

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

CASE No. ARB/03/4

EMPRESAS LUCCHETTI, S.A.
AND
LUCCHETTI PERU, S.A.
(Claimants)

v.

REPUBLIC OF PERU
(Respondent)

AWARD

Members of the Tribunal:

Judge Thomas Buergenthal, President
Dr. Bernardo M. Cremades, Arbitrator
Mr. Jan Paulsson, Arbitrator

Secretary of the Tribunal:

Ms. Gabriela Alvarez-Avila

Date of Dispatch: February 7, 2005

THE TRIBUNAL

Constituted as specified above,

Having completed its deliberations,

Hereby renders the following Award:

I. INTRODUCTION

1. The Claimants, Empresas Lucchetti, S.A and Lucchetti Perú, S.A. (Claimants or Lucchetti), companies constituted in accordance with the laws of Chile and Peru, respectively, are represented in these proceedings by:

Messrs. Edmundo Eluchans Urenda
Gastón Gómez B. and
Gonzalo Molina A.
Edmundo Eluchans y Cia.
Miraflores 178, Piso 16
Santiago de Chile
Chile
and

Messrs. Robert Volterra
Alejandro Escobar and
Ms. Francesca Albert
Herbert Smith
Primrose Street
London EC2A 2IIS
United Kingdom

2. The Respondent is the Republic of Peru (Respondent or Peru), represented in these proceedings by:

H.E. Ambassador Eduardo Ferrero Costa
Embassy of Peru
1700 Massachusetts Avenue N.W.
Washington, D.C. 20036

Judge Stephen M Schwebel

Messrs. Daniel M. Price and Stanimir A. Alexandrov
Sidley Austin Brown & Wood LLP
1501 K Street N.W.
Washington, D.C. 20005

II. PROCEDURAL HISTORY

3. On December 24, 2002, the International Centre for Settlement of Investment Disputes (ICSID or the Centre) received a request for arbitration from Empresas Lucchetti, S.A. and Lucchetti Perú, S.A. against the Republic of Peru. The dispute concerned a pasta factory in the Municipality of Lima and was brought to ICSID under the ICSID Convention. Claimants invoked the dispute settlement provisions of the Bilateral Investment Treaty between the Republic of Peru and the Republic of Chile (the BIT).

4. The Acting Secretary-General registered the request on March 23, 2003 pursuant to Article 36(3) of the ICSID Convention, and notified the parties, pursuant to Institution Rule 7, that the request had been registered inviting them to constitute an Arbitral Tribunal as soon as possible.

5. According to the agreement of the parties, the Tribunal would be composed by three members, one appointed by each party and the third arbitrator, who would be designated as President of the Tribunal, by agreement of the parties. If the parties failed to agree on the presiding arbitrator, the Secretary-General would appoint the President of the Tribunal. Accordingly, Claimants appointed Mr. Jan Paulsson, a national of France, as an arbitrator. Respondent appointed Dr. Bernardo M. Cremades, a national of Spain, as an arbitrator. The parties having failed to agree on the appointment of the President of the Tribunal, the Acting Secretary-General, after consulting with the parties, appointed Judge Thomas Buergenthal, a national of the United States of America, to serve as President of the Tribunal.

6. On August 1, 2003, pursuant to Article 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), the Acting Secretary-General of ICSID informed the parties that all the arbitrators had accepted their appointments and that the Tribunal was deemed to have been constituted, and the proceeding to have begun, on that date. By that same letter, the parties were informed that Ms. Gabriela Alvarez Avila, Senior Counsel, ICSID, would serve as Secretary of the Tribunal.

7. On August 7, 2003, Respondent filed a request for suspension of the proceedings, in view of the fact that “Claimants’ Request for Arbitration [was] (...) the subject of a concurrent State-to-State dispute between the Republic of Peru and the Republic of Chile.” Pursuant to the Tribunal’s instructions, the parties filed on September 11, 2003 their briefs on Respondent’s request for suspension. The Tribunal also invited the parties to present oral arguments on this issue during the first session.

8. The first session of the Tribunal with the parties was held on September 15, 2003 at the Hague, the Netherlands. At this session, the parties expressed their agreement that the Tribunal had been duly constituted, pursuant to the relevant provisions of the ICSID Convention and the Arbitration Rules, indicating that they had no objection in this regard. An exchange of views took place regarding the place of arbitration and the objections to jurisdiction raised by Respondent during the course of the session. It was decided that the place of arbitration would be the seat of Centre in Washington, D.C. and that the proceedings on the merits would be suspended pursuant

to Rule 41(3) of the Arbitration Rules. After consultation with the parties, the Tribunal set up a schedule for the filing of pleadings on jurisdiction.

9. During the course of the first session, the Tribunal also heard oral arguments on Respondent's request for suspension of August 7, 2003. By a decision communicated through the Secretariat on September 16, 2003, the Tribunal found that the conditions for a suspension of the proceedings were not met and confirmed the schedule for the submission of pleadings on the objections to jurisdiction.

10. Pursuant to the schedule for the filing of pleadings, Respondent filed its memorial on jurisdiction on December 15, 2003 and Claimants submitted their counter-memorial on jurisdiction on March 15, 2004. The reply and the rejoinder on jurisdiction were filed on May 17, 2004 and July 16, 2004, respectively.

11. On August 24, 2004, the Tribunal issued directions regarding the organization of the hearing on jurisdiction. Pursuant to those directions, the parties filed documents to be used during the hearing on jurisdiction on August 26, 2004. The Tribunal convened at the premises of the World Bank in Washington D.C. on September 2 and 3, 2004 to hear the parties' oral arguments on jurisdiction. The parties were represented as follows:

Attending on behalf of Claimants:

Edmundo Eluchans Urenda, Edmundo Eluchans y Cia.
Gonzalo Molina Ariztía, Edmundo Eluchans y Cia.
Robert Volterra, Herbert Smith
Alejandro Escobar, Herbert Smith

Attending on behalf of Respondent:

Roberto Rodriguez, Counselor, Embassy of Peru
Alejandro Riveros, Counselor, Embassy of Peru
Alvaro Rey de Castro, Ministry of Foreign Affairs of Peru
César Julio Pantoja Carrera, Office of the State Attorney General of Peru
Stephen M. Schwebel
Daniel M. Price, Sidley Austin Brown & Wood LLP
Stanimir A. Alexandrov, Sidley Austin Brown & Wood LLP
Nicolás Lloreda, Sidley Austin Brown & Wood LLP
Lisa A. Crosby, Sidley Austin Brown & Wood LLP
Carlos Carpio, Law Offices of Rodrigo, Elias & Medrano

12. The Tribunal heard, on behalf of Respondent, Judge Stephen M. Schwebel, Mr. Daniel M. Price, Mr. Stanimir A. Alexandrov and Mr. Alejandro Riveros, and on behalf of Claimant, Mr. Robert Volterra, Mr. Alejandro Escobar and Mr. Edmundo Eluchans Urenda. During the course of the hearing, the parties answered questions from the Tribunal.

