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International Arbitration Case Law
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Award Name and Date:

SAUR International S.A. v. Argentine Republic ICSID Case n° ARB/04/4 – Annulment Proceeding, 19 December 2016

Case Report by:

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Summary:

On 19 December 2016, an ICSID *ad hoc Committee* (the "Committee") ruled on a request filed by the Argentine Republic concerning the annulment of an award rendered by an ICSID Tribunal. The Committee had to deal with allegations that the Tribunal has manifestly exceeded its powers, that there has been a serious departure from a fundamental rule of procedure and that the award has failed to state the reasons on which it was based.

Main issues: annulment of an award – criteria – *ultra petita* adjudication – departure from a fundamental rule of procedure – insufficient or inadequate reasons.

Committee: Justice Abdulqawi Ahmed Yusuf (Member), Mr. Álvaro Castellanos (Member); Mr. Eduardo Zuleta (President).

Claimant's counsel: Dr. Carlos Fernando Balbín, National Treasure Attorney.

Defendant's counsel: Prof. Emmanuel Gaillard, Yas Banifatemi, Coralie Darrigade, Thomas Parigot, Shearman & Sterling LLP.

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1. PROCEDURAL HISTORY

On 19 September 2014, the Argentine Republic transmitted to ICSID Secretariat General a request for annulment.

On 22 September 2014, the ICSID Secretariat General registered the request for annulment and provisionally stayed the enforcement of the award pursuant to Article 54(2) of the ICSID Arbitration Rules.

On 7 January 2015, the Committee composition was deemed to be valid.

By letter of 5 February 2015, the Committee set forth a schedule for the submission of the documents relating to the continuation of the stay of enforcement of the award. The parties exchanged documents as provided for in the schedule.

On 8 May 2015, the Committee issued Procedural Order n°1, recording its decisions concerning the proceedings.

Following agreement between the parties, these appeared before the Committee when its first session and the hearing on the continuation of the stay of enforcement of the award rendered on 7 September 2015 took place at the seat of ICSID in Washington DC.

On 1 March 2016, the Committee issued its Award on the stay of the enforcement, subjecting the continuation of enforcement of the award to the submission by the Argentine Republic to ICSD's Secretariat General of a written official statement within the 30 days following the its Award. As the statement was not issued, the stay of the enforcement of Award was automatically lifted on 1 April 2016.

According to the scheduled established for the proceedings, on 7 July 2015Argentina filed a Memorial on Annulment (Memorial); on 15 September 2015, SAUR filed its Counter-Memorial on Annulment (Counter-Memorial); on 10 November 2015, Argentina submitted its Reply on Annulment (Reply) and on 5 January 2016 SAUR submitted its Rejoinder on Annulment (Rejoinder).

On 4 and 5 April 2016, the Parties appeared before the Committee during the hearing on annulment, which was held at the seat of ICSID in Washington DC.

On 4 May 2016, the Parties submitted their documents concerning the costs of the proceedings.

On 7 December 2016, the Committee declared the proceedings closed pursuant to Article 38 of (ICSID) Arbitration Rules.

I. FACTS

The company SAUR, which was the Claimant in the arbitration proceedings, created in 1994 a wholly-owned subsidiary, gathering all of the international business activities of the company “Société d’Aménagement Urbain et Rural, S.A.” specialized in water production, water treatment, water distribution and sanitization.

SAUR participated in a call for tender issued by the Province of Mendoza (Argentina) in 1997, concerning the privatization by means of a partial divestiture of shares of the Argentinian company *Obras Sanitarias Mendoza* ("OSM"), which provided services of drinking water distribution and sanitation in the Province of Mendoza.

After the bid was awarded to SAUR, OSM and the Province of Mendoza signed a concession contract, appointing OSM as the agent for the provision of drinking water distribution and sanitation services.

SAUR made an investment as a result of:

The acquisition of 12,08 % of the capital share of OSM, by paying USD $72,4 million;

The conclusion of a contract for the provision of technical support, whereby SAUR was appointed as the technical operator entity responsible for performing management activities on behalf of OSM, in exchange of a compensation equivalent to 3% of the turnover of the latter.

The Respondent in the arbitration proceedings, the Argentine Republic, was a party to the arbitration proceedings because of the involvement of one of its provinces, namely, the Province of Mendoza.

Even though both the concession contract and the technical support contract have been properly performed during the first years, the financial crisis that hit Argentina in 2002 had a great impact on the performance of the above contracts. After sustaining important losses, OSM requested a rise in the water distribution rates. The Province of Mendoza was under the obligation to take emergency measures to face this new challenging financial situation.

On 17 November 2003, SAUR submitted a request for arbitration before the ICSID, claiming that the Province of Mendoza had violated the principles established by the BIT.

On 17 May 2007, the Province of Mendoza and OSM concluded the Second Memorandum of Understanding ("Segunda Carta de Entendimiento"), an agreement that established a methodology for the determination of changes in rates. The parties agreed to raise the going rates at that time by 19,7%.

Subsequently, OSM was intervened by the Governor of the Province of Mendoza in order to "reestablish the conditions of the provision of service and to assure its continuity." Said intervention was for an initial period of 180 days, and was renewed for an additional period of 180 days by the Executive Power.

