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Tribunal Rejects América Móvil's Claims Against Colombia

María Camila Rincón (Zuleta Abogados) · Monday, November 1st, 2021

On May 7, 2021 the arbitral tribunal in the arbitration between América Móvil S.A.B de C.V and the Republic of Colombia (the "Tribunal") under the [Colombia-Mexico Free Trade Agreement](#) (the "FTA") (ICSID Case No. ARB(AF)/16/5) issued the award.

América Móvil initiated the arbitration on its own name and in representation of its subsidiary in Colombia, Comunicación Celular S.A ("Comcel"), arguing that Colombia breached the FTA by expropriating its "Right to Non-Reversion" and certain assets affected to concession contracts granted in 1994 (the "Assets"). The majority of the Tribunal concluded that the alleged "Right to Non-Reversion" did not exist under Colombian domestic law or international law and therefore there was no right subject to expropriation. The Tribunal therefore found no breach of the FTA and denied Claimant's request of compensation of US\$ 1,286,517,675. Finally, it ordered América Móvil to pay 50% of Colombia's costs in the arbitration.

Background

In 1993, Colombia's Ministry of Communications (the "Ministry"), opened two public bids for the adjudication of mobile phone services concessions under [Law 80 of 1993](#). Both the bid and the concession contract model incorporated a reversion clause providing that at the end of the concession term, all the elements and assets affected to the concession shall become property of the Nation, without any compensation from the latter (the "Reversion Clause").¹⁾

In March 1994, concessions were granted to Comcel, Ocel, and Celcaribe by a 10-year term, renewable for the same term. The concession contracts incorporated the Reversion Clause (the "Concession Contracts"). The Reversion Clause was never amended or removed from the Concession Contracts.

In 2002, América Móvil acquired indirect control of Comcel. In 2004, Comcel acquired Ocel and Celcaribe S.A.

On July 30, 2009, the Congress enacted [Law 1341](#). Article 68.4 of such law provided that in telecommunication concessions in effect at the time of its entry into force, operators would only be obliged to revert the radio frequencies assigned to the Concessions. The law further provided for a transition regime pursuant to which an operator could decide whether to join the new regime set out in Law 1341 or to continue in the previous regime until the termination of its concession.

Joining the new regime entailed the anticipated termination of the concession, thus the operator had to request a new title for operating (the “Transition Regime”).

On May 27, 2010, Colombia’s Constitutional Court (the “Court”) issued [Judgment C-403](#), rejecting a petition to declare the Transition Regime unconstitutional.

On November 28, 2013, Comcel requested to join the Transition Regime. Comcel and the Ministry began negotiations to agree on the conditions for the renewal of permits for the use of the radioelectric spectrum. At the time, the Ministry did not request the reversion of the Assets to the State.

In February 2014, the Court published [Judgment C-555](#) (issued on August 22, 2013) resolving a petition to declare that Article 68.4 of Law 1341 was unconstitutional. The Court analyzed whether Article 68.4 should be understood as to derogate the reversion clauses incorporated in public contracts executed before the entry into force of Law 1341 or whether those clauses should remain in force. The Court concluded that the law did not derogate the Reversion Clauses and therefore these continued to be binding for the parties. To that extent, the Court declared that Article 68.4 was constitutional insofar as it was interpreted in the sense that the reversion clauses incorporated in concession contracts signed before the entry into force of Law 1341 continued to be binding for the parties.

Following the Court’s ruling, on March 27, 2014, the Ministry issued [Resolution 598](#), authorizing Comcel to join the new regime under Law 1341 and renewed the company’s permits to use the radio spectrum until 2024. The Concession Contracts governed by the previous regime were therefore terminated and the six-month period to liquidate them began in accordance with Clause 44 thereof. The Parties, however, could not reach an agreement. On the one hand, the Ministry argued that pursuant to the Reversion Clauses and Judgment C-555, Comcel had the obligation to revert the Assets. On the other hand, Comcel argued that pursuant to Law 1341 it did not have the obligation to revert the Assets but merely the radio frequencies.

On February 16, 2016, the Ministry initiated a domestic arbitration against Comcel and Colombia Telecomunicaciones S.A. E.S.P (“Telefónica”) (the operator of another concession) before the Center of Arbitration of the Chamber of Commerce of Bogota. The Ministry requested the arbitral tribunal to declare that the reversion clause incorporated in the concession contracts was in force and therefore Comcel and Telefónica had to revert all the assets affected to their concessions, or, in the alternative, pay a compensation equivalent to their value. In turn, Comcel and Telefónica requested the tribunal to declare that the reversion clause was not in force and that the contracts had to be liquidated pursuant to the regime provided in Law 1341.