13. Transcripts in English and Spanish of the hearing on jurisdiction were prepared and distributed to the parties and the members of the Tribunal.

14. On November 2, 2004, following receipt of a communication from the Claimants, dated October 27, 2004, to which they attached a decision by Dr. Pablo Sánchez Velarde, Supervisory Prosecutor for Anti-Corruption, dated August 31, 2004, the Tribunal invited the parties to comment thereon by November 16, 2004. Their respective comments, with additional exhibits, were received by the Tribunal on the aforementioned date.

III. THE REQUEST FOR ARBITRATION

15. The Request for Arbitration states that the First Claimant is a company constituted in accordance with the laws of Chile. It is the owner of more than 98% of the shares of the Second Claimant. By virtue of this Chilean ownership, and in accordance with the terms of Article 8.3 of the Peru-Chile BIT, the Second Claimant is also to be treated as a Chilean investor for the purposes of the dispute resolution provisions of the Peru-Chile BIT.

16. The Second Claimant is the owner of a property situated at la Avenida Prolongación de los Defensores del Morro n° 1277, in the district of Chorrillos in the City of Lima, where it has constructed an industrial plant for the manufacture and sale of pasta.

17. The First Claimant is a market leader in Chile in the production of pasta and related products. It decided to expand its activities to other countries and in 1995 concentrated on Peru and quickly achieved a pre-eminent position in the market in this country. The production and operation of the Second Claimant's plant in Lima was intended to supply both the local and export markets. The total amount of the investment in Peru was more than \$150 million.

18. Claimants submit that they obtained all of the necessary authorizations and administrative and municipal permits in accordance with the laws, regulations and practice usual in Peru for the construction of the industrial plant. Nevertheless, at the end of 1997 and the beginning of 1998 the Municipalidad Metropolitana de Lima (Municipality of Lima) annulled the permits granted to the Second Claimant for the construction of its industrial plant, referring to environmental problems and supposed deficiencies relating to the granting of the permits. The annulment of the permits and the grounds on which they were based were, without exception, the object of judicial proceedings in Peru. The judicial proceedings concluded in favor of the Second Claimant. Claimants state that these judicial proceedings have been resolved definitively and irrevocably according to Peruvian law, and are now *res judicata*. No public or private entity has ever sought to challenge these judicial decisions.

19. The Second Claimant's plant is constructed close to, but not within, a protected wetland called los Pantanos de Villa. At the appropriate time the Second Claimant had submitted two environmental impact studies. The second of these studies was duly

approved by INRENA (Instituto Nacional de Recursos Naturales, the competent Peruvian state entity in environmental matters, within the Ministry of Agriculture), through a Resolución Directorial that directed the Second Claimant to comply with various environmental requirements. Claimants state that since the date of the approval of its environmental impact study, the plant has been monitored periodically by INRENA and has always been found to conform to the environmental standards required by Peruvian law and regulations. Claimants contend that the plant does not use water from the marsh or wetlands, nor from subterranean wells in the area, having its own system of piped supply and disposal of water. Similarly, the noise and light levels of the plant have been measured and shown to be clearly below the requirements of the regulations and directives. In its totality the plant enjoys ISO 14.001 international certification, which has been obtained by few factories in Peru.

20. After that the Municipality de Chorrillos granted the Second Claimant its operating license in December 1999, the Second Claimant developed its business without legal interference until the revocation of its license in August 2001. The Council of Municipality of Lima promulgated Acuerdos de Consejo 258 and 259 (hereafter Decree 258 and Decree 259 respectively) on August 16, 2001 (officially published on August 22, 2001). Decree 258, (entitled *Ordering that the Council of the Municipality of Lima request the Congress of the Republic to declare the preservation, maintenance and protection of the Ecological Reserve of Pantanos de Villa a matter of public necessity*), contained a provision (Article 3) charging the Mayor of Lima to present to the Peruvian legislature proposals for the legislative expropriation by reason of public necessity of all areas necessary for the permanent preservation, maintenance, and protection of the Ecological Reserve of Pantanos de Villa. After a lengthy preamble, the operative part of Decree 258 reads as follows:

“IT IS HEREBY DECREED:

Article 1.- The Council of the Municipality of Lima, representing the Municipality of Lima, shall, after studying any technical reports that it considers relevant, adopt all decisions, administrative actions, resolutions and, in general, measures necessary to ensure a comprehensive and final solution for the preservation, maintenance and permanent protection of the Ecological Reserve of Pantanos de Villa.

Article 2.- The Council of the Municipality of Lima, representing the Municipality of Lima, shall request the Congress of the Republic to declare that the preservation, maintenance and permanent protection of the Ecological Reserve of Pantanos de Villa are a matter of public necessity.

Article 3.- The Council of the Municipality of Lima, representing the Municipality of Lima, shall, after studying any technical reports prepared following public bidding, with the participation of the Universities and Professional Associations, propose to the Congress of the Republic legislation for expropriation on grounds of public necessity concerning the relevant areas constituting the Reserve and the adjacent

areas surrounding it, as necessary to ensure a comprehensive and final solution for the preservation, maintenance and permanent protection of the Ecological Reserve of Pantanos de Villa.

For registration, information, publication and enforcement.

*ALBERTO ANDRADE CARMONA
Mayor of Lima”*

21. Decree 259, (entitled Revocation of *Lucchetti Perú S.A’s Municipal operating license and order for the permanent closure of its establishment*) specifically revoked the operating license of the Second Claimant. After a lengthy preamble, the operative part of Decree 259 reads as follows:

“IT IS HEREBY DECREED:

Article 1.- The municipal operating license granted by Municipal Resolution No. 6856-98-MDCH to Lucchetti Perú S.A. for its industrial plant situated at an unnumbered location on Avenida Prolongación Defensores del Morro, 20.5 km. along the Panamericana Sur highway, Chorrillos, for the manufacture and sale of pasta is hereby revoked.

Article 2.- The industrial establishment referred to in the preceding article shall be closed and entirely removed; this shall be done within a maximum of twelve months from the day following the publication of this Decree.

Article 3.- The Council of the Municipality of Lima shall establish an Ad Hoc Technical Commission to study and recommend measures for the effective implementation of the provisions of the preceding article, with a membership including representatives of civil society and of institutions devoted to the preservation and protection of the environment and biological diversity.

Article 4.- The relevant civil and criminal proceedings shall be instituted to protect the Ecological Reserve of Pantanos de Villa, the Municipality of Lima, its authorities and the neighbors of the capital of the Republic.

