



School of International Arbitration

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School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law

*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: Bear Creek Mining Corporation v. Republic of Peru (ICSID Case No. ARB/14/21) – Award – 30 November 2017

Case Report by: Bobin Park**, Editor Diego Luis Alonso Massa***

Summary: Claimant brought an action for relief against Peru pursuant to the Free Trade Agreement between Canada and Peru (“FTA”) alleging Peru breached, *inter alia*, expropriation protections, fair and equitable treatment, full protection and security, and protection against unreasonable or discriminatory measures under the FTA, in relation to its investment in a silver mining project in the Santa Ana area of Puno, which is within 50 kilometres of the border between Peru and Bolivia. As its preliminary conclusion, the Tribunal found that within the meaning of the FTA (i) Claimant made an investment; (ii) the Tribunal has jurisdiction over the claim; and (iii) there is no bar to the exercise by the Tribunal of such jurisdiction. Further, the Tribunal decided on the Merits that the Peruvian government’s adoption of Supreme Decree 032-2011 constituted indirect expropriation of the right of Claimant to operate the Santa Ana concessions, and that this occurred in violation of Article 812 of the FTA.

Main Issues: Jurisdiction; Admissibility; Indirect Expropriation; Lawfulness of Supreme Decree 032-2011; Police Powers Doctrine; Fair and Equitable Treatment

Tribunal: Professor Karl-Heinz Böckstiegel (President), Dr. Michael Pryles (Arbitrator) and Prof. Philippe Sands QC (Arbitrator)

Claimant's Counsel: Mr. Henry G. Burnett, Mr. Craig Miles, Ms. Caline Mouawad, Mr. Cedric Soule, Mr. Fernando Rodríguez-Cortina, Ms. Eldy Quintanilla Roché, Ms. Jessica Beess und Chrostin, Mr. Luis Alonso Navarro, Ms. Verónica García (King & Spalding LLP, New York) and Mr. Luis Miranda Alzamora, Ms. Cristina Ferraro Delgado (Miranda & Amado Abogados, Peru)

Respondent's Counsel: Mr. Ricardo Ampuero Llerena (Comisión Especial que Representa al Estado en Controversias Internacionales de Inversión Ministerio de Economía y Finanzas), Dr. Stanimir A. Alexandrov (Stanimir A. Alexandrov PLLC), Ms. Marinn Carlson, Ms. Jennifer Haworth McCandless (Sidley Austin LLP, Washington D.C.), and Mr. Juan Pazos Battistini, Mr. Ricardo Puccio Sala (Estudio Navarro & Pazos Abogados)

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

** Bobin Park is a registered Attorney in South Korea and a Legal Trainee at the SICANA, Inc. ICC New York Case Management team. She holds the White & Case International Arbitration LL.M. degree from University of Miami School of Law. Ms. Park worked as a research assistant in the Cost-Management Project led by Professor Jan Paulsson and the ICC. Ms. Park further holds a J.D. degree from Korea University School of Law, and an M.A. degree in International Commerce from Korea University. IACL’s case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not reflect those of ACICA or the IBA. Ms Bobin Park can be contacted at bobin.park@gmail.com.

*** Lawyer, University of Buenos Aires, admitted to practice law in the City of Buenos Aires; Sworn Translator, University of Buenos Aires, Argentina. LLM holder in International Relations – with a specialization in Private International Law – Institut de Hautes Études Internationales, University of Geneva, Switzerland. Mr. Alonso Massa can be contacted at: alonso@arbitrage-transnational.com or <https://ar.linkedin.com/in/diegoluisalonsomassa>

Digest:

1. Relevant Facts

Bear Creek Mining Corporation (“Bear Creek” or “Claimant”) is a company incorporated under the Laws of Canada. Respondent is the Republic of Peru (“Peru” or “Respondent”) (¶¶ 1-2). Discovering the existence of potential silver ore deposits in an area of Peru known as Santa Ana in the Puno in 2004, Bear Creek decided to invest in a silver mining project in the corresponding region (¶ 123). Pursuant to Article 71 of the Peruvian Constitution, in order for Claimant, as a foreign national, to conduct the mining business in this border location, it was obliged to obtain a “public necessity” Decree granted by the Peruvian Council of Ministers, along with a multitude of other permitting requirements (¶ 124).