On August 18, 2016, the Claimant filed with ICSID a Request for Arbitration against Colombia under the FTA. The arbitration was conducted under the [ICSID Additional Facility Rules](#). The Claimant argued that by issuing Judgment C-555, Colombia expropriated Claimant’s Right to Non-Reversion of the Assets and consequently the Assets. The Claimant requested a sum of US\$ 1,286,517,675 as compensation for the alleged expropriation of the Assets.

On July 25, 2017, the domestic tribunal concluded that the Reversion Clause was in force and continued to be binding. Given that restitution was impossible, Comcel had to pay approximately US\$1,034 billion plus default interest as of the date of payment of the award. On August 29, 2017, Comcel paid said compensation under protest.

The Award

Jurisdiction

The Tribunal rejected Colombia's jurisdictional objections and concluded that it had jurisdiction over América Móvil's claims. Colombia raised four objections.

First, Colombia stated that the FTA does not provide for an fair and equitable treatment (FET) clause and therefore Claimant's claim is outside the Tribunal's jurisdiction. The Tribunal rejected Colombia's position by finding that Claimant's claim is one of expropriation given that it was focused on the expropriation of its "Right to Non-Reversion".

Second, Colombia contended that the Tribunal had no jurisdiction to act as a court of appeal over decisions of Colombian domestic courts. The Tribunal concluded that it had *prima facie* jurisdiction to examine if domestic decisions breached international law.

Third, Respondent argued that Claimant's claim is a contractual one and therefore the Tribunal had no jurisdiction. The Tribunal, however, found that Claimant's claim was that Judgment C-555 breached the FTA, which is not a matter of contract interpretation.

Fourth, Colombia stressed that América Móvil did not present its Notice of Intent in accordance with the requirements set out in Rule 1 of the Annex to Article 17-16 (d) (the "Annex") of the FTA, given that it did not demonstrate any quantifiable damage. The Tribunal concluded that Annex's requirements are procedural and not of consent.

Merits

The Tribunal analyzed whether Colombia expropriated the alleged "Right to Non-Reversion". The Tribunal concluded (i) that the applicable law to establish the existence of the Right to Non-Reversion is Colombian law, (ii) that the Colombian courts had decided that the alleged Right to Non-Reversion did not exist under Colombian law, and (iii) that Colombian judges are the only authorized interpreters of the law.

The Tribunal noted that it could not act as a judge of appeal of the decisions issued by domestic judges unless such decisions breached a rule of international law, i.e., violations of fundamental procedural rules, overly long proceedings, or have incurred in denial of justice, among others. For the Tribunal, neither the Colombian courts nor the domestic arbitral tribunal breached international law, and therefore had no reason to deviate from such decisions. In this sense, the majority of the Tribunal concluded that the "Right to Non-Reversion" did not exist in the Colombian legal system and, therefore, it could not be expropriated.

On a different strand of analysis, the Tribunal examined whether the "Right to Non-Reversion" existed pursuant to the representations of some Colombian state organs, as claimed by América Móvil. Albeit the majority of the Tribunal found that some State organs had the conviction that the "Right to Non-Reversion" existed, not even a hypothetical expectation regarding the existence of the Right to Non-Reversion is enough to give life to a right of property.

Comments

Given that the Tribunal's analysis was focused on the expropriation claim, the conclusions of the Tribunal's majority were largely supported on the finding that no source under Colombian domestic law had created a "Right to Non-Reversion" as a property right that could be subject to expropriation. Given that Colombian courts and the domestic tribunal had already ruled on the existence or non-existence of the "Right to Non-Reversion", the Tribunal placed a high level of deference on such decisions.

The award in *America Movil v. Colombia* is the first of two claims presented by telecommunications operators in Colombia regarding the reversion of assets affected to certain concession contracts executed in 1994. The other [claim](#), presented by Telefónica under the [Colombia-Spain BIT](#), is still pending. Albeit the facts and the disputed measures in both cases are similar, the wording of the treaties is different, particularly, because the Colombia-Spain BIT includes an FET clause while the Colombia-Mexico FTA does not. If it finds jurisdiction, the tribunal in *Telefónica v. Colombia* will probably address the question on the breach to the FET, the investor's legitimate expectations, and the State's alleged representations prior to Judgment C-555 on the non-existence of the obligation to revert all the assets affected to the concessions, which was not addressed by the tribunal in *América Móvil v. Colombia*.

(Before joining Zuleta Abogados, Maria Camila, one of the authors of this post, participated in Colombia's representation in this arbitration.)

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References

?1 This clause was incorporated in the light of Article 19 of Law 80 of 1993 providing that “in operating contracts or concession of State assets it will be agreed that, at the end of the exploitation or concession term, the elements and assets directly affected to it become the property of the contracting entity, without this having to make any compensation.”

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