

Mihaly International Corporation
v.
Democratic Socialist Republic of Sri Lanka
(ICSID CASE NO. ARB/00/2)

INDIVIDUAL CONCURRING OPINION BY MR. DAVID SURATGAR

1. Although in agreement with the findings of the Arbitral Tribunal as set out in this Award, I believe that there are important features in this case which need to be set out for the record and should be taken into consideration by the Government of Sri Lanka and by other Governments interested in encouraging private foreign investment in infrastructure projects. This is particularly true in the case of public utility projects in power generation and distribution or in water and waste water treatment. These invariably require some form of international competitive bidding or competitive proposals leading to a Build Own and Transfer (BOT) or Build Own and Operate (BOO) transaction or to a Concession.

2. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) was devised by the World Bank in order to assist in the improvement of the climate for private foreign investment. At the time, there was a limited flow of private foreign or indeed private investment in infrastructure projects in emerging markets and in many cases there was some degree of disinvestment. Governments were yet to embark on programmes of privatisation of public utilities. The drafters of the Convention debated a definition of “investment” for purposes of the Convention and following debate decided against a definition. Under Article 25(4), States could put investors on notice as to the type of disputes that they would be prepared to have submitted to the Centre, and also to define the scope of their advance consent to the jurisdiction of ICSID by means of a law or by Bilateral Investment Treaties such as the United States–Sri Lankan Bilateral Investment Treaty.¹

¹ Aron Broches “Bilateral Investment Protection Treaties and Arbitration of Investment Disputes” in The Art of Arbitration (1952) at pp. 63-66; and A.R. Parra, Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment, 12 ICSID Rev.-FILJ 287 (1997). See also Rudolf Dolzer and Margrete Stevens, Bilateral Investment Treaties (1994) at pp. 26-31.

3. Sri Lanka accordingly had the opportunity to adopt a precise and limited definition of “investment” for purposes of its consent to jurisdiction of the Centre. Apparently it had not done so. It signed a Bilateral Investment Treaty with the United States which sets out in Article I(1)(a) a very general definition of investment for purposes of the Treaty. It specifically provides in Article I(1)(a) that investment should include:

- “(ii) a company or shares of stock or other interests in a company or interests in the assets thereof
- (iii) a claim to money or a claim to performance having economic value, and associated with an investment, . . . and
- (iv) any right conferred by law or contract, and any licenses and permits pursuant to law”. (emphasis added).

4. As the Award accepts, the claimant in this case argued (cogently in my view) that they were given a period of exclusivity in which to develop a BOT project for a 350 mw power generating facility in accordance with Sri Lankan law and rules and under a series of performance benchmarks. This commitment by Sri Lanka was set out in a “Letter of Intent” (15 February 1993) which followed expressions of interest from some 25 groups from which 5 groups were invited to enter into negotiations and finally out of which the claimant’s group was selected and given the “Letter of Intent”. (See Award paras. 40 and 41). This “Letter of Intent” was superseded by a “Letter of Agreement” (dated 22 September 1993) and by a “Letter of Extension” (dated 20 July 1994). The Award (paras. 40-41) fully describes these letters and their scope and content.

5. As the Award indicates (paras. 31-32) the ICSID Convention (Article 25(1)) states that the necessary basis for jurisdiction requires that there be a dispute, that it be a legal one, that the dispute arises directly . . . out of an investment and that there was an investment. The Award notes (paras. 33-34) that as the Convention does not define investment “. . . the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment.”

6. The Award takes the position that while expenditures directly incurred under BOT procedures prior to final contract could become investments in accordance with internationally accepted accounting practices, this would only occur once contracts were signed. While noting the

expert opinion of Per Ljung, cited by the Claimant, to the effect that such expenditures would constitute investment in the host country, the Award holds that the Respondent had not given its consent to this treatment of development costs (para. 36). In taking this position the Award appears to rely on the need for actual consent by Sri Lanka to a particular development cost being accepted as constituting an “investment” for purposes of the case. On this matter I believe the Tribunal should have called for evidence of international legal and utility precedents and practice. This could have been done by joining the final decision on jurisdiction to the hearings on the merits.

