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CASES

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CONSORTIUM GROUPEMENT LESI–DIPENTA v. PEOPLE’S DEMOCRATIC
 REPUBLIC OF ALGERIA¹

(ICSID Case No. ARB/03/8)

Award. 10 January 2005

(*Arbitration Tribunal: Tercier, President; Faurès and Gaillard, Members*)

SUMMARY: *The facts:* — Consorzio Groupement LESI–DIPENTA (“Consortium” or “the Claimant”), an Italian consortium, instituted arbitration proceedings against the People’s Democratic Republic of Algeria (“Algeria” or “the Respondent”) under a bilateral investment treaty between Italy and Algeria (“the BIT”).² The Consortium was constituted by two Italian companies, Lavori Edili Stradali Industriali LESI SpA (“LESI”) and Gruppo DIPENTA Costruzioni SpA (“DIPENTA”).

¹ The Claimant was represented by Professor Antonio Crivellaro. The Respondent was represented by Mr Abdelmadjid Attar, Mr Dominique Falque, Mr Mohammed Chemloul and Professor Ahmed Laraba.

² Bilateral Agreement on the Promotion and Reciprocal Protection of Investments between Algeria and Italy, signed 18 May 1991, entered into force 26 November 1993. The text of the agreement is available in Italian at www.unctad.org/sections/dite/iaa/docs/bits/italy_algeria.it.pdf.

The Algerian Agence Nationale des Barrages (“ANB”) issued a call for tenders for the construction of the Koudiat-Acerdoune dam in the district of Bouira in Algeria. LESI and DIPENTA formed a temporary group of companies for the purpose of submitting a joint bid for the construction of the dam, agreeing to form a consortium between the two companies should they be awarded the contract. LESI and DIPENTA’s bid was successful. On 20 December 1993, a contract was signed with ANB, and on the same day the Consortium was constituted in Rome by notarized articles of association. The parties disagreed on whether the creation of the Consortium was communicated to the Algerian authorities. On 13 April 1994, the articles of association and by-laws of the Consortium were sent to ANB.

The Claimant alleged that, between December 1993 and April 1996, security problems in Algeria had prevented the commencement of work at the site, and from April 1996 persistent security problems had delayed construction. Work at the site was suspended on 1 November 1997 in accordance with a stop-work order issued by the Algerian authorities. On 14 April 2001, ANB notified its decision to cancel the contract, and the Consortium acknowledged cancellation and said it would submit a claim for compensation. On 27 June 2001, ANB notified its decision that the contract was cancelled.

The Consortium submitted claims for compensation and sought to reach an agreement on the amount with ANB. On 15 May 2002, a formal appeal concerning the dispute with ANB was sent to the Minister of Water Resources, attaching a claim for damages and interest. Further negotiations with ANB over the amount of compensation failed. On 3 February 2003, the Consortium filed a request for arbitration with the International Centre for the Settlement of Investment Disputes (“the Centre”), directed against Algeria. The Consortium asked the Tribunal to declare that Algeria had breached its obligations under the BIT by not promoting, protecting and affording security to its investment, by applying discriminatory measures against it, and by illegally expropriating it. It claimed damages based on prolonged stoppage of work at the site, damages flowing from the cancellation of the contract, and financial costs due to the delay in compensation. The request for arbitration was registered on 20 May 2003.

The Respondent challenged the jurisdiction of the Tribunal and the admissibility of the claim, issues to be first decided by the Tribunal. Regarding jurisdiction, the Tribunal considered the following four questions: (i) whether the issue at hand was a legal dispute; (ii) whether the dispute was one arising directly out of an investment; (iii) whether it arose from a problem between a Contracting State and a national of another Contracting State; and (iv) whether the State in question had given its consent in writing to the jurisdiction of the Centre.

Regarding admissibility, the Respondent argued that the request for arbitration was inadmissible because: (i) the Claimant did not respect the conditions of seeking friendly settlement and respecting a six-month cooling-off period as stipulated in Article 8 of the BIT; (ii) the Claimant lacked standing to bring the action against Algeria; and (iii) the Claimant had brought a simultaneous suit against ANB in the courts of Algeria.

Held: — The Tribunal lacked jurisdiction. The request for arbitration submitted by the Consortium in its own name was inadmissible since the Consortium did not have standing.

(1) The dispute between the parties regarding the determination of the damages suffered by the Claimant was a legal dispute, not a mere matter of accounting or finance. The wording of Article 25(1) of the ICSID Convention was to be understood in its broadest sense, and covered all questions relating to conclusions based on the claims of one party against the other by virtue of legal rules. This was to be distinguished from disputes which had as their basis political or economic questions. That the amount rather than the principle of compensation was disputed did not change the situation (Part II, paras. 8–9).

