



School of International Arbitration

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International Arbitration Case Law

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International Arbitration Case Law
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Award Name and Date: Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic (ICSID Case No. ARB/14/32) – Award – 5 November 2021

Case Report by: Juan Pablo Gómez-Moreno**, Editor Ignacio Torterola***

Summary: Claimants brought an action for relief against Argentina under the Argentina-Austria BIT (the ‘BIT’) alleging Argentina breached, *inter alia*, fair and equitable treatment and expropriation protections in the BIT concerning its investment through the revocation of a gambling license. A majority consisting of Mr. Hans Van Houtte and Mr. Stephan Schill considered that Respondent breached the protections relative to indirect expropriation incorporated in articles 4(1) and 4(2) of the BIT because the measures enacted by local authorities were not applied following the regulatory powers of the state as they were arbitrary and disproportionate under international law.

Main Issues: indirect expropriation and regulatory powers of the state, damages for the expropriation of individual assets, causes of action derived from shareholding rights, content and scope of the fair and equitable treatment standard.

Tribunal: Prof Dr Hans Van Houtte (President), Prof Dr Stephan W. Schill (Arbitrator) and Dr Santiago Torres Bernández (Arbitrator)

Claimant's Counsel: Mr Florian Haugeneder, Mr Emmanuel Kaufman (KNOETZL HAUGENEDER NETAL, Vienna)

Respondent's Counsel: Dr Carlos Alberto Zannini, Dr Horacio Pedro Diez, Dr Sebastián Antonio Soler (Procuración del Tesoro de la Nación, Buenos Aires)

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Digest:

1. Relevant Facts

Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft (the ‘Claimants’) are the majority shareholders in the Argentine company Entretenimientos y Juegos de Azar S.A. (‘ENJASA’), which had an exclusive 30-year license for the operation of gambling facilities and lottery activities within the Province of Salta, through Leisure & Entertainment S.A. (‘L&E’) (¶ 1). The underlying dispute arose out of the revocation of ENJASA’s license in 2013 by the Ente Regulador del Juego de Azar (‘ENREJA’) through Resolution No. 240/13 following three investigations for breach of gaming regulations (¶ 116).

Claimants considered this an arbitrary exercise of power and politically motivated decisions aiming at increasing the Province’s revenue from gaming activities, which ultimately led to the destruction of their investments and consequently brought an action against Argentina under the BIT signed in 1992 and in force since 1995 alleging Argentina had breached, *inter alia*, fair and equitable treatment, national treatment, and non-expropriation without compensation protections incorporated in the BIT, seeking as a result for said actions compensation for damages exceeding USD 50 million (¶ 2).

2. Procedural History

On 4 December 2014, Claimants filed a Request for Arbitration, which was registered by ICSID on 18 December 2014 (¶ 5-6). The Tribunal issued Procedural Order No. 1 on 23 June 2015 (¶ 13). Claimants filed their Memorial on the Merits on 2 October 2015 (¶ 14). Respondent filed its Memorial on Objections to Jurisdiction and Counter-Memorial on the Merits on 15 March 2016, including a request to bifurcate the proceeding and treat objections to jurisdiction as a preliminary issue (¶ 16). On 8 April 2016, Claimants opposed Respondent’s request (¶ 17) and on 25 April 2016, the Tribunal agreed to hear the objections to jurisdiction as a preliminary matter (¶ 18). Claimants filed their Counter-Memorial on Jurisdiction on 26 July of 2016 (¶ 19). On 11 October 2016, Respondent filed its Reply on Objections to Jurisdiction (¶ 20). Claimants filed their Rejoinder on Jurisdiction on 23 December 2016 (¶ 21). A hearing on jurisdiction was held from 23 to 25 March 2017 (¶ 23). On 23 June 2017, the Parties submitted Post-Hearing Briefs on jurisdiction (¶ 24). The Tribunal issued its Decision on Jurisdiction on 29 June 2018 ruling that it had jurisdiction over the dispute (¶ 25). Claimants submitted their Reply on the Merits on 3 December 2018 (¶ 29). On 27 May 2019, Respondent filed its Rejoinder on the Merits (¶ 30). The Tribunal held the hearing on the merits from 2 to 13 September 2019 (¶ 42). Both parties filed their Post-Hearing Briefs on 24 January 2020 (¶ 49). Lastly, they sent their Costs Submissions on 30 July 2021 (¶ 59).

