Due process in international investment arbitration – reflections on annulment proceedings in ICSID and Swiss Federal Tribunal

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INTRODUCTION

As one of the most cardinal guarantees of arbitral procedures, due process plays a significant role in holding fair and equitable proceedings in a meaningful manner and provides equality between the parties to a dispute.[1] The present paper's focus is on two annulment decisions rendered in the context of the ICSID and Swiss arbitration law based on this concept.

The term 'due process' does not appear in either the ICSID Convention or the Swiss arbitration law, including the Swiss Private International Law Act ('PILA'). Moreover, there is still confusion as to whether the concept only implies the right to be heard, or includes fundamental procedural guarantees and equal treatment as well.[2] However, the most fundamental manifestation of due process seems to be the right to be heard, which has been referred to as the 'Magna Carta' of arbitration proceedings.[3] This right – expressed in the Latin maxim *audiatur et altera pars* – basically requires that the parties 'must be heard on all issues affecting their legal position.'[4]

Despite the lack of explicit mention of due process, both the ICSID Convention and the PILA contain provisions regarding the annulment of awards based on the violation of this concept.

ICSID awards may be annulled by *ad hoc* annulment committees under the grounds provided in Article 52 of the Convention. In particular, according to Article 52(1)(d):

> (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: … (d) that there has been a serious departure from a fundamental rule of procedure … .

On the other hand, arbitral awards rendered by tribunals seated in Switzerland may be annulled by the Swiss Federal Court under Article 190(2)(d) of the PILA, which provides:

> (2) The award can only be challenged on the grounds that: … (d) the principle of equal treatment of the parties or their right to be heard in adversarial proceedings was violated … .

Generally, one can find few successful annulment requests in these two fora. It means that both the ICSID *ad hoc* committees and the Swiss

[1] Charles T. Kotuby Jr. & Luke A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, OUP, 2017, p. 176.

[2] Simon Hohler, 'Country Report: Switzerland' in Franco Ferrari *et al.* (eds), *Due Process as a Limit to Discretion in International Commercial Arbitration*, Kluwer, 2020, pp. 375-376.

[3] Franco Ferrari *et al.*, 'General Report' in Franco Ferrari *et al.* (eds), *Due Process as a Limit to Discretion in International Commercial Arbitration*, Kluwer, 2020, p. 19.

[4] Christoph Schreuer *et al.*, *The ICSID Convention: A Commentary*, CUP, 2009, p. 987.

Federal Tribunal take an extreme hands-off approach in dealing with annulment proceedings.[5]

The two annulment decisions under consideration are among decisions that crystallize the content of due process. In fact, they demonstrate how one should treat the concept in a teleological and pragmatic way.

1. ISSUES FALLING OUTSIDE THE SCOPE OF DUE PROCESS: CRIMINAL LAW PRINCIPLES

Before taking a position on the factual issues, an arbitral body must ascertain the legal scope of a given concept. Therefore, for a matter to be accepted as a factual violation of due process, it must legally fall within the scope of due process. In this respect, *Fraport v. Philippines* is an illustrative case, in that two claims seeking to annul the award were declared to be outside the scope of due process.

1.1. FACTUAL BACKGROUND IN FRAPORT V. PHILIPPINES

The dispute in this case arose under an investment made by Fraport AG Frankfurt Airport Services Worldwide ("Fraport"), a German company, in Philippine International Air Terminals Co., Inc. ("PIATCO"), a Philippine company. In 1997, PIATCO and the Philippine government concluded a concession agreement concerning an international passenger terminal at Ninoy Aquino International Airport in Manila ("Terminal 3"). In 1999, Fraport's investment started by entering into four agreements under which it acquired direct and indirect interests in PIATCO. However, in 2002, the Philippine authorities enounced that the Terminal 3 contracts were not to be complied with, because they had found that the contracts were null and void. Moreover, the Supreme Court of the Philippines determined that Philippine law and public policy had been violated, and consequently, the contracts were null and void *ab initio*. Thus, in 2003, Fraport initiated arbitral proceedings against the Philippines in an ICSID Tribunal ("Tribunal") under the Germany-Philippines BIT of 2000.[6]

