

Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. v. Republic of Peru
Annulment

DISSENTING OPINION OF SIR FRANKLIN BERMAN

1. I can well understand, and indeed sympathise with, the decision of my colleagues that the present case does not meet the standard for annulment under the ICSID Convention. These are always matters of judgement, sometimes quite delicate judgement, and, if I find myself coming down on the other side of the line from them, I doubt whether the distance between us is all that great. Because, however, I take a sterner view than they do of the manifold shortcomings of the Tribunal's Award, I should explain why I do so, in the interests of the ICSID system as a whole, and as a pointer for future Tribunals.
2. There are two essential features to this case, the first being that the proceedings had been dismissed *in limine* on jurisdictional grounds, without the Claimant being allowed a hearing on the merits of its claims, and the second being that the ground for doing so was the reach *ratione temporis* of the consent to ICSID jurisdiction under the Bilateral Investment Treaty (BIT) which the Claimant had invoked.
3. The first of these two features is, to my way of thinking, fundamental. It plays itself out against the background of the well-recognized fact that the whole aim behind the Washington Convention which created ICSID – and indeed a principal aim behind the entire network of investment treaties of which the present BIT is one example – was to create a procedure for the settlement of disputes between investors and host States which would be entirely separate from and independent of the national courts of the host State. The question therefore is: what requirements does this state of affairs impose on an ICSID Tribunal faced with a claim by the host State, as Respondent before it, that that fundamental objective has not been achieved in the particular circumstances of a particular claim? What is a Claimant (one might say 'an ICSID Claimant') entitled to expect of the Tribunal, and what indeed are we all, as users of the ICSID system, entitled to

expect when that sort of claim is put forward? A further question is then (though subsidiary to the first): if the case is one under a BIT, what impact does the fundamental aim just described have on the assessment of the ‘object and purpose’ (to borrow a phrase from the Vienna Convention on the Law of Treaties) of the BIT itself, and hence on its interpretation?

4. There is obviously room for some discussion as to what the standard of ‘manifestness’ under Article 52(1) of the Washington Convention should be understood to mean in relation to jurisdictional error on the part of a Tribunal, and indeed the question is very properly addressed at paragraphs 99-101 of the ad hoc Committee’s Decision. No doubt the Committee is right to say that there is no warrant for holding the notion of ‘manifestness’ to mean anything different for one head of annulment under the Article than for another. But that does not, to my mind, stand in the way at all of insisting that, when a Tribunal proposes to non-suit a Claimant at the initial stage, i.e. so as to preclude any airing of the claims on their merits (or demerits), the grounds for doing so must be clear and strong, and in particular that they must be clearly explained and justified, so as to enable the Claimant (not to mention other consumers of the ICSID system) to understand what the Tribunal has done and why. Where, on the other hand, the case is not sufficiently clear as to enable the issue to be convincingly determined in limine, the proper course is plainly that provided for in Article 41(2) of the Convention and in the Arbitration Rules, namely to join the preliminary objection to the merits, and determine it then on the basis of full and complete argument. The converse of this proposition is of course that, if a Tribunal chooses to decline jurisdiction at the preliminary stage without adequately explaining the reasons why, then one is at once within the area of annulable error – if not on the basis of an excess of powers, then at least on the basis of a failure to give reasons (though, as the ad hoc Committee correctly observes at paragraph 72 of the Decision, it is quite possible to conceive of circumstances in which two grounds for annulment should not be thought of as operating in isolation, but instead as reinforcing one another).

5. To determine whether the Tribunal did in fact adequately explain the reasons for its conclusion, I have to move to the second of the essential features identified in paragraph 2 above, i.e. that the ground on which the Tribunal chose^{*} to decline jurisdiction was the reach *ratione temporis* of the consent to ICSID jurisdiction under the BIT. In making this choice the Tribunal (again I borrow from the Committee's Decision at paragraph 67) took upon itself the need first to determine what was meant by the term 'dispute' in the second sentence of Article 2 of the BIT, and then to decide whether the circumstances of the case before it met or did not meet that meaning. As the Committee rightly puts it, the first is a straightforward question of treaty interpretation, the second of its application, reflecting the pairing often found in dispute settlement clauses so that they cover disputes over 'the interpretation or application' of the treaty (as, for example, in Article 8 of the present BIT). The Committee also has my complete support when it says that the indisputable requirement, in respect of the first of these, treaty interpretation, is to apply the rules laid down in Article 31 and subsequent Articles of the Vienna Convention. The Committee goes on to say that, even while the Tribunal failed to describe what rules of treaty interpretation it was applying, it (the Committee) has no basis for concluding that the Tribunal disregarded any significant element of the well-known and widely recognised international rules of treaty interpretation. Indeed, one may add, that sort of failing would be surprising in the extreme in the case of a Tribunal of such distinction, and such wide experience specifically in the field of public international law.

