



## RESEARCH PAPER

### Pakistan's Development and International Investment Arbitration: A legal analysis of Bayindir Insaat, Pantechniki and Totto Case on Jurisdiction

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PAPER INFO	ABSTRACT
<p><b>Received:</b> May 11, 2021</p> <p><b>Accepted:</b> August 28, 2021</p> <p><b>Online:</b> September 01, 2021</p> <p><b>Keywords:</b> <i>Bayindir V.</i> Pakistan, BITs, Construction Projects, Contract Claims, ICSID Jurisdiction, International Investment Law, MITs, <i>Pantechniki Case,</i> <i>Toto Case,</i> Treaty Claims</p> <p><b>*Corresponding Author:</b> sardarwaqarkhan @gmail.com</p>	<p>This work analyses the decision of International Centre for settlement of investment disputes (ICSID) on the issue of jurisdiction in relation to construction claims under International Investment Arbitration. It attempts to locate the place and significance of <i>Bayindir</i> Rule which highlighted the dangers of making claims under Bilateral Investment Treaties (BITs). In this context, the case of <i>Bayindir v. Pakistan</i> (Bayindir Case, 2009) is addressed. Further, it also analyses similar cases on the issue of jurisdiction and construction contracts, such as, <i>Pantechniki</i> (Pantechniki case, 2009) and <i>Totto</i> (Totto Case, 2012). It argues that there is difference between treaty and contract claims. The analysis of three cases reveals that redressal from ICSID in case of claiming through contract claims is condensed. In all three cases, contractors seek to get remedy under International Investment law (IIL) and approached ICSID, irrespective of their contractual arbitration agreement clauses under which the domestic law of the country will be applicable. It concludes that under IIL contractors faced difficulties while indicating that their claims are treaty claims and not contract claims. The uniqueness of the decisions of these three cases involves the scope of the ICSID's jurisdiction. The methodology used in this article is qualitative.</p>

## Introduction

International investment law (IIL) is that branch of law which deals with investments made by investors in foreign or other countries. In this respect, investors used to invest in their private (contract) and treaty (BIT or MIT) capacities. The investors are under an obligation to treat the other party with deep care, good faith, fairly and equitably. Moreover, it is one of the recognized minimum standards of IIL that parties to contract should be extremely careful while investing in other countries. Investors usually consider their own knowledge and experiences while investing.

Investors always look into possible rate of return because it is also too important while investing. The element of risk is always there and it is important to consider. The global economies are in growing need of designing rules and regulations which regulate IIL. So far, IIL is not in codified form. However, it is governed by the rules of customary international law, BITs or MITs. The authority where investment disputes are referred to is ICSID or International Chamber of Commerce (ICC) or Stockholm Chamber of Commerce (SCC) (Subedi, 2008). The ICSID is the preferred forum for investors to seek remedy if dispute arose. ICSID not only decides the disputes among parties but also expand their rights by assuming jurisdiction in certain cases. It is governed by the ICSID Convention. It is quite interesting that the Convention has not defined the term "investment" and even the term "legal dispute" (Amerasinghe, 1975).

However, such terms did not constitute problem and difficulties for the ICSID jurisdiction (Hirsch, 1993). The drafters of the Convention refrained from including a definition of the term "investment" in the Convention (Tupman, 1986). Article 25(4) of the Convention allows "parties to limit the subject matter jurisdiction as several have done by excluding the disputes arisen from cases involving natural sources. Some countries excluded certain territories" (*Holiday Inns v. Morocco*).

Such terms are discussed in detail in number of cases, such as, *Alcao V. Jamaica*, 1979. In *Vivendi V. Argentina* the term investment was broadly defined as "any kind of asset". However, sometimes the tribunal ICSID assumes its jurisdiction even on contract claims (though these are purely contractual) and considered the general principles of international law and provisions of Bilateral Investment treaties (BITs) or Multilateral Investment treaties (MITs) for the solution of the dispute. Tribunal also takes into consideration the rules of customary international law while deciding cases (Nolan & Baldwin, 2006). If the agreement does contain the arbitration clause then ICSID may resolve the dispute (Lamin, 1991).