Claimant, in efforts to secure the mining rights in Santa Ana, agreed with Ms. Villavicencio, who is a Peruvian national registered as an employee of Claimant with the Peruvian Ministry of Labor and a legal representative of Claimant in certain matters (¶ 121), that she would secure the mineral rights while Claimant requested and until it obtained the authorization required under Article 71 of the Constitution (¶ 126). On 17 November and 5 December 2004, Claimant additionally entered into a series of Option Agreements with Ms. Villavicencio, which provided that Claimant could acquire the concessions if a Declaration of Public Necessity was received from Respondent (¶ 128).

On 5 December 2006, Bear Creek applied for a Declaration of Public Necessity and a Supreme Decree authorizing Claimant to purchase the Santa Ana Concessions from Ms. Villavicencio (¶ 140). On 29 November 2007, Supreme Decree 083-2007 (“Supreme Decree 083”) was enacted by the President and Council of Ministers of Peru, declaring that the Santa Ana Project was a “public necessity” and authorizing Claimant to acquire, own, and operate the corresponding mining concessions and to exercise any rights derived from the ownership (¶ 149). Thereafter, Ms. Villavicencio transferred to Claimant the concessions as was provided in the seven option agreements. These transfer agreements were registered by SUNARP¹ on 28 February 2008 (¶ 150).

¹ Peruvian National Superintendent of Public Registries (Superintendencia Nacional de los Registros Públicos)

Three years and six months later, on 24 June 2011, Peru adopted Supreme Decree 032-2011-EM (“Supreme Decree 032”), revoking Supreme Decree 083 and the Peruvian executive’s finding of a public necessity, thereby eliminating the legal prerequisite for Claimant’s ownership of mineral concessions in the border region (¶ 202). In between the issuance of Supreme Decree 083 and Supreme Decree 032, there were growing protests by numerous indigenous communities in Santa Ana affected by the mining Project and considerable social unrest in the Puno department (¶¶ 155-201).

Claimant accordingly brought an action for relief against Peru pursuant to the Free Trade Agreement between Canada and Peru (the “FTA”) alleging Peru had breached, *inter alia*, expropriation protections, fair and equitable treatment, full protection and security, and protection against unreasonable or discriminatory measures under the FTA (¶ 113).

2. Procedural History

Claimant filed a Request for Arbitration on 11 August 2014, which was registered by ICSID on 18 August 2014 (¶¶ 9-11). The Tribunal was constituted on 3 December 2014 (¶ 12). On 9 January 2015, Claimant filed a Request for Provisional Measures, in which it requested interim measures ordering Respondent to stay the MINEM Lawsuit² while this arbitration is pending (¶ 16). The first session of the Arbitral Tribunal was held on 12 January 2015 (¶ 17). On 19 April 2015, the Tribunal issued its decision denying Claimant’s Request for Provisional Measures (¶ 28).

Claimant filed its Memorial on the Merits on 29 May 2015 (¶ 29). On 6 October 2015, Respondent submitted its Counter-Memorial on the Merits and Memorial on Jurisdiction (¶ 30). Claimant submitted its Reply on the Merits and Counter-Memorial on Jurisdiction on 8 January 2016 (¶ 35). On 13 April 2016, Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction (¶ 48). Claimant submitted its Rejoinder on Jurisdiction on 26 May 2016 (¶ 53). The Hearing on Jurisdiction, Admissibility, and the Merits was held on 7-14 September 2016 at the World Bank Headquarters, Washington D.C. (¶ 93).

Claimant and Respondent simultaneously submitted their respective Post-Hearing Briefs on 21 December 2016 (¶ 102). On 15 February 2017, Claimant and Respondent simultaneously submitted their respective Reply Post-Hearing Briefs (¶ 105). Claimant and Respondent submitted their respective Costs Submissions on 29 March 2017 (¶ 106). On 12 September 2017, the Tribunal declared the proceeding closed in accordance with Rule 38(1) of the ICSID Arbitration Rules (¶ 111).