6. But to suppose that the Tribunal must have applied the proper rules of treaty interpretation is not, to my way of thinking, the end of the matter. The real question, as I have suggested above, is whether they adequately explained what

^{*} The term 'chose' refers to nothing more than that, as duly noted by the Committee in paragraph 67 of the Decision, the Tribunal, faced with a series of Preliminary Objections by the Respondent, elected to rest the entire weight of its decision on one of them alone – not in itself an objectionable course, though it would have been equally open to the Tribunal to have canvassed in its Award all of the grounds as argued before it, and to have adopted one or more of them in the alternative (assuming them to be well founded).

they were doing in the interpretative process, and did so specifically with the very particular care needed from a Tribunal proposing, on the basis of the interpretative outcome, to decline jurisdiction altogether. And the only way to answer that question, given that the Tribunal (somewhat surprisingly, I think) did neglect to tell us what they were doing, is to look to what the Tribunal actually did as evidence of what rules they were applying. It is precisely in that area that I part company with my colleagues, and find the Award so defective that I would be prepared to annul it.

7. To explain why, I need to go in some greater detail into the interpretation of Article 2 of the BIT, not in order to determine its ‘correct’ interpretation (as the Committee rightly says, that would amount to appeal, not annulment), but in order to bring out the elements that on any analysis must necessarily have formed part of a properly-conducted interpretative process.
8. The Vienna Convention tells us that the essence of treaty interpretation lies in extracting the ordinary meaning of the terms used, in their context, and in the light of the object and purpose of the treaty as a whole. It goes on to add that other indicators of the intention of the Treaty Parties may be admissible in defined circumstances for defined purposes. So when the issue was, as here, how the term ‘dispute’ was to be understood for the purposes of Article 2 of the BIT, one would have expected a number of straightforward enquiries to have been undertaken, including: a textual analysis of the provision in question and its purpose; an analysis of other connected provisions of the treaty; an examination of other places in the treaty where the same terms had been used, to see what light that might throw on the intentions behind Article 2; a discussion of the object and purpose of the treaty as a whole as a guide to the interpretation of Article 2; a search for whatever other material might be available to illuminate the precise intentions of the Treaty Parties in agreeing to Article 2; and so on and so forth. There is nothing special about this list; the items in it are simply the normal tools of treaty interpretation.

9. At this point a digression is however in order, to bring out an unusual, though not insignificant, aspect of the broader background against which the exercise in treaty interpretation was taking place. Every case of the interpretation of a BIT by an ICSID Tribunal shares this unusual feature, namely that the Tribunal has to find the meaning of a bilateral instrument, one of the Parties to which (the Respondent) will be a party before the Tribunal, while the other Treaty Party by definition will not. Or, to put the matter the other way round, one of the parties to the arbitration before the Tribunal (but not the other) will have been a stranger to the treaty negotiation (see paragraph 70 of the Committee's Decision). That circumstance surely imposes a particular duty of caution on the Tribunal: it can clearly not discount assertions put forward in argument by the Respondent as to the intentions behind the BIT and its negotiation (since that is authentic information which may be of importance), but it must at the same time treat them with all due caution, in the interests of its overriding duty to treat the parties to the arbitration on a basis of complete equality (since it is also possible that assertions by the Respondent may be incomplete, misleading or even self-serving). In other words, it must be very rarely indeed that an ICSID Tribunal, confronted with a disputed issue of interpretation of a BIT, will accept at its face value the assertions of the Respondent as to its meaning without some sufficient objective evidence to back them up.
10. The point can be put quite vividly in another way. At issue in the interpretation of Article 2 of the BIT was not Peru's consent to ICSID jurisdiction, taken as it were as a subject on its own; what was at issue was the mutual acceptance of ICSID jurisdiction by both of the Parties as part of the bargain they agreed to in the BIT. When it came to pre-treaty investment by their nationals in one another's territory, Peru was not accepting any less jurisdiction than Chile, nor was Chile accepting any more jurisdiction than Peru. So, although it may on the surface have appeared, in terms of the forensic situation before the Tribunal, that the question for determination was how far one of the two litigating parties before

it had consented to its jurisdiction, the underlying element of mutuality must surely have been obvious to a Tribunal of this eminence even if neither of the parties brought it out four-square in its argument.