Most of the cases filed in the ICSID are related to Construction projects. However, difficulties are faced by the ICSID if there is multiplicity of proceedings or clash of Laws on investment or if question of applicability of law is involved (Mehren et al. 2004). For instance, a contract was concluded between *Bayindir* and National Highway Authority (NHA), later on it was terminated by NHA. The claim was for \$496.6 million. Basically, it was related to the road building construction project. The tribunal rejected *Bayindir's* plea and decided in favour of Pakistan. It was a landmark decision which is related to issue of jurisdiction because Pakistan has objected to Jurisdiction but ICSID tribunal held that it has assumed the Jurisdiction (*Bayindir case*, 2009). Moreover, tribunal also elaborated the governing rules regarding treaty and contract claims.

In this context, this work briefly discusses the issue of jurisdiction and construction projects in relation to ICSID and BITs. The purpose is to examine the issue of jurisdiction and difficulties faced by International tribunals in respect of application of domestic law and multiplicity of proceedings in International Tribunals. In particular, the decisions of ICSID are critically analyzed and in this regard, the *Bayindir's* case is examined in detail whereas the *Pantechniki* and *Totto* are examined shortly. Finally, conclusions will be drawn up.

## **Literature Review**

### **Construction Projects in IIL**

Most of the cases in ICSID are related to the construction projects. No specific definition of investment is given in Convention. However, the BITs and MITs defined the terms "investor" and "investment". For example, the Pakistan/Turkey BIT, 1995, at issue in the *Bayindir* case defined investment as including "every kind of asset in particular, but not exclusively...(b)...claims to money or having other rights to legitimate performance having financial value related to an investment, (c) moveable and immoveable property, as well as other rights in *rem* such as mortgages, liens, pledges and any other similar rights..." (Pakistan/Turkey BIT, 1995).

Another related example in this respect is *Pantechniki* case. Under Greece/Albania BIT, 1991, construction contracts for a road and bridge project were investments because they involved "the supply of services and materials; the contribution of equipment and construction management; the mobilization of human and capital resources for the purposes of performing the Contracts; and the entitlement to compensation deriving from the above" (*Pantechniki* case, 2009). It is a trend in IIL that contractors usually seek to protect their BIT rights. Such rights given by BIT are an advantage for them. However, there is a difference between treaty claims and contract claims (as discussed below in detail). For instance, "the disputes regarding the Dabhol power plant in India were subject to the BIT between India and Mauritius. Contractors seek to take advantage of their BIT rights" (Thatcher, 2006).

### **Jurisdiction of ICSID**

For the purpose of examining jurisdiction, article 25 of the Convention is taken into consideration.

### **Article 25 of the Convention**

The personal jurisdiction of ICSID is limited to disputes "between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State". It seems that the ICSID can exercise jurisdiction if there is an investor-state dispute or if any national of the contracting state files a suit in ICSID, the tribunal may entertain it under this article. "National of another Contracting State" is defined in the Article 25(2) of the Convention.

### **Discussion: Critical Analysis of *Bayindir*, *Pantechniki* and *Toto***

#### ***Bayindir* Case**

#### **Parties to the present Dispute**

#### **The Claimant**

*Bayindir* is the claimant. *Bayindir* is a Turkish Company. Its work is to construct roads, infrastructure, bridges and motorways in Turkey and other Countries.

### **Bayindir's Representation:**

*Bayindir* was represented by Farrukh Karim Qureshi. His co-counsel includes following: "Michael Buhler, John Crawford, Sigvard Jarvin and Jonathan Eades from the law firm of Jones Day, Paris, France (from 21 January 2004 to 30 June 2005); Emmanuel Gaillard and John Savage from the law firm of Shearman & Sterling LLP (from 1 July 2005 to 14 July 2005); Gavan Griffith from Essex Court Chambers, London (from 18 July 2005 to 6 December 2005); and Sir Michael Wood from 20 Essex Street Chambers, London (from June 2007 to 16 November 2007)". In arbitration concerning the merits, *Bayindir* was represented by: "Farrukh Karim Qureshi and Nudrat Ejaz Piracha, Samdani & Qureshi, Islamabad; Stanimir A. Alexandrov, Marinn Carlson and Jennifer Haworth McCandless, Sidley Austin LLP, Washington D.C; and Judge Stephen M. Schwebel, Washington DC".