For registration, information, publication and enforcement.

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Mayor of Lima”*

22. Claimants state that the liability of the State of Peru in this situation is twofold. First, the acts of the Municipality of Lima are imputable to the State in accordance with ICSID jurisprudence and international law. Second, the State has a direct responsibility in that a substantial period of time has passed since the promulgation of these Decrees

and the State has not complied with its obligation under the Peru-Chile BIT to correct the situation and protect the investment. Claimants contend that Decree 258 is unconstitutional and illegal under Peruvian domestic law and international law for various reasons. In addition, Decree 259 contains a clear threat to the rights of the investor.

23. Claimants allege further that Respondent is in breach of its obligations under three distinct Articles of the Peru-Chile BIT: Article 3.2 (protection in accordance with the law, and from unjust or discriminatory measures); Article 4.1 (guarantees of just and equitable, national and most-favored-nation treatment); and Article 6.1 (protection from illegal, discriminatory or uncompensated expropriation). These Articles of the Peru-Chile BIT read as follows:

“ARTICLE 3

Promotion and Protection of Investments

1....

2. Each Contracting Party shall protect within its territory the investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not adversely affect the administration, maintenance, use, usufruct, expansion, sale or liquidation of such investments by unjustified or discriminatory measures.

ARTICLE 4

Treatment of Investments

1. Each Contracting Party shall guarantee fair and equitable treatment within its territory for investments of investors of the other Contracting Party. Such treatment shall be no less favorable than that granted by each Contracting Party to the investments of its own investors made within its territory, or that granted by each Contracting Party to investments of investors of the most-favored nation made within its territory, if the latter treatment is more favorable.

ARTICLE 6

Expropriation and Compensation

1. Neither of the Contracting Parties shall adopt any measure directly or indirectly depriving an investor of the other Contracting Party of an investment, unless the following conditions are met:

- a) The measures are adopted in pursuance of the law and in accordance with the relevant constitutional rules;*
- b) The measures are not discriminatory;*
- c) The measures are accompanied by arrangements for the payment of immediate, adequate and effective compensation. Such compensation shall be based on the market value of the investments made on a date immediately prior to the date on which the measure is publicly announced. In the event of any delay in the payment of compensation, interest shall accrue, at a commercial rate established on the basis of the real market value, from the date of expropriation or loss until the*

date of payment. The legality of any such expropriations, nationalizations or similar measures and the amount of compensation shall be subject to revision in accordance with due legal process.”

24. Claimants state that Decrees 258 and 259 and subsequent acts have caused enormous losses and damages to their investment and violated their rights. In these circumstances Claimants seek the following relief from this Tribunal:

- “ 1. The Peruvian State should be declared to have violated the obligations assumed under the APPI and the applicable principles of international law and therefore to be liable to the Claimants.*
- 2. The Claimants should be granted compensation for the consequential damage and loss of earnings associated with the investment made, all amounts to be indicated in the request for arbitration.*
- 3. The Claimants should be reimbursed for the costs incurred in this arbitration, including professional fees.*
- 4. The Claimants should be paid the appropriate interest applicable prior to and subsequent to the award, the rate and method of calculation to be indicated in the request for arbitration.*
- 5. The Claimants should be granted other forms of compensation and reparation to be specified.”*

IV. RESPONDENT’S OBJECTIONS TO JURISDICTION

25. Respondent raises the following three objections to the jurisdiction of the Tribunal:

1. Lack of Jurisdiction *Ratione Temporis*.

- (i) The provisions of the BIT do not apply to disputes and controversies that arose before the BIT entered into force;
- (ii) the BIT entered into force on August 3, 2001;
- (iii) the dispute between the Claimant and the Peruvian authorities began in 1997-1998;
- (iv) therefore, because the dispute arose before the BIT entered into force, the Tribunal has no jurisdiction.

This submission is based on Article 2 of the BIT (Ámbito de Aplicación), which provides as follows:

“ARTICLE 2

Scope

This Treaty shall apply to investments made before or after its entry into force by investors of one Contracting Party, in accordance with the legal provisions of the other Contracting Party and in the latter’s territory. It shall not, however, apply to differences or disputes that arose prior to its entry into force.”

There is no dispute that the BIT entered into force on August 3, 2001. Claimants submit that the dispute began after the BIT came into force, and that, therefore, the Tribunal has jurisdiction *ratione temporis*.

According to Claimants, this dispute relates to the two 2001 Decrees of the Municipality of Lima described in Paragraph 20 above. The dispute was first raised by Claimants in a letter addressed to the President of the Republic of Peru dated October 3, 2001.

2. Lack of Jurisdiction due to Prior Submission to Local Courts.

- (i) Under Article 8 of the BIT, an investor’s choice to submit a dispute to local courts is final and binding;
- (ii) Claimants have previously submitted this dispute to the courts of Peru;
- (iii) therefore, the Tribunal lacks jurisdiction to hear this dispute.

Article 8 of the BIT provides as follows:

“ARTICLE 8

Disputes between a Contracting Party and an Investor

1. *The Parties involved shall hold consultations with a view to obtaining an amicable solution to disputes between a Contracting Party and an investor of the other Contracting Party.*
2. *If such consultations do not produce a solution within six months following the date of the request for settlement, the investor may refer the dispute to:*

-the competent court of the Contracting Party in whose territory the investment was made, or

-international arbitration by the International Centre for Settlement of Investment Disputes (ICSID), established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed in Washington on 18 March 1965.

Once the investor has referred the dispute to the competent court of the Contracting Party in whose territory the investment was made or to the arbitral tribunal, the choice of one or other procedure shall be final.

3. *For the purposes of this Article, any juridical person constituted in accordance with the legislation of one of the Parties, in which investors of the other Contracting Party were majority share-holders prior to the occurrence of the dispute, shall be treated, in accordance with Article 25(2)(b) of the above-mentioned Washington Convention, as a juridical person of the other Contracting Party.*
4. *The arbitral award shall be final and binding on both Parties.”*

Claimants deny that there has been any prior submission of this dispute to the Peruvian courts.

3. Lack of Jurisdiction *Ratione Materiae*.

- (i) The BIT only applies to ‘investments’ made in accordance with the legal provisions by the other Contracting Party;
- (ii) the definition of ‘investments’ in Article 1 of the BIT confines its meaning to investments made in accordance with the laws and regulations of the Contracting Party in whose territory the investment was made, namely, Peru;
- (iii) Claimants have violated numerous laws and regulations of Peru governing the construction and operation of their plant;
- (iv) therefore, the plant is not a protected ‘investment’ within the meaning of Article 1 of the BIT and is outside the BIT’s scope pursuant to Article 2.

