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Analysis of Beer Creek Mining V. Peru Case

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Abstract: This article discusses arbitral awards that are significant for finding that foreign investors do not have obligations under the international law in the context of obtaining social license to operate as long as they are involved in community consultations in accordance with national laws. Moreover, it examines to what extent tribunals apply contributory fault principle in order to calculate compensation for violation of investment protection standards. Furthermore, it argues that international obligations of investors should be recognized as they have international rights.

Keywords: international investment agreements, investor rights, investor obligation, calculation of compensation, contributory fault principle.

INTRODUCTION

Beer Creek Mining v. Peru[1] involves an investor-state dispute arising out of circumstances, where the investor seeks damages from the host State for having cancelled a permit in response to an outcry by a local community against the investment. Accordingly, the arbitral tribunal held that revocation of an authorization for operating the mining concessions constituted an unlawful indirect expropriation under the Peru-Canada Free Trade Agreement.[2] Moreover, the tribunal rejected lack of social license as a contributory fault and illegality arguments alleged by respondent. Two aspects of this award are of particular importance. First, it sheds light on the conception of obtaining a social license and in particular, foreign investor's obligation to consult with indigenous communities affected by an investment project in the light of international law framework. Second, the award is one of the first to interpret and apply an investment treaty that provided specific criteria for distinguishing indirect expropriation from legitimate regulatory measure.[3] Thus, the award raises significant questions about the legitimate rights and responsibilities of the foreign investor, host State government and local communities impacted by investment activities.

In this case, the claimant was Beer Creek Mining Corporation (Beer Creek) incorporated under the laws of Canada, which commenced ICSID arbitration against the Republic of Peru[4] pursuant

[1] *Beer Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21. Award (30 November, 2017)

[2] Ibid para.449

[3] James Harrison, 'Significant International Environmental Cases: 2017-18' (2018) 30 (3) Journal of Environmental Law pp.539

[4] *Beer Creek v. Republic of Peru* (n1) para.1

to the investment chapter of the Canada-Peru Free Trade Agreement (Canada-Peru FTA).[5] The dispute concerned Beer Creek's alleged investments in Peru such as the Santa Ana silver mining projects, where it contended that Peru has violated its obligations under the FTA and international law specifically, those relating to expropriation, fair and equitable treatment, full protection and security, protection against unreasonable and discriminatory measures.[6] Peru's action that gave a rise to Beer Creek's claim was the adoption of Supreme Decree 032-2011-EM, which revoked authorization rights of Beer Creek to operate its mining concessions.

In 2006, the claimant commenced a procedure to acquire silver mining rights pertaining to the Santa Ana project, which was located close to the Peru-Bolivia border and indigenous populations in Peru.[7] There were two major issues associated with the mining area. Specifically, the proposed area of the Santa Ana mining project was part of the territories of Aymara indigenous peasant communities, whose economic activities involved subsistence agriculture and farming, which was depended on water resources.[8] Therefore, this area was considered to be very sensitive since any contamination posed by mining activities would adversely affect on the subsistence of those local communities.[9] Moreover, under the Constitution of Peru, a foreign national could not obtain mining rights in border regions without a declaration of "a public necessity".[10] Therefore, the claimant agreed with one of its Peruvian employees that she would obtain the concession rights in her own name, while the claimant as a foreigner acquired a declaration of public necessity.[11] In November 2007, the claimant successfully acquired Supreme Decree 083-2007 enacted by the respondent, which authorized the claimant as a foreigner to own and operate relevant mining concessions including the Santa Ana Project and it subsequently obtained titles to the mining concessions from its local employee.[12] However, the mining project was highly contentious amongst neighboring indigenous communities in the region, who organized continuous protests and strikes against the mining project during the period of 2008 and 2011.[13] Meanwhile, the claimant had undertaken a range of community engagement activities such as workshops and consultations with local populations as required by Peruvian law thereby, concluding agreements with some of the communities (closest to the Project) and promising job opportunities.[14] However, the protests against the environmental and social impact assessment (ESIA the respondent was in the process of carrying out) of the Santa Ana project continued to grow requiring its cancellation.[15] Consequently, the central government intervened in order to address these concerns by meeting the representatives of the protestors, which resulted in the issuance of Supreme Decree 032-2011-EM that revoked Supreme Decree 083-2007 and thus, cancelled authorizations issued to the claimant.[16]

