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No U-Turns Allowed: Bacilio Amorrortu v. Peru's Award on Jurisdiction

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On August 5, 2022, the Tribunal hearing the *Bacilio Amorrortu v. The Republic of Peru* case issued its Partial Award on Jurisdiction, upholding the State's objection that Mr. Amorrortu did not provide a valid waiver as required by the "No U-Turn Clause" established in article 10.18.2 of the United States – Peru Trade Promotion Agreement ("USPTPA" or the "Treaty"). In a majority vote aligned with the interpretation of a previous USPTPA case, the Tribunal concluded that the waiver's defects could not be cured by the Claimant. The present article provides a brief introduction into the background of the case and the main issues in dispute.

Background

The Talara Basin, located in northwestern Peru, is home to one of the country's main areas of oil operations. Private and state-owned companies have been conducting exploration and exploitation activities since the late 19th century and, according to the local authorities, the daily oil production of its active blocks sum up to 20,488 BPOD.

In the early 1990s, under the government of Alberto Fujimori, Peru underwent a series of reforms to liberalize its then strongly State-centered economy. In the area of upstream oil and gas, the state-owned company Petróleos del Perú S.A. was deprived of the monopoly it used to hold over exploration and exploitation activities. A new company, Perupetro S.A., was created and invested with powers to conclude license agreements with private companies, through which the companies were authorized to extract and retain title over Peru's hydrocarbons in exchange of the payment of a royalty.

Between 2013 and 2014, Mr. Amorrortu attempted to get into the oil operations business in the Talara Basin. Through his company Baspetrol S.A.C., Mr. Amorrortu filed a proposal to Perupetro in order to hold direct negotiations to be awarded a license agreement for the exploration and exploitation of the basin's Blocks III and IV. However, Perupetro did not begin the direct negotiation procedure and instead launched an international public tender, which the company Graña y Montero Petrolera S.A. won.

In 2020, Mr. Amorrortu began international arbitration proceedings under the USPTPA, arguing

that Peru had breached article 10.5 of the Treaty by not granting his investment a fair and equitable treatment in accordance with customary international law. Specifically, the Claimant argued that the tender had been rigged as part of a corruption scheme involving high ranking officials of the Peruvian government, thus violating his legitimate expectations.

Peru's Jurisdictional Objections

In accordance with article 23 of the 2013 UNCITRAL Rules, applicable to the case, Peru raised six objections to the Tribunal's jurisdiction before filing its statement of defense. According to the Respondent, Mr. Amorrortu:

1. did not have any right under the USPTPA to a direct negotiation or a contract. Thus, under article 10.20.4 of the Treaty, "*as a matter of law,* [the] *claim submitted* [was] *not a claim for which an award in favor of the claimant may be made*";
2. did not qualify as a protected investor under the USPTPA;
3. did not own a protected investment under the USPTPA;
4. did not submit a valid waiver as per article 10.18.2 of the USPTPA;
5. did not submit his claim within the three-year period established in article 10.18.1 of the USPTPA; and
6. that the measures alleged by Mr. Amorrortu were not attributable to Peru.

On January 2021, the Tribunal decided to bifurcate the proceedings in order to rule on Objections 1 and 4 as preliminary questions.

The No U-Turn Clause

Article 10.20.4 of the USPTPA establishes that no claim may be submitted to arbitration unless "*the notice of arbitration is accompanied* […] *by the claimant's written waiver* […] *of any right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measures alleged to constitute a breach referred to in Article 10.16*."

To comply with this requirement, the Notice of Arbitration stated that Mr. Amorrortu "*waive*[d] *its right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to any measures alleged to constitute a breach referred to in Article 10.16* […]. *To the extent that the Tribunal may decline to hear any claims asserted herein on jurisdictional or admissibility grounds, Claimant reserves the right to bring such claims in another forum for resolution on the merits*." (emphasis added).