Article 1.2 of the BIT defines an investment in the following terms:

“2. The term “investment” refers to any kind of asset, provided that the investment was made in accordance with the laws and regulations of the Contracting Party in whose territory the investment was made and shall include particularly but not exclusively:

- a) Movable and immovable property and any other rights in rem such as easements, mortgages, usufructs and pledges;*
- b) Shares and any other form of participation in companies;*
- c) Loans, securities, rights to money and any other benefit of economic value;*
- d) Intellectual and industrial property rights, including copyright, patents, trademarks, technological processes and know-how, goodwill and other similar rights;*
- e) Commercial concessions granted by law or by contract, including concessions for the exploration, cultivation, extraction or exploitation of natural resources.”*

Article 2 defines the scope of application of the BIT in the following terms:

“ARTICLE 2

Scope

This Treaty shall apply to investments made before or after its entry into force by investors of one Contracting Party, in accordance with the legal provisions of the other Contracting Party and in the latter’s territory. It shall not, however, apply to differences or disputes that arose prior to its entry into force.”

Claimants submit that its investment in Peru has been made in accordance with the laws and regulations of Peru.

26. Should the Tribunal find that anyone of the three objections to jurisdiction is well founded, it will have to dismiss this case.

V. JURISDICTION *RATIONE TEMPORIS*

27. Respondent submits that the Request for Arbitration relates to a continuing dispute that arose in 1997 and is therefore outside the scope of the Peru-Chile BIT. According to Claimants the dispute arose as a result of the promulgation of Decrees 258 and 259 after the BIT entered into force.

28. Respondent contends that Claimants commenced the construction of their plant without obtaining the necessary urban habilitation and environmental approvals and that their approach throughout the construction process was to build their plant quickly, without regard for Peruvian laws and regulations, in the expectation that they could then present a *fait accompli* to the municipal authorities who would feel pressured to approve the project and grant the necessary permits after the fact. Claimants submit that they complied with the laws and regulations of Peru, cooperated with the authorities, and in some cases, such as with regard to the conditions imposed by INRENA, exceeded the necessary standards and adopted additional measures. Claimants point to the opposition to the construction of their plant, beginning around August 1997, by the Mayor of Lima, Alberto Andrade Carmona. That opposition was motivated by political considerations and was a factor in the subsequent administrative interference with the construction of the plant.

29. The Tribunal does not need to examine the possible motives for the administrative measures in relation to the plant between August 1997 and January 1998. It is sufficient to note that there were a series of administrative measures that negatively affected the progress of construction. These included the following:

- (i) August 18, 1997: The Municipality of Chorrillos issued a stop work notice (*notificación de paralización de obra*) to Claimants;
- (ii) September 25, 1997: The Council of the Municipality of Lima issued Acuerdo de Consejo 111 (*Decree 111*) which ordered work on the construction of the plant to cease immediately. The decree also created a special Commission (*Comisión Ruiz de Somocurcio*) to review the

authorizations for Claimants' plant and to make proposals to improve the urban and environmental control of Pantanos de Villa. The operative part of Decree 111 read as follows:

"IT IS HEREBY DECREED:

1.- It is declared advisable and necessary to order the immediate cessation of work on the construction of the Planta Lucchetti Perú, S.A. as soon as possible and subject to accountability.

2.- A Special Commission shall be established consisting of:

*Jorge Ruiz de Somocurcio, presiding
Santiago Agurto Calvo
Ricardo Giesecke Sara Lafosse
Luzmila Zapata García
Luis Carlos Rodríguez Martínez
Olimpia Méndez León
Martha Moyano Delgado*

with responsibility for reviewing the administrative formalities observed by LUCCHETTI S.A., and recommending to the Council of the Municipality the appropriate approach and corrective measures, including preventive measures and stronger urban and environmental control of the natural area and the area of influence of Pantanos de Villa.

3.- The opinion of the Commission for Services to the City and the Environment and the Legal Affairs Commission will be sought, and a legal report will be prepared detailing the additional and specific actions to be taken in this regard.

For registration, information and enforcement.

*ALBERTO ANDRADE CARMONA
Mayor of Lima"*

The Comisión Ruiz de Somocurcio issued its report on October 17, 1997. It made the following findings relating to Claimants' plant:

"Conclusions and Recommendations:

1. The procedures for urban authorization and granting of a construction license for the industrial plant Lucchetti Perú S.A. located in the area adjacent to Pantanos de Villa, Chorrillos district, infringed and violated specific provisions of the National Construction Regulations, the Environmental Code, rules and agreements on environmental protection and the Regulations on Construction Licenses.

2. ...*The proposed industrial plant Lucchetti Perú S.A. poses an imminent environmental threat to the Natural Protected Area of Pantanos de Villa, Chorrillos district. Since it has been determined that in the present case there has been infringement of the rules of public policy in the matter, the Council of the Municipality of Lima must order the cessation of construction, in view of the fact that the Chorrillos District Municipality has not issued a stop work order, and the competent organs, subject to accountability, must proceed to cancel the relevant provisional construction license and impose the most severe penalties applicable, restoring the principle of authority...*

- (iii) October 21, 1997: The Council of the Municipality of Lima promulgated Acuerdo de Consejo 126 (*Decree 126*), which established the special Regulatory Zone of Pantanos de Villa. Decree 126 included the following provisions:

“IT IS HEREBY DECREED:

Article 1.- The “Special Regulatory Zone of Pantanos de Villa” shall be established...

....

Article 4.- All procedures of urban authorization, construction licenses, licenses to operate establishments and other administrative actions of a municipal nature, whatever the stage reached, concerning applications to develop inside the “Special Regulatory Zone of Pantanos de Villa” described in Articles 1 and 2 of this Decree shall be suspended. This suspension shall cover the actions of the District Municipalities with jurisdiction over the buffer zone of the Metropolitan Ecological Area Pantanos de Villa.”

- (iv) January 2, 1998: The Provincial Technical Commission of the Municipality of Lima issued Acuerdo 01 (*Decree 01*) (*Administrative acts authorizing construction of industrial plant on land located in the district of Chorrillos are declared null and void*). After a lengthy preamble, the operative part of Decree 01 read as follows:

“IT IS HEREBY DECREED:

1.- The final construction license allegedly granted as a result of administrative inaction, as well as any other express or presumed administrative action authorizing construction work on the industrial plant to be built by LUCCHETTI PERU S.A. on the land covering an area of 59,943.00 m² between the avenida Los Héroes de Villa and the former Panamericana Sur highway (avenida Huaylas), lots 1A and 2 at Villa Baja, Chorrillos district, province and department of Lima, are declared null and void.

