

Highbury International AVV

Email and FEDEX

GRIEVANCE REPORT

FOR: Dr. Jim Yong Kim, M.D., Ph.D. (Chairman of ICSID's Administrative Council) and Dr. Meg Kinnear (ICSID's Secretary General)

FROM: Manuel Fernández (Director of Highbury International AVV.)

SUBJECT: Grievance Report (Case CIADI No ARB/11/1).

DATE: January 3, 2014

I. INTRODUCTION

1. In accordance with what was explained in Highbury International AVV's letter of the same date, hereunder this report states the main grievances regarding the above referenced case. The grievances are several. They relate not only to the quality of the award but also to the excessive cost and time the arbitrators took to issue the award.

II. GRIEVANCES

A. TIME

2. The Tribunal took almost three years to issue a ruling on one jurisdictional challenge. The ruling suggests, however, that a related party could have brought the arbitration.

3. The Tribunal took more than one year deliberating. If one considers that, the tribunal only analyzed the first jurisdictional objection, the time involved seems unreasonable and unjustified.

4. The award comprises of 74 pages but only 22 contain legal analysis. It is difficult to understand, under any standard, that the Tribunal has taken thirteen months to write only a 22 pages analysis.

5. What is most troubling about the award is neither claimants nor respondents were served as the dispute remains essentially unresolved.

B. COSTS

6. The Tribunal initially appeared to be moving in an expedited fashion. In order to justify its acting in an expedited fashion, it requested the appointment of an assistant. Nevertheless, contrary to the practice of other Tribunals, where the Chairman takes over those costs, said assistant generated additional cost to the parties.¹ Although this was not usual not provided for in the Rules, the parties felt that they could really not challenge nor dispute the Tribunal's request for this added expense.

7. The fees charged by the Arbitrators apparently exceeded \$1,000,000.² Considering that they only decided one jurisdictional objection, this seems totally disproportionate to the work that should have been devoted to that issue.

8. The Tribunal failed to mitigate costs and in fact, that increased them unnecessarily. For instance, it requested the presence of witnesses which were not requested by any of the parties and whose testimony dealt with substantive and not jurisdictional matters.

9. Although all the members of the Tribunal reside in Latin America, they decided to deliberate in Paris.³

C. IGNORED BASIC LEGAL PRINCIPLES

10. As set forth in the Request for Annulment, the Tribunal ignored basic legal principles and elementary concepts of International law.⁴

¹ Said assistant charged a fee of US\$ 150 per hour. See letter of the Tribunal dated 15 July 2011.

² Moreover, more than three months after having received the award, we have no statement of account. We hope that, given the quality of the glitches herein described, a balance will exist, particularly given the advanced on costs made, totaling US\$ 1,332,161.15.

³ See paragraph 40 of the Award.

⁴ For instance, in its findings, the Tribunal ignored the basic concept that the existence of the investment is a preliminary domestic law issue. The Tribunal considered in its jurisdictional decision, that it was empowered to not apply domestic law that establishes the validity of the legal acts which clearly and expressly grant *ius standi* to Claimants to bring suit. The Tribunal also ignored that the critical date to determine the "*ius standi*" (date of commencement of the arbitral proceedings) cannot be confused with the critical date in which a corporate restructure may be performed (treaty shopping), that is to say the date on which the dispute arose. Moreover, the Tribunal disregarded the proper law, exceeded its jurisdictional mandate, and thereby its decision became subject to annulment under Art. 52 of the ICSID Convention. The Tribunal also breached material rules of procedure, which clearly show that it acted in a biased way. Finally, but not less important,

11. We naturally understand that ICSID does not become involved in the decision-making aspect of any case. However, it is involved in the appointment of arbitrators when required to do so such as appointing the chairman and the members of the *ad hoc* committee. Therefore, it is respectfully requested that the *ad hoc* committee that is appointed contain arbitrators with experience in investment arbitration. We also request that ICSID insure that the members of the *ad hoc* committee not have the same nationality as any members of the Tribunal that decided this case and take special care to make sure that there are no relations between the *ad hoc* Committee and the Tribunal. We would also request that care be taken to make sure that any member of the ICSID legal team involved in the selection process does not have the same nationality or relationship with the members of the Arbitral Tribunal who rendered the challenged award.

We trust that the requests made will be deemed fair and reasonable.

Sincerely,

A handwritten signature in black ink, appearing to be 'M. S. ...', is written over a horizontal line.

as may be seen in the Request for Annulment, the Award is based on reasons that do not qualify as such due to the fact that they are frivolous, manifestly contradictory or unintelligible.