Apart from the disagreement between the parties regarding social license issues, there were conflicting views between the members of the tribunal as well. While it was asserted that ' Claimant could have gone further in its outreach activities', for the majority of the tribunal, the relevant question was whether the respondent could 'claim that such further outreach was legally required and its absence caused or contributed to social unrest so as to justify Supreme Decree

[5] Free Trade Agreement between Canada and the Republic of Peru (signed 28 May 2009, entered into force 1 August 2009)
[6] *Beer Creek v. Republic of Peru* (n1) paras.113-115
[7] Ibid para.140
[8] Amicus Curiae Brief Submitted by the Association of Human Rights and the Environment-Puno (DHUMA) and Mr. Carlos Lopez (Non-Disputing Parties) (10 June 2016) para.III, pp.7
[9] Ibid
[10] *Beer Creek v. Republic of Peru* (n1) para.124
[11] Ibid para.126
[12] Ibid para.149
[13] Ibid paras.152-169
[14] Ibid paras.152-171
[15] Ibid paras.172-201
[16] Ibid para.202

032'.[17] Moreover, the tribunal grounded its legal evaluation on the *Abengoa v Mexico* award, according to which: 'For the international responsibility of a State to be excluded or reduced based on the investor's mission or fault, it is necessary not only to prove said omission or fault, but also to establish a causal link between [the omission or fault] and the harm suffered.[18] In the view of the majority of the tribunal Peru failed to demonstrate such a causal link between the Beer Creek's activity with respect to its Santa Ana Project and the adoption of Supreme Decree 032.[19] They further elaborated that a number of Peruvian authorities were involved in the procedure, which were aware of the claimant's consultation activities, and had approved them without raising any objections thereto, from the beginning of the project till the adoption of Decree 032. Therefore, for the majority 'Respondent after its continuous approval and support of Claimant's conduct cannot in hindsight claim that this conduct was . . . insufficient, and caused or contribute to the social unrest in the region'.[20]

By contrast, in his Partial Dissenting Opinion, Professor Sands asserted that the acts and omissions of claimant contributed in material ways to the social unrest that led to the issuance of Decree 032, which was clearly demonstrated by the respondent.[21] He emphasized that the claimant was responsible for obtaining a social license by making an extensive reference to ILO Convention 169 relating to Indigenous and Tribal Peoples in Independent countries.[22] In particular, he referred to consultation requirements provided by article 15 of the Convention and asserted that:

It may be the function of a State or its central government to deliver a domestic law framework that ensures that a consultation process and outcomes are consistent with Article 15 of ILO Convention 169, but it is not their function to hold an investor's hand and deliver a 'social license' out of those processes. It is for the investor to obtain the 'social license', and in this case it was unable to do so because of its own failures.[23]

Thus, Professor Sands concluded that the Convention may not impose direct responsibilities on foreign investors, but as such could not mean that it is without relevance or legal effects for them and offered to reduce the proposed damage by half.[24]

The tribunal applied Article 812.1 0f the Canada-Peru FTA and its relevant Annex in determining whether Supreme Decree 032 constituted an indirect expropriation. Annex 812.1 provided three specific factors among others in order for determining indirect expropriation namely, 'the economic impact of the measure or series of measures'; 'the extent to which the measure or series of measure interferes with distinct, reasonable investment-backed expectations'; and 'the character of measure or series of measures'.[25] In its examination of these factors, the tribunal found that Decree 032 that revoked claimant's authorization for the mining project had 'an obvious economic impact' and interfered with 'distinct, reasonable expectations' because the claimant had relied on the authorization granted by Decree 083 and invested between 2007 and 2011.[26] As regards the character of a measure, the tribunal recalled its conclusions made on the justifications presented by the respondent for the revocation such as illegality of obtaining concessions and social unrest. Since both of the justifications for the violation of the FTA were