### **The Respondent**

The Respondent is the Islamic Republic of Pakistan (hereafter Pakistan)

### **Respondent's Representation**

Pakistan was represented by the Hon. Malik Muhammad Qayyum, Attorney General for Pakistan (from 2007 to 2008), and by the former Attorney General for Pakistan Mr. Makdoom Ali Khan during the proceeding on jurisdiction (up until 2007). Their co-counsel includes following: "Christopher Greenwood CMG, QC (up until 5 February 2009), Samuel Wordsworth of Essex Court Chambers, London (since 19 July 2004); V. V. Veeder QC from Essex Court Chambers, London (from 19 July 2004 to 28 November 2007); Umar Atta Bandial from Umar Bandial & Associates, Lahore (from 19 July 2004 to 16 July 2005); Rodman R. Bundy, Loretta Malintoppi and Nicholas Minogue from Eversheds, Paris (since 19 July 2004), and Iftikharuddin Riaz from Bhandari; Naqvi & Riaz, Lahore, Pakistan (since 16 July 2005)".

### **Facts of the Case**

#### **Motorway Project**

In Pakistan the National Highway Authority (NHA) was established in 1991 under National Highway Authority, Act. Its primary purpose is to maintain, develop, operate and plan National Highway, roads, infrastructure and bridges. It is necessary to mention here that NHA is corporation and it can sue and can be sued. However it is controlled and administered by Government of Pakistan. NHA did a number of projects. In this case, NHA has planned the work of motorway project.

Initially, the *Bayindir* has contracted with NHA in 1993 for the completion of Islamabad Peshawar Highway project (Motorway Project). Contract was concluded between both the parties (1993 contract) (Alcotepe & McHugh, 2009). It was decided among both the parties that in case of dispute "Engineer" will be appointed who will resolve the dispute. The most important provision in the contract was that in case of dispute, the law of Pakistan shall be applicable. Under such agreement, the FIDIC general

conditions of contract for works of Civil Engineering construction and conditions of particular applications has been added by the parties (Bayindir case, 2009).

In this connection, after four years in 1997, the dispute arose among the parties. Parties signed Memorandum and agreed that parties will apply to the arbitration tribunal in the appropriate manner in order to seek decision of tribunal on the issue of quantum expenses incurred by *Bayindir* as specified in *Bayindir's* claim for expenses only. Additional to this Memorandum in July 1997, parties concluded another contract namely: "the agreement for the revival of contract agreement for the construction of Islamabad-Peshawar Motorway (1997 contract)".

The 1997 contract includes almost all the provisions of 1993 contract. Under this contract in case of dispute the FIDIC conditions and law of Pakistan shall be applicable. Further, it was decided that in order to carry on business NHA is supposed to pay 30% advance (Mobilization advance) to *Bayindir*. However, the NHA has paid. Another term of contract was that *Bayindir* will provide guarantee to the amount equivalent the Mobilization Advance. In 1998, the banks of turkey submitted guarantees in order to get the mobilization advance. It was also decided that in case of dispute, Engineer will be appointed and his decision would be final.

### **Origin of Dispute**

In 1998, the Engineer issued notice to *Bayindir* to continue the construction. However, *Bayindir* submitted for extension of time (EOT) and regarding payment. *Bayindir* has given the two EOTs under an agreement and the final date for completion of project was decided as 31<sup>st</sup> December, 2002. Initially, the completion date was December, 2000. In 2001 *Bayindir* claimed another EOT in which he demanded further extension. It was granted extension of thirty-seven days. Later on, *Bayindir* informed Engineer that two priority sections should be inserted in contract and further EOT may be granted.

On the other hand, NHA filed for liquidated damages because the decision of EOT/3 was pending with Engineer. Because of much time extensions taken by *Bayindir* and unsatisfactory performance the NHA issued a notice to terminate the contract and evacuated site of *Bayindir*. NHA appointed another contractor in order to complete the work site namely: "M/S Pakistan Motorway Contractors Joint Venture" (PMCJV). It is quite worth noting that a number of disputes arose between the conclusion and termination date of the contract. *Bayindir* asserted that delays were made by NHA whereas NHA holds that *Bayindir's* performance is not satisfactory.

As a response to termination *Bayindir* filed Constitutional challenge in Lahore High Court (LHC). LHC dismissed petition because of the arbitration clause in the contract. On the other hand NHA filed for appointment of arbitrator under arbitration law in Pakistan. NHA also claimed for the Mobilization advance. The Court decided in favour of the Pakistan and held that *Bayindir's* performance is not satisfactory and mobilization amount should also be returned to Pakistan. The present dispute is based on BIT which was signed by Pakistan and Turkey.

## **The Claim**

*Bayindir* filed for arbitration in ICSID on 15 April, 2001. *Bayindir* asserted that delays were caused by NHA and amounts should be given to him. The total claim is of \$496.6 million. On the other hand, Pakistan argued that because of the poor performance of *Bayindir*, the contract was terminated and in this respect throughout the project Pakistan has acted fairly and in good faith.