2.- The location of the project mentioned in the preceding paragraph is declared unsuitable, because it does not meet the operational standards for Light Industry (I-2) corresponding instead to a High Industry Zone (I-3), in

accordance with the parameters established in the General Zoning Regulations of Metropolitan Lima and the National Construction Regulations.

3.- The approval given by the District Technical Commission of the District Municipality of Chorrillos for the Architect's Project submitted by LUCCHETTI PERU S.A. referred to in the preceding paragraphs, as well as other subsequent actions relying on that irregular approval, are declared null and void.

4.- This decree shall at once be transmitted to the District Municipality of Chorrillos for immediate implementation and other relevant purposes, subject to accountability, and the Municipal Directorate of Urban Development of the Council of Metropolitan Lima shall be informed of the action taken.

5.- This decree shall at once be transmitted to LUCCHETTI PERU S.A. and to the General Inspectorate of the Council of Metropolitan Lima.

Lima, 2 January 1998"

30. Claimants' response to this decree and the revocation of its construction license was to seek judicial assistance to enable the construction and operation of the plant to proceed.

31. Claimants began legal proceedings in January 1998 with an action of Amparo Constitucional against the Provincial Council of the Municipality of Lima, the Mayor of the Municipality of Lima (Alberto Andrade Carmona), and the District Council of the Municipal District of Chorrillos. The relief sought in the Amparo Constitucional action included the following: the immediate suspension of the effects of Decree 01; an order that the Mayor abstain from making threats, carrying out or executing, whether by himself or his subordinates, any act or fact of demolition, or any act that implied the transfer or loss by Claimants of their legitimate property rights in their plant; the non-application to Claimants of Article 4 of Decree 126 of October 21, 1997; and the suspension and non-application of the stop work notice issued by the Municipal District of Chorrillos in accordance with Decree 111 of the Council of the Municipality of Lima. As part of their Amparo Constitucional action, Claimants applied for immediate orders by way of precautionary measures.

32. The Amparo Constitucional action resulted in four separate judgments, all in favor of Claimants:

- (i) January 19, 1998: The First Transitory Corporate Court Specialized in Public Law (*Primer Juzgado Corporativo Transitorio Especializado en Derecho Público*) declared well-founded Claimants' application for precautionary measures and granted Claimants the relief sought in the Amparo Constitucional action, including the suspension of Decree 01 and of

Article 4 of Decree 126, as well as the stop work notice relating to the construction of Claimants' plant.

- (ii) February 6, 1998: Claimants obtained a Judgment in the Amparo Constitucional action from the Specialized Public Law Court of Lima, first instance (*Primer Juzgado Corporativo Transitorio Especializado en Derecho Público*) which read as follows:

JUDGMENT:

DISMISSING the Respondent's defense of lack of authority to act put forward by the cited MUNICIPALITY OF LIMA and the related request to include the DISTRICT MUNICIPALITY OF CHORRILLOS as co-perpetrator of the above-mentioned violation of the regulations, and ALLOWING the complaint against the Provincial Council of the Municipality of Lima and against Andrade Carmona, Mayor of the Municipality of Lima.

In addition to granting various other requests sought by Claimants, the judge ordered, on February 9, that the judgment be transmitted to the Office of the Public Prosecutor.

- (iii) March 4, 1998: The Sala Corporativa Transitoria Especializada en Derecho Público, confirmed on appeal the order made on January 19, 1998 in respect of the precautionary measures. It also ordered the enforcement of this decision on March 13, 1998.
- (iv) May 18, 1998: The Sala Corporativa Transitoria Especializada en Derecho Público confirmed, with a minor amendment, the judgment in the Amparo Constitucional action.

33. On March 16, 1998 Claimants instituted an Enforcement Action seeking a judicial order in relation to the continuation of the works at Claimants' plant under police supervision. It appears that the judgment at first instance in the Enforcement action was dated April 23, 1998. The judgment on appeal (*La Sala Corporativa Transitoria Especializada en Derecho Público*), dated September 11, 1998, dismissed the jurisdictional and procedural objections of Respondent and also ordered the Municipality of Lima to approve the definitive plans and authorize the construction of Claimants' plant.

34. On December 9, 1998 the Public Law Court (*Primer Juzgado Corporativo Transitorio Especializado en Derecho Público*), first instance, issued a judgment in Claimants' favor with regard to Ordinance 184 of the Council of the Municipality of Lima, dated September 4, 1998, relating to the regulation, conservation and development of Pantanos de Villa (*Ordinance 184 action*). The judgment found that provisions of Ordinance 184 would prevent the execution of the September 11, 1998 judgment in the Enforcement Action, and therefore ruled:

The effects of Ordinance 184 adopted by the Council of the Municipality of Lima, dated September 4, 1998 and published in the Official Gazette “El Peruano” on November 11, 1998, are INAPPLICABLE to the Claimant Lucchetti Peru Sociedad Anónima and the work may proceed.

35. On December 23, 1998 the Municipality of Chorrillos issued a construction license to Claimants. On December 29, 1998 it also issued an operating license for the manufacture and sale on a continuous twenty-four hour basis of pasta products at Claimants’ plant. The Preamble to the operating license specifically stated that Ordinance 184 did not apply to Claimants’ plant by virtue of the earlier judicial order:

That, despite the foregoing and despite the fact that Complainant’s industrial plant is located in the Regulatory Zone established by Ordinance 184, by virtue of the order of the First Public Law Court in the Amparo proceedings whereby, in execution of judgment, by decision of December 9, 1996, the effects of Ordinance 184 of the Council of the Municipality were declared INAPPLICABLE to the Claimant.

36. Claimants submit that the aforementioned judicial decisions in their favor are final and conclusive. The dispute with the Municipality of Lima in 1998 was therefore definitively resolved by the courts at that time. There can thus be no possible continuity between the dispute with the Municipality of Lima in 1998 and the dispute between Claimants and the Republic of Peru that arose on August 22, 2001.

37. It is Respondent’s submission that the judgments referred to above are part of an ongoing dispute that “was suppressed, not settled, by the judgments”. It contends that the Tribunal “should consider the corrupt and egregious circumstances under which the judgments were attained”. It also submits that for this Tribunal to attribute “any preclusive significance to those illicitly obtained judgments for purposes of permitting Claimants to gain access to the ICSID forum would constitute a gross miscarriage of justice and subvert the rule of law”.

VI. ARGUMENTS OF THE PARTIES

38. Article 2 of the BIT provides that the BIT applies to investments made either before or after the BIT entered into force. It further specifies, however, that it does not apply to differences or to disputes that arose prior to its entry into force. Therefore, before proceeding further, the Tribunal must decide when the present dispute arose. If it arose before the BIT entered into force, the Tribunal will lack jurisdiction to hear the dispute. It will have jurisdiction if it finds that the dispute arose after the BIT’s entry into force. The parties take diametrically opposed positions on this question.

