

Oded Besserglik v Mozambique: The BIT Was Not In Force, Who's To Blame?

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In the recently rendered *Oded Besserglik v Mozambique* award ("Award"), after 5 years of proceedings and millions in costs and expenses, a tribunal accepted a Motion to Dismiss and declined jurisdiction over the dispute for the relevant treaty never entered into force.

Despite the fact that Mozambique prevailed on its motion, this case raises several questions as to the efficiency, ethics and professionalism of all participants (and the system). No participant of the case is in a position to discharge its responsibility, especially because this case should have never been brought before a tribunal (claimant's counsel fault), approved and registered (ICSID's fault), heard (tribunal's fault), and untimely defended (respondent's counsel fault).

Background of the Case

Mr Besserglik ("Claimant"), a South African national, had interests in a couple of entities in Mozambique and was allegedly unlawfully deprived of his shares and other assets for which he had claimed around US\$ 100 million in compensation.

On 4 March 2014, the Claimant filed an Application for Approval of Access to the International Centre for Settlement of Investment Disputes (“ICSID”) Additional Facility on the basis of the Agreement Between South Africa and Mozambique for the Promotion and Reciprocal Protection of Investments (“BIT”), *signed* on 6 May 1997, and the Law No. 3/93 of Mozambique (“Investment Law”).

The application was approved by the Secretary-General of the ICSID on 17 April 2014 and confirmed on 3 July 2014, after it had made a request for additional information. Mr Besserglik requested to commence arbitration proceedings in June 2014 and the tribunal was constituted in January 2015. On 20 June 2017, within weeks to the Hearing on Jurisdiction and Liability, Mozambique filed a Motion to Dismiss alleging that the BIT never entered into force. At this point, the parties exchanged several submissions, produced several witness statements, and Mozambique and South Africa have even exchanged Diplomatic Notes (confirming that the BIT never entered into force, see Award ¶373).

Procedural Considerations for the Motion to Dismiss

The tribunal was posed three fundamental questions:

- Were there any limitations to raise a new jurisdictional objection at a late stage of the proceedings, in accordance with the Article 45(2) of the Arbitration (Additional Facility) Rules (“Arbitration Rules”)?
- Did Mozambique waive its right to raise such a jurisdictional objection, in accordance with the Articles 33 and 34 Arbitration Rules?
- Despite such delay, is the tribunal -in its own words-, still bound to validate the jurisdictional objection and dismiss the case?

(i) Timing

Between the registration of the request to commence the proceedings and the Motion to Dismiss, 21 months had passed. This had been made in disregard of Article 45(2) of the Arbitration Rules, which provides that any objection shall be raised *as soon as possible* after the constitution of the tribunal until the filing of the counter-memorial. The latter being the *ultimate limit* to raise such objections

unless they were unknown by the objecting party (the tribunal cited the approach taken in the *Pac Rim v El Salvador Award*, ¶265).

Mozambique had to bear the burden of demonstrating that the factual basis of the jurisdictional objection, *i.e.* that the BIT was not in force, was unknown until it was effectively raised in its Motion to Dismiss. The tribunal acknowledged that such a duty is difficult to discharge, stating that “[a] party who was aware or could have, by an examination of its records, made itself aware of the fact that the BIT was not in force, is not protected by the exception”; otherwise respondents will be entitled to raise jurisdictional objections at any stage of the proceedings (Award, ¶272).

Mozambique attempted to justify being under the exception by relying on the United Nations Conference on Trade and Development (“UNCTAD”) and ICSID websites where the BIT was registered as in force, and in the fact that, since December 2011, Claimant’s counsel was cognizant that the BIT was not in force. For the tribunal, such justifications did not discharge Mozambique’s duty under the Arbitration Rules, nor did its case fall under the exceptions. Mozambique should have raised this jurisdictional objection until the filing of the counter-memorial *unless* the factual basis of the objection was *unknown* (the exception). However, had Mozambique checked its records, it would have known that the BIT was not in force.

(ii) Waiver

The tribunal deemed that Article 34 of the Arbitration Rules did not apply to the question of whether a belated jurisdictional objection entails a waiver, especially because such a failure of a timely objection would not cure the lack of jurisdiction.

(iii) Tribunal’s Authority

Normally, a Respondent’s belated jurisdictional objection would not be upheld by the tribunal (Award, ¶307). Nonetheless, in light of the principle of *Kompetenz-Kompetenz*, the tribunal had a duty to write valid and enforceable awards and it must only proceed with matters under its competence. Consequently, tribunals are entitled to examine every jurisdictional objection as it is their *prerogative* (citing

Zhinvali v. Georgia) and a *duty* (citing *Pac Rim v El Salvador*) (Award, ¶310 *et seq*).

