School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: TOTAL S.A. V. ARGENTINE REPUBLIC (ICSID CASE NO. ARB/04/01). DECISION ON ANNULMENT

Case Report by: Damián Vallejo Segura**, editor Prof. Jorge M. Guira ***

Summary:

In the decision rendered on February 1, 2016, the *ad hoc* Committee decided to dismiss Argentina's Application for Annulment of the Award and of the Decisions on Jurisdiction and Liability, which form integral part of the Award, rendered on November 27, 2013. Argentina based its request in three grounds: (i) the Tribunal manifestly exceeded its powers; (ii) there were serious departures from fundamental rules of procedure; and (iii) the Award failed to state the reasons on which the decision was based. The mentioned grounds were applied to five particular issues. The *ad hoc* Committee constituted under the ICSID Convention, after analyzing Argentina's requests, entirely dismissed the application for annulment. The *ad hoc* Committee ordered each party to bear its own legal costs, and ordered Argentina to bear the costs of the annulment proceeding.

Main Issues:

Annulment – interpretation – jurisdiction – reasoned decision – rules of procedure – ICSID – investment law.

Ad Hoc Committee: Eduardo Zuleta – President, Teresa Cheng, Álvaro Castellanos.

Claimant's Counsel: Mr. Nigel Blackaby, Mr. Noah Rubins, Mr. Sam Hunter Jones (Freshfields Bruckhaus Deringer LLP, Wasghinton D.C., U.S.A., Paris, France, and London, United Kingdom), Mr. Luis Erize and Mr. Sergio Porteiro (Abeledo Gottheil Abogados SC, Buenos Aires, Argentina).

Respondent's Counsel: Dra. Angelina María Esther Abbona (Procuración del Tesoro de la Nación, Buenos Aires, Argentina) and Dr. Carlos Francisco Balbín (Procuración del Tesoro de la Nación, Buenos Aires, Argentina).

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Damián Vallejo Segura is an LL.M. in International Legal Studies and Certificate in International Arbitration and Dispute Resolution candidate at Georgetown University Law Center. He is a practicing attorney in the Kingdom of Spain having obtained an LL.B. and an LL.M. in Business Law from ESADE Law School.

*** Prof. Jorge M. Guira, Esq., BA, MA, JD, LLM, PgDip, PhD, FHEA is the Director of the Centre for Commercial Law and Financial Regulation as well as the Program on Energy Law and Policy at the University of Reading. He is a US qualified lawyer based in London.

Digest:

1. Relevant Facts and Procedural Dates

On March 27, 2014, in accordance with Article 52(2) of the ICSID Convention, the Republic of Argentina ("Argentina" or "Respondent") filed an Application for the Annulment of the Award rendered on November 27, 2013 and of the Decisions on Jurisdiction and Liability, which form an integral part of the Award, (¶ 3 and ¶5) issued in favor of Total S.A. ("Total" or "Claimant"). Argentina also requested the stay of the enforcement of the Award. The Secretary-General of ICSID granted the Stay Request on April 2, 2014 (¶ 7).

In the Decision on Jurisdiction, the Tribunal declared that the dispute between Total and Argentina was within ICSID's jurisdiction and the competence of the Tribunal, since jurisdictional requirements set out in the Argentina-France BIT and in the ICSID Convention were met. In the Decision on Liability, the Tribunal upheld Total's submission concerning Argentina's obligation to grant Fair and Equitable Treatment to Total under the aforementioned BIT (¶ 4).

In December 4, 2014, the *ad hoc* Committee issued a Decision concerning the termination of the stay of the enforcement of the Award, whereby it: (i) rejected Argentina's request to continue the stay of enforcement of the Award rendered on November 27, 2013; and (ii) ordered the lifting of the stay of enforcement of the Award (¶ 18).

Following Respondent's Memorial and Claimant's Counter-Memorial on annulment (¶ 19), Respondent's Reply on annulment (¶ 20) and Claimant's rejoinder (¶ 22), the hearing on annulment was held at the seat of ICSID in Washington D.C. (¶ 32), the *ad hoc* Committee declared the proceeding closed in accordance with Rule 38(1) of the ICSID Arbitration Rules on December 24, 2015 (¶ 38).

2. Position of the Parties

2.1. Argentina's position

Argentina requested the annulment of the Award and the Decision on Jurisdiction and Liability on the basis that: (i) the Tribunal manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention); (ii) there were serious departures from fundamental rules of procedure (Article 52(1)(d) of the ICSID Convention); and (iii) the Award failed to state the reasons on which it was based (Article 52(1)(e) of the ICSID Convention) (¶ 39).

Although Argentina submitted three grounds for annulment, its Application for annulment touched upon five different issues (¶ 42).

2.1.1 Applicable law and Claimant's derivative claim

Argentina claimed that the Tribunal has manifestly exceeded its powers and failed to state reasons in relation to the law applicable to the merits of the dispute and Total's derivative claim (¶ 56).