39. Respondent argues that the Tribunal lacks jurisdiction to deal with the present dispute because it had fully crystallized before the entry into force of the BIT and, while it continued beyond that date, the later events did not generate a new dispute but merely continued the earlier dispute. In its view, Article 2 of the BIT consequently bars the Tribunal from dealing with this claim.

40. Claimants submit that there were two disputes and that the earlier dispute had been finally resolved in 1998 with the judgments in their favor by the Peruvian courts. According to Claimants, the dispute now before the Tribunal arose in 2001 after the BIT had entered into force. It was triggered by Decrees 258 and 259, which resulted in the cancellation of Claimants' production license and the order for the removal of their plant.

41. In support of its contention that there was only one dispute and that it arose before the BIT entered into force and continued beyond that date, Respondent submits that the subject matter of the dispute was the same in 1997/98 as in 2001 when Decrees 258 and 259 were adopted, and that the conflict between Claimants and the municipal authorities during that entire period of time amounted to an interrelated series of events which together make up a single dispute. In response to Claimants' submission that the 1998 Peruvian judgments had become *res judicata* and thus had effectively terminated the first dispute, Respondent argues that the concept of *res judicata*, which is designed to prevent the relitigation of claims, does not address the question the Tribunal has to decide. This is so, it submits, because *res judicata* does not speak to the factual question whether a dispute underlying the litigation continues between the parties. Respondent contends, moreover, that the judgments in question were obtained by corrupt conduct and therefore could not be deemed to have ended the dispute between the parties that began in 1997.

42. Claimants submit that the present dispute arose after the entry into force of the BIT. In their view, this is a new dispute because it is defined by reference to the obligations of Respondent under the BIT. The dispute concerns Decrees 258 and 259. They were promulgated after the BIT entered into force and gave rise to the present dispute because they violated Claimants' rights under the BIT. Claimants further submit that measures taken after the entry into force of the BIT give rise to a new dispute even if they refer to facts or events that occurred prior thereto. According to Claimants, the specific measures at issue in the present dispute took place after the entry into force of the BIT. They thus differ in substance and content from the measures that gave rise to the earlier dispute. In this regard, Claimants assert that Decree 01 had declared Lucchetti Peru's construction license void *ab initio*, whereas Decree 259 revoked its license to operate the plant. They also submit that the grounds adduced in justification of Decree 01 differ from those advanced for Decree 259, the former allegedly involving a violation of the applicable zoning requirements for light industries, whereas the latter points to non-compliance with various environmental conditions on the basis of which the license was supposedly granted. Claimants emphasize further that between the time of the adoption of these two decrees, the construction of the factory had been completed and was manufacturing pasta for a period of two and a half years before Decree 259 was promulgated.

43. Respondent counters Claimants' arguments by alleging that the conflict of legal interests which had in the 1997-98 period crystallized into a dispute — with the adoption of Decree 01 (1998) and the litigation in the Peruvian courts — did not become a new dispute simply because Claimants formulated their claim as a violation of the BIT. Respondent sees no merit in Claimants' contention that acts or legal measures

that occur after the entry into force of the BIT must be deemed to give rise to a new dispute under Article 2 of the BIT. Respondent also denies Claimants' contention that the judgments entered in Claimants' favor by the Peruvian courts were capable of resolving the earlier dispute. These fraudulent judgments did not and could not end the dispute. Rather, according to Respondent, they were an episode in the ongoing dispute between the parties. In this connection, Respondent considers that it is irrelevant to the task of this Tribunal whether or not the Peruvian judgments are sound as a matter of Peruvian law. What is relevant and what the Tribunal must determine is whether the subject matter of the 1997-98 dispute is the same as that relating to Decrees 258 and 259. If it is, then the judgments cannot as a matter of law be deemed to have ended the ongoing dispute and, according to Respondent, the Tribunal must declare that it lacks jurisdiction under Article 2 of the BIT. Respondent also points to Claimants' efforts to obtain the "regularization" of the construction of their factory in July 2001 — by that date neither the BIT nor Decrees 258 and 259 were in effect — as evidence that Claimants themselves considered that the Peruvian judgments had not ended the earlier dispute. The regularization process was not completed until 2003.

44. Respondent next addresses Claimants' submission that the subject matter dealt with in Decree 259 differs from that of Decree 01. It is Respondent's position that the issues that were litigated in 1998 did not deal only with the legality of Claimants' construction license as contended by Claimants. They involved instead a series of legal measures bearing on Claimants' failure to comply with applicable Peruvian rules and regulations. In Respondent's view, Decrees 258 and 259 are merely the latest legal measures Claimants have challenged in connection with the construction and operation of their factory. Moreover, when the content of Decree 01 (1998) together with the other measures adopted by the municipal authorities are compared with Decree 259 (2001), it becomes evident that they dealt with and were motivated by environmental concerns.

45. As for Claimants' contention that the present dispute is a new dispute because it is formulated as a claim under the BIT, Respondent submits that the issue to be determined by the Tribunal does not turn on the form in which a claim has been put forward, but on the question whether the dispute arose before or after the entry into force of the BIT. Respondent consequently does not accept Claimants' assumption that the *ratione temporis* reservation set out in Article 2 of the BIT can be circumvented by formulating the claim as a BIT claim. In its view, to accept Claimants' position would render the *ratione temporis* reservation a legal nullity. That, Respondent submits, would violate generally accepted canons of treaty interpretation.

46. Claimants reject Respondent's contention that Decree 259 was merely one more episode in an ongoing dispute. In their view, there would not have been a dispute between the parties had Decree 259 not been enacted. Its adoption marks the beginning of the dispute now before the Tribunal. Claimants also assert that the contention that the Peruvian court judgments merely suspended the pending dispute is untenable. In their view, Peru's obligation under the BIT to protect Claimants' investment in Peru did not arise until after the entry into force of the BIT. That obligation was violated by Decree 259, which was promulgated after the effective date of the BIT. No continuity can therefore exist between what occurred in 1998 and the publication of Decree 259.

47. Claimants assert further that Article 2 of the BIT does not reverse the accepted international law rule concerning the non-retroactive effect of treaties. They claim that Article 2 does not prevent the Tribunal from exercising jurisdiction over a dispute concerning the violation of the BIT simply because it can be related in some form to an earlier dispute that arose before the BIT had entered into force and that was resolved before that date. Claimants also submit that an analysis of the relevant international jurisprudence supports their conclusion that the present dispute arose after the BIT's date of the entry into force. Pursuant to that jurisprudence, Claimants argue that the date when the present dispute arose must be determined by reference to its origin. Its origin, in Claimants' view, was the promulgation of Decrees 258 and 259. It follows, according to Claimants, that the adoption of Decree 01 in 1998 cannot be the origin of the present dispute because the application of that decree was resolved in the *amparo* proceedings before the Peruvian courts.