Furthermore, the tribunal considered that despite Mozambique's delay could have entailed a procedural advantage and would have been ruled out as such, these sort of objections are not at the *disposal* of the parties (Award, ¶316) and the fact that a BIT is not in force cannot be amended by the untimely jurisdictional objection of one of the parties (Award, ¶320).

The BIT is Not in Force: What Happened Next?

Mozambique made four submissions to support the fact that the BIT is not in force, but the tribunal mainly relied on the second one: as per article 12(1) of the BIT, the entry into force of the BIT is subject to a *notification*. The tribunal analysed the situation in light of Article 24(1) of the Vienna Convention on the Law of the Treaties ("VCLT"), which establishes the *manner* and *date* for a treaty to enter into force.

The BIT's Article 12(1) adopted a very *formalistic approach* whereby it enters into force "on the day following" after an exchange of notifications between Mozambique and South Africa (indicating the fulfilment of constitutional requirements in each state). For the tribunal, even the publication of the BIT in the Official Gazette of Mozambique as "in force" does not discharge the requirement of the notification as per Article 12(1) (Award, ¶341).

The tribunal regarded the lack of evidence as to the exchange of notifications as sufficient to dismiss the case (Award, ¶371). Nonetheless, it went on to consider that the Diplomatic Notes between Mozambique and South Africa confirmed that the BIT never entered into force (Award, ¶383). The tribunal also deemed that the lack of registration of the BIT before the United Nations ("UN") Secretariat is irrelevant because its sanction (that such treaty cannot be invoked before any organ of the UN) is not applicable to an investor (a non-member of the UN).

Additional Basis of Jurisdiction

The tribunal noted that the Claimant failed to construe a cogent argument towards the applicability of the Investment Law as an additional basis for jurisdiction

(Award, ¶397) and thus accepted Mozambique's submission that the consent to arbitration under the Investment Law was the BIT itself, and, since it never entered into force, claims based on such law should also fail (Award, ¶416).

Nonetheless, in an attempt to construe an argument of *estoppel*, the Claimant alleged that Mozambique made several representations as to the applicability of the BIT for South African investors and, hence, estoppel should apply to give effect to the BIT.

Mozambique argued that the VCLT, as the applicable law on the issue, does not enshrine the possibility of estoppel bringing the BIT into force. Furthermore, the alleged representation was done years after the investment was made thus barring any allegation that such representations were of relevance.

The tribunal, without referring to the applicability of *estoppel* in situation where non-state parties are involved (see *Cambodia v Thailand, Dissenting Opinion of Judge Spender*, pp. 143-4), held that, in light of the VCLT, the notification requirement cannot be discharged by invoking estoppel, due to a question of jurisdiction and that a treaty is in force is a matter of law (Award, ¶422).

As for the requirements of estoppel to be applicable in the case, the tribunal considered that Mozambique should have made a statement of fact that is unambiguous, voluntary, unconditional, authorized, and that caused an advantage for itself and detriment to the other party (see further on estoppel in *Mauritius v UK award*, ¶438). In that sense, the Claimant was unable to show that he relied on a valid representation of Mozambique (a PowerPoint presentation) nor in other requirements of estoppel. Hence, the tribunal rejected the submission on estoppel (see estoppel as a source of jurisdiction in *Chevron v Ecuador, Second Partial Award on Track II*, ¶7.80 *et seq*).

A String of Errors

Mozambique is a country with great needs and the fact that it employed large sums of money in a dispute with no jurisdictional basis is at least polemic considering that several times States are brought before international tribunals for exercising – legitimately or not – its regulatory powers. The manner in which this case has been handled is a disfavour to a *system* that has received severe critics

for its alleged lack of transparency and legitimacy, and that is currently under revision and reform.

There were four moments in which the BIT could have been checked, namely:

- When claimant's legal counsel prepared his case (after December 2011, when South Africa informed him that the BIT was not in force),
- At the time of the application for approval and request to arbitration,
- At the time the tribunal was appointed and initiated its procedural activities, and
- When Mozambique's legal counsel prepared its defence.

Legal counsels of the parties, the ICSID and the tribunal shared a joint duty to conduct the proceedings with the highest level of efficiency and diligence. Especially because in investor-state arbitration the exercise of sovereign powers of a state are under examination and, on several occasions, states are condemned to pay astronomical amounts of money with prejudice to their economies.

The members of the arbitral tribunal and especially legal counsels are not only subject to the applicable ethical standards in international arbitration, but also to their own domestic deontological standards which compel them to exercise their legal profession with the utmost care and attention. Surely, further development on this point needs to be conducted not only at the multilateral level but also within the arbitral institutions and organizations in order to avoid infamous cases like this.