3. Jurisdiction of The Tribunal and Admissibility

Claimant submitted that its claims fall within ICSID jurisdiction and the competence of the Tribunal, in accordance with the ICSID Convention and the FTA. Respondent, however, disputed over the Tribunal’s jurisdiction and admissibility of Claimant’s claims.

² Peru’s Ministry of Energy and Mines (Ministerio de Energía y Minas)

3.1 Jurisdiction of The Tribunal

3.1.1 Whether an Investment conferring Jurisdiction on the Tribunal exists

Respondent contested that, as Claimant's concessions were obtained in violation of Article 71 of the Peruvian Constitution, Claimant's alleged investment is invalid under Peruvian law (¶¶ 275-276). Claimant denied Respondent's objection and submitted that the FTA and the ICSID Convention are the only relevant legal instruments that govern the Tribunal's jurisdiction, including the definition of "investment" (¶ 277). The Tribunal observed that Article 847 of the FTA provides an express and wide definition of the term "investment", and it is mandatory to apply it in the present case (¶ 282). It accordingly concluded that Claimant made "investments" within the meaning of the FTA, and that it is to be treated as an "investor" (¶¶ 284-285).

3.1.2 Whether Claimant held the Rights on which it bases its Claim

Respondent argued that the Tribunal cannot assert jurisdiction, since Claimant cannot establish that it owned or controlled the right to mine at Santa Ana, thereby failing to prove its ownership of the investments on which its claim is based (¶¶ 286-287). Claimant rejected Respondent's argument and noted that it is uncontroversial that an investment typically consists of several interrelated economic activities that should not be viewed in isolation (¶ 289).

The Tribunal held the same view as Claimant and acknowledged that the steps already taken by Claimant, i.e. (1) the finding of public necessity that expressly authorized Claimant to acquire mining rights in the border region, (2) Claimant's acquisition of mining concessions comprising the Santa Ana Project and the Corani Project, (3) the years Claimant engaged in expensive exploration and development efforts in Respondent State, and (4) the resulting discovery of significant economic silver mineralization in the area, undoubtedly comprise "investment" within the meaning of Article 847 of the FTA (¶¶ 296-297). The Tribunal therefore concluded that Claimant held rights providing jurisdiction to the present claims raised (¶ 298).

3.1.3 The Legal Standard: Whether Legality or Good Faith is a prerequisite to the Tribunal's exercise of Jurisdiction

Relying on the *Inceysa* and the *Hamester* tribunal, Respondent claimed that Investment arbitration tribunals lack jurisdiction over claims that are based on investments made in violation of (1) domestic law or (2) the international law principle of good faith. It alleged that Claimant's purported investment violates both (¶ 299). In response, Claimant, by referring to Article 816 of the FTA which allegedly suggests that the Contracting Parties agreed that the legality requirement would be excluded from the scope of the FTA, asserted that the FTA does not contain a legality or good faith requirement (¶ 308).

The Tribunal shared this view with Claimant and found that Article 816 identifies the legality requirement as a "special formality" that the host State is entitled to adopt if it so wishes. The tribunal further concluded since nowhere in the FTA or otherwise in the record is an express or implied provision of law to the effect that Peru made use of this option, there is no jurisdictional requirement that Claimant's investment was legally constituted under the laws of Peru (¶¶ 318-319).

3.2 Admissibility of Claimant's Claims

Respondent urged the Tribunal to find Claimant's claims inadmissible, (1) as all claims rest on an unlawfully obtained investment in violation of Article 71 of the Constitution, and (2) if it were to find that Claimant lacked a social license to build and operate the Santa Ana Project (¶¶ 326-328). Claimant rejected this objection and claimed that the Tribunal should take the legality of the investment and good faith into account when adjudicating the merits of the case, without limiting itself to the analysis of the question of the admissibility of Claimant's claims (¶ 329). Quoting the *Khan Resources* tribunal, Claimant further asserted that it would undermine the object and purpose of the FTA to deny Claimant the right to make its case before this Tribunal based on the same alleged violations the existence of which Claimant seeks to dispute on the merits (¶ 332).

The tribunal decided that, for the same reasons as discussed for jurisdiction, an alleged illegality of the investment was not sufficient to deny admissibility, though it will have to be considered and may become relevant in the examination of the merits (¶¶ 333-335).

