School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

Academic Directors: Ignacio Torterola
*Loukas Mistelis**

TEINVER S.A., TRANSPORTES CERCANÍAS S.A. AND AUTOBUSES URBANOS DEL SUR S.A.
v.
THE ARGENTINE REPUBLIC
(ICSID CASE NO: ARB/09/1)

DECISION ON JURISDICTION

Case Report by Sofia Castillo**
Edited byMona Davies***

In its Decision of December 21, 2012, an ICSID tribunal dismissed Argentina's objections on jurisdiction over a dispute with a group of Spanish companies concerning the nationalization of two airlines pursuant to the 1991 Bilateral Investment Treaty between Argentina and Spain.

Main Issues:	Jurisdiction - exhaustion of local remedies; jurisdiction - ICSID Convention Article 25 - dispute arising directly out of investment; jurisdiction - ICSID Convention Article 25 – notification; jurisdiction – personal- shareholder; jurisdiction - subject matter - investment - consistency with local law; jurisdiction – temporal; procedure – negotiations; treaty obligations – international law standard – MFN.
Tribunal:	Judge Thomas Buergenthal, President; Henri C. Alvarez, Q.C.; Dr. Kamal Hossain.
Claimant's counsel:	Mr. Roberto Aguirre Luzi, Mr. R. Doak Bishop, Mr. Craig S. Miles, Ms. Silvia Marchili, MR. Esteban Lecesse, Mr. Jorge Mattamouros of King & Spalding LLP.
Defendant's Counsel:	Dra. Angelina María Esther Abbona, Procuradora del Tesoro de la Nación Argentina.

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

** Sofia Castillo is a third year law student at American University Washington College of Law specializing in copyright and trademark law.

*** Mona Davies is Assistant Director of International Arbitration Case Law (IACL).

1. Facts of the Case

In the early 1990s, Spanish company Iberia was a significant shareholder in two Argentinean airlines, Aerolineas Argentinas S.A. (ARSA) and Austral-Cielos del Sur S.A. (collectively the Argentinean Airlines). (¶3). In 1994, in compliance with Argentine law, Iberia incorporated a fully-owned Argentine subsidiary, Interinvest S.A. (Interinvest) to serve as the holding company for the Spanish investments in the Argentine airline industry. (¶3). In 1995, the Spanish government created the Sociedad Estatal de Participaciones Industriales ("SEPI") to operate as the holding company for all companies fully or partially owned by the Spanish government, including Iberia's shareholdings in Interinvest. (¶3).

By mid-2001, ARSA filed for bankruptcy reorganization. (¶4). After a bidding procees, Air Comet S.A. ("Air Comet"), a Spanish subsidiary of Grupo Marsans, and SEPI entered into a Share Purchase Agreement on October 2, 2001, through which Air Comet acquired SEPI's 99.2% interest in Interinvest which in turn held 92.1% of ARSA's shares and 90% of AUSA's shares. (¶¶4, 5). At this time, Air Comet was partially owned by two of the three Claimants, Autobuses Urbanos and Transportes de Cercanias. Claimant Teinver became an Air Comet shareholder in 2006. (¶4).

Air Comet paid a purchase price of US$1 for the interest in Interinvest, and agreed to assume the assets and liabilities of the Airlines, retain airline employees for two years, make a US$50 million capital increase, maintain its majority interest in the corporations, service specified flight routes, and to expand aircraft fleets. (¶6). For its part, SEPI agreed to assume the airlines' liabilities up to US$300 million, and to assume commitments resulting from the implementation of the industrial plan up to US$248 million. (¶6). SEPI later agreed to contribute an additional US$205 million to cover the operational losses suffered by the airlines between July and October 2001. (¶6). In December 2002, ARSA and a majority of its creditors reached a settlement on debt restructuring, which was subsequently approved by an Argentine commercial court and by a court of appeals. (¶7).

Claimants alleged that Respondent unlawfully expropriated their investment in the Argentine Airlines in two steps. (¶8). The "formal" expropriation occurred when the Argentine Congress enacted the nationalization of the companies in December 2008. (¶4). However, this formal expropriation was allegedly the culmination of a long process of creeping expropriation which started in October 2004 at the latest. (¶8).

