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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: Carlos Ríos and Francisco Ríos v. Republic of Chile (ICSID Case No. ARB/17/16) – Award – 11 January 2021

Case Report by: Juan Pablo Gómez-Moreno**, **Editor** Diego Luis Alonso Massa***

Summary: Claimants brought an action for relief against Chile pursuant to the Colombia-Chile Free Trade Agreement (the 'FTA') alleging Chile breached, *inter alia,* fair and equitable treatment, full protection and security, most favored nation and expropriation protections in the FTA in relation to its investment in the public transportation system of the city of Santiago de Chile. The Tribunal considered the particular text of the FTA and concluded that Respondent did not breach any of its obligations.

Main Issues: relinquishment to other proceedings different to arbitration, determination of the *dies a quo* in continuing violations, standard of reasonable and certain expectations.

Tribunal: Professor Gabrielle Kaufmann-Kohler (President), Professor Oscar M. Garibaldi (Arbitrator) and Professor Brigitte Stern (Arbitrator)

Claimant's Counsel: Mr. Eduardo Silva Romero, Mr. José Manuel García Represa, Ms. Erica Stein, Ms. Audrey Caminades (Dechert LLP, Paris)

Respondent's Counsel: Mr. Paolo Di Rosa, Mr. Patricio Grané Labat, Ms. Gaela Gehring Flores (Arnold & Porter Kaye Scholer LLP, Washington DC, London)

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

** Juan Pablo Gómez-Moreno is a lawyer and philosopher of Universidad de los Andes (Colombia) and alumnus of the postgraduate degree in International Business Law and the Masters' in Private Law at the same institution. He acts as legal counsel on international arbitration issues at the Colombian Oil Refinery. He has been a teaching assistant and assistant professor in public international law, international trade law and international investment and commercial arbitration. He is also actively working as a research assistant, editor, reporter, and contributor in different international projects in the field. He has authored various scholarly writings on business law, international arbitration, and international trade. He is a member of various international young arbitration networks (ICCA, ICC, ITA, ICSID. 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. Mr Gómez can be contacted at jp.gomez1102@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; Ph.D. candidate

at the Université du Québec à Montréal (UQAM). Mr. Alonso Massa can be contacted at: alonso@arbitrage-transnational.com

Digest:

1. Relevant Facts

Carlos Ríos and Francisco Ríos (the 'Claimants') are the majority shareholders in Inversiones Alsacia S.A. ('Alsacia') and Express de Santiago Uno S.A. ('Express', and together with Alsacia the 'Companies') (¶ 1). 'Transantiago' is a public transportation system that operates in Santiago, Chile, and consists of three services (metro, metro-train, and bus) that citizens can use through a card called 'Bip!' (¶ 8). The Companies and other five operators were the concessionaires of the Transantiago (the 'Operators') (¶ 9). In 2005, the Companies subscribed concession contracts with the Ministry of Transport and Telecommunications of Chile (the 'MTT') (¶¶ 10-13). These contracts were terminated in 2011 following a law issued in 2010 to reform the public transportation regime (¶¶ 14-22). However, the Companies and MTT subscribed new concession contracts in 2012 (the 'New Contracts') (¶ 24).

The underlying dispute arose out of several circumstances surrounding the operation of the Companies, which led to an acute financial crisis (the 'Measures'). First, the lack of application by Respondent of the Infrastructure Master Plan 2011-2015. Second, the imposition of discounts and fines for shortcomings on performance indicators known as ICR, ICF and ICT. Third, decisions of the Directorate of Public Metropolitan Transportation (the 'DTPM') such as the rejection of Companies' requests to expand their fleet (¶¶ 33-36) or the resolution to eliminate certain services in charge of the Companies (¶ 51). Fourth, damages suffered by Companies due to vandalism and evasion of ticket payments by locals. Fifth, the refusal to re-establish the economic balance of the New Contracts. Sixth, the subscription of lease agreements between Companies and MTT in the context of measures for the expropriation of certain bus terminals (¶ 76-78). Finally, a bidding process opened by the MTT to assign the concession for the use of certain roads (the '2017 Bidding') (¶ 79-81).

During the arbitration, the liabilities of Companies reached US $464 million, which led to bankruptcy proceedings (¶ 72). Claimants brought an action for relief against Chile pursuant to article 9.16.4 of the Colombia-Chile FTA alleging Chile had breached, *inter alia,* expropriation, fair and equitable treatment, most favorable treatment, and full protection and security protections under the FTA (¶ 226).