In the arbitration, the Philippines submitted that the alleged investment of Fraport fell outside the scope of the BIT, since it has been made in violation of Philippine law, particularly, its Anti-Dummy Law ("ADL"). In this respect, the Philippines invoked Article 1(1) of the BIT, which provides that an investment is "accepted in accordance with the respective laws and regulations of either Contracting State."[7]

In contrast, Fraport contended that it made an investment under the aforesaid Article, and that the Philippines had been aware of the details of PIATCO's shareholding structure, and yet, it never charged Fraport with any violation of the ADL.[8]

Finally, in August 2007, the Tribunal issued its award against Fraport, finding that its investment had not been made under Philippine law and thus, it did not fall within the scope of the Tribunal's jurisdiction under the BIT.[9]

Subsequently, in December 2007, Fraport filed before an ICSID *ad hoc* Committee ("Committee") an application requesting the annulment of the award.

In its application, Fraport presented three grounds, the second of which is relevant for the present paper, under Article 52(1)(d) of the ICSID Convention.[10]

[5] See, for instance, Felix Dasser & Piotr Wójtowicz, 'Challenges of Swiss Arbitral Awards—Updated Statistical Data as of 2017', *ASA Bulletin*, vol 36, no 2, 2018, p. 280 (suggesting that the success rate of annulment proceedings before the Swiss Federal Tribunal is less than 10 per cent).

[6] *Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, 23 December 2010, paras. 14–25.

[7] para. 27.

[8] para. 28.

[9] para. 30.

[10] For a summary of the Award, for example, see Ahmed S. El Kosheri, 'Reflections on the ICSID Annulment Decision Rendered in the FRAPORT/Philippines Case' in Herbert Kronke and Karsten Thorn (eds), *Grenzen überwinden – Prinzipien bewahren. Festschrift for Bernd von Hoffmann*, Gieseking, 2011, pp. 996–1001.

1.2. THE NATURE OF CRIMINAL LAW PRINCIPLES

Under Article 52(1)(d), Fraport alleged that by denial of the principles that must be respected when determining whether a criminal law had been violated, the Tribunal committed a serious departure from a fundamental rule of procedure. In particular, Fraport submitted that the principles of *nullum crimen sine lege* (no crime without law) and *in dubio pro reo* (when in doubt, in favor of the defendant) were violated.[11]

For Fraport, the "general principle of due process" requires that the two principles must be respected in the interpretation of ADL as a criminal statute. The failure to do so, according to Fraport, is a breach of a fundamental rule of procedure. The Philippines, by contrast, maintained that the principles of *nullum crimen sine lege* and *in dubio pro reo* are not rules of procedure, but a substantive rule and a standard of evidential proof, respectively.[12]

As for the principles of *nullum crimen sine lege* and *in dubio pro reo*, the Committee found that the former was not a rule of procedure, and the latter could not be applied in international arbitral proceedings. For the Committee, in the context of ICSID proceedings, the application of the second principle, *ie*. the presumption of innocence, could "amount to a failure of due process since it may unbalance the essential equality between the parties."[13] Therefore, the Committee rejected Fraport's argument regarding the criminal law principles allegedly violated by the Tribunal.

2. RIGHT TO BE HEARD

The right to be heard has multiple manifestations, including (i) the right to make submissions and evidentiary offers in support of one's case, (ii) the right to comment on submissions and evidentiary offers by the opposing party, (iii) the right to comment on findings of the arbitral tribunal, and (iv) the arbitral tribunal's duty to take cognizance of and consider the parties' submissions and evidentiary offers.[14] In this section, one of the facets of the right to be heard is discussed, and then, two limitations of this right will be extracted from the case law.

2.1. THE RIGHT TO PRODUCE EVIDENCE IN SUPPORT OF ONE'S CASE

According to the right to be heard, every party not only must have a reasonable opportunity to produce evidence in support of its case, but also must be given the opportunity to react to the evidence submitted by the other party. In *Fraport v. Philippines*, invoking Article 52(1)(d), Fraport argued that by relying on evidence admitted after the closure of proceedings, thereby denying Fraport's right to be heard, the Tribunal committed a serious breach of a fundamental rule of procedure. In this regard, the Tribunal had admitted evidence from the Philippine prosecutor related to the criminal charges regarding Fraport's alleged breach of the ADL.[15]

Recognizing the right to be heard as an undoubtedly accepted fundamental rule of procedure, the Committee declared that the rights of the parties to present their case—the so-called *principe de la contradiction*—requires the right to produce submissions on evidence presented by the opponent. Importantly, the Committee added that the right to be heard cannot be disregarded simply because both parties were equally disadvantaged. Moreover, the Committee mentioned that a party to ICSID proceedings may well lose its right to be heard if it raises no objection in this respect, or has already waived this right (ICSID Arbitration Rule 27).[16]

[11] para. 120.
[12] paras. 121 & 134.
[13] paras. 191 & 193.
[14] Ferrari *et al.*, 'General Report', *op.cit.*, pp. 19–30.
[15] para. 120.
[16] paras. 199–200, 202 & 204.