According to Peru's Objection 4, Mr. Amorrortu's waiver did not comply with the formal or the substantive requirements of the Treaty. Regarding the former, the Tribunal sided with the Claimant and concluded that the USPTPA's text did not support Peru's view that the waiver had to "accompany" the Notice of Arbitration in a different document and be signed by Mr. Amorrortu himself rather than his counsel.

As to the substantive requirements, however, the Tribunal upheld Objection 4, concluding that the

language of article 10.20.4 was categorical and precluded any reservation of rights from being included in the waiver. To support this finding, the Tribunal cited the criteria applied in *Renco I v. Peru*, where the same provision was interpreted and where it was stated that:

> *"Article 10.18(2)(b) is a "no U-turn" provision which is intended to provide flexibility, by allowing recourse to other fora up to a point, and certainty, by prohibiting any such recourse thereafter. In particular, it prevents an investor from returning to a domestic court after submitting its claims to arbitration. Renco's reservation of rights is incompatible with this "no U-turn" structure because it purports to reserve Renco's right to initiate subsequent proceedings in a domestic court and perform the very "U-turn" which Article 10.18(2)(b) is designed to prohibit."*(see paragraph 96).

After having found Mr. Amorrortu's waiver to be invalid under article 10.18.2 of the USPTPA, the Tribunal then turned to the question of whether a valid waiver (which the Claimant submitted into the evidentiary record after the objection was raised) could be admitted to cure the first one. This question split the Tribunal's vote, with the majority upholding Objection 4 by denying the possibility that a defective waiver could be cured.

According to the majority, Mr. Amorrortu's defective waiver could not be cured by the "second" one. Since compliance with article 10.18.2 is part of the offer to arbitrate contained within the USPTPA, "if an invalid or non-compliant waiver is submitted, a State's offer to arbitrate and an investor's acceptance of the same do not meet. No arbitration agreement is formed and, by way of necessary implication, any arbitral tribunal that is constituted based on such non-existent arbitration agreement will be deprived of jurisdiction *ab initio.*"

The majority's view was shared by the majority in *Renco I*, where a similar attempt to cure a defective waiver was rejected. However, the fact that unanimity was not reached in either case is a signal that the debate over the interpretation of the "No U-Turn Clause" in the USPTPA is far from been settled.

While the dissenting arbitrator did not file a separate opinion on the matter in *Renco I*, the Presiding Arbitrator in Amorrortu did develop his position, arguing that the date of the decision on jurisdiction should be considered the critical date to determine if a valid waiver was submitted by the claimant. This position follows the International Court of Justice's ("ICJ") criteria in the *Mavrommatis* case and the case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide ("Croatia v. Serbia"), where the Court held that "[w]*hat matters is that, at the latest by the date when the Court decides on its jurisdiction, the applicant must be entitled* […] *to bring fresh proceedings in which the initially unmet condition would be fulfilled*." (see paragraph 85)

The majority rejected the application of the ICJ's criteria by holding that article 10.18.2 of the Treaty constitutes *lex specialis* and that, if the Tribunal were to admit that a defective waiver can be cured, it would be "*pulling itself up by its own bootstraps*". Consequently, under today's prevailing opinion, the USPTPA's "No U-Turn Clause" not only precludes a claimant from resorting to other *fora*, but also from 'turning around' to cure any defect in the required waiver.

Conclusion

Although the interpretation adopted in *Amorrortu* and *Renco I* may be compatible with the provisions of the USPTPA, as a matter of investment treaty policy, it is unclear what purpose such provision serves. While the "No U-Turn Clause" provides certainty to the States by securing that all disputes concerning a measure will be solved in a single forum, such certainty would not be undermined by allowing a defective waiver to be cured (especially if an adverse award on jurisdiction would not preclude the investor from filing a new claim with a proper waiver subsequently). In the words of the ICJ, "*it is not in the interests of the sound administration of justice to compel the applicant to begin the new proceedings anew*." (see Croatia v. Serbia, paragraph 85).

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