(2) The dispute arose directly out of an investment within the meaning of the Convention. The construction contract constituted an investment for the purposes of Article 25(1) of the ICSID Convention. While the Convention offered no definition of the term “investment”, and earlier decisions proceeded on a case-by-case basis, some objective criteria emerged from those cases. A contract was considered an investment if: (i) the contracting party had made contributions in the host country; (ii) those contributions had a certain duration; and (iii) they involved some risks for the contributor. It was not necessary that the investment contribute more specifically to the host country’s economic development (Part II, paras. 13, 15).

(a) The Claimant had committed significant resources to the construction of the dam. The “contribution” criterion required that a portion of the contribution had to be made in the country concerned and have economic value. This was not limited to financial commitments. Contributions could partly be made in the home country provided they were allocated to the project to be carried out abroad (Part II, para. 14).

(b) The “duration” condition seemed at first sight to be fulfilled since the contract’s minimum duration was fifty months, such projects often justifying extensions. The notion was to be understood broadly. There had to be economic commitments of significant value sufficient at least to promote the economy and development of the country concerned. While there was no objective criterion in the Convention, for construction contracts jurisprudence relied on the contract’s duration, which was a good measure in this case inasmuch as it concerned a project of real national significance (Part II, para. 14).

(c) Regarding “risk”, the requirement that there be risk for the contributor did not mean that the contract must contain a risk element, such as an insurance contract or loan. It was sufficient if the contract implied increased risks and uncertainties for the contracting party, regardless of whether the contract allowed for the submission of disputes to domestic courts. In this case, the construction contract implied such risks, some of which materialized upon cancellation of the contract (Part II, para. 14).

(3) The dispute was between the Claimant and a Contracting State within the meaning of the ICSID Convention. It was a necessary and sufficient condition

that the action had been brought against Algeria, since the attribution of ANB's actions to the State was a question for the merits. This formal approach would be abandoned if it became clear that the State had no connection to the contract. However, in the present case, without prejudging the question of attribution, the involvement of the Algerian State could not *a priori* be excluded (Part II, paras. 19–20).

(4) Provided the measures challenged by the Claimant constituted violations of the BIT, then Algeria had given its consent in writing to the jurisdiction of the Centre. Algeria's consent to jurisdiction under the BIT was linked to "investments", a broad term under the BIT which was satisfied by the contract in this case. The fact that the contract was not formally recognized as an investment under Algerian law (for the purposes of tax privileges) did not offend against the requirement in the BIT that the investment be made "in conformity with the laws and regulations in force". In accordance with Article 4(1) of the BIT, the scope of Algeria's consent to jurisdiction was limited to claims where the measures taken were unjustified or discriminatory in law or in fact. Not all breaches of contract would meet this standard. This interpretation was confirmed by the absence of an "umbrella clause" in the BIT, as found in some other treaties (Part II, paras. 24–6).

(5) The Claimant had satisfied the conditions of pursuing attempts at friendly settlement and respecting the six-month cooling-off period as stipulated in Article 8 of the BIT. The reference date for calculating the six-month period was the date of the first request and not the time when negotiations were found to have failed. The cooling-off condition was not absolute and could be waived when it was obvious that any conciliation attempt would be doomed given the clearly demonstrated attitude of the other party (Part II, paras. 32–3).

(6) The request for arbitration was inadmissible because the Consortium did not have standing to bring the claim. Since the Consortium had not signed the contract with ANB, it had no rights under that contract. Although the contract was signed by the temporary group of companies, which comprised LESI and DIPENTA, the Consortium was a separate legal entity under Italian law, entitled to assume rights and obligations in its own name. That the Consortium had replaced the two companies had to be explicitly drawn to the Respondent's attention; notification did not suffice. Neither could the Consortium be said to be acting as agent, nor could it bring the claims of its members. Since the Claimant was not an investor for the purposes of Article 25(1) of the ICSID Convention, not only was the request inadmissible, but the Tribunal had no jurisdiction. The two companies party to the contract were able to initiate ICSID proceedings against Algeria in their own name and on their own behalf on the basis of the BIT (Part II, paras. 37–41).

(7) In accordance with the Tribunal's broad discretion as to costs, and the rejection of most of the Respondent's objections, each party was to bear one half of the arbitration costs and to bear their own costs of representation. The Respondent owed the Claimant US \$45,050 with respect to the advance (Part II, para. 43).