11. That last consideration leads in turn to another particular feature of the present case. If what I have said in the last two paragraphs conjures up the image of the ‘absent Contracting Party’, it seems that that party (Chile) was not quite as absent as all that. The Committee says, in paragraph 79 of the Decision, that the information about Chile’s views on Article 2 is scarce. This must surely rank as a considerable understatement. For we know that the Tribunal at an early stage in the proceedings turned down an application by the Respondent itself (Peru) to suspend the arbitration until the question of the correct interpretation of Article 2 in relation to Lucchetti’s investment had been established in a State-to-State arbitration Peru was initiating under Article 8 of the BIT (see paragraph 9 of the Award). From this it must necessarily follow that there was a formal disagreement between the two Treaty Parties on this question, and that the Tribunal had been made fully aware at least of its existence, if not of the particular positions being advocated by each Treaty Party. Is that not in and of itself yet another reason for handling with extra caution, as suggested above, arguments on the question advanced before the Tribunal by the only Treaty Party that was in fact present before it?

12. It needs no lengthy analysis of the Tribunal’s Award to discover that virtually none of the expectations set out in paragraph 8 above is fulfilled in it. As the Committee points out in paragraphs 92-94 of the Decision, there is no discussion of the fact that Article 2 refers equally in its second sentence to ‘differences’ on the same footing as ‘disputes’ (though that might be explained by the fact that neither of the parties made anything of this point). But there is virtually no discussion either of the fact that that sentence is in form an exception to the general principle of retroactivity expressly laid down in the first sentence, and of the implications of that for its interpretation; or of the fact that the term ‘dispute’

is used elsewhere, in two Articles, Articles 8 & 9, either of which, on its face, would appear to cover Lucchetti's investment unless the exception in Article 2 applied; or of the object and purpose of the BIT and its possible significance for interpretative purposes. Therefore, applying the touchstone set out in paragraph 6 above, the only possible conclusion – whatever supposition one is inclined to make about the rules of interpretation the Tribunal 'must surely have' brought into play – is that the actual evidence of their Award does not sustain the supposition that the Tribunal did diligently and systematically apply the Vienna Convention rules at all, let alone with the particular care the situation would seem to have dictated.

13. I am tempted to leave the matter there, but duty dictates a more precise indication of how the Award fails to meet in this respect the accepted standard of reasoning. The key passages in this respect are paragraphs 48 and 59; they constitute the Tribunal's own findings on the *ratione temporis* exception, and follow on from a lengthy section summarizing the respective submissions of the parties, but their striking feature is that neither paragraph recapitulates the language of Article 2 or seeks to subject it to any form of analysis of any kind. Paragraph 48, more strikingly still, launches directly into a brief discussion of the 'accepted meaning' of 'dispute' as a 'legal concept' in international law without the slightest discussion to establish what the Treaty Parties may have intended in the specific context of Article 2, with its first sentence expressly making the BIT substantively retrospective. The ad hoc Committee must surely be close to the mark when it surmises (at paragraph 80) that the purpose behind the second sentence was "to prevent that, where a dispute or a difference had arisen at a time when the BIT did not exist, the investor would be provided with new ammunition as a result of the subsequent entry into force of the BIT", but of that surmise there is not a trace in the terms of the Award itself. Moreover, even if the surmise is shown to be correct, the story doesn't end there; it must necessarily presuppose some examination of whether the Treaty Parties, for the purpose of putting that common intention into effect, did or did not have in mind, beyond the subject

around which the ‘dispute’ revolved, some identity of parties, some identity of the legal obligations in play, some identity of the actions or omissions constituting the matters in dispute. Instead, more or less all that the reader finds, following the establishment in the abstract of what ‘dispute’ means (paragraph 48), is the ex cathedra assertion (paragraph 50) that what the Tribunal has to determine is whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute. No authority is given for this proposition arising out of the BIT itself; the only authority is a very old decision of the Permanent Court of International Justice (and a recent ICSID Award which the ad hoc Committee rightly finds to be out of context, and therefore irrelevant to the point at issue). Finally, when the reader does encounter at the end something approaching (though only very approximately) a textual analysis of Article 2 of the BIT (paragraph 59), it is in a form which treats the meaning of the second sentence of the Article as already having been conclusively determined, so that the assertion of a claim under the intervening BIT (retrospective though the BIT is) cannot be allowed to ‘nullify’ the second sentence or ‘deprive it’ of any (*sic!*) meaning.

