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Hostage on a Roller Coaster: An Arbitral Tribunal Condemns Bolivia to Consummate an Announced Expropriation and to Pay Damages for Breaching the FET Clause

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Since 2006, the Bolivian State adopted a policy of "recovery" of resources and entities that were considered as 'strategic' by the State. Multiple investment arbitration proceedings against Bolivia were initiated as a consequence of the expropriation measures derived from the execution of this policy. To this date, the main claim in each of these cases has been the expropriation of investments undertaken by the Bolivia, except for one: the case of *BBVA v. Bolivia* (*Banco Bilbao Vizcaya Argentaria S.A. v. Plurinational State of Bolivia* (ICSID Case No. ARB(AF)/18/5)).

In this *sui generis* case, the Claimant did not submit a claim for an expropriation measure, but rather the investor's claim was the consummation of the expropriation measure ordered by the State.

The main discussion revolved around the scope of the FET and arbitrary measures standards (i.e., the magnitude or gravity of the State's conduct for it to be considered a breach of a Treaty). The Tribunal found that both standards had been breached by Bolivia and ordered it to pay a compensation (plus interest) to BBVA for the value of its shares in a pension fund manager (AFP for its Spanish acronym) called Previsión BBVA – AFP S.A.

This article addresses the relevant background of the case, the reasoning of the Tribunal, and concludes with final remarks.

Relevant background

In 1997, the Bolivian State signed a contract with BBVA through which Bolivia granted a license to this company to operate as an AFP. The contract did not provide for a specific validity period, but it established that the license would lose its validity if it was revoked by Bolivia.

Bolivia nationalized the services of pension administration through statutory provisions contained in the Bolivian Constitution of 2009 and the Pension Law of 2010 ("Pension Law"). These provisions established that pensions management would be in charge by a Public Manager of Pensions ("Gestora") and that the provision of this service could not be entrusted to any private entity.

The Pension Law established that the AFPs had to transmit all the data and documents in their possession. This law also provided that a Supreme Decree would determine the date on which the Gestora would initiate its activities, and the form in which the transfer of data and documents would take place. Importantly, this rule imposed the obligation for the AFPs to recover the full amount due from employers. Finally, the law established that the AFPs were obliged to keep providing the services while the Gestora initiated its functions as a Public Manager of Pensions.

BBVA requested the Tribunal to declare that Bolivia had violated and continued to violate Articles 3 (1) and (2) of the Bolivia-Spain BIT which contain an FET provision and the prohibition against arbitrary measures. Further, the Claimant asked the Tribunal to order the Bolivian State to pay the fair market value of its shares in Previsión BBVA – AFP S.A. and to authorize BBVA to deposit its shares in an account in which the Bolivian State is the beneficiary.

Analysis of the Tribunal

The Tribunal laid out three main criteria related to the FET standard and one regarding the prohibition against arbitrary measures.

First, the Tribunal determined that since the FET provision in the applicable investment protection treaty (the Bolivia-Spain BIT) did not make any reference to customary international law, the standard of protection of this provision was different from that of the minimum treatment standard. Therefore, it is clear that according to the Tribunal's reasoning, unless the investment treaty provides otherwise, the FET standard is different from the minimum standard of treatment.

Second, the arbitrators followed the criteria adopted by different tribunals[1)] concerning the obligations imposed to States through the FET standard. According to the Tribunal, this standard requires States to behave in a reasonable, consistent, and unambiguous manner; grant a certain and predictable legal framework to the investors; and avoid incurring in arbitrary acts or harassment against the investor.

Third, the arbitrators rejected the Respondent's argument related to the high threshold required to find a breach of the FET standard. According to the Tribunal's reasoning, the threshold must be determined on a case-by-case basis depending on all the relevant circumstances.

Furthermore, the Tribunal briefly analyzed the standard of the protection against arbitrary measures highlighting that an arbitrary measure is any measure contrary to the law, justice, or reason.

Specifically, the Tribunal found the following conducts as unfair, unequitable, and arbitrary:

1. The Pension Law established a transition period until the initiation of operations of the Gestora in which BBVA was legally bound to keep providing pension management services in Bolivia. This transition period lasted twelve years due to the three following factors: The Bolivian State created the Gestora five years after legally establishing the nationalization, it started the transfer of the data seven years after this measure, and postponed in four occasions the start of this entity's operations.

   In the eyes of the Tribunal, as occurred in *Vivendi II*, the investor was held hostage within the Bolivian territory considering that BBVA continued to provide services while being impeded of disposing of its own investment for twelve years and deprived of any certainty as to when the State would take over its investment. Consequently, the Tribunal held that the Bolivian State's conduct was unjust, unreasonable, and illegal for not granting the investor a clear, predictable, and transparent legal framework.

2. As mentioned, a process of data transfer took place from 2017 to 2019. In this period, the Bolivian State suddenly and repeatedly changed the regulation related to the transfer of data and information from the AFP to the Gestora. As the tribunal in the *PSEG* case considered, the arbitrators understood that these changes generated a "roller coaster effect" to the detriment of the investor.
3. Finally, the Bolivian State pursued to oblige the investor to remain in its territory after the termination of the contract to collect every amount endowed by the employers to the AFP. Moreover, Bolivia imposed BBVA as a condition to leave the country to assume the so called "*stock de deuda*" which was the unpaid debt from the employers to the AFP.
4. The Tribunal concluded that it was unlawful and unreasonable to demand the investor to keep executing contractual obligations such as the recovery of debt once the contract was no longer valid. In addition, the arbitrators found that this recovery process could become indefinite.

Regarding the full restitution of the uncollected debt, the Tribunal held that it was completely arbitrary because a previous process for negligence[2)] in the collection of debt would have to take place before a similar measure is assumed against the investor.

Final Remarks

It is important to highlight the following aspects:

1. The difference established by the Tribunal between the FET and the minimum treatment standard could turn relevant for the analysis of current and future cases in two ways. First, for the analysis of the application of the FET standard, the reasoning of the Tribunal would serve as a logic explanation of when to equate the FET and the minimum treatment standards and when not to. Second and in the same vein, the conclusion of the Tribunal could guide other arbitrators to assess in which cases customary international law would apply.
2. The criteria laid out in the award regarding the threshold of the FET standard, supported by cases such as *Glencore v. Colombia*, could trigger a deeper analysis in investment tribunals regarding the gravity of the State's conduct that would be tantamount to a breach of the FET clause. The meticulous and comprehensive analysis assumed and proposed by the Tribunal transcends the one that would be just based on the high or low threshold required for the breach, it focuses on the specific facts and circumstances of the case.

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References

?1 Some of the cited cases were: *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006; *Olin Holdings Ltd v. Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018; *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016; *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11 Award of 25 July 2017; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017

?2 According to Article 288 of the Supreme Decree 24469 the State audit entity called APS (for its Spanish acronym) is entitled to impose sanctions to those individuals or institutions who commit infractions following the procedure established by Articles 292 – 296 of this regulation. Article 286 of the Decree provides that those infractions committed by negligence are considered of medium severity and passible give rise to the imposition of a sanction in accordance with Article 287 of the Decree

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