4. The Merits

4.1 Whether Respondent Expropriated Claimant's Investment in The Santa Ana Concession

4.1.1 Whether Supreme Decree 032 Effected an Indirect Expropriation

Claimant submitted that Supreme Decree 032 indirectly expropriated Claimant's investment in Santa Ana, in violation of Annex 812.1 of the FTA, which specifically defines "indirect expropriation" (¶ 341). It contended, by applying the tests from Annex 812.1 of the FTA, the Tribunal would find Supreme Decree 032 constituting an "indirect expropriation" under Annex 812.1(b), and it severely lacking proportionality under Annex 812.1(c) (¶¶ 341-347).

Respondent denied Claimant's indirect expropriation contention, arguing Supreme Decree 032 did not indirectly expropriate Claimant's investment, since it did not cancel or transfer Claimant's ownership and Claimant maintains title to the Santa Ana concessions (¶ 355). In general, Supreme Decree 032 and Respondent's arguments provided expressly two legal reasons on which they relied: (1) the newly discovered unconstitutionality of Supreme Decree 083 due to the involvement of Ms. Villavicencio; and (2) the social unrest in the Puno department requiring the derogation of Supreme Decree 083 (¶¶ 388-390, 400).

With reference to Article 812.1 of the FTA and Annex 812.1, the Tribunal found that the FTA contains more extensive and detailed definitions and rules of indirect expropriation than do most other BITs (¶¶ 368-372). For the determination of an indirect expropriation, the Tribunal examined whether the effects of Supreme Decree 032 fall under the "factors" of Annex 812.1 subsection (b) of the FTA (¶ 374).

In application of the first factor in subsection (i), the Tribunal found that there is an "*economic impact*", as Supreme Decree 032 by revoking the authorizations of Supreme Decree 083 deprived Claimant of all the major legal rights it had obtained and needed for the realization of its mining Project (¶¶ 375, 415). In application of the second factor in subsection (ii), the Tribunal found that Supreme Decree 032 "*interferes with*" Claimant's "*distinct, reasonable investment-backed expectations*" (¶¶ 376, 415).

With respect to the third factor, (iii) the “character of the measure”, the Tribunal tried to find answers to two questions. First, “*Did Claimant’s Involvement of Ms. Villavicencio Justify the Derogation of Decree 083?*” Pointing out the fact that the public necessity approval by Supreme Decree 083 by the Constitutional President of Peru was granted after nearly one year of careful consideration of application documents, that included detailed information of Ms. Villavicencio’s relationship with Claimant and her involvement with the Santa Ana Project, by the various government authorities, the Tribunal observed that Respondent’s arguments that Claimant had illegally obtained the public necessity declaration by Supreme Decree 083 through the involvement of Ms. Villavicencio is not valid (¶¶ 392-399). Second, “*Did the Social Unrest Justify the Derogation of Supreme Decree 083?*” While admitting further actions by Claimant would have been feasible, the Tribunal concluded Respondent, after its continuous approval and support of Claimant’s conduct, cannot claim that this conduct was contrary to the ILO Convention 169 or was insufficient, and caused or contributed to the social unrest in the region (¶ 412). Consequently, Supreme Decree 032 was found to be based on reasons found to be illegal according to Peruvian law and do not justify a breach of the FTA (¶ 415).

From the above considerations, the Tribunal concluded that the three “factors” expressly provided in Annex 812.1(b) of the FTA for the identification of an indirect expropriation are fulfilled, and therefore held that Supreme Decree 032 was an indirect expropriation in the sense of Article 812 and Annex 812.1 of the FTA (¶¶ 415-416).

4.1.2 Whether Supreme Decree 032 Effected a Direct Expropriation

Claimant argued that Respondent’s revocation of Supreme Decree 083 constituted a “*forcible and unlawful taking of Claimant’s property*”, for which Respondent must compensate Claimant (¶ 417). It added Supreme Decree 032 openly, directly, and intentionally revoked Claimant’s right to acquire, possess, and operate the Concessions, thereby having the effect of transferring title of the mining concessions to Peru (¶¶ 422-423).