Argentina contended that the Tribunal failed to apply the applicable law because it did not apply domestic law, along with the BIT and international law in its analysis of Total's *ius standi*. Moreover, the Tribunal did not state reasons for its failure to apply Argentine law, which should have been considered in order to determine whether the rights in question belonged to Total (¶ 57).

Argentina argued that the Tribunal wrongly exercised jurisdiction according to Article 25(1) of the ICSID Convention and Article 8(1) of the BIT (¶ 58). Moreover, here the indirect or derivative actions undertaken should not have been allowed.

Respondent also contested the Tribunal's application of Argentine law to determine the extent of property rights constituting the investment under domestic law, as the latter was applied to make a determination as to the investment status but instead it was rejected as the basis for establishing standing and ownership of such rights (¶ 61).

2.1.2 Renegotiation Process and the Fair and Equitable Treatment Standard

Argentina argued the Tribunal's decision constituted a manifest excess of powers, including the failure to state reasons and a departure from the fundamental rules of procedure, in taking into account the renegotiation process under the Fair and Equitable Treatment Standard (¶ 67).

The Tribunal dismissed Argentina's jurisdictional objection that the dispute was contractual in nature because the object of the proceeding was not the renegotiation process. Nevertheless, the Tribunal went on to hold Argentina liable for violating the Fair and Equitable Treatment Standard because of the inconclusive results of the renegotiation process of tariffs as to the gas transportation sector. (¶ 68).

Argentina claimed a violation of the principle of due process and the right of defense, as it had been substantially deprived of its right to be heard, implying a departure of fundamental rules of procedure (¶ 69).

2.1.3 Argentine Emergency Law Provisions

Argentina considered that the Tribunal had exceeded its powers and failed to state reasons in relation to its application of the Argentine emergency law provision (¶ 74).

The terms of reference, under which the Tribunal was authorized to function, had been derogated from by failure to apply the emergency doctrine under Argentine law and Argentina's domestic law *in totum* as a source of law indicated in Article 8(4) of the BIT (¶ 75).

The Tribunal failed to state the reasons that prevented the proper application of the emergency doctrine (¶ 76).

2.1.4 Article 5(3) of the BIT and the necessity defense

The Tribunal manifestly exceeded its powers and failed to state the reasons by which it decided to ignore the application of Article 5(3) of the BIT. Under the necessity defense, Argentina's sole obligation was to grant no less favorable treatment to French investors than that accorded to other investors; the BIT had been abrogated as a result of a situation of emergency (¶ 80-83).

The Tribunal failed to provide the reason why the aforementioned provision was not applicable to economic emergencies, in particular as it had stated that the scope of application of said provision was limited to a national emergency where losses that have occurred were a result of war or civil disturbance (¶ 84).

The Tribunal rejected such application because Argentina failed to show that those measures were the only way for the State to safeguard essential interests against a grave and imminent peril. However, the Tribunal failed to specify the legal standard of "essential interest" and "only way" (¶ 86-87).

2.1.5 Assessment of damages

Argentina considered that the Tribunal failed to state the reasons according to which it assessed damages (¶ 90) and incurred three contradictions in relation to such assessment that precluded the reader from understanding its motives (¶ 91-94).

2.2. Total's position

Total rejected all of Argentina's arguments for the annulment of the Award alleging that Argentina was seeking a *de novo* review of substance of the Decisions and the Award in order to overturn the Tribunal's decisions on such basis (¶ 98-153).

3. Review and Analysis by the ad hoc Committee

3.1 The Scope of Review

The *ad hoc* Committee recalled that grounds for annulment under Article 52(1) of the ICSID Convention are limited, as annulment is an exceptional remedy and not an appeal (¶ 158, 159).

3.2 Analysis of the ad hoc Committee regarding the applicable law and Claimant's derivative claim`

The *ad hoc* Committee considered that the text of the treaty provided for several applicable laws without establishing a hierarchy between them, so it was for the Tribunal to decide which law to apply, based on the text of the treaty and the submissions of the parties. It is not a function of the *ad hoc* Committee to review the correctness of the approach adopted by the Tribunal or the conclusion on which is the applicable law for a particular issue (¶ 196).

The Tribunal reason for not applying Argentine law or the Barcelona Traction case, as claimed by Respondent, does not imply a manifest disregard of the applicable law in the view of the *ad hoc* Committee (¶ 211).

The Tribunal considered that the BIT and the ICSID Convention were the relevant laws to determine standing to bring claims under the BIT, and specifically rejected Argentina's characterization of Total's claim as derivative claims as well as its contention that Argentine law should apply to disallow such claims. The Tribunal also rejected Argentina's views that international law should apply and, in any event, that under the ICJ jurisprudence the claims were derivative or indirect claims (¶ 249).