The following is the text of the Award:

AWARD (10 JANUARY 2005)

I. THE FACTS OF THE CASE¹

The description that follows is by choice of a summary nature, based entirely on statements by the Claimant, the Respondent having at this stage refused to enter a detailed plea. It serves only as a basis for discussion of the questions of law that will be examined here. Discussion of significant questions of fact as necessary for resolving the dispute could be reopened in a discussion of the merits of the case.

A. The Parties

1. The Claimant is Consorzio Groupement LESI–DIPENTA (hereafter “Consortium”) with headquarters at Via Indonesia 100, 00144 Rome, Italy. It was constituted by notarized articles of association on December 20, 1993, under the name “Groupement LESI–DIPENTA” by the companies Lavori Edili Stradali Industriali LESI SpA (hereafter “LESI”) and GRUPPO DIPENTA COSTRUZIONI SpA (hereafter “DIPENTA”). It was registered on January 12, 1994 under the name “Consortio Groupement LESI–DIPENTA” in the Enterprise Registry of Rome (cf. no. 9 et seq.; Claimant exhibits no. G11 and G15).

2. The Respondent is the People’s Democratic Republic of Algeria (hereafter “Algeria” or “the Algerian State”), represented by M. Abdelmadjid Attar, Minister of Water Resources, with headquarters at the Ministry of Water Resources, 3 Rue du Caire, BP 86, Kouba, Algiers.

B. Chronology of Events

3. On September 14, 1992 the Ministry of Equipment of Algeria, acting through its National Dams Agency (Agence Nationale des Barrages, ANB, hereafter “ANB”) issued a call for tenders for construction of the Koudiat-Acerdoune dam in the District (*Wilaya*) of Bouira. This dam was to provide drinking water for the city of Algiers (Respondent exhibit no. 10).

The call for tenders specified: “The National Dams Agency, as the client and project owner, by means of this pre-selection notice, invites eligible firms to submit their bids, under seal, for execution of the supplies and works hereafter described.”

4. On November 24, 1992, LESI and DIPENTA signed a “Protocol of Agreement for Constitution of a Temporary Group of Companies” for purposes of submitting

¹ The key documents are hereafter indicated as follows:

Claimant’s Request for Arbitration of February 3, 2003 = Claimant 03.02.03;

Respondent’s Memorial of January 27, 2004 = Respondent 27.01.04;

Claimant’s Memorial in Response on Jurisdiction of April 3, 2004 = Claimant 03.04.04;

Respondent’s Memorial in Reply on Jurisdiction of May 5, 2004 = Respondent 05.05.04;

Claimant’s Memorial of Rejoinder on Jurisdiction of June 3, 2004 = Claimant 03.06.04.

a joint bid for construction of the dam. That protocol specified the following (Claimant exhibit no. G13):

4. If the works are awarded to the Group, the parties undertake to ratify this agreement by creating a consortium between the two companies, to be governed by corporate statutes, with each company retaining its own autonomy.

5. The parties shall be jointly and severally liable to the ANB, the client, for all obligations flowing from submission of the bid and execution of the works . . .

...

9. This protocol of agreement shall terminate:

- (a) if the companies are not prequalified; and if they are prequalified;
- (b) if they are awarded the work, once the constitution of the association of companies has been signed;
- (c)

...

5. At meetings held on October 27 and 30, 1993, ANB communicated to representatives of the “Group of Companies LESI–DIPENTA” its decision to award them the works for building the dam, subject to approval of the Contract by the supervisory authorities concerned (Respondent exhibit no. 8 = Claimant exhibit no. G14).

6. According to the Claimant, as soon as the Contract award was announced, LESI and DIPENTA constituted the Consortium with a view to signing the Contract. The articles of association establishing the Consortium were completed before a notary in Rome on December 20, 1993 (cf. below no. 9).

7. On December 20, 1993, LESI and DIPENTA, “joined together as a Temporary Group of Companies, pursuant to the agreement of November 24, 1992 signed before Mr Luigi Cerasi, notary at Rome, and annexed to this offer . . .”, submitted a bid to ANB. That bid was signed, “Groupement LESI–DIPENTA by proxy of the Groupement LESI–DIPENTA by proxy G. Medioli” (Respondent exhibit no. 1).

According to the Claimant, the “Protocol of Agreement for the Constitution of a Temporary Group of Companies”, concluded on November 24, 1992 between LESI and DIPENTA (cf. no. 4; Claimant exhibit no. G13) was communicated.