2. Procedural History

Claimants sent Chile a notice of intent on 10 May 2016, informing its intention to subject claims to arbitration pursuant to Article 9.16.4 of the Colombia-Chile FTA (¶ 87). On 26 May 2017, Claimants filed a Request for Arbitration, which was registered by ICSID on 13 June 2017 (¶ 88). The Tribunal issued Procedural Order No. 1 on 23 January 2018 (¶ 89). Claimants filed their Memorial on the Merits on 9 February 2018 (¶ 90). Respondent filed its Counter-Memorial on the Merits on 13 June 2018 (¶ 92). Claimants filed their Rejoinder on the Merits and Reply on Jurisdictional Objections on 24 October 2018 (¶ 93). Respondent filed its Rejoinder on the Merits and Reply on Jurisdictional Objections on 28 January 2019 (¶ 94). Claimants filed its Rejoinder on Jurisdictional Objections on 23 March 2019 (¶ 95). The hearing on the preliminary objections to jurisdiction and the merits was held on 11-16 April 2019 in London (¶ 96). Claimant and Respondent submitted their respective Post-Hearing

Briefs on 28 June 2019 (¶ 99). Claimant and Respondent sent their Costs Submissions 29 July 2019 (¶ 100).

3. Preliminary objections

3.1 Relinquishment to other proceedings

Respondent submitted that since the Companies started various proceedings before domestic authorities the relinquishment to other proceedings per article 9.18.2(b) of the FTA had not been made (¶ 140). Further, Respondent stressed that the claims raised by the Companies in domestic proceedings are the same as those subject to the arbitration (¶ 143). As to the fact that such claims were filed by the Companies and not by the Claimants, Respondent argued that this is irrelevant because the FTA allows claims brought by the claimant in representation of a legal person (¶ 144). In consequence, Respondent considers that the tribunal lacks jurisdiction.

In Claimants' view, despite the existence of parallel proceedings before domestic authorities, the formal relinquishment presented by the Companies on 23 May 2017 fulfilled the requirement in Article 9.18.2(b) of the FTA (¶ 146). Besides, they argued that claims brought before the tribunal were only in respect to losses suffered directly by the shareholders, which are different to those of the Companies (¶ 148). In conclusion, Claimants asserted that Article 9.18.2(b) of the FTA was aimed to prevent duplicity of claims, which was clearly not the case as there was not identity of cause, subject or parties (¶ 149).

The Tribunal considered that the relinquishment under Article 9.18.2(b) of the FTA had to be made either by the investor or by the investor and the company if the investor acted in representation of such a legal person (¶ 152). It then concluded that Claimants were requesting relief for losses resulting from not receiving dividends, the destruction of value and moral damages. Hence, their claims were based on damages suffered as shareholders of the Companies and not in representation of said legal persons (¶ 154). For this reason, the Tribunal considered that the relinquishment submitted by the Claimants *motu proprio* met the requirements of Article 9.18.2(b) of the FTA (¶ 155).

3.2 Claim limitation period

On the other hand, Respondent argued that the term to raise the claims under Article 9.18.1 of the FTA had expired as more than 39 months had passed since Complainants had knowledge of the events that serve as grounds for such claims (¶ 158). Claimants consider that the 39 months had to be counted since the submission of the notice of intent on 26 February 2014 (¶ 165). However, Respondent alleged that Claimants had knowledge of said violations long before such a date (¶ 159) and rejects that the supposed violations constitute continuing violations according to the ILC Articles on Responsibility of the States (¶ 161).

The Tribunal started its analysis by determining that 26 February 2014 was the date before which, if Claimants had knowledge of the alleged violations, such claims would be outside the scope of the arbitration (¶ 173). It then proceeded to study this issue in regard to claims referring to expropriation and claims referring to fair and equitable treatment, full protection and security, and most favoured nation (the 'Standards'). As to compound violations, the Tribunal clarified that they refer to a state measure which, considered jointly with other preceding actions, constitutes the breach of an obligation. Then, in compound violations what must be considered for purposes of expiration is the date of the predominant measure (¶ 190).

Against this background, the Tribunal considered that the predominant event was when Companies defaulted in their obligations in August 2014, which led to bankruptcy proceedings (¶¶ 195-196). The Tribunal then concluded that none of the claims regarding expropriation had expired yet (¶ 197). As to continuing violations, the Tribunal explained that they refer to a measure that amounts to a violation so that said measure and violation remain to exist in the future for certain period of time (¶ 201). In its opinion, what had to be considered pursuant to Article 9.18.1 of the FTA was whether such action had been taken prior to the 26 February 2014 and Claimants had knowledge of it and its ensuing damage (¶ 204).