VII. FINDINGS OF THE TRIBUNAL

48. The Tribunal notes that as a legal concept, the term dispute has an accepted meaning. It has been authoritatively defined as a “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons,”¹ or as a “situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance” of a legal obligation.² In short, a dispute can be held to exist when the parties assert clearly conflicting legal or factual claims bearing on their respective rights or obligations or that “the claim of one party is positively opposed by the other.”³

49. It is clear, and that does not appear to be in dispute between the parties, that by 1998, after Decree 01 was adopted and Claimants challenged that decree in the *amparo* proceedings, a dispute had arisen between Claimants and the municipal authorities of Lima. The Tribunal finds that at that point in time, the parties were locked in a dispute in which each side held conflicting views regarding their respective rights and obligations.

50. The parties disagree, however, as to whether the earlier dispute ended with the judgments rendered by the Peruvian courts in Claimants' favor or whether it continued and came to a head in 2001 with the adoption of Decrees 258 and 259. The Tribunal must therefore now consider whether, in light of other here relevant factors, the present dispute is or is not a new dispute. In addressing that issue, the Tribunal must examine the facts that gave rise to the 2001 dispute and those that culminated in the 1998 dispute, seeking to determine in each instance whether and to what extent the subject matter or facts that were the real cause of the disputes differ from or are identical to the other.⁴ According to a recent ICSID case, the critical element in determining the existence of one or two separate disputes is whether or not they concern the same

¹ *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment of 30 August 1924 (Merits), 1924 P.C.I.J. (ser. A), No. 2, p. 11.

² *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of March 1950, I.C.J. Reports 1950, p. 65 at 74.

³ *South West Africa, Preliminary Objections*. Judgment, I.C.J. Reports 1962, p. 319, at 328.

⁴ See *Electricity Company of Sofia and Bulgaria (Preliminary Objection)*, 1939 P.C.I.J., p. 64 at 82.

subject matter.⁵ The Tribunal considers that, whether the focus is on the “real causes” of the dispute or on its “subject matter”, it will in each instance have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute.

51. It is undisputed that the subject matter or origin of the 2001 dispute, if it was a new dispute, was the promulgation of Decrees 258 and 259. Decree 258 was designed to establish a regulatory framework for the permanent protection of the Pantanos de Villa as an ecological reserve. It authorized the municipal authorities of Lima to adopt measures necessary to achieve that objective. Decree 259 ordered the revocation of Claimants’ operating license for the production of pasta and decreed the closing and removal of the factory. The lengthy preamble to Decree 259 lists the findings in justification of the decision. The list invokes Lucchetti’s failure to comply, since 1997, with the legal rules applicable the construction of the plant near the Pantanos de Villa, thus endangering that ecological reserve. It makes reference to the litigation instituted by Lucchetti against the municipality’s efforts to protect the region’s environment and notes that the revelations contained in recently released videos and in testimony before a congressional committee indicate that there was corruption in the procurement of the judgments in Lucchetti’s favor. The preamble then takes note of various relevant legislative and regulatory measures, including Decree No. 126-97-MML. This decree created the Zona de Reglamentación Especial Pantanos de Villa, which was declared of ecological interest to the municipality. The preamble also refers to Decree 01 of January 2, 1998 and notes that the decree declared null and void the construction license Lucchetti allegedly received due to administrative inaction as well as the approval of its architectural plans for the construction of the factory. Next, the preamble takes note of the *amparo* action instituted by Lucchetti to set aside Decree 01 and Article 4 of Decree 126-97 and to obtain authorization for the operation of the industrial plant. The preamble invokes Resolution No. 6856-98-MDCH of December 29, 1998 which, having been issued “in compliance with the fraudulent judicial decisions rendered in the judicial proceedings in question,” granted Lucchetti a municipal operating license for its pasta factory and the sale of its product. Finally, the preamble points out that Resolution No. 6556-98 specified in its Article 2 that the license in question was granted on condition that there be full observance of the limitations and restrictions provided for in the applicable environmental impact study and that there be avoidance of other environmentally harmful activities such as, for example, the emission of noxious gases and fumes.

52. In setting out the administrative, legislative and judicial history of Claimants’ efforts to obtain permission for and to operate their pasta factory in the vicinity of the environmental reserve of Pantanos de Villa, Decree 259 related the action it mandated directly to the measures the municipal authorities took in 1998 in order to force Claimants to comply with the environmental and zoning requirements applicable to the construction of their pasta factory. It also focuses on the failure of the municipal authorities to achieve their objective because of the judgments entered in Claimants’ favor in 1998 that forced them to issue the licenses they had previously denied Claimants.

⁵ CMS Gas Transmission Co. v. Argentina, Case No. ARB/ 01/ 8, July 17, 2003, 42 ILM 788, para. 109 (2003).

53. The reasons for the adoption of Decree 259 were thus directly related to the considerations that gave rise to the 1997/98 dispute: the municipality's stated commitment to protect the environmental integrity of the Pantanos de Villa and its repeated efforts to compel Claimants to comply with the rules and regulations applicable to the construction of their factory in the vicinity of that environmental reserve. The subject matter of the earlier dispute thus did not differ from the municipality's action in 2001 which prompted Claimants to institute the present proceedings. In that sense, too, the disputes have the same origin or source: the municipality's desire to ensure that its environmental policies are complied with and Claimants' efforts to block their application to the construction and production of the pasta factory. The Tribunal consequently considers that the present dispute had crystallized by 1998. The adoption of Decrees 258 and 259 and their challenge by Claimants merely continued the earlier dispute.

54. Before concluding, however, that the above finding is determinative of the outcome of this case, the Tribunal considers that it should address the further question whether there are other legally relevant elements that would compel a ruling that the 2001 dispute must nevertheless be treated as a new dispute. In this regard, Claimants point to the fact that Decree 259 revoked their operating license whereas Decree 01 voided their construction license and that the earlier dispute involved only Decree 01, which was concerned with construction issues rather than the environmental issue dealt with in Decrees 258 and 259. They also note that their plant had been in operation for more than two years before Decree 259 was issued. There was thus a substantial time gap between the adoption of Decree 259 and the judgments of 1998 which, according to Claimants, put an end to the earlier dispute, and had become *res judicata*. Finally, Claimants assert that their claim before this Tribunal alleges a violation of the BIT, which was not yet in effect in 1998. It must thus be seen as a new dispute — a proceeding to enforce BIT rights and obligations that did not exist in 1998. They consider that as a BIT claim, it does not come within the provisions of the *ratione temporis* reservation set forth in Article 2 of the BIT.

