

Case note

Emilio Agustín Maffezini

v

The Kingdom of Spain

Year of the award: 2000

Forum: ICSID

Applicable investment treaty: Argentina – Spain BIT (1991)

Arbitrators Mr. Francisco Orrego Vicuña, President Mr. Thomas Buergenthal Mr. Maurice Wolf	Timeline of the dispute 30 October 1997 – request for arbitration 24 June 1998 – arbitral tribunal constituted 25 January 1999 – decision on jurisdiction 13 November 2000 – arbitral award 31 January 2001 – rectifications of award
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I. Executive Summary

In 1989, Mr. Maffezini, an Argentine investor, established in Spain a joint venture for the production of chemicals (EAMSA), where he held 70% interest. The remaining 30% of the company's stock belonged to SODIGA, a Spanish public entity. In 1992, the construction of the chemical plant and other EAMSA operations had to be discontinued because of company's financial crisis.

In the ICSID arbitration brought by Mr. Maffezini against Spain under the Argentina-Spain BIT, Mr. Maffezini blamed SODIGA, whose actions he attributed to the Kingdom of Spain, for misinforming him about the costs of the project, which turned out to be significantly higher than originally estimated. He also referred to the fact that in late 1991, 30 million Spanish pesetas had been irregularly transferred from his personal bank account as a loan to EAMSA, upon the order of SODIGA's representative in EAMSA.

The Tribunal dismissed all claims, except for the one relating to the unauthorized bank transfer. The Tribunal held that the latter episode was indeed attributable to Spain and constituted a violation of Spain's BIT obligation to accord protection and fair and equitable treatment to the Claimant. To compensate for this breach, the Tribunal ordered Spain to pay to Mr. Maffezini the amount of the mentioned bank transfer plus interest.

This case does not represent any significant value in terms of damages award, due to the undisputed amount of compensation (bank transfer) and the extreme brevity of the Tribunal's reasoning. Only the award of interest might be worth attention, as the Tribunal used different interest rates for pre-Award and post-Award interest as well as different frequency of compounding interest (annual compounding for pre-Award interest; monthly compounding for post-Award interest).

II. Factual Background and Claims of the Investor

The Claimant, Mr. Emilio Agustín Maffezini, a national of Argentina, initiated an ICSID arbitration against Spain under the provisions of the Argentina-Spain BIT. The dispute involved a chemical products joint venture (EAMSA), established in 1989 by Mr. Maffezini (70% interest) and a Spanish publicly owned entity SODIGA (30% interest).

The project was going forward until 1992, inter alia thanks to a loan received by EAMSA from SODIGA and subsidies from the Spanish government. EAMSA purchased a plot of land and started the construction of a chemical plant. However, in view of rising project costs and the consequent EAMSA's financial difficulties, in March 1992 Mr. Maffezini ordered the plant construction to stop and dismissed EAMSA employees.

Shortly prior to that, in November 1991, 30 million Spanish pesetas had been transferred from Mr. Maffezini's personal bank account as a loan to EAMSA. The transfer was ordered by SODIGA's representative in EAMSA, who was acting under the general authorisation of Mr. Maffezini.

The arbitration was initiated by Mr. Maffezini in 1997, following the parties' inability to settle the matter of EAMSA's outstanding debt to SODIGA.

In the arbitral proceedings, Mr. Maffezini claimed the following:

- 1) Because of SODIGA's status as a public entity, all of its acts and omissions were attributable to Spain;
- 2) The project failed because of the wrong advice given by SODIGA with regard to the costs of the project, which turned out to be significantly higher than originally estimated;
- 3) SODIGA was also responsible for the additional costs resulting from the environmental impact assessment (EIA) since EAMSA was pressured to make the investment before the EIA process was finalized and before its implications were known;
- 4) He had not agreed to a loan to EAMSA for 30 million Spanish pesetas and the transfer of this amount from his personal account to EAMSA was irregular.

The Award did not specify the total amount of damages claimed by Mr. Maffezini.

III. Findings on Merits¹

The Tribunal dismissed all of Mr. Maffezini's claims except for the one regarding the transfer of 30 million Spanish pesetas from his bank account, as a loan to EAMSA. On that claim, the Tribunal ruled that the transfer had not been duly authorized by Mr. Maffezini. The Tribunal found that SODIGA's representative in EAMSA, who had ordered the transfer, had been exercising SODIGA's public (as opposed to commercial) functions attributable to the Kingdom of Spain. The Tribunal held that these acts amounted to the breach by Spain of its obligation to protect the investment (Article 3(1) of the Argentine-Spain BIT), as well as of Spain's commitment to ensure the investor a fair and equitable treatment (Article 4(1) of the BIT). (paras.72-83)

IV. Findings on Damages

A. Principal Amount

The parties did not dispute the transferred amount, and the Tribunal awarded 30 million Spanish pesetas as the principal amount of compensation.

B. Interest

The Tribunal awarded interest from 4 February 1992 until the date of the Award at the LIBOR rate for the Spanish peseta for each annual period since 4 February 1992. The Tribunal reasoned that since the funds had been withdrawn from a time-deposit account of Mr. Maffezini, it was appropriate to order the payment of interest compounded on an annual basis. The Tribunal calculated the interest to amount to ESP 27,641,265. (para.96)

The Tribunal also ordered payment of post-Award interest, if Spain did not comply with the Award within 60 days. In that case, the total awarded amount (principal amount plus pre-award interest) was to accrue interest at a rate of 6% per annum, compounded monthly, as of the date of the Award to the date of payment.

¹ Prior to its award on merits, the Tribunal issued a decision on jurisdiction of 25 January 1999, for which this case is mostly known (the decision discussed the possibility of use of the MFN provision to rely on procedural rules of other BITs that were more favourable for the investor). The decision on jurisdiction is not covered in this summary.