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Arbitral Tribunal Not Properly Constituted: What is the Role of an ICSID Committee?

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Introduction

On 14 December 2018, an ICSID committee issued a decision on annulment of the award of *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17* ("Suez 03/17") in which it declined to uphold the application for annulment from Argentina. This decision marked the fourth time Argentina has failed in its attempt to have the award set aside since 2016 with the same reason that the original tribunals failed to disqualify Prof. Gabrielle Kaufmann-Kohler due to the conflict of interest. Three of these four cases were ICSID arbitrations (the two other ICSID cases are: *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23* ("EDF") and *Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19* ("Suez 03/19")). The fourth case was an *ad hoc* UNCITRAL arbitration under Argentina-UK BIT (*AWG Group Ltd. v. The Argentine Republic* ("AWG")). This post will focus on the three ICSID committees' annulment decisions and the debate therein regarding the limitation of review powers of an ICSID committee under the ICSID Convention.

Factual Background

Prof. Kaufmann-Kohler started to act as a member of the Board of Directors of UBS in April 2006 and remained in this position until 2009. In each of the three ICSID arbitration proceedings that took place within this period of time, UBS was undeniably connected with the claimants in some different forms. Argentina hinged its arguments on these connections in order to question Prof. Kaufmann-Kohler's qualifications before other unchallenged members in accordance with Article 58 of the ICSID Convention. In *EDF*, Argentina requested the rest of the tribunal to disqualify Prof. Kaufmann-Kohler on the basis of five connections between UBS and EDF and EDFI, a subsidiary of EDF, most importantly the common interests of these three companies in an Italian company and a Swiss Company. In *Suez 03/17* and *Suez 03/19*, Argentina challenged Prof. Kaufmann-Kohler on the ground that UBS held shares and other interests in the claimant companies, *i.e.* Suez and Vivendi (only in *Suez 03/19*). Argentina further claimed that Prof. Kaufmann-Kohler had failed to disclose these connections.

The tribunals in each of the three cases followed the requirement under Article 14(1) of the ICSID Convention, thus applying the test of whether Prof. Kaufmann-Kohler could "be relied upon to exercise independent judgment". The tribunals reached similar conclusions, namely that the connections between Prof. Kaufmann-Kohler and the claimants were so far-flung that they could not have affected her independence. In *EDF*, the unchallenged members opined that Prof. Kaufmann-Kohler's non-executive directorship at UBS gave her no financial interest in any of the Claimant companies and that she would not benefit in any way from an award in their favour.[1)] Meanwhile, in *Suez 03/17* and *Suez 03/19*, the tribunals evaluated the extent of arbitrator-party relationship based on four qualitative criteria: proximity, intensity, dependence, and materiality. Taking into account the facts regarding the significance of shares that UBS held in Suez and Vivendi, as well as the role of Prof. Kaufmann-Kohler at UBS, both tribunals concluded that the connections between Prof. Kaufmann-Kohler and the claimants 'did not create a manifest lack of independence and impartiality of judgment' because UBS was merely a portfolio investor in the claimant companies and the economic links were fairly insignificant. Therefore, these proceedings still remained ongoing with Prof. Kaufmann-Kohler as part of the tribunal.

The Consistency in Three ICSID Committees' Decisions

After losing in each of the original proceedings, Argentina decided to request the *ad hoc* committees to annul the award on two grounds. The first ground was the improper composition of the tribunal under Article 52(1)(a) with the participation of Prof. Kaufmann-Kohler who was supposed to be disqualified based on an alleged of conflict of interest. On the second ground, Argentina claimed that Prof. Kaufmann-Kohler committed 'a serious departure from a fundamental rule of procedure' under Article 52(1)(d) with her failure to disclose the connections between UBS and the claimants. Argentina further argued that the *ad hoc* committee would have to examine the issues *de novo* and decide as though there was no challenge that had been previously made.

To begin with the earliest decision in *EDF*, the committee responded to Argentina's argument that the issues should be determined *de novo* by assessing the relationship between the findings and rulings of the tribunal in respect to Article 58 and the role of the committee at the annulment stage. The *EDF* committee considered that the function of an ICSID *ad hoc* committee did not include the determination of the independence and impartiality of an arbitrator, because Articles 57 and 58 entrusted this function to the unchallenged members of the tribunal. According to this committee, the role of an *ad hoc* committee was not to determine whether or not the original tribunal has rendered a correct decision because it is not an appellate body. It would not find a ground of annulment existing under Articles 52(1)(a) and 52(1)(d) unless the tribunal's decision was "so plainly unreasonable that no reasonable decision-maker could come to such a decision". The tribunal continued to point out that the same conclusion had actually been reached by another 'reasonable decision-maker', which was the *Suez 03/19* tribunal, and therefore rejected Argentina's annulment request with regards to Prof. Kaufmann-Kohler's disqualifications.