However, the Committee found that Fraport had not waived its right since the Tribunal had not rendered a decision to which Fraport could object.[17] Against this background, the Committee found the Tribunal's treatment "of the parties following receipt of the Prosecutor's Resolution in serious departure from the fundamental rule of procedure entitling the parties to be heard."[18] In particular, the Committee found that the Tribunal failed to reopen the proceedings following its receipt of the Resolution and related documents, which was in denial of the right of the parties to make submissions on this matter.[19] Further, the receipt of the Prosecutor's Resolution, according to the Committee, was a "highly material development" in this case,[20] and "the Tribunal could have reached a different finding had it found that the prosecutor had access to the secret shareholder agreements."[21]

Therefore, the Committee ruled that the Arbitral Award was annulled in its entirety based on the infringement of the party's right to be heard – consisting of the opportunity to adduce evidence and argument on its claim and in rebuttal of those of its opponents – under Article 52(1)(d) of the ICSID Convention.[22]

2.2. LIMITATIONS OF THE RIGHT TO BE HEARD

Unlike the criminal law principles, discussed above in *Fraport v. Philippines*, there is no doubt that the right to be heard falls within the realm of due process. However, there are some limitations to the right to be heard. Evidence may be rejected by the arbitral tribunal without violating the right to be heard, provided, *inter alia*, that (i) the evidence is unconvincing, (ii) the fact to be proven is already established or is irrelevant, or (iii) the arbitral tribunal, in an anticipated assessment of the evidence, reaches the conclusion that it is already persuaded and that the alleged evidence cannot modify its conviction.[23] Two of these possible limitations were discussed in *Deutsche Telekom v. India*.

2.2.1. FACTUAL BACKGROUND IN DEUTSCHE TELEKOM V. INDIA

In this case, the decision rendered by the Swiss Federal Tribunal in 2018 arose out of a dispute between the Republic of India ("India") and Deutsche Telekom AG ("Telekom"), a German telecommunication company.[24]

Telekom possesses almost a fifth of the capital in Devas Multimedia ("Devas"), an Indian telecommunication company. Through Deutsche Telekom Asia Pty Ltd ("Telekom Asia"), a Singapore-based, wholly owned subsidiary, Devas concluded a contract with Antrix, an Indian State-owned company, for setting up celestial equipment – in particular, two satellites – by Devas. However, the subject of the contract never materialized, and in 2011, Antrix informed Devas of the termination of the contract due to the decision of the Indian Cabinet Committee on Security not to give permission to launch the satellites for commercial purposes.[25]

[17] para. 234. Although, it has alternatively been suggested that with a pre-emptive objection, the parties may have preserved their right to invoke Article 52(1)(d). See Matthias Scherer, 'ICSID Annulment Proceedings Based on Serious Departure from a Fundamental Rule of Procedure (Article 52(1)(d) of the ICSID Convention)', *Czech (& Central European) Yearbook of Arbitration*, 2011, p. 224.

[18] para. 218.

[19] paras. 235 & 244.

[20] paras. 211–212.

[21] Scherer, *op.cit.*, p. 223.

[22] para. 247.

[23] Simon Hohler, 'Country Report: Switzerland' in Ferrari *et al.* (eds), *op.cit*, pp. 392–393.

[24] The Parties' names were not announced in the decisions of the Swiss Federal Tribunal. However, they have been made public in the Global Arbitration Review (GAR). See <https://globalarbitrationreview.com/swiss-court-upholds-treaty-award-against-india>.

[25] *4A_65/2018*, Decision of the Swiss Federal Tribunal, 11 December 2018, para. A.b.