14. None of this is of course to say that the Tribunal’s reading of what Article 2 as a whole properly means is not a tenable one. But there are other tenable interpretations too. And between the premise (that ‘dispute’ has a given meaning), and the conclusion (that there is a given test to determine whether a particular dispute continues in being or not), and the confirmatory conclusion (that the application of this test to the premise can’t be set aside by invoking the BIT), there lie a whole series of steps in the logical chain. Virtually none of these appears on the face of the Award; they have to be inferred by the educated reader; and in consequence the Award clearly fails to meet the accepted requirement (as enunciated in the Annulment Decision in MINE v. Guinea) that “..... the requirement that an award has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law the requirement to state

reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law.”

15. That would be enough in itself, but I feel I must touch as well on another problem area which the ad hoc Committee deals with in its Decision, but too perfunctorily as I see it. I have referred above to the Tribunal’s twofold task – of interpreting the BIT and then applying it; this problem area relates to the second of those. Whereas treaty interpretation can often be a detached exercise, it is virtually inevitable that treaty application will entail to some extent an assessment of the facts of the particular case and their correlation with the legal rights and obligations in play. So it is in this instance. The ad hoc Committee points out, referring to paragraph 53 of the Award, that “there is no doubt that what Lucchetti refers to as the Municipality of Lima’s subjective assertions did become a crucial element in the Tribunal’s ultimate decision”, and goes on to discuss (in paragraph 122 of its Decision) whether Lucchetti was or was not given adequate opportunity to make its case against these assertions. With everything the Committee says in these two paragraphs I am in complete agreement. But for me the question does not stop there, the crucial issue being, not whether the parties had adequate opportunity to advance their factual cases, but what steps the Tribunal took to evaluate them, given that (as indicated) they became a ‘crucial element’ in its decision. To my mind, it is inescapable that every ‘crucial element’ in an ICSID Tribunal’s decision has to be the subject of a finding by the Tribunal; that, if the element is a factual element which is in dispute between the parties, the finding has to be the result of a proper fact-finding procedure; and that the elements and steps in this procedure must be spelled out in the Award. When one looks at the text of the Award, however, all that can be discovered (the key passages are at paragraphs 51-53) is two paragraphs summarizing the recitals whose bona fides the Claimant was challenging, followed without a break by the conclusion that the dispute was therefore the ‘same dispute’ as the pre-BIT one.

16. The only conclusion I can draw is that the Tribunal simply failed to put to the proof by any recognized fact-finding process these factual assertions by the Respondent, and the challenge to them by the Claimant, and that this constitutes in the circumstances (i.e. because the facts in issue became a ‘critical element’ in the Award) a “serious departure from a fundamental rule of procedure” within the meaning of Article 52(1)(d) of the Washington Convention.
17. To be sure, the waters were muddied to a considerable extent, as the proceedings developed, by the introduction on the part of the Claimant of the argument that the Tribunal was somehow under an obligation provisionally to accept its (the Claimant’s) version of the facts for the purpose of deciding whether the Tribunal did have jurisdiction or not. The ad hoc Committee disposes of this argument summarily, and is quite right to do so. It is one thing to say that factual matters can or should be provisionally accepted at the preliminary phase, because there will be a full opportunity to put them to the test definitively later on. But if particular facts are a critical element in the establishment of jurisdiction itself, so that the decision to accept or to deny jurisdiction disposes of them once and for all for this purpose, how can it be seriously claimed that those facts should be assumed rather than proved? However – and this is the essential point – the dismissal of that argument should not be converted into exactly the same mistake, but with the situation turned on its head. If the Claimant’s facts can’t simply be assumed for the purpose of upholding jurisdiction, then surely it follows that the Respondent’s facts can’t simply be assumed for the purpose of denying it.