2. *Legal Issues Discussed in the Decision*

(a) *First Jurisdictional Objection: Claimants' Fulfillment of the Procedural Requirements of Article X of the Treaty and the applicability of the MFN clause in Article IV*

The Tribunal interpreted Article X's requirement of amicable negotiations for a period of six months as "a general best efforts obligation for the parties to attempt to amicably settle their dispute". (¶108). With regards to when this six-month period begins, the Tribunal decided on whether there was a formal notification requirement pursuant to the Argentina-Spain BIT and what was the relevant date.

The Tribunal rejected Respondent's argument that Article X required the investor to give formal notice to the host State to commence settlement negotiations. (¶112). Concurring with *Vivendi I* and international jurisprudence, the Tribunal concluded that notification is not only not required but also that the BIT was clear that its only requirement to trigger the six-month period was that the dispute was "in connection with investments". (¶¶112, 115).

The Tribunal rejected Claimants' argument that the six months began from the date of Respondent's actions or omissions that eventually led to the dispute. (¶¶109, 110). The Tribunal followed the ICJ's decision in *Mavrommatis* and the arbitral award in *Maffezini* to establish that the six-month period starts on the date when the dispute cristallyzed, defined as the date in which the injured party identifies a breach and objects to it rather than on the date of the breach itself. (¶¶110, 119). The Tribunal explained that this interpretation accomplishes the policy goal of allowing the host State the opportunity to redress the problem before the investor submits the dispute to arbitration. (¶111). The court then determined that the critical date in this case was June 11, 2008 – six months before Claimant's had filed their claim with ICSID. (¶117).

The Tribunal found that the parties identified two core issues to their dispute: 1) a disagreement over the regulatory framework applied to Claimants regarding airfare caps which began in 2004, and 2) a disagreement over the compensation owed to Claimants for the direct expropriation of their investment which began after 2008. (¶118). The Tribunal determined that, concerning the regulatory framework, an October 2004 letter where Claimants stated their position that Respondent had failed to properly apply its regulations was evidence that a dispute had crystallized. (¶120). Although the Tribunal could not establish a clear date for when the dispute regarding Interinvest's value had crystallized, the Tribunal concluded that the formal expropriation was closely related to the alleged creeping expropriation. Therefore, the negotiations pertaining to

the first disagreement initiated in 2004 were enough to satisfy the six month amicable negotiation requirement of Article X(2). (¶¶122, 123, 124, 125).

The Tribunal agreed with Claimants' assertion that the valuations of the Argentinean Airlines that were conducted in October 2008 and January 2009, as well as the expropriation lawsuit that Respondent initiated against Interinvest after the January 2009 valuation complied with the requirement of exhaustion of local remedies. (¶130). The Tribunal explained that both the arbitral proceeding and the valuation proceedings before Argentinean courts had the same goal of making Claimants whole for the economic loss suffered as a result of the nationalization. (¶132). The Tribunal also concluded that the fact that the domestic expropriation proceedings were brought against Interinvest, an Argentine company owned by Claimants through Air Comet, did not prevent those proceedings from counting for purposes of Article X(2) and (3) when the subject matter of those proceedings was the same as that before the Tribunal. (¶133).

According to the Separate Opinion of Dr. Kamal Hossain, the Tribunal should have stopped its analysis here because it had relied on an express provision of the BIT to arrive at a clear finding. (Separate Opinion, ¶10). The Tribunal, however, also discussed whether the BIT's MFN clause allowed the Tribunal to assert jurisdiction over the dispute. (¶136). The Tribunal concluded that the broad language of Article IV(2) which applied the MFN clause to "all matters" in the BIT, in combination with the very specific exceptions of Article IV(3), allowed an interpretation in favor of Claimants. (¶¶160, 164). Since neither jurisdiction nor admissibility were included in the list of exceptions, the Tribunal looked at how other decisions had applied MFN clauses to determine whether Claimants could avail themselves of the provisions in the Argentina-Australia BIT. (¶¶164, 167).