Respondent rejected Claimant’s direct expropriation claims for the following grounds: (1) Supreme Decree 032 involves no transfer of ownership and Claimant retains title to the Santa Ana concessions (¶ 424); plus (2) Claimant may only base its expropriation claim on rights that it held at the time of the alleged expropriation. While Claimant only held the exclusive right to attempt to obtain the right to mine at Santa Ana, it had obtained none of the approvals necessary for the exploitation phase of the Project (¶¶ 426-428).

The Tribunal concluded that, having found in the previous phase that Supreme Decree 032 constituted an indirect expropriation, there is no need to examine whether it also constituted a direct expropriation. The Tribunal added further that the Parties have not presented arguments related to the legal consequences of a finding of a direct expropriation, and such a finding indeed would not change or add to those that follow from an indirect expropriation (¶ 429).

4.1.3 Whether Supreme Decree 032 was Lawful under Article 812 of the FTA

The Tribunal noted that in accordance with the express wording of Article 812.1 of the FTA, (1) if there is no due process of law or (2) if there has not been payment of “prompt, adequate and effective compensation”, a direct or indirect act of expropriation will violate the FTA (¶ 443).

The Tribunal indicated the fact Respondent did not invite Claimant to the meetings between 20 and 23 June 2011, on the basis that Claimant's attendance might have made the discussion with the groups organizing the social unrest more difficult and the Government was under strong political pressure to find an agreeable solution (¶ 444). As such, the Tribunal assumed that no effort was made by Respondent to give Claimant the opportunity to comment before the issuance of Supreme Decree 032. It also noted the undisputed fact that Supreme Decree 032 did not provide for any compensation to Claimant (¶¶ 447-448).

Therefore, the Tribunal concluded Supreme Decree 032, while lacking due process of law and payment of prompt, adequate and effective compensation, constituted an unlawful indirect expropriation, in violation of Article 812.1 of the FTA (¶ 449).

4.1.4 Whether Supreme Decree 032 was a Valid Exercise of Police Powers

Claimant averred that, even if the Tribunal were to analyze this case under the police powers doctrine, Supreme Decree 032 cannot be considered a legitimate exercise of police powers, as it was issued without notice to Claimant, in violation of Claimant's right of defense, and without payment of compensation and the application of due process (¶¶ 451, 453). Claimant further maintained, even if Supreme Decree 032 were to fall within the scope of Respondent's police powers, there can be no doubt that Supreme Decree 032 was arbitrary, not proportional, and issued without regard for due process (¶ 458).

In contrast, Respondent alleged that the police powers doctrine applies because Respondent issued Supreme Decree 032 (1) to protect its citizens in the face of months of violent protests that threatened their health and safety and destabilized the international border; (2) to safeguard the integrity of its Constitution and Respondent's sovereignty over natural resources; and (3) because the issuance of Supreme Decree 032 was necessary to maintain international comity with Bolivia (¶ 469). Respondent asserted it took the appropriate actions, including not only Supreme Decree 032, but also Supreme Decree 033, which suspended all new mining concession requests in Puno, maintaining its interventions were effective in stopping the protests, strikes, and violence that had paralyzed the region (¶ 470).

The Tribunal found that, even if these two Decrees together would have to be considered as justified by the exception in Article 2201 of the FTA, Respondent failed to explain the other reasons found above to be in breach of Article 812 of the FTA, and since the exception in Article 2201 does not offer any waiver from the obligation in Article 812 to compensate for the expropriation, Respondent has also failed to explain why it was necessary for the protection of human life not to offer compensation to Claimant for the derogation of Supreme Decree 083 (¶ 477). It therefore concludes that, irrespective of a possible applicability of the Exception in Article 2201 of the FTA, two of the breaches of Article 812 of the FTA found above remain and thus Supreme Decree 032 must be considered a breach of the FTA (¶ 478).

4.2 Whether Respondent Afforded Claimant Fair and Equitable Treatment

4.2.1 Whether Respondent Afforded Claimant Fair and Equitable Treatment ("FET") as Required by the FTA

The Parties agreed on the fact that, pursuant to Article 805 of the FTA, Respondent was obliged to accord Claimant and its investment FET in accordance with the Minimum Standard of

Treatment (“MST”) (¶¶ 481, 491). However, they sharply disagreed on the proper interpretation and application of that standard (¶ 481).