[17] Ibid para.408
[18] Ibid para.410
[19] Ibid para.412
[20] Ibid
[21] *Beer Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Philippe Sands (30 November, 2017) paras.4-6
[22] Ibid paras.7-9
[23] Ibid para. 37
[24] Ibid para. 10
[25] *Beer Creek v. Republic of Peru* (n1) para.371
[26] Ibid paras.375-376

rejected by the tribunal, it found that Supreme Decree 032 was an indirect expropriation in the context of Article 812 and Annex 812.1.[27]

The award is significant for finding that foreign investors do not have obligations under the international law in the context of obtaining social license to operate as long as they are involved in community consultations in accordance with national laws. However, the conflicting approaches taken by the members of the Tribunal indicate ongoing changes in relation to the consideration of foreign investors' obligations in international investment law.[28] While some arbitrators concentrate on state obligations, explicit references to foreign investors' responsibilities are being made in international investment arbitration case law. For instance, in *Urbaser and Bilbao Bizkakia v Argentina*, the tribunal in its evaluation of Argentina's counterclaim, concluded that 'it is therefore to be admitted that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an obligation on all parts, publis and privat parties, not to engage in activities aimed at destroying such rights'.[29]

CONCLUSION

A key conflict between views of the majority of the tribunal and Professor Sands was the application of the contributory fault principle. The majority concluded that even if the investor was responsible for inadequacy of community engagement activities, further activities were not required by the state and therefore, those deficiencies could not justify a reduction in damages.[30] However, it is worth considering that whether these arbitrators' approach to contributory fault was excessively restrictive.[31] Specifically, these arbitrators seemed to focus exclusively on the quality of the investor's community consultation activities despite the fact that it is only one of many areas in which investor fault may happen.[32] Although the investor's communication activities were perfect, it may have failed to grant the community a share of benefits or to conduct sufficient due diligence before investing.[33] Moreover, the requirement of causal link between the investor's fault and the loss of the investment seems to exclude the consideration that investor's fault still can contribute to losses even if it does not generate the outright revocation of the authorization. For instance, in Copper *Mesa Petroleum v. Ecuador*, the tribunal found that the claimant's response to project opponents namely, using physical force made it difficult to secure community support and reduced the damage by thirty percent.[34] Also, similar point was made in the Professor Sand's Dissenting Opinion about material contribution of the claimant.

Rather than restricting the analysis to domestic legal requirements, tribunals may assess how investor's activities conflict with the relevant international standards including, UN Guiding Principles on Business and Human Rights, the OECD Guidelines and ILO Convention 169.

Another relevant issue for the tribunal's consideration could be compatibility of the investor's expectations with the state's international non-investment obligations. If the commitments offered to an investor do not inherently comply with host state's international obligations, the investor is

[27] Ibid para.416

[28] Jean-Michel Marcoux and Andrew Newcombe 'Beer Creek Mining Corporation v Republic of Peru: Two Sides of a 'Social License' to Operate' (2018) 33 (3) ICSID Review pp.659

[29] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) para 1199.

[30] *Beer Creek v. Republic of Peru* (n1) para.412

[31] George K. Foster 'Investor-Community Conflicts in Investor-State Dispute Settlement: Rethinking "Reasonable Expectations" and Expecting More from Investors' (2019) 69 (105) American University Law Review pp.162

[32] ibid

[33] Ibid pp.163

[34] *Copper Mesa Mining Corp v. Republic of Ecuador*, Case No.2012-2, Award (PCA 2016)

not supposed to reasonably rely on them.[35] Accordingly, the tribunal had to examine the Beer Creek's expectations in the context of Peru's obligations under ILO Convention 169.

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