the State protected itself from arbitrary arbitral proceedings, which would not be strictly in accordance with the BIT. This is easy to understand considering that we are dealing here with a unilaterally accepted obligation of the State to appear before an arbitral tribunal in fulfillment of its obligations and responsibilities related to protection of investments by Greek investors. It should be noted that YU/SMO may not initiate arbitral proceedings against a Greek investor - it is even questionable whether it could file a counterclaim. All this, of course, equally applies to Greece in relation to YU/SMO investors.

4. The fundamental issue posed before the Arbitral Tribunal is, then, to establish whether the Claimant from Greece invested assets in accordance with YU/SMO legislation. The Claimant has failed to prove this, or rather, has not even tried to prove it. On the contrary, the Claimant referred to a certain number of arbitral awards in which the arbitrators, for reasons known to themselves, concluded that various concrete commercial contracts may be considered as investments. These awards have no connection whatsoever with the BIT concluded between Yugoslavia (SMO) and Greece. These arbitral awards are

in no way binding upon the Arbitral Tribunal in this dispute, nor do they represent a source of law. The opinions of legal commentators are even less so. It should be noted in passing, however, that the cited arbitral awards concerned predominantly commercial contracts entered into between a State and a foreign private company, which is not the case here. This case involves commercial contracts entered into between a Greek company and a YU/SMO company. For all the above reasons, and primarily because this is contrary to the express provision of the BIT Article 1.1, such “evidence” presented by the Claimant is inadmissible.

5. YU/SMO legislation is decisive for establishing whether the Claimant made an investment in the RTB BOR company. This is clearly and unequivocally stated in the BIT Article 1.1., which makes the YU/SMO legislation applicable to the question of existence of investment in YU/SMO. Naturally, if an investment was made in Greece, the Greek legislation would be the applicable law. There is no doubt that the Contracting Parties had this intention in mind, both jointly and each one of them individually, when they concluded the BIT. They knew that such legislation existed and this was why they used the expression “legislation” rather than “law”. The Arbitral Tribunal has a duty to respect this clearly expressed will and intention of the Contracting Parties and to decide accordingly.

6. It is provided in the BIT Article 9, para. 6, that the Arbitral Tribunal “shall decide the dispute in accordance with the provisions of this Agreement and the applicable rules and principles of international law”. This concerns the case of an arbitral proceeding between a State and a foreign private investor from the other Contracting State. As the BIT clearly provides and stipulates that the existence of an investment is judged on the basis of the legislation of the State in which it has been made, there is no place for application of the “applicable rules and principles of international law” to this issue.

7. A careful, exact and valid analysis of the BIT Article 1.1. provides true answer to the question whether the Mytilineos company invested in the RTB-Bor company, and accordingly, whether it invested in the territory of YU/SMO. Article 1.1. includes three material elements: 1. “*every kind of asset*”; 2. “*invested by an investor of one Contracting Party in the territory of the other Contracting Party*”; 3. “*in accordance with the latter’s legislation*”. It is necessary to scrutinize each one of these elements.

7.1. “*Every kind of asset*”. The Contracting Parties envisaged the kinds of assets that may be invested. Some of these have been enumerated, while others, though not expressly mentioned, may also be invested. It is interesting that “money” has not been expressly mentioned although this is a common type of asset. Among other kinds of assets

one also finds “claims to money”. Naturally, as any other asset, claims to money must be invested. The existence of the “claims to money” alone does not imply that they are invested. However, in these proceedings the Claimant considers that its “claims to money” towards the RTB-Bor company, based on unpaid price for delivered goods and services, as well as unpaid credit installments and interests, were its investment in RTB BOR. However, these are in general, and under YU/SMO legislation in particular, no investments. For a “claim to money” to be considered as an investment, one has to know its amount, when and where it was invested, in what scope, etc. An ordinary “claim to money” arising from unpaid debts under commercial transactions can never and in no place be considered as an investment. This would be contrary to the very notion of investment. In any case this would be so in YU/SMO.

Any other “kind of asset” whether specified in the BIT or not, has to be invested. For example, “shares” may be a “kind of asset” and they must be invested in accordance with the legislation on investments. Naturally, if shares are acquired as a result of investment of other assets in one company, they do not have to be invested. This is only logical.

It clearly follows from the General Cooperation Agreement (Article 3) that Mytilineos and RTB-Bor companies were aware that “the claim to money” must be invested. Article 3 of this Agreement provides: “(b) in case of privatisation Mytilineos shall have the right to *convert any outstanding claim against RTB-Bor to shares...*”

7.2. “*Invested by an investor of one Contracting Party in the territory of the other Contracting Party*”. This part of the BIT Article 1.1. provision shows two things. Firstly, the assets must be invested. This means really invested, and not only intended to be invested. Logically so, since the Contracting Parties wished to guarantee only for those assets that are really invested in their territory. Secondly, the assets must be invested by an investor from the other Contracting Party, in this case Greece. This condition has been, as far as nationality of the Claimant is concerned, satisfied.