55. The Tribunal finds that the issues in dispute in 1998 did not concern only matters dealt with in Decree 01. The dispute involved a series of legal measures that addressed environmental matters, among them Decrees 01 and 126, and Official Letter 771-MML-DMDU, which formed the basis for Claimants' successful *amparo* action. Thereafter, moreover, the municipality enacted Ordinance 184, which established a comprehensive environmental regulatory scheme and required activities not in compliance with the plan to be brought into compliance therewith within a five-year period. Claimants successfully challenged that ordinance as applied to them in the same court that granted their *amparo* action. That ruling compelled the municipal authorities to grant Claimants their construction and operating license. It is thus clear that the issues in dispute in 1998 dealt with the same environmental concerns reflected in Decrees 258 and 259 of 2001, and that those concerns did not only focus on the construction but also the operation of the plant.

56. As for the time that elapsed between the judgments rendered in Claimants' favor in 1998 and Decree 259, that fact alone will not transform an ongoing dispute into two disputes, unless the evidence indicates that the earlier dispute had come to an end or had

not as yet crystallized into a dispute.⁶ Here the municipality continued throughout to seek to apply its environmental regulatory scheme to Claimants' plant, only to be blocked in its efforts by the various judicial proceedings Claimants instituted and which the municipality vigorously contested and sought to circumvent. See, e.g., Ordinance 184. Moreover, the municipality adopted Decrees 258 and 259 as soon as it concluded that the disclosures about the manner in which the judgments had been procured enabled it to reassert its earlier position and to apply its environmental regulatory scheme to Claimants' operations. That the municipality never considered that its dispute with Claimant had ended with the judgments is further evidenced by the language of the preamble to Decree 259 which, as has been seen above, recounts and relies on the municipality's earlier efforts to force Claimants to comply with its environmental rules and regulations. Accordingly, the Tribunal is of the view that the lapse of two and half years between these judgments and the adoption of Decrees 258 and 259 does not in and of itself compel the conclusion that the earlier dispute had come to an end and that a new dispute arose in 2001. The Tribunal considers, moreover, that Decrees 258 and 259 did not generate a new dispute notwithstanding the fact that the 1998 judgments had become *res judicata* under Peruvian law. The *res judicata* status of these judgments, standing alone, does not compel that result since the facts before the Tribunal indicate, as has already been shown, that the original dispute continued. Moreover, the public controversy concerning these judgments, stimulated by the continuing judicial and parliamentary inquiries relating to them, further demonstrates that, as a practical matter, the *res judicata* status of the judgments was not deemed to have put an end to the dispute.

57. Turning now to the question concerning the alleged illegalities surrounding the manner in which the 1998 judgments were procured, the Tribunal is of the view that, if proved, they would provide an independent ground for holding that the judgments could not have had the effect of terminating the earlier dispute. However, since the Tribunal has already concluded on other grounds that these judgments did not end the dispute, it is unnecessary for it to address this issue.

58. Finally, Claimants contend that in these proceedings they invoke rights and obligations arising under the BIT and that they therefore are entitled to have the Tribunal adjudicate this claim. According to them, moreover, being a BIT claim, the present dispute is not and cannot be the same dispute as the one that existed prior to the BIT's entry into force.

59. It is true, of course, that Claimants are entitled to have this Tribunal adjudge rights and obligations set forth in the BIT. But this is so only if and when the claim seeks the adjudication of a dispute which, pursuant to Article 2 of the BIT, is not a

⁶ Cf. *Maffezini v. Spain* (Decision on Jurisdiction), ICSID Case No. ARB/97/77, 16 ICSID Review 212, paras 90-98 (2001). Here the tribunal had before it a provision similar to Article 2 of the BIT in the present case. It found that the events leading to a dispute had been the subject of discussions between the parties for a number of years before the entry into effect of the BIT there in issue. These discussions did not produce "the conflict of legal views and interests" necessary to transform them into a dispute until after the entry into force of the BIT. Therefore, the challenged dispute was not barred by the BIT. *Id.*, para. 96. In the present case, "the conflict of legal views and interests" had crystallized prior to the entry into force of the BIT. Had that been the case in *Maffezini*, its tribunal would have reached the same conclusion as this Tribunal.

dispute that arose prior to that treaty's entry into force. The allegation of a BIT claim, however meritorious it might be on the merits, does not and cannot have the effect of nullifying or depriving of any meaning the *ratione temporis* reservation spelled out in Article 2 of the BIT.⁷ Further, a pre-BIT dispute can relate to the same subject matter as a post-BIT dispute and, by that very fact, run afoul of Article 2. That, as has been seen above, is the case here.

60. Given that the present Award is responsive to a jurisdictional objection, the factual and legal propositions at the heart of Lucchetti's substantive case have naturally not been tested. Lucchetti contends that it was invited to invest in Peru, made its investment properly, expended tens of millions of dollars in building the most advanced industrial installations in the country, and established a model of operational success, employing a substantial workforce and making good, competitive products with export potential. Lucchetti also stresses that it has not been alleged (let alone proved) that its establishment in Peru as an investor was procured by irregular means. It is therefore in a fundamentally different position than someone whose initial agreement is said to have been procured by fraud or corruption. Most of all, it claims that its assets have been spoliated in a purely arbitrary and pretextual fashion.

61. Lucchetti may therefore consider it a harsh result that its effort at obtaining an international remedy is brought to a halt before the merits of its contentions are even examined. Such a conclusion, however, would not be warranted in light of the fact that Lucchetti did not have an *a priori* entitlement to this international forum. It cannot say that it made its investment in reliance on the BIT, for the simple reason that the treaty did not exist until years after Lucchetti had acquired the site, built its factory, and was well into the second year of full production. It cannot conceivably contend that it invested in reliance on the existence of this international remedy.

62. The only question entertained by this Tribunal is precisely whether the claim brought by Lucchetti falls within the scope of Peru's consent to international adjudication under the BIT. Lucchetti has not satisfied the Tribunal that this is the case, and thus finds itself in the same situation as it would have been if the BIT had not come into existence. Its substantive contentions remain as they were, to be advanced, negotiated, or adjudicated in such a manner and before such instances as it may find available.

⁷ See, e.g., *Asian Agricultural Products, LTD. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/ 87 /3, 6 ICSID Review 526 (1991), where the tribunal points out that "nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning." *Id.*, para. 40, Rule (E).

VIII. AWARD

Taking all the foregoing considerations into account, the Tribunal holds that it has no jurisdiction to hear the merits of the present claim.

The Tribunal decides that each Party shall pay one half of the arbitration costs and bear its own legal costs.

Thomas Buergenthal
President

Bernardo Cremades
Arbitrator

Jan Paulsson
Arbitrator