The Tribunal opposed to the thesis of Claimants according to which the limitation period starts when the alleged violation ceased to exist. In its opinion, what was relevant was the moment when Claimants knew of the violation, not its duration in time (¶ 205). In addition, the Tribunal considered the authorities invoked by Claimants to uphold such interpretation, such as the ILC, InterAmerican jurisprudence, and the case *UPS v Canada,* inappropriate for different reasons (¶¶ 206-209). Considering all of the above, the Tribunal decided that out of the 11 claims raised by Claimants only seven were within the acceptable timeframe as there was evidence that Claimants knew or should have known of the remaining claims (¶¶ 210-219). The tribunal disregarded claims on infrastructure, evasion, vandalism, operative cost overruns, and drop in demand (¶ 220)

4. Responsibility

4.1 Expropriation

4.1.1 Applicable standard

Claimants submitted that the accumulation of several measures by Chile amounted to an indirect expropriation (¶ 229) because it destroyed the economic value of their investment (¶232). They also considered that according to *SGS v. Paraguay* whether such expropriation came from the sovereign action of the state was irrelevant because any action of the state can be characterized as such (¶ 231). Respondent considered that allegations made by the Claimants did not refer to regulatory acts of the state but matters of a contractual nature (¶¶ 235-237). Further, following the tribunal in *Electrabel* it suggested that the reduction of an investment did not amount *per se* to an expropriation, and the critical financial situation of the Companies was only the result of a poor management (¶¶ 238-239).

On this issue, the Tribunal turned to the text of the FTA and considered three overarching factors in annex 9-C of the treaty. Firstly, the Tribunal noted that only measures that interfered with a 'tangible or intangible property right' could amount to an indirect expropriation (¶ 245). As to the shares of a company, such rights entail the possibility to receive dividends or recover an investment (¶ 246). However, under the FTA not any economic loss would lead to an expropriation, but only those that cause a substantial deprivation (¶¶ 248-251).

Secondly, the Tribunal highlighted that the FTA refers to measures that interfere with 'reasonable and certain expectations,' which pursuant to article 31 of the VCLT must be interpreted as expectations that admit no doubt and were necessary for the investment to be made (¶¶ 253-257). Thus, the Tribunal accepted Respondent's argument in the sense that 'reasonable and certain expectations' is different to 'legitimate expectations' as the former standard is higher (¶ 258). Thirdly, it considered that, except when umbrella clauses are in place, a 'governmental action' refers to sovereign and not merely 'contractual' actions (¶ 259).

4.1.2 Non-execution of the Master Plan

Claimants considered that the Master Plan was mandatory because it was an administrative order, it contained well-defined activities, and representatives of MTT had admitted that the State was committed to it (¶¶ 264-266). Then, Claimants expected Chile to make the investments infrastructure in defined in the Master Plan, which was not the case and prevented them from running the business properly as roads and other aspects of the transportation system were not adequate for a smooth operation (¶ 267). Respondent replied that the Master Plan is a non-binding instrument and is not addressed to anyone in particular because of its general legal nature (¶ 268). Besides, it could be modified at any time and incorporated no specific obligations, so no specific commitment was ever made by the government (¶¶ 267-270).

The Tribunal considered that the Master Plan was indeed a sovereign act due to its legal nature and the fact that it was adopted as a matter of public policy before any of the Contracts (¶¶ 272-275). Nonetheless, it disregarded it as an instrument with 'reasonable and certain expectations' (¶ 277). First, the Tribunal was of the opinion that the Master Plan lacked any private receivers and neither the Companies nor the Claimants were subjects of rights or obligations thereto (¶ 278). Second, as the Master Plan could be updated or amended at any time, this should have shed doubts on any reasonable investor (¶ 279). Third, there was no technical or financial certainty that the work set forth in the Master Plan would be completed as it was subject to several studies and approval (¶ 280). Fourth, nothing in the negotiation of the Contracts suggested a commitment of the State in regard to the Master Plan (¶ 282).

4.1.3 Lack of sufficient support as to evasion

Claimants argued that Chile did not provide sufficient support to prevent evasion in the payment of tickets (¶¶ 287-290). Further, they considered that the State had an obligation to oversee the payment of tickets by passengers and adopt measures to punish infractions (¶ 289). This was additional to the commitment made by MTT to control ticket payment (¶ 290).

The Tribunal pointed out that pursuant to Chilean law, police officers have the power to verify ticket payments and carry out actions to enforce it (¶ 307). Further, it agreed that the State is in charge of promoting any legislation necessary to regulate these matters (¶ 307). Therefore, most measures in connection with ticket payment were within the sovereign capacity of the state. In addition, the Tribunal considered that Claimants did have a 'reasonable and certain expectation' that the State would make real efforts to prevent evasion but clarified that such commitments were not bound to any specific act or measure (¶ 331). Then, it proceeded to study whether such expectations had been affected by the state.

