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Swissbourgh v Lesotho: Can a Right to Arbitrate be an Investment?

Jack Wass (Stout Street Chambers) · Tuesday, December 11th, 2018

In a conventional investment dispute, the claimant seeks compensation for the impairment of its substantive investment in the territory of the host state. *Swissbourgh Diamond Mines (Pty) Ltd v Lesotho* arose out of mining investments made by the claimants in Lesotho in the 1990s. However, this arbitral proceeding was not concerned directly with the impairment of the claimants' underlying investment. Rather, they alleged that Lesotho was liable for frustrating the claimants' ability to bring their underlying investment claim in a particular forum.

The claimants alleged that Lesotho had participated in the unlawful dissolution of a tribunal established pursuant to the Treaty of the Southern African Development Community (SADC Tribunal) after the claimants had submitted their expropriation claim to that tribunal, but before the claim was resolved. This prevented them seeking recourse for the underlying expropriation. The claimants brought a separate arbitration, administered by the Permanent Court of Arbitration and seated in Singapore, under Annex 1 to the Protocol on Finance and Investment of the SADC (the Investment Protocol).

The PCA Tribunal granted an order that a new tribunal be established to hear the underlying claim,[1)] and Lesotho applied to set aside the award. The Singapore Court of Appeal, in a unanimous judgment delivered by Sundaresh Menon CJ, upheld the High Court's decision that the PCA Tribunal did not have jurisdiction and that the award had to be set aside.[2)]

The Court of Appeal dealt with four issues:

- First, it held that where a dispute fell outside the scope of an arbitration clause, then Article 34(2)(a)(iii) of the UNCITRAL Model Law allowed the award to be set aside;
- Second, it held that Lesotho was not 'bound to accept' the jurisdiction of the PCA Tribunal;
- Third, it held that the PCA Tribunal did not have jurisdiction over the claim; and
- Fourth, it found that the claimants may not have exhausted local remedies before bringing the arbitral claim.

In this post I will focus on the second issue, and conclude with some brief thoughts on the third.

The claimants alleged that by making various public and private statements, Lesotho committed to accepting the jurisdiction of the PCA Tribunal, and that the respondent should not be permitted to approbate and reprobate on that question. Either Lesotho's statements constituted binding

unilateral declarations to accept the jurisdiction of the Tribunal, or Lesotho was estopped from denying that it had done so. The statements in question fell into three categories: (i) political statements to SADC organs that the claimants would be permitted to pursue their claims in other fora; (ii) submissions in the course of the Tribunal's hearing phase that the claimants should have the opportunity to pursue their claims if the Tribunal found that it had jurisdiction; and (iii) a freestanding offer to have the claim arbitrated in another SADC state, which was rejected.

In principle, the second and third questions ought to have been addressed in the reverse order: only if the Court found that the Tribunal lacked jurisdiction did any question of relying on Lesotho's statements arise. The claimants' case was that *if* the Tribunal lacked jurisdiction, then Lesotho was precluded from relying on that absence because of the statements it had made.[3)]

The question of whether a claimant can invoke estoppel (or its related doctrines, acquiescence and binding unilateral declarations) to establish the jurisdiction of a tribunal is unsettled. The International Court of Justice controversially held that the United States was precluded from denying the Court's jurisdiction in the *Nicaragua Case*,[4)] and more recently a minority of the International Tribunal on the Law of the Sea argued that Ghana was estopped from denying the Tribunal's jurisdiction over Argentina's claim in respect of the *ARA Libertad*.[5)]

Critics argue that since the jurisdiction of an international tribunal is founded on consent, a respondent by definition cannot be precluded from contesting jurisdiction: either they consented or they did not. In *Swissbourgh*, the Court did not see anything objectionable in principle to the idea that a respondent state may be precluded from contesting the jurisdiction of an arbitral tribunal. As I have argued elsewhere,[6)] the application of estoppel reinforces rather than undermines the consensual nature of international jurisdiction: where a state has made an unequivocal representation that it will not dispute the jurisdiction of a tribunal, and the claimant has relied upon that representation to its detriment, it would be contrary to the underlying principle of good faith for the respondent to resile from it. Reliance on unilateral declarations can be justified on the same basis.

But the significant consequences of such a finding demand strict adherence to the elements of estoppel: an unambiguous representation, reliance, and detriment.[7)] The Court of Appeal rightly found that these elements were not satisfied: most importantly, Lesotho's statements were not directed at the jurisdiction of the PCA Tribunal, but were directed at the *merits* question of whether the claimants should have an alternative forum available, and in some cases were expressly conditional on the PCA Tribunal having jurisdiction in the first place. There is an understandable temptation to restrain a state from adopting inconsistent positions generally, but the fundamentality of consent means that a tribunal cannot equate the state's position on the merits with acceptance of jurisdiction to determine the substance, unless the state has made an unequivocal statement to that effect.[8)]

Since Lesotho was free to deny that the PCA Tribunal had jurisdiction, the Court was then required to determine whether it did so under Annex 1 to the Investment Protocol. It emphasized the need for a territorial nexus between the investment and the host state. Although the Court did accept that an investment consists of a bundle of rights which includes the secondary right to seek remedies and vindicate the primary right, the right to refer the underlying claim to the SADC Tribunal did not have the necessary territorial nexus since it existed only on the international plane and beyond

Lesotho's enforcement jurisdiction; the only investment left was the original mining leases, which did not carry an obligation to guarantee that the SADC claim would be heard. It followed that the PCA Tribunal had no jurisdiction over the claim in relation to the dissolution of the SADC Tribunal, and the award had to be set aside. Although the Court relied on the 'generally accepted principle in international investment law' of territoriality, that limitation is usually invoked to ensure that the underlying activity constituting the investment has the necessary economic link with the host state to justify the protection of the treaty.[9)] In the Court of Appeal's conception, that criterion also serves to distinguish between matters within and beyond the enforcement jurisdiction of the host state.

The result in *Swissbourgh* may seem harsh. The claimants had a genuine underlying investment. They claimed that the investment had been expropriated and that they had possessed the right to refer that dispute to the SADC Tribunal. Lesotho participated in a process that foreclosed that avenue, leaving the claimants without recourse. In those circumstances it would have been tempting to find a remedy. However, adherence to fundamental principles of international jurisdiction did not allow the Court to do so.

References

?1 *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* (Sir David A R Williams QC, R Doak Bishop and Justice Petrus Millar Nienabar (dissenting in part)).

?2 *Swissbourgh Diamond Mines (Pty) Ltd & ors v Kingdom of Lesotho* [2018] SGCA 81.

?3 *Chagos Marine Protected Area (Mauritius v United Kingdom),* 18 March 2015, para 437, citing *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand)* [1962] ICJ Rep 6, Judge Fitzmaurice Sep Op, 63.

?4 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Jurisdiction) [1984] ICJ Rep 392, 410–1

?5 *The 'ARA Libertad' Case (Argentina v Ghana)* (Provisional Measures) [2012] ITLOS Rep 332, Judges Wolfrum and Cot Sep Op, paras 68–9

?6 Jack Wass 'Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals' (2016) 86(1) British Yearbook of International Law 155.

?7 It is sometimes said that benefit to the representor is sufficient, and detriment to the representee is not required; this theory is rejected in Wass at 165.

?8 It was for this reason that I argue the Separate Opinion in the *ARA Libertad* case was wrong: see Wass at 171.

?9 See, for example, the decision of the majority in *Abaclat v Argentina* (Decision on Jurisdiction and Admissibility) ICSID Case No ARB/07/5 (2011, Tercier P, van den Berg & Abi-Saab (dissenting)), para 374.

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