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Case Note – Guaracachi America Inc & Rurelec Plc vs Bolivia: Multiple bites at the cherry but only half the benefit

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An arbitral award (PCA Case No. 2011-17, 31 January 2014) arising out of the nationalisation of an electricity generation business in Bolivia has provided useful guidance on: (1) the ability of multiple investor claimants to bring joint claims against a state under separate BITs in a single proceeding; and (2) the time at which a state is entitled to invoke a denial of benefits clause to deny an investor the benefits of an investment treaty.

Background

The Claimants, Guaracachi (a USA company) and Rurelec (a UK company) commenced a claim against Bolivia under the USA-Bolivia and the UK-Bolivia BITs arising out of the nationalisation in 2010 of Guaracachi's 50.001% shareholding in Empresa Electrica Guaracachi S.A. and of additional assets owned by Rurelec's subsidiary, Energia para Sistemas Aislados Energais S.A. Rurelec indirectly owns Guaracachi through a chain of BVI companies and, therefore, Rurelec's claim in respect of Empresa Electrica was for the expropriation of an indirect shareholding. The Claimants claimed damages in excess of US\$143 million.

The arbitral tribunal of Jose Miguel Judice, Raul Vinuesa and Manuel Conthe dismissed Guaracachi's claim entirely on the basis that Bolivia was entitled to deny it the benefits of the USA-Bolivia BIT, but awarded Rurelec damages of approximately US\$29 m (plus compound interest) as Bolivia had unlawfully expropriated its indirect investment in EGSA without providing just and effective compensation.

Multiple claims in a single proceeding

Bolivia argued that the Claimants were not entitled to bring claims under two separate BITs in a single arbitration with a single tribunal as it had not provided its consent for USA and UK investors to do so in the express language of the USA-Bolivia and UK-Bolivia BITs.

The Claimants argued that the lack of express wording in the BITs was insufficient to exclude Bolivia's consent. The Claimants therefore took the position that the issue was one of procedure rather than jurisdiction and relied on well-versed arguments about the time and cost efficiencies in dealing with related disputes in a single set of proceedings.

While the Tribunal's analysis proceeded from the perspective of jurisdiction and not procedure, it held in favour of the Claimants. In analysing whether Bolivia had in fact provided its consent, the

Tribunal explained the traditional concept of how dispute settlement procedures in BITs provide an open offer which – when accepted by investors – constitutes a binding arbitration agreement. In this case, the Tribunal found that the offers of arbitration in the UK-Bolivia and the US-Bolivia BITs did not contain any restrictions or conditions that would prevent the Claimants from bringing their claims in a single proceeding. The fact that the BITs were silent on the issue did not help Bolivia as the Tribunal held that silence could not operate to limit the scope of the state’s consent.

From a practical perspective, the Tribunal noted that while there may be differences between the exact legal basis of each Claimant’s claims given differences between the USA-Bolivia and UK-Bolivia BITs, the Tribunal is perfectly capable of analysing each Claimant’s claims individually even though the facts and evidence may be the same.

Denial of benefits

The USA-Bolivia BIT contains a denial of benefits clause which entitles either state to deny the benefits of the BIT to an investor company if that company is (a) owned or controlled by nationals of a third state, and (b) has no substantial business activities in the state in which it is organised. Bolivia relied on this clause to argue that it is entitled to deny Guaracachi the benefits of the USA-Bolivia as Guaracachi’s immediate shareholder is a BVI company and Guaracachi is a special purpose vehicle that conducts no business activities in the USA as paid no taxes in the USA and it is just a ‘mailbox’ company. Guaracachi disputed this arguing that it did conduct substantial commercial activities in the USA as it maintained offices there, and held shareholders’ and directors’ meeting there.

Importantly, Bolivia argued that it is entitled to rely on the denial of benefits clause retroactively, i.e. at the time of filing its defence as opposed to at the time Guaracachi made its investment. Guaracachi argued that Bolivia was not entitled to invoke the denial of benefits clause retroactively at the time of filing its defence as this would breach investors’ legitimate expectations of stability and certainty.

The Tribunal held, with little written analysis, that Guaracachi was owned by nationals of a third country and that what activity Guaracachi did undertake in the USA, such activity was not sufficient to satisfy the requirement for substantial business activities. The Tribunal’s analysis therefore focussed on the nature and timing of Bolivia’s reliance on the denial of benefits clause.

The Tribunal considered that the denial of benefits clause operates as a condition on the benefits granted by the state, including the state’s consent to arbitration. The fact that investors have notice of that conditionality means that the denial of benefits clause cannot therefore frustrate an investor’s legitimate expectations. This was particularly pertinent in this case where the USA-Bolivia BIT was only entered into after Guaracachi made its investment.

The Tribunal stressed that the whole point of a denial benefits clause is to give a state the opportunity to withdraw the benefits of a BIT to investors who try and invoke them and, therefore, the denial of benefits clause can be ‘activated’ at the point that the benefits are claimed by the investor. The Tribunal continued to hold that if the conditions are satisfied, the state’s consent is impacted and the tribunal will not have jurisdiction. The Tribunal therefore concluded that the question of when Bolivia can exercise the denial of benefits clause is one of jurisdiction. Consequently, in accordance with the UNCITRAL Rules (which were the applicable arbitral rules), the latest time at which Bolivia could invoke the denial of benefits clause to object to the

Tribunal's jurisdiction was when it filed its defence.

The uncertainty inherent in this outcome is clearly an unattractive prospect for investors as they will not know for sure if they will have the benefit of a BIT until it is too late. The Tribunal acknowledged this, but considered that it is investors who ultimately must bear the risk as a part of the quid pro quo of structuring their investments using vehicles controlled by companies of a third country with no substantial business activities in that third country.

Conclusion

While not a ground-breaking case, the decision in *Guarachi* serves as a welcome authority on the issues of multiple claims and denial of benefits clauses.

As to the first issue, the decision highlights the ability of investors to maximise the strategic value and impact of their claims by bringing claims in a single unified proceeding where possible.

As to the second issue, previous decisions in other investment cases have reached differing views. Tribunals in *Plama Consortium Limited v. Republic of Bulgaria* (ICSID Case No. ARB/03/24) and *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14) adopted a more claimant friendly pre-emptive view, while the tribunal in *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12) followed a similar approach to the Tribunal in *Guarachi*. Therefore, while not decisive, the Tribunal's decision in *Guarachi* is a welcome additional authority which highlights the importance of international investors seeking proper legal advice – both at the time of their investment and where new investment treaties are introduced – to ensure that their investments maximise available investment protection.

The views expressed are those of the author.

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This entry was posted on Monday, February 24th, 2014 at 10:32 am and is filed under [Investment Arbitration](#), [Jurisdiction of the arbitral tribunal](#), [UNCITRAL Arbitration Rules](#)

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