Claimant strongly rejected Respondent’s reliance on *Neer* and argued that the contemporary MST includes a broader set of protections, including substantive and procedural protections (¶¶ 482-489). It further submitted the MST, thus, protects investors from State conduct that is arbitrary, grossly unfair, unjust or idiosyncratic, discriminatory, involves a lack of due process, or contravenes an investor’s legitimate expectations (¶ 482). Claimant alleged Respondent’s nearly year-long thorough review of the Santa Ana Project and its subsequent issuance of Supreme Decree 083 were specific assurances that gave rise to Claimant’s legitimate expectation for the mining permission of the Santa Ana concessions as well as due process, should any dispute arise regarding the Concessions (¶ 500). It, therefore, asserted that Respondent’s sudden issuance of Supreme Decree 032 in June 2011 without notice or opportunity for Claimant to be heard, which revoked Supreme Decree 083 and expropriated Claimant’s investment, was an arbitrary and unlawful conduct toward Claimant, in serious and clear violation of due process, legitimate expectation, FET and Respondent’s MST obligations (¶¶ 501-504).

Respondent, on the other hand, contended that to demonstrate a breach of Article 805 of the FTA, Claimant must identify a specific rule of customary international law that Respondent violated (¶ 496). Respondent further submitted its action with respect to Santa Ana were rational, non-discriminatory, and non-arbitrary measures taken to protect public safety and the integrity of its regulatory regime for natural resources (¶ 506). It also denied allegation of Respondent’s violation of legitimate expectation, by arguing that Claimant had no reasonable or legitimate basis to expect Respondent to honour the investment indefinitely, given the illegal manner with which Claimant obtained its rights in Santa Ana (¶507). In addition, Respondent noted the unclarity of what specific “due process” Claimant was denied, since there was no public forum that Claimant could have joined to contest the issuance of Supreme Decree 032 (¶ 513). Respondent, in sum, asserted that as Claimant has failed to prove an FET violation under the MST, Claimant’s claim must fail (¶¶ 497-513).

4.2.2 Whether Respondent Afforded Claimant Fair and Equitable Treatment Under An Autonomous Standard

Claimant argued, apart from the MST under the FTA, Respondent is obliged to accord Claimant “autonomous” FET protections by operation of the MFN Clause of the FTA, contained in Article 804. Through Article 804 of the FTA, it accordingly imported the FET standard that is provided for in Art 2(2) of the Peru-United Kingdom BIT (¶ 517).

Respondent disagreed with Claimant’s claim and submitted that it cannot import an autonomous FET standard because (1) the FTA excludes pre-existing treaties from the scope of its MFN Clause, and (2) importing an autonomous FET standard would conflict with the express will of the Contracting Parties (¶¶ 529-531).

4.2.3 The Tribunal’s Reasoning

The Tribunal concluded that, having found in the previous phase Supreme Decree 032 constituted an unlawful indirect expropriation, there was no need to examine whether it also constituted a breach of a duty to afford Claimant fair and equitable treatment. The Tribunal added further that the Parties have not presented arguments related to the legal consequences

of such a finding, and such a finding indeed would not change or add to those that follow from an unlawful indirect expropriation (¶ 533).

4.3 Whether Respondent Afforded Claimant Full Protection and Security (“FPS”)

The Tribunal concluded that, having found in the previous phase Supreme Decree 032 constituted an unlawful indirect expropriation, there is no need to examine whether it also constituted a breach of a duty to afford Claimant full protection and security. The Tribunal added further that the Parties have not presented arguments related to the legal consequences of such a finding, and such a finding indeed would not change or add to those that follow from an unlawful indirect expropriation (¶ 544).

4.4 Whether Respondent Complied with Any Duty to Afford Claimant Protection Against Unreasonable or Discriminatory Measures (“UDM”)

The Tribunal concluded that, having found in the previous phase Supreme Decree 032 constituted an unlawful indirect expropriation, there is no need to examine whether it also constituted a breach of a duty to afford Claimant protection against unreasonable or discriminatory measures. The Tribunal added further that the Parties have not presented arguments related to the legal consequences of such a finding, and such a finding indeed would not change or add to those that follow from an unlawful indirect expropriation (¶ 553).

