School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Decision Name and Date: Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/03/19 – Annulment Proceeding – 5 May 2017

Case report by: Lisa M. Bohmer**, Editor Diego Luis Alonso Massa***

Summary:

In a Decision on Argentina's Application for Annulment rendered on 5 May 2017, an *ad hoc* annulment committee ("the Committee") rejected Argentina's application for annulment of the Award, the Decision on Liability and the Decision on Jurisdiction (together, "the Award") rendered by the arbitral tribunal ("the Tribunal") in the ICSID case No. ARB/03/19. The Committee first examined the scope of its review under the four grounds for annulment raised by Argentina under the ICSID Convention: proper constitution of the arbitral tribunal (art. 52(1)(a)), manifest excess of powers (art. 52(1)(b)), serious departure from a fundamental rule of procedure (art. 52(1)(d)) and failure to state the reasons on which the award is based (art. 52(1)(e)). The Committee considered that a previous decision on a request for disqualification of one of the arbitrators can only be sanctioned under art. 52(1)(a) if "no reasonable decision-maker could have come to such a decision", that any excess of powers has to be "obvious, evident and substantially serious", that a serious departure from fundamental rules of procedure must have had an impact on the award and that only a total failure to address evidence that would have been highly relevant to the decision may justify annulment under Article 52(1)(e). On this basis, the Committee rejected Argentina's contention that the Award should be annulled pursuant to these four grounds as applied to the appointment of Prof. Kaufmann-Kohler as director of UBS, the application of a most-favored nation provision to the requirement to submit the case to local courts for 18 months, the rejection of the necessity defense raised by Argentina under customary international law and the valuation of damages.

Main issues: Annulment – ICSID Convention: annulment grounds – Scope of review in annulment proceedings – Proper constitution of the tribunal – Manifest excess of powers – Serious departure from a fundamental rule of procedure – Failure to state the reasons on which the award is based – Independence and impartiality – Application of the MFN clause to dispute resolution provisions – Necessity defense – Valuation of damages

Ad hoc Committee: Professor Dr. Klaus Sachs (President), Mr. Rodrigo Oreamuno B., Sir Trevor Carmichael.

Arbitrators in the underlying arbitration: Professor Jeswald W. Salacuse (President), Professor Gabrielle Kaufmann-Kohler (Appointed by Claimants), Professor Pedro Nikken

(Appointed by Respondent).

Respondent's (Applicant's) Counsel: Dr. Bernardo Saravia Frías (Procurador del Tesoro de la Nación).

Claimants' Counsel: Mr. Nigel Blackaby (Freshfields Bruckhaus Deringer LLP, Washington, DC) & Mr. Elliot Friedman, Ms. Noiana Marigo, Mr. Ben Love, Ms. Amanda Lee, Ms. Elizabeth Skeen, Mr. Eric Brandon (Freshfields Bruckhaus Deringer LLP, New York).

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Digest:

1. Relevant Facts and Procedural Details

On 21 August 2015, the Argentine Republic applied for annulment of the Award. The underlying arbitration arose out of several emergency measures adopted by the Argentinian government after the financial crisis of 2000. According to the Claimants, those measures had a negative impact on the operations of a local entity, Aguas Argentinas S.A. ("AASA") organized and managed by them, which had been granted a concession contract for water distribution and waste water treatment in the city of Buenos Aires. Eventually, the dispute led to the termination of the concession contract, to its transfer to a public company and to AASA's bankruptcy.

On 3 August 2006, the arbitral tribunal rendered a Decision on Jurisdiction, stating that it had jurisdiction over Suez and Vivendi Universal S.A.'s claims under the France-Argentina BIT[1], and over Sociedad General de Aguas de Barcelona S.A ("AGBA")'s claims under the Spain-Argentina BIT.[2] In particular, the tribunal held that the application of the most-favored nation ("MFN") clause in the France-Argentina BIT made it unnecessary for AGBA to comply with the requirement to submit the case to the local courts for 18 months under the Spain-Argentina BIT. After this first decision, the Tribunal allowed several non-governmental organizations to submit *amicus curiae* briefs. It also considered and rejected two proposals to

[1] Accord entre le Gouvernement de la République française et le Gouvernement de la République Argentine sur l'encouragement et la protection réciproques des investissements, signed on 3 July 1991 and in force since 3 March 1993.
[2] Acuerdo para la promoción y protección recíprocas de inversiones entre el Reino de España y la República Argentina, signed on 3 October 1991 and in force since 28 September 1992.

disqualify Professor Gabrielle Kaufmann-Kohler as a member of the tribunal. The two remaining arbitrators held that her independence and impartiality did not become compromised when she started serving as a director of the UBS group, which held shares in Suez and in Vivendi. Subsequently, the Tribunal rendered a Decision on Liability on 30 July 2010 holding that Argentina denied the Claimants' investments fair and equitable treatment, and it rejected Argentina's necessity defense under the Argentina-France BIT as well as under international law. On 9 April 2015, the Tribunal rendered its final award granting the Claimants reparation in the amount of USD 37,261,504 plus interest.