Apart from the dispute between Devas and Antrix,[26] in 2013, Telekom initiated a proceeding against India before an *ad hoc* arbitral tribunal with its seat in Geneva based on the Germany-India BIT of 1998, alleging violation of Article 3 (fair and equitable treatment) and Article 5 (prohibition of expropriation).

In 2017, the arbitral tribunal issued an interim award, declaring that it was able to exercise jurisdiction over the dispute, and that India had violated the standard of fair and equitable treatment under the BIT. It further bifurcated the proceedings, leaving determination of the amount of damages resulting from the breach for the next phase.[27]

India, in consequence, sought to have the award annulled by the Swiss Federal Tribunal, which dismissed the application. In order to challenge the arbitral tribunal's award, India, *inter alia*,[28] submitted two arguments regarding due process, in particular the right to be heard.

However, both arguments were rejected since, according to the Swiss Federal Tribunal, they did not meet the limitations of the right to be heard, which will be explained bellow.

2.2.2. PUNCTUALITY OF THE REQUEST

In the event of a belated submission, the tribunal may reject the request. The right to be heard can arguably even impose an obligation for the tribunal to do so. As was observed by the Paris Court of Appeal in 2015, "the fact that the arbitrators can rule out belated submissions, far from violating due process, ensures the respect of due process."[29]

In the instant case, India asserted that the BIT covered only *direct* investment, and for it to be extended to *indirect* investment, there must be an express provision to that effect. In this respect, India claimed that its right to be heard was breached. It asserted that it had been denied the right to submit the *travaux préparatoires* for the BIT entered into between India and the Netherlands in 1995. India argued that its right to adduce evidence, as a facet of the right to be heard, was therefore violated, and that the arbitral award must thus be annulled in accordance with Article 190(2)(d) of the PILA.

However, in line with the findings of the arbitral tribunal, the Swiss Federal Tribunal found that India should have known of the *travaux préparatoires* from the beginning of the arbitral proceedings and should have brought them up in due time. Hence, the request of the appellant to adduce the *travaux préparatoires* of the BIT as evidence was belated.[30]

Furthermore, in 2016, India informed the arbitral tribunal about criminal charges made by India's Central Bureau of Investigation ("CBI"), *inter alia*, against Devas and some of its officers. For the appellant, if the charges were to be proved, the investment would not have been made in accordance with Indian law as the law of the host State, as required by Articles 1(b) and 3(1) of the BIT as the *clause de conformité* ("compliance clause"). Under these provisions, an investment is an asset invested in "in accordance with the national laws of the Contracting Party where the investment is made." In other words, India was of the opinion that if the

[26] On 19 June 2011, Devas brought a claim against Antrix at the International Chamber of Commerce ("ICC") Court of Arbitration regarding the breach of the contract. According to the ICC award issued on 14 September 2015, Antrix was ordered to pay an amount for improperly terminating the contract.

[27] *Ibid*., para. B.b.

[28] For an analysis of the case in its entirety, see Xavier Favre-Bulle, 'Case Notes on International Arbitration', *Swiss Review of International and European Law*, vol. 29, 2019, pp. 685-689; Matthias Scherer & Angela Casey, 'Domestic Review of Investment Treaty Arbitrations: The Swiss Experience Revisited', *ASA Bulletin*, vol. 37, no. 4, 2019, pp. 816–818.

[29] Caroline Kleiner, 'Country Report: France' in Ferrari *et al.* (eds), *op.cit*, p. 163: "*le fait pour les arbitres d'écarter des écritures tardives, loin de méconnaître le principe de la contradiction, en assure le respect*."

[30] para. 3.2.1.2.5.

criminal charges were proved, the legality of the contract between Devas and Antrix would be in question, in which case, there would be no protected investment under the BIT. It therefore requested a suspension of the arbitration procedure until the criminal proceedings were concluded.

However, the arbitral tribunal dismissed the request for suspension. One of the arguments of the appellant before the Swiss Federal Tribunal was that since the arbitral tribunal barred it from producing evidence regarding the alleged illegality of the contract, its right to be heard was breached.[31]

Nonetheless, the Swiss Federal Tribunal reiterated that the right to take evidence must be exercised in due time and in accordance with the applicable procedural rules. According to the arbitral tribunal's findings, the criminal charges had been known at least since 2009 and could thus have been raised at the latest in post-hearing submissions. Therefore, since the evidence was not produced in due time and consistent with the procedural rules, the arbitral tribunal correctly determined that the request made by the appellant to set aside the award was to be rejected.[32]

It is worth mentioning that the rejection of a belated request can be valid even when the relevant facts are discovered only *after* the applicable deadline has lapsed, provided that the party "should have known" about it. Therefore, in this case, it was not enough for India to establish that it was not aware of the facts, since it should have known.