The Tribunal considered different efforts of the State to prevent evasion and found that they were insufficient to prevent harm to investors' expectations (¶ 382). First, it determined that the number of police officers assigned to oversee ticket payment and the number of controls on ticket payment were insufficient to prevent evasion (¶¶ 356-369). Second, it established that government actions to expand the locations where citizens could recharge their Bip! card were limited and came late (¶¶ 370-376). Third, it disregarded other measures adopted by the State to fight evasion such as workshops, which were not deemed to be sovereign (¶¶ 377-379).

4.1.4 Lack of protection from vandalism

In the Tribunal's opinion, claims on vandalism were divided in two: (i) lack of prevention and persecution of vandalism; and (ii) exposure to vandalism by making the Companies operate during events of risk (¶ 399). As to the first, it considered the sovereign capacity of Respondent to be undeniable as it was in charge of public order (¶ 400). However, it rejected such sovereign capacity for the second because Companies were contractually obliged to operate in such events and had agreed to receive increased payments in exchange (¶¶ 401-402). Regarding expectations, the Tribunal found that certain degree of vandalism was normal in the city, so it was expected (¶ 412). In addition, there was no specific commitment by the State in terms of measures of results, so it was only expected to fight vigorously to prevent vandalism (¶ 411).

As a consequence, the Tribunal considered that it had to determine whether risks associated to vandalism had increased since 2011, following the execution of the Contracts (¶ 413). The tribunal found that the levels of vandalism rampaged during 2013, 2014, and 2015, and thus the expectations of Claimants in such years were frustrated (¶ 422). In the same vein, it concluded that efforts of the State in these periods were insufficient (¶ 432). However, it also identified that vandalism was significantly reduced since 2016 and attributed such changes to the measures of Respondent as Claimants did not offer any alternative explanations to such changes (¶ 435).

4.1.5 Inadequate imposition of fines and discounts

The Tribunal considered that the imposition of discounts under the Contracts is a merely contractual matter and therefore had no relation to sovereign powers (¶ 458). However, it considered that the alleged interference of Respondent with ICR, ICF, and ICT indexes was a different issue (¶ 459). Regarding ICF and ICT the Tribunal considered that such standards were accepted by the Companies in the Contracts and disregarded them as sovereign matters (¶¶ 460-462). As to ICR, the Tribunal agreed that the Directive adopted by the DTPM on 4 July 2014 was of a non-contractual nature and thus it entailed a sovereign action (¶¶ 463-468).

Nonetheless, the Tribunal considered that Claimants did not demonstrate that Respondent interfered with their ICR (¶ 487). It determined that expectations in this claim referred to the alleged application of the Directive in a discriminatory manner (¶ 470). For Claimants, authorities permitted several Operators to work under irregular intervals, but denied the same possibility to the Companies (¶ 473). The Tribunal determines that this was not the case because Claimants only requested permission to operate with irregular intervals once, which is not representative of the circumstances (¶¶ 474-478). It also finds that it was not correct that irregular intervals were systematically authorized for other Operators (¶¶ 478-486).

4.1.6. Elimination of certain services

The Tribunal considered that the relevant issue was whether the DTPM was authorized under the New Contracts to eliminate the services (¶ 495). Then, it determined that, as this covered in said agreements, it was a contractual and not a sovereign matter (¶ 497).

4.1.7. Refusal to re-establish the economic balance of the Contracts

Under this claim, the Tribunal determined that it was crucial to know whether the re-establishment of the economic balance of the Contracts was a contractual remedy or an

obligation of the State was pursuant to Chilean law (¶ 507). It found that the rule on the economic balance of the contract was not applicable because it only applied to concession agreements, which was not the case (¶ 508). Further, it established that, even if applicable, Claimants had not referred to any events of *faits du prince* or *ius variandi* that could trigger such principle (¶ 516). The Tribunal considered that, as it was not clear that Respondent had the obligation to re-establish the economic balance of the Contracts, determining whether MTT acted in its sovereign capacity was irrelevant (¶ 517).

4.1.8 Expropriation of Companies' terminals

Claimants had made this allegation but did not uphold it during the Hearing or afterwards. The Tribunal interpreted this to mean that such expropriation did not exist because Companies never lost their control over the terminals (¶ 518).