## **Legal issues (Questions)**

A number of issues and question arose. These are as follows:

### **Which law will be applicable?**

One of the issues before the Court in this case is related to the applicability of law. In contract it was decided that the law of Pakistan shall be applicable. However, *Bayindir* approached ICSID tribunal. The question arose that whether ICSID has jurisdiction over it and if the matter will be decided by ICSID then which law will be applicable?

### **Had *Bayindir* made an investment?**

It is also a question in tribunal that had *Bayindir* properly invested under BIT in this case or had *Bayindir* given amount to Pakistan in respect of providing all necessary equipments in order to complete the construction project?

### **Treaty claims and Contract claims**

Treaty claims are those claims which are between States. On the other hand, contract claims are purely private and such include investor and state. In this case it is also an issue that what is the nature of the claim because *Bayindir* has concluded contract with NHA (separate legal entity) and not with Pakistan.

### **Issue of Jurisdiction**

In case of conflict between provisions of the contract claims and treaty claims question arose that does international tribunal has jurisdiction over the matter or not? If answer is in affirmative, then by which law the right be established in legal transaction and by which law legal transaction and enforcement of the award will be governed?

### **Fair and equitable treatment**

It is one of the international minimum standards in IIL that parties in the contract will carry fair and equitable treatment between each other and remain faithful during the project. In this case question arose because *Bayindir* asserted that Pakistan did contract in bad faith and discriminatory behavior is on the part of Pakistan.

### **Most Favoured Nation Clause**

Pakistan and Turkey were involved in BIT under which parties are supposed to act in good faith by inspection of Most Favored Nation (MFN) clause. The question arose whether on the overall reputation of Pakistan in terms of BIT Pakistan violated the MFN clause?

### **Expropriation**

Another issue before the Court was that did expropriation committed by Pakistan because *Bayindir* asserted that Pakistan is involved it and terminated *Bayindir's* contract without compensation.

### **Stay of Proceedings**

The most important question was related to the jurisdiction of the ICSID tribunal. Pakistan objected and asserted that ICSID has no jurisdiction over it and the matter has already been decided by the Courts in Pakistan subject to the provisions of the contract.

### **Analysis of Arguments of the parties**

*Bayindir* advanced the following arguments

First, *Bayindir* has made an investment under BIT and Article 25 of Convention; Second, Pakistan has made breach of contract as in BIT. Such breaches include, breach of the fair and equitable treatment, breach of the most favoured nation clause and expropriation without compensation; Third, treaty claims were distinct claims; Finally, ICSID has jurisdiction over the contract claims (*Bayindir* case, 2009).

Pakistan objected to the allegations made by *Bayindir* and challenged ICSID jurisdiction because language of the agreement (1993 contract) was very clear in which it was stated that in case of dispute the law of Pakistan shall be applicable. On the other hand, *Bayindir* denied it. Pakistan advanced the following arguments:

First, Pakistan submitted that *Bayindir* did not make investment under article 1(2) of BIT and article 25 of ICSID convention; Second, Pakistan submitted that breach of contract was made by *Bayindir* because of its non-performance. Further, contract was concluded between NHA (a separate legal entity), and in terms of agreement it was agreed between parties that contract was governed by law of Pakistan, therefore ICSID has no jurisdiction; Third, Pakistan also argued for stay of proceedings because claim was contract claim; Fourth, the *Bayindir* has breached the provisions of the contract and claimed under treaty claim; Fifth, ICSID has no jurisdiction because of the fact that *Bayindir* applied for treaty claim and not contract claim; Finally, the *Bayindir* has alleged breach of contract and treaty claims are not similar to contract claims so it would be injustice if ICSID assert jurisdiction.

### **Decision on Jurisdiction: Analysis of ICSID Ruling**

On 14 November, 2005 The ICSID tribunal assumed the jurisdiction and disagree with the Pakistan's contention/arguments in respect of jurisdiction. ICSID asserted that it has jurisdiction on treaty claims as well as contract claims. The ICSID Tribunal presented award in which issues are systematically answered.

#### **No Violation of Fair and Equitable Clause**

The tribunal held that there was no violation of fair and equitable clause on behalf of Pakistan. Pakistan has performed in good faith throughout the contract. The *Bayindir* allegations are of no avail and there is no violation of fair and equitable treatment. Moreover, the tribunal held that, Pakistan has given opportunity to *Bayindir* in good faith and in this respect given EOTs, three times. The Pakistani Courts decision is also against *Bayindir*. It seems that *Bayindir* claim is false and vexatious. In this respect, the tribunal further emphasized that, the issues were contractual and not treaty claims. *Bayindir* has insufficient proof to prove that conspiracy was on part of NHA.