3. Responsibility

3.1 Expropriation

3.1.1 Abuse of regulatory powers

According to Claimants, article 4 of the BIT protects investors from direct and *de facto* expropriation and, as the revocation of ENJASA's license was an abuse of the regulatory powers of ENREJA and constituted an indirect expropriation of their investment, Claimants are entitled to receive compensation for damages (¶ 191). Claimants accepted that under customary international law regulatory measures that pursue a legitimate interest, are aimed at the general welfare, and are not discriminatory fall within a State's right to regulate and are deemed to be in accordance with due process (¶ 192). Further, relying on the rulings in *LG&E* and *El Paso*, Claimants asserted that Respondent's measures should satisfy the test of proportionality to be considered reasonable and proportionate (¶ 193).

Contrary to the foregoing, Claimants argued that Respondent's measures were an irregular exercise of regulatory powers made in bad faith by local regulators as Resolution No. 240/13 was issued without previous warning and targeted specifically Claimant's investment in Salta (¶ 194). Besides, Claimants considered that the measures were politically motivated and aimed at providing advantages to other gaming operators in the region as ENREJA applied regulations that had not been in force, disregarded statute of limitations, and rendered legal recourses moot (¶ 195). Lastly, Claimants complained that despite its infringements being minor, the measures applied by authorities were the harshest available and targeted them specifically (¶ 196).

On the contrary, Respondent argued that the revocation of the license was justified and proportionate as Resolution No. 240/13 was founded on findings from the three investigations carried out by regulatory agencies (¶ 242). Firstly, as to the justification of the measures imposed by local authorities, Respondent pointed out that ENREJA was entitled to exercise the disciplinary power over ENJASA's operations and to revoke the license under Article 13 of Law No. 7020 (¶ 253). While Claimant's asserted that such measure was superseded by the enactment of Law No. 7133 which did not contemplate the revocation of a license (¶ 254), Respondent reasoned that both regulations are in force (¶ 254).

Secondly, concerning the proportionality of the revocation, Respondent pointed out that Resolutions No. 380/12 and 384/12 established several breaches of anti-money laundering regulations by ENJASA, which made the revocation proportional (¶ 257). According to Respondent, as these regulations concern matters of public interest such as the preservation of the social and financial order, the revocation of the license was adequate (¶ 258). Additionally, Respondent justified the measure based on data that it had applied actions such as warnings and fines previously and gradually (¶ 259), which were not sufficient to address the problem as ENJASA allegedly did not make any changes (¶ 261).

Further, Respondent argued that no forced transfer of ENJASA's assets had taken place and that Decree No. 3330/13 did not pass the license to other operators but authorities only granted provisional permits and later issued new permits to keep gambling operations ongoing (¶ 277). Respondent also claimed that Claimants continued operating certain assets as the Sheraton Hotel in Salta (¶ 278) and proposed a distinction between compensable and non-compensable expropriation depending on the regulatory reasons behind the measures (¶ 279). Consequently,

it asserted that several awards have found in the past that the Tribunal is not expected to second-guess the policies a state considers useful or necessary for the public good (¶ 281).

On this issue, the Tribunal acknowledged that, unless otherwise provided in a treaty, the regulatory or police powers of the state are an important element of the analysis as they are incorporated into customary international law (¶ 332). Then, based on cases such as *Metalclad*, it referred to what it concluded to be the two key considerations for a measure to qualify as an indirect expropriation: (i) the severity of interference of the measure (¶ 335) and (ii) that the measure does not fall within a state's regulatory powers, taking into account that such powers must be proportionate, exercised in good faith, and in line with the principles of international law, non-discrimination, and the prohibition of arbitrariness (¶ 336).

To determine if Respondent's measures fell within its regulatory powers, the Tribunal relied on the standard in *Quiborax* that (i) state action must be based in actual violations of domestic laws; (ii) violations must be sanctioned with the measures adopted by the state; and (iii) measures must have been carried out in accordance with due process (¶ 338). Then, the Tribunal considered it adequate to add to the standard the following considerations on the degree of deference: (i) that a tribunal is not expected to review compliance of the host state with its own regulatory framework *de novo* (¶ 342) and (ii) that the limitations in the exercise of regulatory powers are not restricted to due process but extend to good faith, the prevention of arbitrary or discriminatory treatment, and proportionality (¶ 343).

According to the Tribunal, ENREJA's right to regulate anti-money laundering matters was indeed a legitimate purpose (¶ 358). The Tribunal concluded that Claimants had not provided conclusive evidence of a long-term strategy from authorities as of 2007 to oust ENJASA from the gaming sector (¶ 362). Additionally, it interpreted that there was not a conflict between the disciplinary regulations that would lead to conclude that it was not within ENREJA's powers to revoke the license (¶ 375). Despite the foregoing, the Tribunal found manifest errors by ENREJA in its three investigations, which encompassed incorrect interpretations of legal rules and incorrect findings of fact that led to conclude that it had acted arbitrarily under international law (¶ 378) and applied sanctions that were not proportionate (¶ 417).