4.1.9 Economic impact

As the Tribunal found that there were violations regarding evasion and vandalism, it proceeded to assess if such issues amounted to a substantive deprivation of property understood as a loss of value in the shares of Claimants (¶ 521). To make such analysis, the Tribunal decided to compare the actual circumstances of the case (Factual Scenario) with a hypothetical situation that assumes that Respondent made sufficient efforts to fight evasion and vandalism (Counterfactual Scenario) (¶ 522). For this purpose, parties' experts on damages were invited to prepare a Joint Model of Quantification (the 'MCC') (¶ 526).

By looking at the results of the MCC, the Tribunal concluded that the economic impact of the relevant measures was non-existent. This was the case because, according to the MCC, the cashflows of the Companies would have been insufficient to pay dividends even in the Counterfactual Scenario. Therefore, the Tribunal found that the omission of Respondent to implement actions against evasion and vandalism was not the reason why Companies had negative balances after the relevant period, which should be interpreted as the absence of a substantive deprivation of Claimants' property (¶ 623).

4.1.10. Lawfulness of the expropriation

As the Tribunal concluded that there had been no expropriation, it also decided that it was not necessary to discuss the lawfulness of the measures (¶ 625).

4.2. Fair and equitable treatment, most favorable treatment, and full protection and security

As previously decided, regarding the Standards, the Tribunal had jurisdiction only over the following claims: (i) forceful and discriminatory exposure of the Companies to vandalism; (ii) arbitrary and discriminatory rejection of requests for the increase and renewal of the [bus fleet]; (iii) arbitrary suppression of certain services and discriminatory assignment to other Operators; (iv) refusal to re-establish the economic balance of the New Contracts; (v) undue imposition of fines and discriminatory intervention in ICR results; and (vi) the discriminatory exclusion of Claimants and Companies from the 2017 Bidding (¶ 626).

As to the Standards, the Tribunal relied heavily on its previous findings. Firstly, it reminded that, as no umbrella clause was applicable, measures contrary to the Standards would have to result from a sovereign act of the State (¶ 627). Then, the Tribunal stated that it had already

found that measures (i) to (v) were uncapable of engaging Chile's responsibility under the FTA (¶ 628). As to measure (vi), the Tribunal considered that it did not amount to a discriminatory treatment because neither the Operators nor any third parties were declared winners of the 2017 Bidding, and thus no discrimination was even possible (¶ 629).

6. Costs

The Tribunal ordered Claimants to bear the full costs and expenses incurred by ICSID in connection with the arbitration proceedings, and to reimburse Respondent 40% of its legal costs and expenses (¶ 641).

7. Partially dissenting opinion

Mr. Oscar Garibaldi had a partially dissenting opinion on the determination of the date upon which the statute of limitations for claims begins to run (*dies a quo*) in the event of continuing violations (¶ 1). The Tribunal decided that the applicable *dies a quo* is the time when the claimant knew for the first time of the measure that would constitute the violation (¶ 2). Pursuant to the wording of Article 9.18.1 of the FTA, which refers to the issue of the *dies a quo*, Mr. Garibaldi considered that two elements must be present: (i) real or presumptive knowledge of the 'alleged violation; and (ii) real or presumptive knowledge of the existence of damages or losses resulting thereof (¶ 6). He then focuses on the two elements of the first criteria, this is the 'alleged violation' and 'real or presumptive knowledge' of it (¶¶ 7-8).

As to the 'alleged violation', the dissenting opinion stresses the particular nature of continuing violations. In Mr. Garibaldi's view, following the ILC Opinion in this regard, the *dies a quo* for such violations should be established only after the end of time of the commission of the wrongful act (¶ 14). While the majority of the Tribunal disregards such alternative because the expiry of claims was a topic excluded from the final draft of the ILC Articles on the Responsibility of States, he considers it an authoritative source of great relevance (¶ 15). Regarding the 'real or presumptive knowledge', Mr. Garibaldi highlights that the FTA does not indicate that such knowledge encompasses either the first time when the claimant has knowledge of the violation nor anytime before the violation ceases to occur (¶ 17).

In this sense, Mr. Garibaldi considers that knowledge of a violation in these cases only denotes knowledge once the continuing violation has stopped (¶ 19). To this extent he opposes to the contrary interpretation of the majority which in his opinion suggests the existence of terms that are absent in the FTA (¶ 20). He points out that this is different to other agreements such as TLCAN or NAFTA that refer explicitly to the time when the breach 'first occurred' (¶ 20). Besides, he also quotes the case of *Resolute Forrest Products Inc. v Canada* where the tribunal considered irrelevant the continuity of the violation precisely because of the express text of the treaty (¶¶ 23). Further, he opines that the majority decision blurs the difference between continuing and simple violations because it asserts that, if the claimant had knowledge of the violation on certain date it cannot do it again in the future (¶¶ 25).