7.3. “*Invested...in accordance with (YU/SMO) legislation...*” This is the key element of the provision contained in the BIT Article 1.1. Every Contracting Party undertook to guarantee private investors from the other Contracting Party protection of their investments against certain risks, as provided in the BIT, only if “the assets are invested in accordance with its legislation”. This is by its nature a mandatory rule. It means for example, that a foreign and domestic company may not provide that their business operation is an investment and thereby bind the State to guarantee on the basis of the BIT. This would not be possible. By this provision, every Contracting Party, and thus

YU/SMO, as well, has protected itself and made a reservation that it will meet its obligations under the BIT towards the foreign (Greek) investor only if he “invested his assets in accordance with its legislation.” If he did not, then he may not use any rights under the BIT, including the right to arbitration.

7.3.1. As far as YU/SMO is concerned, the legislation with which the investment must comply is the legislation on foreign investment. The Mytilineos company is a foreigner and its investments in YU/SMO are undoubtedly and solely governed by foreign investment legislation. The fundamental part of such legislation is the Foreign Investment Act. This Act was in force at the time of conclusion of the BIT and it remains in force today, with some change in 2002. It is a special Act which regulates all basic issues related to foreign investments, such as: the right of a foreigner to invest, forms of foreign investment, rights of a foreign investor, approval, notification and registration of foreign investment, etc. Many of its provisions are of mandatory nature. In addition to this Act, there are also other laws that regulate foreign investments, which are related to it. When an investment is made into a domestic YU/SMO company, such as the Claimant claims having made in RTB-Bor, it is necessary to meet various conditions. Thus, “*the amount of a foreign investment shall be specified in the investment contract...*” (Article 4 of the Foreign Investment Act). This is lacking. Furthermore, it is necessary that the investment contract provides for participation of the foreign investor in profits and losses, which is also lacking in this case. It is also necessary that the foreign investment contract was approved and registered by the competent state authority. This is also lacking. In contrast, the commercial contracts in this case expressly provide that no State approvals are necessary; that is a clear indication that Mytilineos and RTB-Bor companies were aware that those were no investment contracts. Furthermore, it is necessary that the amount/value of the asset, which the foreigner invested into a domestic company, be entered in the commercial company court register. This is also missing, and so on. It follows that the commercial contract invoked by the Claimant are neither individually, nor jointly, foreign investment contracts, nor can they be considered as such. They do not have any of the features defined by YU/SMO legislation in order to be qualified as foreign investment agreements. Moreover, it cannot be considered that the Claimant made its investment pursuant to such contracts – there is no invested amount, there is no entry of the invested amount in the commercial company register, etc.

7.3.2. YU/SMO legislation on foreign investment is of a mandatory character. It represents public order in YU/SMO. The BIT Article 1.1. provision, which provides that “assets must be invested in accordance with YU/SMO legislation” is also mandatory. The

State was willing to accept the BIT obligations only under the condition that the Greek investment would be made in accordance with the YU/SMO legislation. Since the obligations of the State towards the foreign private investor with respect to protection of his investment are unilateral, the *causa* of its obligations is found in the condition that the investment was made “in accordance with YU/SMO legislation.” If this is not the case, the *causa* is missing, and the obligation of the State is non-existent.

8. For all the stated reasons, the Claimant, in my opinion, did not invest his “claims to money” into the RTB-Bor Company in accordance with the YU/SMO legislation. At the time of conclusion of commercial contracts between the Claimant and RTB-Bor Company, no investment of claims to money was made. Such claims to money arose later, in performance of commercial contracts, when RTB-Bor Company failed to meet its obligations based on purchased and delivered goods, services received, and on repayment of credits, including the agreed interests. However, none of these claims to money, arising in such manner, have ever been invested in accordance with the YU/SMO legislation. This is absolutely clear to everyone who is familiar with the YU/SMO legislation. Naturally, if there is a desire to respect the BIT and its reference to YU/SMO legislation, which is clearly, unequivocally, precisely and bindingly made in Article 1.1.

Considering that the Claimant made no investment in accordance with the BIT, the Claimant has not acquired the status of investor under the BIT. And since it does not have the status of an investor, the Claimant is not entitled to request the arbitration against SMO in the manner provided in the BIT. Accordingly, the Arbitral Tribunal has no jurisdiction to resolve this dispute. This is my deep professional conviction, which makes me dissent from the Arbitral Award that finds that the Arbitral Tribunal has jurisdiction in this dispute. As my opinion is completely opposite from the one expressed in the Arbitral Award, I was unable to sign the Award.

Arbitrator  
  
Prof. Dr. Dobrosav Mitrović

Beogra,d 6.09.2006.