8. On December 20, 1993, again:

Group of Companies
 LESI/DIPENTA COSTRUZIONI SpA,
 represented by Mr Giovanni Medioli, President,
 with headquarters at 100 Via Indonesia, Rome,
 hereafter “the Company”,

of the first party,

and ANB, of the other party,

signed a contract entitled “Barrage de Koudiat Acerdoune – Dossier d’Offre” (“Koudiat-Acerdoune Dam – Bid File”) relating to construction of the dam

(hereafter “the Contract”). The overall time limit for fulfilling the Contract was 50 months, as of issuance of the service order that marked the beginning of the works (Claimant exhibit no. 1 = Respondent exhibit no. 2).

On the last page of that document, the stamp of “the Company” appeared as follows: “Groupement LESI–DIPENTA by proxy G. Medioli”.

9. On that same day, the Consortium was constituted in Rome by notarized articles of association pursuant to Articles 2602 et seq. and 2612 et seq. of the Italian Civil Code (ItCC). On January 12, 1994 it was registered in the Enterprise Registry of Rome at the Tribunal of Rome under number 138/94, and also with the Chamber of Commerce of Rome under number 685037 (Claimant exhibits G11 and G15).

10. According to the Claimant, while the Contract is dated December 20, 1993, the President of the Consortium, Mr Medioli, had signed it a few days earlier in Rome, in accordance with instructions from the Algerian authorities, in a version that was undated. The date was added by ANB after approval and signature by the competent authorities. A ceremony was reported to have been held in Algiers on December 19 to make public the award of the Contract and the commencement of the work. Mr Medioli sent his assistant, Mr Ugo Napoli, to deliver the copies already signed by the President. The following day, the Algerian authorities added their signature and gave the service order to begin work to Mr Napoli, who countersigned it (Claimant 03.04.04 no. 16 and 17).

11. Also on December 20, 1993, the service order to begin work was notified to the “Groupement LESI–DIPENTA”. That service order specified that the Contract had been approved by the National Procurement Commission and by the State Financial Comptroller (Claimant exhibit no. G16 = Respondent exhibit no. 9).

12. According to the Respondent, LESI and DIPENTA did not inform the Algerian authorities that they had constituted a consortium with external activities, within the meaning of the ItCC (Respondent 27.01.04 p. 5).

13. By letter of April 13, 1994, the “Groupement LESI–DIPENTA” sent to ANB a copy of the articles of association and by-laws of the Consortium, as well as Minutes of Meeting No. 1 of the Managing Council, giving powers of representation to Mr Salvatore Giudice and Mr Ugo Napoli (Claimant exhibits no. G36 and G37).

14. According to the Claimant, many difficulties were encountered in executing the Contract:

- From December 1993 to April 1996, the commencement of work at the site was prevented by difficulties in securing rights-of-way and by security problems;
- From April 1996 to November 1997, some of the works were performed, but in a very limited manner, because of persistent security problems;
- From November 1, 1997 to June 27, 2001, the date the Contract was cancelled, work was suspended by decision of the competent authorities, following the decision of ANB to change the method of constructing the dam (Claimant 03.02.03 p. 5 et seq.).

15. On December 31, 1996, the “Groupement LESI–DIPENTA, with headquarters in Rome at 100 Via Indonesia, constituted by the companies LESI SpA (ROME) and GRUPPO DIPENTA COSTRUZIONE SpA (ROME), led by the

company LESI Spa, represented by Mr Salvatore Giudice . . . as Technical Director with full powers for these purposes, hereafter designated the Group” and ANB concluded Amendment No. 1 to the Contract, applying the value-added tax (hereafter “VAT”) to the initial amount of the Contract. That amendment was signed under the letterhead of the “Democratic People’s Republic of Algeria, Ministry of Equipment and Territorial Development, National Dams Agency” (Respondent exhibit no. 3).

16. On October 28, 1997, ANB notified a service order to the “Groupement LESI–DIPENTA”, under the letterhead of the “People’s Democratic Republic of Algeria, Ministry of Water and Forests, National Dams Agency”, instructing it to cease work as of November 1, 1997. This stop-work order followed a decision by ANB to modify the method of constructing the dam, replacing the initial “rock fill” variant with the “roller-compacted concrete (RCC)” variant. According to the Claimant, ANB maintained that this modification required prior approval of the African Development Bank (hereafter the “ADB”), which had financed the Contract (Respondent exhibit no. 11 = Claimant exhibit no. G16; Respondent 27.01.04 p. 16; Claimant 03.02.03 pp. 5 and 8).

17. On November 1, 1997, work was effectively suspended.

18. On October 4, 1997–November 2, 1997, the “Groupement LESI–DIPENTA” and ANB concluded Amendment No. 2 to the Contract relating to the VAT and the introduction of a new price. This was formally concluded in the same manner as Amendment No. 1 (see above, paragraph 15) (Respondent exhibit no. 4).

