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International Arbitration Case Law

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ALAPLI ELEKTRIK B.V.
v.
REPUBLIC OF TURKEY
(ICSID CASE NO: ARB/08/13)

DECISION ON ANNULMENT

Case Report by Maria Davies**
Edited by Ignacio Torterola ***

In its Decision on Annulment of July 10, 2014, the *ad hoc* Committee dismissed the application for annulment of the arbitral Award, rendered in *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/ 08/13), filed by Alapli Elektrik B.V. on grounds set out in Articles 52(1)(b), 52(1)(d) and 52(1)(e) of the ICSID Convention.

Main Issues:	Annulment – ICSID Convention – failure to state reasons; annulment – ICSID Convention – manifest excess of powers; annulment – ICSID Convention – serious departure from a fundamental rule of procedure; interpretation; jurisdiction.
Committee:	Professor Bernard Hanotiau (President), Professor Karl-Heinz Böckstiegel and Mr. Makhdoom Ali Khan.
Applicant's counsel:	Mr. Robert Volterra, Mr. Stephen Fietta, Mr. Patricio Grané Labat, Mr. Jiries Saadeh and Mr. Bernhard Maier of Volterra Fietta.
Respondent's Counsel:	Mr. Stanimir Alexandrov, Ms. Marinn Carlson, Ms. Jennifer Haworth McCandless and Mr. Aaron Wredberg of Sidley Austin LLP.

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Digest

1. Procedural History (¶¶ 1-16)

On November 12, 2012, Alapli Elektrik B.V. (the "Applicant") filed with the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID") an application for annulment (the "Application") of the award rendered on July 16, 2012 in *Alapli Elektrik B.V. v. Republic of Turkey* (ICSID Case No. ARB/08/13)(the "Award").

The Application was filed in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules").

The Application was made within the time period provided in Article 52(2) of the ICSID Convention and sought annulment of the Award on the grounds set out in Articles 52(1)(b), 52(1)(d) and 52(1)(e) of the ICSID Convention.

On November 16, 2012, the Secretary-General notified the Parties that the Application had been registered on that date in accordance with Rule 50(2) of the Arbitration Rules.

By letter of December 12, 2012, in accordance with Rule 52(2) of the Arbitration Rules, the Secretary-General notified the Parties that an *ad hoc* Committee ("Committee") had been constituted.

By agreement of the Parties, the Committee held its first session by telephone conference on February 15, 2013. During the session, the Parties confirmed their agreement on certain procedural matters and made oral submissions on certain points of disagreement.

On February 28, 2013, the Committee issued Minutes of the First Session of the *ad hoc* Committee and Procedural Order No. 1.

On March 25, 2013, the Applicant filed its Memorial on Annulment.

On June 10, 2013, the Respondent filed its Counter-Memorial on Annulment.

On July 29, 2013, the Applicant filed a Reply on Annulment.

On September 23, 2013, the Respondent filed its Rejoinder on Annulment.

The hearing on annulment was held at the World Bank facilities in Paris, France on December 17 and 18, 2013.

The Parties filed their respective statements of costs on February 7, 2014.

In accordance with Arbitration Rules 53 and 38(1), the proceedings were declared closed on May 5, 2014.

2. *Facts of the Case* (¶¶ 17-27)

The dispute concerned a concession to develop, finance, construct, own, operate and transfer a combined cycle power plant in Turkey. In 1995, two Turkish nationals, Mr. Morova and Mr. Özkan, established a company in Turkey as the investment vehicle to the concession ("First Project Company"). In 1997, a feasibility study for the Project was submitted to and approved by the Ministry of Energy and Natural Resources of the Republic of Turkey ("MENR").

The First Project Company concluded a letter of intent with an affiliate of the General Electric Group ("GE"), providing that the affiliate would be the engineering, procurement and construction contractor for the Project. The First Project Company also entered into a Joint Development Agreement with another affiliate of GE which provided that the affiliate would provide certain funding for the development of the Project.

In October 1998, the First Project Company and the MENR concluded a concession contract concerning the Project.

In April 1999, the Applicant, incorporated in the Netherlands, was established as a subsidiary of a holding company incorporated in Curacao, which was wholly owned by Mr. Morova. In March 2000, the Applicant obtained shares in a newly registered Turkish entity ("the Second Project Company") which was assigned the rights of the First Project Company under the concession contract. The assignment was approved by MENR in November 2000.

In November 2000, the First Project Company sought to convert the concession contract to a private law contract, following the adoption of Law No. 4501 which allowed for such conversions. At the same time, Law No. 4628 eliminated Treasury guarantees for certain energy sector projects not finalised before December 31, 2002 and made certain restrictions to energy sales agreements.