4.5 Arguments Related to Contributory Fault and Liability

The Tribunal underlined that Respondent has the burden of proof that its breaches of the FTA were to some extent caused by Claimant. As Respondent has not met that burden, the Tribunal concluded there was no contributory fault and liability of Claimant (¶ 568).

5. Damages

The Tribunal concluded that the calculation of Claimant’s damages in the present case cannot be carried out by reference to the potential expected profitability of the Santa Ana Project and the DCF method. It found the Project remained too speculative and uncertain to allow such a method to be utilized. Instead, the Tribunal decided that the measure of damages should be made by reference to “the amounts actually invested” by Claimant (¶ 604).

Regarding the Corani Project, while finding that Claimant has failed to provide sufficient proof of causation of any losses in the Corani Project due to Respondent’s breach of the FTA with regard to the Santa Ana Project, the Tribunal concluded that the damage claim related to the Corani Project must be dismissed (¶¶698-704).

In conclusion, the Tribunal ordered Respondent to pay Claimant US\$ 18,237,592 in damages, which corresponds to Claimant’s expenditures after the issuance of Supreme Decree 083 and up to the issuance of Supreme Decree 032 (¶ 661).

6. Costs

The Tribunal ordered Respondent to bear its own costs of arbitration and to reimburse 75% of the arbitration costs requested by Claimant, i.e. US\$ 5,986,183.29 (¶ 736).

7. Separate Opinion of Philippe Sands

Philippe Sands largely agreed with the conclusions of the Tribunal to the effect that, within the meaning of the FTA, the Claimant made an investment; the Tribunal has jurisdiction over the claim; and there is no bar to the exercise by the Tribunal of such jurisdiction (admissibility); and the effect of Supreme Decree 032 was to expropriate by indirect means the right of the Claimant to operate the Santa Ana concessions, and that this occurred in violation of Article 812 of the FTA. However, in his view, the circumstances in which Supreme Decree 032 was adopted – in particular the failure to give the Claimant a right to be heard before its adoption – also gave rise to a violation of Article 805, being a violation of the obligation to offer “Fair and Equitable Treatment” (¶ 2).

In addition, while agreeing with the Majority that the consequence of the violation of Article 812 of the FTA entitled the Claimant a measure of compensation, he disagreed with the Majority’s assessment of the amount of damages that were due, in particular the failure to reduce that amount by reason of the fault of the Claimant in contributing to the unrest (¶ 4). According to Sands’ assessment of the evidence before the Tribunal, he found that (1) the Respondent has clearly established the Claimant’s contributory responsibility; and (2) the evidence clearly showed that the Claimant’s acts and omissions, in the period before 2008, during 2008, thereafter, and right up until May 2011, contributed in material ways to the events that unfolded and then led to the Project’s collapse (¶¶ 5-6). Relying on statements of Professor Peña Jumpa [Respondent’s expert witness], he observed that it is apparent that the investor’s outreach program was inadequate by failing to involve all the potentially affected communities (¶ 33), and such failure contributed to the adoption of Supreme Decree 032 (¶ 36).

As Claimant’s contribution was significant and material that its responsibilities are no less than those of the Peruvian government, Sands opined that he would reduce the amount of damages to be awarded by one half, to US\$ 9,118,796. (¶ 39). For the same reason, the costs of the proceedings should be split equally between the Parties.

He lastly wished to make it clear that his support for the conclusion that the list of exceptions in Article 2201.1 of the FTA, which fall within a State’s legitimate exercise of its police powers, is “exhaustive” is without prejudice to the application of Article 25 of the ILC Articles on State Responsibility, which deals with acts of Necessity. In the present case, the conditions of Article 25 are not met because the act in question – the revocation of Supreme Decree 083 – was not “*the only way for [Peru] to safeguard an essential interest against a grave and imminent peril*”. Nevertheless, he maintained that, whatever the requirements of the FTA, the possibility of having recourse to Article 25, as a rule precluding wrongfulness, is not excluded by the FTA (¶ 41).