The Tribunal also referenced UNCTAD's categorization of cases based on their analysis of MFN clauses for purposes of jurisdiction. (¶168). The first category encompasses cases in which claimants invoke an MFN clause to override a procedural requirement for the submission of a claim to international arbitration. (¶¶169, 170). In these cases, claimants' arguments were successful. (¶170). The second category consists of cases where claimants attempted to extend the scope of the mandate of the arbitral tribunal beyond that specifically set forth in the basic treaty through an MFN clause. (¶169, 171). In these cases, claimants' arguments were predominantly rejected.[1] (¶172). The Tribunal

[1] In his separate opinion Dr. Kamal Hossain expressed his disagreement with the relevance of these categories. (Separate Opinion, ¶83). For Dr. Hossain, both types of cases involved a use of the MFN clauses to bypass the consent of the parties.

concluded that this case belonged in the first category because Claimants sought only to override procedural requirements and did not seek to replace the Treaty's provisions on the arbitral forum or rules or to broaden the scope of the legal issues that may be adjudicated through arbitration. (¶172, 173, 182). The Tribunal then found that Claimants could invoke the MFN clause to override procedural conditions and had successfully complied with the requirements of the Australia-Argentina BIT. (¶186).

(a) Second Jurisdictional Objection: Claimants' Standing

Respondent argued that Claimants lacked standing to bring their claims because (a) Claimants were seeking to recover damages from for harms inflicted upon companies in which Claimants invested and (b) Claimants were not direct shareholders in Interinvest. (¶¶187, 207). The Tribunal concluded these arguments lacked merit because Article I(2)'s definition of investment was broad and inclusive, implying the treaty protected both direct and indirect shareholders. (¶209, 230, 238).

The Tribunal determined that the clarity of the Treaty's language prevailed over Respondent's arguments based on ICJ jurisprudence on shareholder rights. (¶¶215, 221). The Tribunal explained that Respondent's argument based on Article 25(2)(b) of the ICSID Convention to prevent shareholders of domestic companies to bring claims did not apply because Spain and Argentina had not agreed to treat locally incorporated companies owned by nationals of the other State as domestic companies. (¶225). The Tribunal also rejected Respondent's assertion that Argentinean laws against derivative claims prevented Claimants from pursuing action in this case. (¶226). The Tribunal explained that domestic legislation is only relevant for purposes of determining questions of fact in connection to a jurisdictional issue before ICSID and are not jurisdictional requirements. (¶227).

The Tribunal also found that Claimants' reorganization after they had filed their claim before ICSID had no effect on jurisdiction. (¶255, 259). The Tribunal explained that since the reorganization postdated the filing and that at the date of the filing the Tribunal did have jurisdiction, the Tribunal could address this issue during the merits phase. (¶259).

Dr. Kamal Hossain expressed his disagreement with this interpretation of the treaty. (Separate Opinion, ¶¶22, 23). In his view, a plain reading of the words "shares held" in Article I(2) should limit the definition of investments to shares directly held only, unless indirectly held shares are expressly included. (Separate Opinion, ¶23). Moreover, Dr. Hossain shared Respondent's concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain

of claims. (Separate Opinion, ¶27). Dr. Kossain also pointed to the text of the Treaty that incorporated the legislation of the host country as a relevant characteristic in the definition of investment in Article I(2). (Separate Opinion, ¶22). For Dr. Kossain, Claimants' investments were not necessarily included within Argentina's consent to arbitration. (Separate Opinion, ¶28).

(b) Third Jurisdictional Objection: Issues of State Attribution

The Tribunal concluded that, based on case law, State attribution can be relevant at the jurisdictional level when the parties represent a fairly cut and dry issue that will determine whether there is jurisdiction. (¶271). The Tribunal determined that, based on *Hamester*, the attribution of the acts by unions and Mr. Cirielli was not clear-cut and that it needed more evidence to adjudicate such fact intensive allegations. (¶¶273, 274).

(c) Fourth Jurisdictional Objection: The Legality of Claimants' Investment

The Tribunal explained that the protections of ICSID dispute settlement mechanism should not extend to investments that were illegal at the time they were made. (¶¶317, 318, 320). Article I(2) expressly required that investments under the BIT had to comply with the legislation of the host country, in this case Argentina. (¶318). As a result, the Tribunal concluded that allegations of violations of Spanish law and allegations of violations of Argentinean law subsequent to Claimants' acquisition of their investment were irrelevant. (¶323).

3. Decision

The Tribunal rejected all of Respondent's objections on jurisdiction and postponed decisions on issues of State attribution and costs to the merits phase.