3.1.2 Deprivation of Claimant's Investment

Claimants considered that regulatory takings can amount to indirect expropriation and identified two criteria to determine this: the intensity of the effects and their duration (¶ 196). According to Claimants, the decisive point for expropriation as to the intensity of the effects is the destruction of the capability to reasonably use the investment in an economic sense, which was the case because Claimants lost all economic benefits as shareholders of L&E and ENJASA (¶ 198). Regarding the duration of the effects, Claimants point out that they were permanent as ENJASA had to shut down operations following the revocation of the gaming license in 2013 and therefore the investment lost all its capacity to generate profits (¶ 201).

In this regard, the Tribunal considered that, while Claimants had shareholding rights over L&E and ENJASA which were unaffected following the enactment of Resolution No. 240/13, the license was at the heart of the business operation and thus its revocation only left an empty shell of assets to decompose economically (¶ 353). Additionally, it clarified that such finding was unaffected by the Respondent's assertion that Claimants were offered the possibility to continue operating casinos in the Province of Salta (¶ 354) or that they kept a five-star hotel

operative (¶ 355) as this did not change the fact that the exclusive license was revoked and said action permanently and substantially deprived Claimants of their investment.

3.1.3 Expropriation of Individual Assets

Claimants argued that under article 4(3) of the BIT it is entitled to compensation for damages for the revocation of ENJASA's license and the forced transfer of its operations to local competitors as individual assets additional to the claims for damages as shareholders (¶ 202). According to Claimants, article 4(3), read in conjunction with the broad definition of investment in article 1, not only protects the shares of the foreign investor but explicitly includes the individual assets of local companies and therefore the limited protection to shareholders under customary international law in disputes before the ICJ such as *Barcelona Traction* and the *Ahmadou Diallo* cases does not apply (¶ 203).

Claimants also opposed the narrow reading of the BIT proposed by Respondent when arguing that article 4(3) precludes Claimants from alleging other standards of protection different from expropriation as it would be contrary to the object and purpose of the treaty (¶ 205). Additionally, Claimants rejected Respondent's interpretation that, as the Spanish version of the BIT referred to "financial assets", this was a limitation to the protection of the investment under article 33 of the VCLT because the German version only refers to "assets" (¶ 207). Therefore, unless there would be a clear explanation of the distinction in the Spanish version, all authentic versions of the BIT in different languages must be regarded as equally authoritative (¶ 208).

As to this issue, the Tribunal pointed out that, even though ENJASA's assets themselves, including its exclusive operating license, do not qualify as Claimant's investments under article 4(3) of the BIT, this provision does grant a cause of action to shareholders in case of expropriation of assets/financial assets (¶ 326). Hence, the Tribunal referred to its Decision on Jurisdiction to rule that nothing in the text of article 4(3) supports the argument that the protection of shareholder's rights is excluded in cases where assets/financial assets of a locally incorporated company have been expropriated (¶ 327). Further, it noted that deciding the dispute on whether the BIT covered any type of asset or just financial assets was unnecessary as this claim would be consumed by findings for articles 4(1) and 4(2) (¶ 432).

3.2. Fair and equitable treatment

Claimants alleged that Respondent breached Article 2(1) of the BIT (¶ 209). While Respondent argued that the scope of the FET standard was limited by the concept of minimum standard of treatment under customary international law, Claimants rejected this idea as they considered that the content of the FET had to be determined case by case (¶ 210). Claimants contended that Respondent had breached the following elements of FET: (i) failing to afford due process and procedural propriety; (ii) engaging in coercion and harassment; (iii) acting arbitrarily and in bad faith; and (iv) frustrating Claimant's legitimate expectations (¶ 213).

Firstly, Claimants argued that ENREJA's failure to consider ENJASA's comments to Resolution No. 240/13 and the conduct of the administrative procedure were contrary to due process rights as *inter alia* notification of the charges was sent only six months after formal investigations started, ENJASA did not get access to all the relevant files of the process, and there was no previous warning concerning the revocation of the license (¶ 215). Secondly, Claimants alleged that, following a change in government in the Province of Salta in 2007, local authorities deployed a strategy of harassment against ENJASA that consisted of several

measures including the transfer of the investments to local companies, the initiation of investigations based on formalistic errors, and the imposition of fines for events that had occurred years before fines were even implemented, among others (¶ 217).