The Applicant asserted that it made its investment in reliance upon governmental assurances and legislation intended to attract international investment. It further contended the Respondent contradicted its assurances by making adverse legislative changes, which led to a loss of investment and violation of the Energy Charter Treaty ("ECT") and the Agreement of Reciprocal

Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Republic of Turkey of March 27, 1986 ("BIT").

In the Award, Arbitrator Park and Arbitrator Stern (the "Majority") concluded that the Tribunal lacks jurisdiction to hear the dispute pursuant to both the ECT and the Netherlands-Turkey BIT and did not address the merits of the dispute. Arbitrator's Park line of reasoning was that the Claimant never made a sufficient contribution in the project to create for itself the status of an investor under the ECT or the Netherlands-Turkey BIT (¶ 25). On the other hand, Arbitrator Stern found that there was not a *bona fide* investment. Arbitrator Lalonde filed a dissent (¶ 27).

3. Legal Issues Discussed in the Award

3.1 The Interplay between Articles 48(1) and 48(3) of the ICSID Convention and Arbitration Rule 47(1)(i)

The *ad hoc* Committee observed that Article 48(1) uses the unqualified term "questions", while Article 48(3) uses the expression "every question". It examined the French and Spanish versions of the ICSID Convention and concluded that Article 48(3) refers not to questions in general but to the parties' heads of claim. It further noted that Article 48(1) has been implemented in Arbitration Rule 16, under the heading "Decisions of the Tribunal", while Article 48(3) has been implemented in Arbitration Rule 47, under the heading "The Award".

The Committee found that Articles 48(1) and 48(3) refer to two distinct issues. Thus, Article 48(1) is the more general of the two and provides that whenever the tribunal "decides" "questions", the decision needs to be supported by the vote of a majority of the panel's members. The Article is applicable not only when an award is rendered, but also when a procedural or substantive decision is issued (¶ 119). It is for the tribunal to determine in each case which specific "questions" are material and need to be put to a vote in order to resolve the dispute (¶¶ 125, 128).

On the other hand, Article 48(3) refers to the tribunal's obligation to "deal with" "every question" submitted to it when rendering an "award". It therefore refers to the tribunal's obligation to deal with, either directly or indirectly, the parties' heads of claim within its award (¶ 120). However, it is not obliged to address each argument or sub-issue as long as it deals with each of the parties' heads of claim (¶ 124).

The Committee observed that Arbitration Rule 47(1)(i) refers to "questions", as the term is used in Article 48(1). Given that the Arbitration Rules were adopted on the basis of the ICSID Convention, they cannot be employed to contravene or

enlarge any of the provisions of the ICSID Convention and must be consistent with it (¶ 127). Therefore, should the Arbitration Rules differ from or conflict with the ICSID Convention, the latter would prevail (¶ 127).

3.2 Grounds for Annulment

(a) Article 52(1)(d): Serious Departure From a Fundamental Rule of Procedure

The Committee considered that annulment is justified under Article 52(1)(d) of the ICSID Convention in case of a departure from a procedural rule where (a) the departure is serious, i.e. it deprives a party from the protection afforded by the said rule; and (b) if the rule in question is fundamental, i.e. if it concerns a rule of natural justice (¶¶ 131-132). The Applicant bears the burden of proving both that (i) the tribunal committed a serious departure from a procedural rule; and (ii) that the said rule was fundamental (¶ 134). The Committee concluded that the challenged Award evinces no serious departure from a fundamental rule of procedure (¶ 141).

The Committee reiterated that when dealing with the heads of claims of the parties, it is for the Tribunal to determine which questions are material and put these to vote to dispose of the issue(s) before it (¶ 144). The Committee observed, after an examination of the pleadings of the Parties and their respective heads of claims, the Tribunal could rightly conclude that the only material question on jurisdiction for a resolution of the dispute between the parties that it had to decide was whether or not it had jurisdiction (¶ 152). The decision that the Tribunal lacked jurisdiction was taken in strict compliance with Article 48(1) of the ICSID Convention by a majority of two out of three arbitrators (¶ 154).

The Committee found that the only requirement of Article 48 of the ICSID Convention is that the votes of the tribunal members making up the majority, and not the reasoning which they embrace, be identical (¶¶ 157, 170). The Committee further considered that the validity of the Award would not be affected even if the lines of reasoning were contradictory, citing cases where there was a divergence of views between the members of tribunals who nevertheless voted in favour of the underlying award (¶¶ 165, 171-181). Such a possibility is envisaged by Article 48(4) of the ICSID Convention which allows for the formulation of an individual opinion (¶ 166-169). The Committee concluded that the lines of reasoning that the majority adopted were not contradictory, but complementary (¶¶ 160-164).