2.2.3. RELEVANCE AND EFFECTIVENESS OF THE REQUEST

Another limitation to the right to be heard is that the alleged violation must have possibly changed the result of the decision.

In this regard, concerning the first due process claim of India, discussed above, the Swiss Federal Tribunal suggested that even if the evidence had been timely filed in accordance with the applicable rules of procedure, the arbitral tribunal might have refused to allow it into evidence, provided it had been persuaded that the evidence was irrelevant to the issue, or that the evidence was ineffective in proving the relevant party's claim. In this vein, the Swiss Federal Tribunal agreed with the arbitral tribunal that the methods of interpretation offered by the VCLT require that when the primary method is sufficient, relying on secondary and supplementary means of interpretation, including the *travaux préparatoires* of a BIT, is redundant and unnecessary.

In other words, there is no need to consider the secondary means of interpretation when the interpretation does not 'leave[] the meaning ambiguous or obscure [n]or lead[] to a result which is manifestly absurd or unreasonable,' to use the wording of Article 32 of the VCLT. The terms of the BIT in question and its preamble demonstrate the common intention of the Parties to promote investments to the largest extent possible. Thus, since the meaning of the term "investment" contained in the BIT is quite clear according to the primary means of interpretation, the Swiss Federal Tribunal found that the arbitral tribunal was correct in declaring that there was no need for recourse to supplementary means of interpretation.[33] However, as some have observed, while Article 32 of the VCLT does introduce a hierarchy between primary and secondary means of interpretation, it would seem that the arbitral tribunal "speaks out of its own conviction and refers to the former as additional support for the latter."[34]

In any event, the Swiss Federal Tribunal declared that by preventing India from adducing evidence regarding the *travaux préparatoires*

[31] para. 4.1.
[32] para. 4.5.
[33] para. 3.2.1.2.5.
[34] Matthias Scherer, 'Mission Impossible? Challenging Investment Treaty Awards before the Swiss Federal Tribunal' in Christoph Müller *et al.* (eds), *New Developments in International Commercial Arbitration*, 2020, p. 40.

of its BIT with the Netherlands, the arbitral tribunal did not breach the appellant's right to be heard.

It seems that by declaring in this case – in line with another recent decision[35] – that the party seeking the annulment of the award needs to establish that the infringement of the right to be heard could have influenced the outcome of the award, the Swiss Federal Tribunal deviated from its previous precedent in which the violation of the right to be heard *per se* – regardless of its relevance to the merits – was considered enough for setting aside of the award.[36] In other words, the Swiss Federal Tribunal narrowed the scope of a valid right to be heard, or due process in general. This approach is consistent with the finding of the Committee in *Fraport v. Philippines* applying the 'highly material development' test.

CONCLUSION

A successful plea of due process failure can generally be considered as a valid ground for annulling arbitral awards under the ICSID and Swiss international arbitration law and practice.

However, due process has its own limitations. For instance, for a claim of due process infringement under Article 52(1)(d) of the ICSID Convention to succeed, the alleged violation must be related to *procedural* matters. Further, the issue must be applicable in international arbitral proceedings. For instance, the violation of the presumption of innocence cannot be considered as a violation of due process, since the presumption may lead to a failure of due process as it may infringe equality between the parties.

The right to be heard – the most important instance of due process – is to be understood according to a teleological approach. In particular, in order for the failure of the right to be heard to be accepted as a ground for annulment, the request to this effect not only must be submitted in due time but must also be a highly material development in reaching a specific result in the award, in the sense that its absence is considered a focal point in the relevant case. In sum, belated or irrelevant requests cannot be considered as valid right-to-be-heard grounds for annulling an award.

[35] *4A_424/2018*, Decision of the Swiss Federal Tribunal, 29 January 2019.

[36] Axel Buhr, 'The Right to be Heard—A Constitutional Guarantee of No Formal Nature', 2019. Available at: <https://glossa.weblaw.ch/public_preview.php?glossa_id=2314&lang=de>.