#### **No Violation of MFN Clause**

The tribunal also noted that Pakistan did contract in good faith and responsibly. NHA did not mean to terminate contract of *Bayindir* on the basis of conspiracy. Also there was no violation of the MFN clause. Tribunal held that *Bayindir* was not deprived of the said clause. The ground for such decision was that NHA hired local contractor to complete the work.

#### **No Expropriation on the part of Pakistan**

Regarding the third claim of the *Bayindir* tribunal noted that NHA has terminated contract in good faith and validly. It does not mean that government was involved in taking money from investor. The *Bayindir's* claim for expropriation was also rejected by the tribunal. Further, tribunal also held that the mobilization amount must be returned to the Pakistan.

All claims of *Bayindir* were rejected and tribunal gave nothing to *Bayindir*. In other words, the tribunal held that it has jurisdiction over the claim and in this respect tribunal rejected the application of respondent for stay of proceedings. Also, the tribunal will act and make necessary order for continuation of proceedings on merits. Regarding costs, the tribunal noted that it is deferred to the second phase of arbitration on merits. Tribunal also noted that the arbitration done in Pakistan was appropriate.

### ***Bayindir* related Cases: An Overview**

#### **Pantechniki Case**

*Pantechniki* highlights the extreme care needed before a contractor should abandon its contract disputes mechanism or even litigation once started, for ICSID arbitration, showing that such can result in a bad outcome even on very good facts. *Pantechniki* stands also for another proposition of which international contractors need



to be aware. This is that whenever a contractor is doing business in a country where it knows the state lacks public order resources, the contractor cannot complain if general disorder occurs which the state cannot control, if that disorder also impacts the construction project. This means that clause of *SL force majeure* is cancelled exceptionally and in case of necessity. Thus, it may be good for contractor to depart its contractual right in case of civil disorder” (Pantehniki case, 2009).

### **Toto Case**

This case is also on the issue of jurisdiction. The Court held that “it has no jurisdiction because most of the claims are contract claims rather treaty claims. Therefore, ICSID has no jurisdiction in private and minute nature of contracts”. The tribunal gives zero to *toto*.

### **Conclusion**

From the above discussion it is concluded that under international investment arbitration the investors and in particular (if there is construction project), contractors need to be careful while investing. They should investigate and know their treaty rights. They must be aware of the other facts involved therein, such as, local entity of another country, guarantor’s status, nature of bond and terms of the contract. They need to distinguish between treaty claims and contract claims.

The examination of all three cases reveals that contractors need to be considering that by which law their rights are established. If BIT is concluded between states then they should be aware about that what their treaty rights are. However, in today’s economy the contract matters are not protected under BIT. The contractor cannot take advantage of the fact that treaty is concluded between the states. Contractors do not give justification that under bit their rights are protected. Contract matters are beyond the scope of treaty claims.

In respect of the ICSD’s jurisdiction, it seems that ICSID may assume jurisdiction on the basis of article 25 of the Convention. Although the selection of forum in case of dispute was agreed upon by the parties—as in the case of *Bayindir* it was decided that the forum approached shall be Pakistan—the ICSID has jurisdiction on the ground that arbitration clause was mentioned in the agreement. ICSID in *Salini v Morrocco* also revealed that the *Salini* test is not a mandatory requirement for approaching ICSID. The applicability of law is also important in this regard as determined by ICSID that the arbitration done in Pakistan was appropriate.

As a result, the tribunal awarded zero to *Bayindir* and held that *Bayindir* did not prove violation of fair and equal treatment and MFN clause on the part of Pakistan. Also Pakistan did not commit expropriation in this respect. It seems that contractors cannot justify their claims on the basis of international minimum standards. However, they should be conscious about treaty as well as contractual rights.

It is submitted that ICSID has limited jurisdiction in respect of application of private rights. The focus of ICSID is on public rights. However, it should be expanded

subject to the terms of the agreement and domestic law. This is evident, as *Boliviain* 2007, withdrew its case from ICSID claiming that ICSID has no jurisdiction over application of private rights. Examination of *Bayindir*, *Pantechniki* and *Totto* shows that construction law is different from international treaty law. However, the codification, clarity, and implementation of whole IIL in uniform structure is inevitable and challenge for International Arbitration Community.

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