The Committee did not share the Applicant's view that Arbitrator Park voted in favour of jurisdiction *ratione temporis*, while Arbitrator Stern voted in favour of jurisdiction *ratione personae* and *ratione materiae*, thus leading to a "real" majority

upholding jurisdiction. It found that reference to jurisdiction *ratione temporis* was entirely absent from Arbitrator Park's analysis, while Arbitrator Stern did not cast a vote on jurisdiction *ratione personae* and *ratione materiae* and focused her analysis solely on jurisdiction *raatione temporis* (¶¶ 188-194). Thus, the Committee decided that there was no majority of the votes in favour of upholding jurisdiction, no matter what the grounds (¶ 185).

(b) Article 52(1)(e): Failure to State Reasons

Aligning itself with the annulment committee in *MINE v. Guinea*, the *ad hoc* Committee considered that annulment under Article 52(1)(e) of the ICSID Convention is warranted only when a tribunal has failed to render an award that allows readers to comprehend and follow its reasoning (¶¶197-199). The Committee further acknowledged that contradictory reasons cancel each other out and amount to no reasoning. However, it also cited with approval the *Vivendi I* annulment committee which observed that tribunals often have to balance conflicting considerations and care should be taken when distinguishing between genuine contradictions and an attempt to strike a balance between such conflicting considerations (¶¶ 200-201). The Applicant bears the burden of proving that the Tribunal's reasoning was unintelligible or contradictory or frivolous or absent (¶ 202).

The *ad hoc* Committee concluded that there is no support for the Applicant's contentions that: (i) no reasons were given why the Award denied jurisdiction when an "actual majority" was in favour of upholding jurisdiction; and (ii) Arbitrator Park's and Arbitrator Stern's analyses are contradictory which makes the Award itself contradictory (¶ 211). Reiterating its earlier conclusions, the Committee first stated that the majority arbitrators' lines of reasoning were not contradictory but complementary (¶ 212). The Committee also considered that, individually, Arbitrator Park's and Arbitrator Stern's analyses satisfy the requirements of reasoning established by Article 52(1)(e) of the ICSID Convention because they enable the reader to follow the reasoning from beginning to its conclusion (¶¶ 216-229). Second, the Tribunal was not under an obligation to vote separately on each objection to jurisdiction so long as it dealt with the heads of claims presented (¶ 213). Third, the ICSID Convention allows arbitrators to issue a divergent individual opinion (¶ 214). Finally, as the Committee had already found, there was no hidden majority (¶ 215).

(c) Article 52(1)(b): Manifest Excess of Powers

The *ad hoc* Committee aligned itself with the view taken by the *Wena v. Egypt* annulment committee that an excess of powers must be "manifest", meaning plain, evident, obvious, clear, in order to warrant annulment (¶ 230). When more

than one interpretation of a disputed issue is equally possible, there can be no room for a manifest excess of powers, and the tribunal's determination will be final (¶ 231). The ICSID Convention does not draw a distinction between jurisdictional excesses and any other types of excesses that a tribunal may commit and the standard of excess of powers is identical (¶ 238).

The Committee found that the Tribunal correctly identified the applicable law to the dispute: the ICSID Convention, the Netherlands-Turkey BIT and the ECT, as interpreted in light of the Vienna Convention on the Law of Treaties of 1969 (the "VCLT") (¶¶ 245-246). The Tribunal also strove to apply it (¶¶ 248-255). As a result, annulment of the Award under Article 52(1)(b) of the ICSID Convention is unwarranted (¶ 247). With respect to the failure to apply the applicable law, the Committee stressed that as long as the tribunal correctly identified the applicable law and strove to apply it to the facts, there is no room for annulment (¶ 234). Whether or not the application of the proper law to the facts was correct or not is outside the Committee's mandate to ascertain (¶¶ 234, 251).

In light of these considerations, the Committee held that the Applicant had failed to discharge the burden of proving that the Tribunal manifestly exceeded its powers by failing to apply the proper law to the facts of the case as well as that the Award evinces failure to exercise jurisdiction. Consequently, it dismissed the Applicant's contention that the Award is the result of a manifest excess of power under Article 52(1)(b) of the ICSID Convention (¶¶ 256-257).

4. Decision

The *ad hoc* Committee dismissed the Applicant's claims for annulment under Articles 52(1)(b), 52(1)(d) and 52(1)(e) of the ICSID Convention in their entirety. It unanimously decided that the Applicant shall bear all ICSID costs, including the fees and expenses of the Members of the Committee, as well as Turkey's legal costs and expenses (¶¶ 258-265).