In its application for annulment, the Argentine Republic considered that these three decisions should be annulled pursuant to Article 52(1)(a), (b), (d) and (e) of the ICSID Convention, claiming that the Tribunal was not properly constituted, had manifestly exceeded its powers, that there was a serious departure from fundamental rules of procedure and that the award failed to state the reasons on which it was based. According to the Argentine Republic, four elements of the underlying arbitration should be sanctioned pursuant to these grounds of annulment: (i) the appointment of Professor Kaufmann-Kohler as a Director of UBS and her alleged failure to inform and investigate; (ii) the alleged failure to comply with the requirement to submit the case to the local courts as far as AGBAR was concerned; (iii) the rejection of the necessity defense under customary international law and (iv) the valuation of damages. The Committee examined the scope of review under the four annulment grounds invoked by the Applicant before submitting each of the four elements of the underlying arbitration to an extensive review.

2. The *ad hoc* Committee's Analysis

2.1 General Remarks and Scope of Review in Annulment Proceedings

The Committee reminded the Parties that it does not have the power to review the merits of the award; it is confined to the five limitative grounds of review of Article 53(1) of the ICSID Convention (¶51). It then examined its scope of review under the four grounds of annulment raised by the Applicant.

2.1.1. Proper Constitution of the Tribunal (Art. 52(1)(a))

The Committee considered that it is common ground between the Parties that Article 14(1) of the ICSID Convention encompasses both independence and impartiality of the arbitral tribunal, and that Article 52(1)(a) refers to Article 14(1) through Article 40(2) of the ICSID Convention (¶77). As for the scope of review under Article 52(1)(a), the Committee noted that, contrary to other grounds for annulment, this Article does not include any qualifiers such as "manifest", "serious" or "fundamental". To determine the scope of review, it took into account three elements: (i) the existence of a challenge mechanism in Articles 57 and 58 of the ICSID Convention, (ii) the principle of finality enshrined in Article 53(1), and (iii) the existing jurisprudence on the issue. It concluded that the scope of review under Article 52(1)(a) should be "wide enough to safeguard the integrity of the proceedings but not so wide as to re-consider the merits of a decision" (¶85). It agreed with the *ad hoc* committee in *EDF v. Argentina*[3] that, where there is a previous decision on a request for disqualification of an arbitrator by the arbitral tribunal, the award can only be sanctioned under Article 52(1)(a) for

[3] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Decision on Annulment of 5 February 2016.

lack of independence or lack of impartiality of the relevant arbitrator if it is "so plainly unreasonable that no reasonable decision-maker could have come to such a decision." (¶94).

2.1.2. Manifest Excess of Powers (Art. 52(1)(b))

The Committee agreed with the *ad hoc* committee in *Soufraki v. UAE*[4] that Article 52(1)(b) of the ICSID Convention encompasses three elements: "the imperative jurisdictional requirements, the rules on applicable law, and the issues submitted to the arbitral tribunal" (¶112). Further, while the Respondent alleged that the term "manifest" only requires the excess of powers to be obvious, the Committee considered that an excess of powers can amount to a ground for annulment only if it is obvious, evident and substantially serious (¶¶118).

2.1.3. Serious Departure from a Fundamental Rule of Procedure (Art. 52(1)(d))

The Committee agreed with the Parties that Article 52(1)(d) of the ICSID Convention refers to standards of procedure that have to be observed as a matter of international law (¶128). Contrary to the Respondent, the Committee further considered that the violation of a fundamental rule of procedure must have had a material impact on the award to justify annulment under this ground. Finally, the Committee stated that, when applied to the alleged lack of independence and impartiality of an arbitrator, Article 52(1)(d) does not allow for a *de novo* review of a pre-existing decision on a request for disqualification by one of the Parties. Quoting again the committee in *EDF v. Argentina*, it considered that annulment is only justified under this ground where "the decision not to disqualify the arbitrator in question is so plainly unreasonable that no reasonable decision-maker could have come to such a decision." (¶133)

2.1.4 Failure to State Reasons in the Award (Art. 52(1)(e))

The Committee considered that it is common ground between the Parties that it does not have to assess the quality of the reasons of the arbitral tribunal, but only whether or not the reasons given by the tribunal enables the reader to understand why the tribunal reached its conclusions (¶154). While the Committee agreed with the Claimants that annulment is not a possibility where rectification or interpretation of the award is available, it considered that this defense does not apply in the present case. Further, the Committee refused to establish to what extent it has to undertake reasonable efforts to follow the reasons given by the tribunal in the abstract, considering that this question must be answered taking into account the individual circumstances of each case (¶158). It finally considered that only a total failure to address evidence that would have been highly relevant to the decision may justify annulment under Article 52(1)(e) of the ICSID Convention (¶163).