The two *Suez* committees followed the lead of the *EDF* committee. They held that, with direct reference to *EDF* committee's decision, they would only review whether the decisions made by the tribunals were "so plainly unreasonable that no reasonable decision-maker could come to such a decision" since they would not operate as an appeal mechanism. In the end, the outcomes in both subsequent decisions on 'Kaufmann-Kohler controversy' were not different from the first one with the loss for Argentina.

Commentary

Another way to understand the approach of these ICSID committees is that if the decision of an arbitral tribunal is not clearly unreasonable, though it could be somewhat controversial, still there will be no point going through it all over again. From the author's view, such approach would probably raise two questions:

(1) What should be the actual role of an ICSID committee when dealing with a request to annul an award on the ground of improper composition of the tribunal?

(2) What is the role of Article 52(1)(a) in this context?

Firstly, it is clear that the function of review of an ICSID *ad hoc* committee should be akin to that of a national court before which a challenge of a non-ICSID arbitration award is brought. Besides the three ICSID proceedings, as mentioned above, Argentina also sought *vacatur* of an UNCITRAL award in *AWG* before the District Court for the District of Columbia with the same ground that Prof. Kaufmann-Kohler's participation constituted improper composition of the tribunal.[2)] Unlike the ICSID committees, both the DC district court and then the Court of Appeals adjudicated this particular issue by analyzing the factual background and came to decision on their own, not depending on whether or not the arbitral award was 'plainly unreasonable'. The question is why an *ad hoc* committee and a national court performed in two different ways. From author's view, there would be no reason for them to perform differently, given that they had the same function to decide on an annulment request raised by the same party, with very similar set of facts, based on substantively same grounds under Article 52(1)(2) ICSID Convention and § 10(a)(2) Federal Arbitration Act, which is challenge of an award due to improper constitution of tribunal. The question now is which way is more appropriate.

Secondly, if the approach of three ICSID committees is more appropriate, how should Article 52(1)(a) be interpreted? Article 52(1)(a) enunciates:

"Either party may request annulment of the award […] on one or more of the following grounds:

(a) that the Tribunal was not properly constituted".

Words matter. There is clearly no implication of a limited scope of review under this provision. When a party raises request, the committee shall decide *de novo* on its own whether or not to set aside the award based on the party's request, not on whether there is another tribunal that comes with the same conclusion. If the committee's decision depends on other decisions that much, then what is the role of Article 52 in such circumstances?

Finally, all three *ad hoc* Committees never answered the question raised by Argentina: how did the members of the Committee come to the conclusion not consider the annulment of award relating to disqualification of an arbitrator unless the tribunal's decision was "so plainly unreasonable that no reasonable decision-maker could come to such a decision", since this requirement is not expressly spelled out in Article 52(1)(a) nor anywhere else in the ICSID Convention? The Committees reasoned that they performed the function of an annulment committee, not of an appellate body. If the scope of review was so wide as to re-consider the merits of a decision, an *ad hoc* committee would be turned into an appellate body and thus it would be inconsistent with the limited scope of annulment under the ICSID Convention.[3)] However, the distinction between annulment and appeal consists of two elements: the result of the process and the aspects of the decision under review.[4)]

First, the result of annulment is the invalidation of the original decision while the result of a successful appeal is its modifications. In this case, Argentina clearly did not request the committees to modify the decisions but to invalidate them. Secondly, annulment is not concerned with substantive correctness of the decision while appeal is, and annulment does not provide the challenging party an opportunity to raise new arguments on the merits or introduce new evidence. However, Argentina asked for none of these. Argentina asked the committees to set aside the decisions based on one of fundamental standards listed exhaustively in Article 52(1) and, therefore, the distinction made by the tribunals between annulment and appeal was not relevant in this context.

References

?1 Decision of 25 June 2008 on the challenge to Prof. Kaufmann-Kohler in *EDF International SA and Others v. Argentine Republic* (ICSID ARB/03/23), para. 71

?2 Decision of the US District Court for the District of Columbia on Argentina's Petition to Vacate the Arbitral Award, 30 September 2016; Judgment of the United States Court of Appeals for the District of Columbia, 3 July 2018

?3 Decision on Annulment (5 February 2016) in *EDF International SA and Others v. Argentine Republic* (ICSID ARB/03/23), para. 145

?4 Christoph H. Schreuer, 'The ICSID Convention: A Commentary' (Cambridge University Press, 2009), p. 901.

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