On 12 July 2010, the concession contract was terminated by the Governor because OSM did not comply with its obligations.

During the negotiations, the arbitration proceedings were stayed. However, the arbitral proceedings resumed when Argentina failed to comply with the principles established in the BIT, as a result of the fact that Argentina had not observed the terms and conditions set forth in the Second Memorandum of Understanding, that it had taken measures leading to the intervention of OSM, and that it had terminated the technical support contract with SAUR.

The purpose of the arbitral Award was to quantify, by reference to a method of calculation subject to subsequent verification by the Tribunal, the compensation claimed by SAUR,

which is the investor affected by the expropriation carried out by the Argentine Republic, and thus entitled to receive full compensation for the damages sustained.

The final award was issued on May 22, 2014.

II. LEGAL ISSUES DISCUSSED IN THE AWARD

1. Ultra petita:

Ultra petita must be obvious and not the result of complicated interpretations in one direction or the other. Otherwise, an *ultra petita* adjudication would not be manifest *(Wena Hotels Ltd vs. Arab Republic of Egypt*, ICSID case n° ARB/98/4, Award of January 28, 2002, 41 *International Legal Materials* (2002), p. 933; *Maritime International Nominees Establishment vs. Guinea Republic*, ICSID case n° ARB/84/4, *ICSID Reports,* p. 79)

If from the interpretation of the language of the award can be concluded that that there existed no *ultra petita* decision but another interpretation reaches the opposite conclusion, the alleged abuse of power should not be deemed to be manifest, and consequently, the award should not be set aside (*CDC Group plc vs. Republic of Seychelles*, ICSID case n° ARB/02/14).

As a result, the annulment should not be viable in the assumption of abuse of power based upon an alleged misapplication of the law, an erroneous appraisal of facts or a different assessment of the proof (*Duke Energy International Peru Investments No. 1, Limited. vs. Republic of Peru*, ISCID case n° ARB/03/28)

In order for the Committee to make a determination as to whether the Arbitral Tribunal had made an *ultra petita* decision on jurisdiction, the ICSID Convention was taken into consideration.

The annulment of an award on the ground that the Tribunal has manifestly exceed its powers is of an exceptional nature (*SGS Societé Générale de Surveillance S.A. vs. République de Paraguay*, ICSID Case n° ARB/07/29).

2. Departure from a fundamental rule of procedure

In order to determine whether the award could be set aside pursuant to Article 52(1)(d) of the ICSID Convention, the Committee must confirm that the requirement in question constituted a fundamental rule of procedure, which was violated during the arbitration, and that such a violation was of a serious nature.

The rules of procedure that can be considered as being "fundamental" include the fair treatment of the parties; the right to be heard; the handling of evidence; the burden of proof; the deliberations between the members of the Tribunal; the independence and impartiality of the Tribunal.

In order to set aside an award, the Committee must assess the gravity of the procedural irregularities, both from a quantitative and a qualitative perspective. According to the *ad hoc* Committee in *Wena Hotels v. Egypt*, a violation is only deemed to be a "serious" departure from a fundamental rule of procedure, when the violation of the rule is such that without the

application of that rule, the Tribunal would have reached a substantially different result from the one that it would have reached in the event that the rule of procedure concerned had been observed. Consequently, the party who wishes to invoke this ground of annulment must produce proof of the material impact that this irregularity has had on the award, or how the violation substantially deprived the party concerned of the protection with which the rule in question aims at providing. It is therefore obvious that any departure from a fundamental rule of procedure will not lead to the annulment of the award (*CDC vs. Seychelles).*

3. The award has failed to state the reasons on which it is based

This ground for annulment requires that the Tribunal comply with its duty to render an award whose reasoning can easily be understood in such a way that an informed observer may understand how the Tribunal reached its conclusion. In the view of the *ad hoc* Committee in *Mine v. Guinea* and other *ad hoc* committees, this is a minimal standard. The goal of this rule is to allow for the verification of reasoning behind the Tribunal's decision leading to its final conclusions (*Maritime International Nominees Establishment v. Republic of Guinea; Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case n° ARB/08/13).

In order for an *ad hoc* committee to be able to annul an award on the ground that the Tribunal's reasoning is contradictory, the reasons given by the latter must really contradict one another, causing the award to fail to state the reasons upon which it is based. The question, which is at the heart of the reasoning, must be an element necessary for the Tribunal to reach its decision.

III. DECISION

The *ad hoc* Committee unanimously held that:

(a) All the grounds for annulment alleged by Argentina must be dismissed.

(b) Each party shall bear the fees and legal expenses as a result of the annulment proceedings.

(c) The Argentine Republic shall bear the costs of the proceedings relating to fees and expenses of the members of the Committee and the administrative costs related to the use of ISCID's facilities.

(d) The Argentine Republic is ordered to pay to SAUR the difference between the amount of USD 100,000, which has been paid by SAUR, but that it is was for the Defendant to pay and the amount effectively paid to SAUR as reflected in the balance sheet that will be communicated by the ICSD Secretariat once the calculations concerning the case at hand will have been finalized. Payment is to be made within thirty (30) days following the date on which the above balance sheet will be forwarded to the parties.