19. On June 27, 1998, “Groupement LESI–DIPENTA”, acting through “Giovanni Medioli as President of the Managing Council of the Groupement LESI–DIPENTA, headquartered at Rome, Via Indonesia 100, registered in the Chamber of Commerce, Industry and Crafts of Rome under number 785037”, submitted to the Respondent, in the form of a third amendment (Amendment No. 3), a proposal concerning the technical and economic aspects of building the dam with RCC (Respondent exhibit no. 5).

Mr Medioli declared in that submission: “I declare, under pain of automatic cancellation of the Contract or of having the work placed under State administration with full costs against the Group, that neither said group nor its component companies fall within the scope of the bans instituted by existing legislation and regulations and the provisions for violation of price regulations.”

At the foot of the amendment appeared the following stamp: “Groupement LESI–DIPENTA the President Giovanni Medioli”.

According to the Claimant, this amendment was never signed by Algeria.

20. By letter of April 14, 2001, ANB informed “The President and Director General of the Groupement LESI–DIPENTA” of its decision to cancel the Contract. That letter explained that the difficulties encountered were beyond its control and it therefore invoked force majeure as the grounds for cancellation. These grounds consisted, according to the letter, of the fact that the signature of Amendment No. 3 was conditional upon obtaining financing and that the ADB had conditioned this financing on a new call for international tenders, and hence on cancellation of the Contract. ANB declared, however, that it was ready to compensate the Contractor for its costs, as accepted in its letter of March 16, 1998 (Claimant exhibit no. 3).

21. On April 24, 2001, according to the Claimant, the Consortium acknowledged the cancellation and announced that it would submit a substantiated claim under Article 566 of the Algerian Civil Code (Claimant 03.02.03 p. 12).

22. On June 5, 2001, again according to the Claimant, the Consortium confirmed its claim for compensation (Claimant 03.02.03 p. 12).

23. On June 20, 2001, the Claimant approached the Minister of Water Resources, requesting a meeting to find a solution to the difficulties (Claimant 03.02.03 p. 12).

24. On June 27, 2001, ANB sent a note under the letterhead of the “People’s Democratic Republic of Algeria, Ministry of Water Resources, National Dams Agency”, notifying the Groupement LESI–DIPENTA, in the form of a “decision”, that the Contract was cancelled (Respondent exhibit no. 12).

25. On September 5, 2001, according to the Claimant, the Consortium submitted a further claim for compensation, following which meetings were held in an unsuccessful attempt to reach agreement on the amount of compensation.

26. By letter of April 5, 2002, under the letterhead of the “Groupement LESI–DIPENTA, 00144 Rome, Via Indonesia 100 . . . Tribunal of Rome 138/94 – CCIAA Rome No. 785037 . . .” and stamped “Groupement LESI–DIPENTA President (Giovanni Medioli)” (hereafter “letterhead”), Groupement LESI–DIPENTA wrote to the Minister of Water Resources requesting that an attempt be made to reach a friendly settlement of the dispute, and submitted a new file detailing and quantifying the damages that the Contractor claimed to have suffered (Claimant exhibit no. 10 = Respondent exhibit no. 18).

27. By a letter under letterhead dated May, 15, 2002, Groupement LESI–DIPENTA sent to the Minister of Water Resources a formal appeal concerning the dispute with ANB over execution and cancellation of the Contract (Claimant exhibit no. 21) and attached thereto a “Claim for damages and interest (following stoppage of work and cancellation)”, in which the Claimant was described as follows (Respondent exhibit no. 6):

1.1 *The Claimant: Groupement LESI–DIPENTA*

The Groupement LESI–DIPENTA is a group under Italian law, with headquarters at Rome EUR, 100 Via Indonesia, the President of which is Mr Giovanni Medioli. It has been registered in the Enterprise Registry of Rome since January 12, 1994 under number 785037.

It is referred to hereafter in this note as GLD or “the claimant” or “the enterprise”. In the documents exchanged between the parties, it is variably designated as “the contractor” or “the enterprise” or “the Group”.

It is composed of companies under Italian law, “Lavori Edili Stradali Industriali” – LESI SpA and DIPENTA SpA; LESI is the lead member of the Group.

28. In another letter on its letterhead, dated the same day, the Groupement LESI–DIPENTA advised ANB that it had sent the case to the Minister of Water Resources (Claimant Exhibit no. 22).

29. By letter of June 15, 2002, addressed to “the President of the Groupement LESI–DIPENTA – Italy”, the Ministry of Water Resources acknowledged receipt of the appeal and instructed the Group to reopen negotiations with ANB in search of an amicable settlement (Respondent exhibit no. 19).