2.2 The Committee's Views

2.2.1. First Set of Grounds for Annulment Relating to the Appointment of Prof. Kaufmann-Kohler as Director of UBS and Her Alleged Failure to Inform and Investigate

First, the Argentine Republic alleged that there was a serious departure from fundamental

[4] *Hussein Nuaman Soufraki v. The United Arab Emirates*, Decision of the ad hoc Committee on the Application for Annulment of Mr Soufraki, 5 June 2007.

rules of procedure and that the tribunal was no longer properly constituted when Professor Kaufmann-Kohler accepted her appointment as Director of UBS, a bank holding shares in two of the Claimants. The Committee considered that, according to the standards of review identified above, the decision on the request for disqualification rendered by the two remaining members of the arbitral tribunal can only be questioned where it was plainly unreasonable. It notes that the arbitral tribunal did a qualitative assessment of the connections between the arbitrator and the Claimants using the four criteria of proximity, intensity, dependence and materiality. It considered that this assessment was in conformity with the IBA guidelines on conflict of interest[5], where the fact that an arbitrator holds an insignificant number of shares in one of the Parties is mentioned on the green list. It mentioned that the Tribunal relied on the fact that Professor Kaufmann-Kohler provided a list of arbitrations to UBS to reject an alleged violation of her duty to disclose. It also noted that in three other cases, dispute resolution bodies were faced with this same factual situation and refused to annul the award on this basis. It expressed its sympathy for the reasoning held by the committee in *Vivendi II* [6], which implies that if Professor Kaufmann-Kohler had become aware of the connection between UBS and the claims before the award was rendered, there would be a ground for annulment. However, it considered that this reasoning could not be applied here since, in *Vivendi II*, there was no pre-existing decision on a request for disqualification by the arbitral tribunal (¶211).

2.2.2. Second Set of Grounds for Annulment Relating to the Alleged Failure to Comply with the Requirement to Submit the Case to the Local Courts for 18 Months

Argentina alleged that, by allowing AGBAR's claim to go forward without requiring that the dispute be submitted to local courts for 18 months as stated in the Spain-Argentina BIT, the Tribunal manifestly exceeded its powers, failed to state reasons and seriously departed from a fundamental rule of procedure. The Committee rejected this argument. It agreed with the *ad hoc* committee in *Impregilo v. Argentina*[7] that, since it is contested whether or not an MFN provision may be used to avoid compliance with a local-courts provision in a BIT, neither position can amount, *per se*, to a manifest excess of powers (¶253). While it agreed that "observance of the Parties' consent does qualify as a fundamental rule of procedure" (¶254), the Committee considered that invoking the MFN clause to overcome the condition to submit the dispute to local courts does not amount to a serious departure from that rule (¶254). Finally, it rejected the argument that there was a failure to state reasons considering that the tribunal gave reasons for its decisions and that it had no duty to investigate evidence of subsequent treaty practice that was not put before it (¶260).

2.2.3. Third Set of Grounds for Annulment Relating to the State of Necessity under Customary International Law

Respondent alleged that the Tribunal failed to state the reasons on which its decision is based when rejecting the necessity defense under customary international law. In particular, Argentina considered that the Tribunal failed to establish the legal standards applicable to the

[5] IBA Guidelines on Conflicts of Interest in International Arbitration.
[6] *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for Annulment of the Award rendered on 20 August 2007, 10 August 2010.
[7] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the ad hoc Committee on the Application for Annulment, 24 January 2014.

"only way" and "non-contribution" requirements of Article 25 of the ILC Draft Articles[8] and failed to address evidence. The Committee rejected the first allegation since the legal standards to be applied for the interpretation of Article 25 were not subject to debate between the Parties and since "it is not for a tribunal to establish the issues to be decided" (¶291). With regard to the alleged failure to address expert reports submitted by Argentina and *amicus curiae* briefs filed by five non-governmental organizations, the Committee considered that a tribunal can only be required to address evidence that is "*highly relevant*" (¶303), which was not the case here since the experts agreed that Argentina contributed to the crisis. It added that the Tribunal did explicitly mention the *amicus curiae* briefs and dismiss the allegation that Argentina's human rights obligations trumped its obligations under the BIT (¶308).

2.2.4. Fourth Set of Grounds for Annulment Relating to the Valuation of Damages

Argentina finally alleged that the Tribunal manifestly exceeded its powers and failed to state reasons in its decision on damages. In particular, Argentina contested the valuation period, the construction of the valuation exercise and the management fees. With regard to the valuation period, the Committee considered that it was implicit in the Tribunal's reasoning that the "but for" scenario excluded the termination of the concession contract. As to the construction of the valuation exercise, the Committee considered that the Tribunal could validly hold that AASA's guaranteed debt was a protected investment once the Decision on Jurisdiction had already been rendered. The Tribunal could also apply a higher interest rate since there was no agreement between the Parties on this issue. Finally, with regard to the management contract, the Committee considered again that the Tribunal could decide that the contract was a protected investment once the Decision on Jurisdiction had already been rendered.

3. The *ad hoc* Committee's Decision

The *ad hoc* Committee decided that annulment of the award was warranted under none of the four grounds for annulment invoked by the Respondent. It ordered that the Respondent shall bear the total costs of the proceedings. However, it considered that each party shall bear its own legal costs and expenses incurred in connection with the annulment proceeding since the arguments advanced by the Respondent were not completely without merits.

[8] Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001.