In this context I believe the Tribunal should have called for evidence from the World Bank and the International Finance Corporation as well as from insurance agencies such as the Multilateral Investment Guarantee Agency (MIGA) and the Overseas Private Investment Corporation (OPIC). It does appear for example that investment insurance can be obtained for development costs. As for the World Bank practice attention should be paid to the guidelines set out in the World Bank’s Discussion Paper of September 1999, Submission and Evaluation of Proposals for Private Power Generation Projects in Developing Countries where (at p.14) a full discussion is provided with respect to the correct make-up of proper Capacity Payments. The document emphasises that in addition to Fixed O&M costs, Financing Costs, Insurance Costs and agreed Equity Shareholder returns, there should be included “Project Capital Costs. These comprise all project development and construction costs, including but not limited to pre-feasibility engineering, legal and auditing services.”

In its decision relying on the lack of consent to such treatment of development costs the Award lays emphasis on the specific language to be found in the Letter of Intent, Letter of Agreement and the Letter of Extension to the effect that these instruments were not intended to create a binding legal obligation on either party (paras. 36-47).

I believe that the Tribunal should have sought the position of the parties and have called for evidence as to whether this exculpatory language was designed to ensure that there was no contractual liability before a final BOT contract was signed or whether its effect under Sri Lankan and general principles of international law was to exclude any liability of Sri Lanka arising from its conduct after the award of the Letter of Intent—including a duty to negotiate in good faith.

7. Although I agree with the Award's finding that the development expenditures allegedly incurred by the Claimant were not accepted by Sri Lanka as "investments" and that the Claimant has in this respect not succeeded in meeting the requirements of Article 25(1) of the ICSID Convention, I believe the position clearly would be different if the Claimant could have demonstrated that the expenditures had been incurred by a Sri Lankan company in which it had a share. Such a shareholding by Mihaly International Corporation of the United States would appear on its face to meet the definition of investment set out in Article I of the US–Sri Lanka BIT.

8. Further examination of the Claimant's written materials (see Claimant's Memorial on Jurisdiction para. 22 and p. 33 of Mr. John Walker's first affidavit of the Claimant's Memorial on Jurisdiction para. 65 and also Tab. 49, Exhibit A Vol. 2 from Mr. Walker's first affidavit) appear to indicate that although the international consortium of participants in the successful bidding group established and incorporated a Sri Lankan project development company, the South Asia Electricity Corporation (Private) Limited, Mihaly International Corporation of the United States did not take up shares in such a company. If they did in fact do so or if they had done so, I believe that the test of "investment" under the ICSID Convention Article 25(1) as buttressed by Article I of the U.S.-Sri Lankan BIT would have been met. In this case the Tribunal would perform have to accept that jurisdiction existed ration[e] materiae.

9. In the absence of such evidence, I reluctantly must agree with the conclusions of the Award. In so doing it should be added that the written and oral evidence presented to the Tribunal suggests that the Claimant may well have a sound basis for pursuing its claim before other fora. The expense and patience displayed by the Claimant and its associated corporate partners in following the letter of the requirements imposed by Sri Lanka under its own contract procedures and the Letters of Intent, of Agreement and Extension were considerable and apparently carried out in good faith. The Embassies of numerous governments also supported these efforts.

10. If private foreign investors are to be encouraged to pursue transparency in seeking such BOT opportunities the international community must address the lessons of this case. Expenditure incurred by successful bidders do indeed produce "economic value" as specified by

Article 1 of the US–Sri Lanka BIT and the protection mechanism developed under the aegis of the World Bank in the form of the ICSID Convention should be available to those who are encouraged to embark on such expensive exercises.

David Suratgar

March 7, 2002