

# Kluwer Arbitration Blog

## Criminal investigations and the right to the procedural integrity of arbitration proceedings

Andrew Newcombe (University of Victoria Faculty of Law) · Monday, April 5th, 2010

In this blog I return to the theme of investor misconduct, albeit in a different context from my previous posts: host state criminal investigations during investment treaty arbitration proceedings. This issue has arisen in a number of recent investment treaty arbitrations, most notably in a series of cases against Turkey (*Cementownia*, *Europe Cement* and *Libananco*), where one of the issues was interception and surveillance of legally privileged communications by Turkish police. In a recent Decision on Provisional Measures (26 February 2010), the Tribunal (Prof. Gabrielle Kaufmann-Kohler, Hon. Marc Lalonde and Prof. Brigitte Stern) in *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosc Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, decided that Bolivia had to suspend criminal proceedings against a number of named individuals and any other criminal proceedings directly related to the arbitration. The decision illustrates that, although the ICSID Convention and investment treaties do not prevent a state from exercising criminal jurisdiction or “exempt suspected criminals from prosecution by virtue of their being investors” (para. 129), where criminal proceedings impair the procedural integrity of arbitration proceedings they can be enjoined by provisional measures.

Quiborax involves a claim under the Chile-Bolivia BIT with respect to the revocation of mining concessions. After the Claimants notified Bolivia of their claim, Ecuadorian authorities began to investigate the corporate records of one of the claimants, Non Metallic Minerals S.A. (NMM). Two sets of corporate minutes were discovered, listing different shareholders. The minutes were relevant to whether shareholders in NMM were Chilean investors under the BIT. Bolivia then began criminal proceedings against a number of individuals including one of the claimants, Allan Fosc, alleging that the minutes relied upon by the Claimants were forgeries. One of the charged individuals (Moscoso) confessed (after a request from bail money from Fosc was not forthcoming), was sentenced to two years of imprisonment but immediately received a judicial pardon. On the same day, Moscoso signed an affidavit stating that corporate minutes were replaced “with the purpose of having the claim before ICSID prevail against the Bolivian State” (as quoted in para. 42). Bolivia also brought criminal charges against the judge who had refused to grant Bolivia’s initial request for Moscoso’s preventive detention.

In light of clear relationship between the arbitration and the criminal proceedings, the Tribunal took the view that the “the criminal proceedings appear to be part of a defense strategy adopted by Bolivia with respect to the ICSID arbitration” (para. 122), noting that:

although the Tribunal has every respect for Bolivia's sovereign right to prosecute crimes committed within its territory, the evidence in the record suggests that the criminal proceedings were initiated as a result of a corporate audit that targeted Claimants *because* they had initiated this arbitration. (para. 121)

The Tribunal considered three separate rights that the Claimants argued required preservation: (1) the right to exclusivity of the ICSID proceedings in accordance with Art. 26 of the ICSID Convention; (2) the right to preservation of the *status quo* and non-aggravation of the dispute; and (3) the right to the procedural integrity of the arbitration proceedings.

The Tribunal held that the continuation of the legal proceedings did not threaten the exclusivity of ICSID Proceedings under Art. 26 because criminal proceedings deal with criminal liability and not with investment disputes (para. 129). With respect to right to the preservation of the *status quo* and the non- aggravation of the dispute, the Tribunal agreed with Claimants that the criminal proceedings exacerbate the climate of hostility in which the dispute is unfolding (para. 138). The Tribunal noted, however, that the Claimants have no ongoing investment to protect and that the Claimant, Fosk, had not been formally accused and does not live in Bolivia. Further, criminal proceedings in themselves did not change the *status quo*: "If there are legitimate grounds for the criminal proceedings, Claimants must bear the burden of their conduct in Bolivia." (para. 138) With respect to the third ground for provisional measures, the Tribunal considered that the "Claimants have shown the existence of a threat to the procedural integrity of the ICSID proceedings, in particular with respect to their right to access to evidence through potential witnesses." (para. 148). In light of the need to protect the procedural integrity of the arbitration, the Tribunal found that provisional measures were both urgent and necessary.

The factual scenario in *Quiborax* is relatively unique. The Tribunal found a very close link between the commencement of the arbitration and the launching of the criminal proceedings (para. 164). As a result, the tribunal appropriately recognized that, although arbitration proceedings do not prevent a state from exercising its criminal powers, the integrity of arbitral proceedings requires limits on the exercise of those powers.

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