Thirdly, Claimants contended that ENREJA's actions made clear that its measures were guided by opportunistic reasons, for instance, while sub-licensing by ENJASA to other operators was one of the causes of the revocation, Claimant's business was later transferred by local authorities to the same operators, which clearly showed contradictory behavior (¶ 220). Lastly, Claimants argued that based on the issuance of the license for 30 years until September 2029, they had a legitimate expectation to exploit the license undisturbed if they continued to operate in the same manner confirmed by the authorities (¶ 222). As argued consistently, Claimants alleged that such expectations were completely overturned once there was a change in government in the Province of Salta in 2007, which led to actions of authorities whose only purpose was to transfer ENJASA's license to local operators (¶ 223).

The Tribunal noted that, while parties had extensively discussed the issue of FET during the entire procedure, Claimants' allegations were ultimately limited to the question of whether the revocation of the license was proper under the BIT (¶ 435). Consequently, the Tribunal concluded that allegations on FET under article 2(1) of the BIT duplicated the claim for expropriation under article 4(1) and (2) of the BIT as to the request for compensation (¶ 437). Therefore, it concluded that it was not necessary to make any formal finding on the breach of article 2(1) though the ruling that the revocation of the license was not a lawful exercise of the Respondent's regulatory powers could translate one-to-one into a breach of the FET (¶ 438).

4. Costs and damages

Regarding the costs of the arbitration, the Tribunal awarded Claimants the costs incurred in connection with the proceedings, the fees, and expenses of the members of the Tribunal, and the charges for the use of the facilities of the Centre in EUR 3,725,134.37 and USD 1,736,131.62 (¶ 609), plus interest at a rate of 4% per annum compounded annually from the date of the award until full payment thereof (¶ 610). Further, as to the damages of the dispute, the Tribunal found that Respondent was liable to pay compensation to Claimants in the amount of USD 21,660,000 plus interest at a rate of 4% per annum compounded annually from 13 August 2013 until full payment thereof (¶ 611).

5. Partially dissenting opinion

Mr. Santiago Torres Bernández had a partially dissenting opinion on various issues. The first aspect of dissent from the award is the determination of the subject matter of the dispute in the Request for Arbitration (¶ 1). According to Mr. Torres, it was clear that the arbitration was based on a treaty claim and there was no reason to treat the dispute as if it concerned a contract claim within the framework of Salta's domestic legal system (¶ 3). However, he points out, the majority decision revives certain aspects of a contract claim and rises as an appellate court of actions undertaken by ENREJA when reviewing them *de novo* (¶ 4). The arbitrator also disagrees with the position of Claimants and the majority to remain silent on the argument that Argentine law determines the scope of investors' rights at stake (¶ 12) and argues that the majority avoided applying relevant customary international law (¶ 13).

On the burden of proof, Mr. Torres considers that Claimants failed to submit evidence regarding compliance with local regulations (¶ 17) and did not meet the standard for

demonstrating that state measures were tantamount to an indirect expropriation (¶ 19). Also, he asserts that Claimants had to exhaust domestic judicial remedies before bringing the claim to ICSID, but that was not the case, as Claimants only exhausted local administrative remedies. (¶ 24). Further, the arbitrator considers that there was no room for compensation in the present case because the adverse effect alleged by Claimants does not stem from an internationally wrongful act and Claimants failed to prove a violation of any of the articles of the BIT (¶ 26). Among other issues, Mr. Torres complains that the award did not limit compensation to the actual damage suffered by Claimants (¶ 32) and mistakenly recognized compound interest (¶ 38).

According to the dissenting arbitrator, the majority failed to apply the customary rule of international law on regulatory powers invoked by Respondent and assessed expropriation claims based on the *sole effects* of the measure, disregarding its *causes* (¶ 97). Regarding the claim for a violation of articles 4(1) and 4(2), Mr. Torres considers that ENREJA's measures did not amount to an indirect expropriation because (i) they were aimed at sanctioning breaches of domestic law; (ii) were within its regulatory powers of authorities; (iii) were applied following the ordinary administrative proceeding; (iv) were conducted in accordance with due process; and (v) Claimants were aware of this regulatory framework (¶ 114).

Mr. Torres, unlike the majority, also considered the additional claims under articles 4(3) and 2(1) of the BIT. Regarding the first issue, he asserted that the Tribunal was to apply the interpretation that better reconciled the Spanish and German versions of the BIT, which was the one with a most limited material scope (¶ 249). Hence, he concluded, the provision only covered financial assets and the Claimants claim for individual assets was inadmissible (¶ 251). On the second issue, the dissenting opinion disagrees with the determination of the scope of the FET standard by Respondent, arguing that it is presented as if it was a kind of *a la carte* menu in permanent expansion (¶ 289). Contrary to this, Mr. Torres concludes that the revocation of the license was not a result of any political conspiracy but merely the response of regulating authorities to repeated violations of ENJASA (¶ 361).