The *ad hoc* Committee considered that Argentina was not able to substantiate in the annulment proceedings that the Tribunal was manifestly in excess of its powers in concluding that it had jurisdiction. Argentina was in fact seeking a *de novo* review, not permitted under ICSID Convention (¶ 250, 275).

Again, the *ad hoc* Committee considered that the Tribunal characterized the issue to be decided upon, determined the applicable law to such issue (*i.e.* the BIT), established the consequences of such application and then analyzed and rejected Argentina's reasoning that Total's claims were derivative claims, explaining the reasons for such rejection (¶ 273).

3.3 Analysis of the ad hoc Committee regarding renegotiation process and Fair and Equitable Treatment standard

The *ad hoc* Committee considered that the review of the conduct during the renegotiation process carried by the Tribunal did not entail a review of the merits of the renegotiation itself. The Tribunal did not make an assessment of the merits or legality of the renegotiation, but rather an assessment whether the conduct of Argentina as regards the renegotiation constituted a violation of the BIT (¶ 261).

After the analysis, the *ad hoc* Committee concluded that there was no contradiction between the Decision on Jurisdiction and the Decision on Liability. The *ad hoc* Committee was satisfied with the Tribunal's review, and therefore rejected this ground for annulment (¶ 262).

The *ad hoc* Committee considered that, as in the Decision on Liability the Tribunal did not assess the merits or legality of the renegotiation itself, which had been excluded in the Decision on Jurisdiction, and further that there was no departure from a fundamental rule of procedure. It therefore rejected Argentina's argument (¶ 318-319).

3.4 Analysis of the ad hoc Committee regarding Argentine emergency law provision

The *ad hoc* Committee considered that the Tribunal characterized each issue that it had to decide and determined which law should apply to each one of those, explaining the reasons thereof, in paragraphs 39 and 40 of the Decision on Liability. It is therefore a reasoned decision as to which law should be applied to each specific issue. Argentina argued that the *ad hoc* Committee either applied all the laws in Article 8(4) of the BIT or considered that Argentine law should apply, in order to apply the emergency doctrine. The *ad hoc* Committee reflected that doing so would imply an appeal, precluded under the ICSID Convention (¶ 222).

The *ad hoc* Committee considered that the decision on the emergency doctrine was a reasoned decision and that the Tribunal adopted an interpretation of the BIT as to the determination of the applicable law to each issue under dispute (¶ 280). Again, the *ad hoc* Committee stated that Argentine was seeking a *de novo* review, and as mentioned, this is prohibited under ICSID Convention (¶ 280, 282).

3.5 Analysis of the ad hoc Committee regarding Article 5(3) of the BIT and the Necessity Defense

The *ad hoc* Committee noted that Argentina disagreed with the Tribunal's interpretation of Article 5(3) of the BIT and the conclusion arising out of such interpretation, rather than a failure to apply it by the Tribunal (¶ 226).

The Tribunal interpreted Article 5(3) of the BIT and concluded that a national economic emergency was not covered by the article in question (¶ 227), and it was therefore neither for the *ad hoc* Committee to review the Tribunal's interpretation nor to consider whether such interpretation was correct (¶ 228).

The *ad hoc* Committee contemplated that the Tribunal analyzed the defense of necessity under customary international law. It explained that Argentina had the burden of proof to satisfy the Tribunal that all of elements required under Article 25 the Articles on State Responsibility had been met. The Tribunal should only evaluate

the defense of necessity in respect of Argentina's failure to readjust the gas tariff and what such evaluation of the defense of necessity entails (¶ 232-234).

The Decision on Liability discussed the "essential interests" and the "only way" requirements and concluded that under customary international law, the defense was groundless (¶ 235). The Tribunal considered that Argentine defined the standards of "necessity" of protection of "essential interests" and the "only way" requirements and it failed in producing proof thereof. (¶ 235, 238, 286, 287).

The *ad hoc* Committee considered that Argentina was again seeking to second-guess the interpretation of Article 5(3) of the BIT and rejected this ground for annulment (¶ 285).

3.6 Analysis of the ad hoc Committee regarding the Assessment of Damages

While Argentina contended that the Tribunal had incurred three contradictions, the *ad hoc* Committee considered that there was no contradiction (¶ 292-296 and 300-304) and that the reasoning presented by Argentina for the annulment ground was unconvincing (¶ 297-299). Once again, the ground for annulment was rejected by the *ad hoc* Committee.

4. Decision

The *ad hoc* Committee entirely dismissed Argentina's Application for Annulment of the Award and the Decision on Jurisdiction and Liability on a Decision issued on February 1, 2016 (¶ 325). Following other *ad hoc* Committees' practice, the *ad hoc* Committee ordered each Party to bear its own legal costs and expenses incurred with respect to the annulment proceeding. It also ordered Argentina to bear the costs of the annulment proceedings, which included the fees and expenses of the Committee Members and the costs of using ICSID facilities (¶ 323-324).