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# Can Trust Beneficiaries 'Trust' the Protections Afforded by Investment Treaties? A Confirmation by the Castillo v. Panama Award

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Investment treaty arbitration tribunals have addressed issues surrounding State intervention and States' regulatory freedom time and time again, consequently creating guiding precedent regarding State conduct that could constitute breaches of the fair and equitable treatment ("FET") or expropriation standards. However, recently, an investment treaty arbitration tribunal not only had to deal with issues surrounding the merits of State intervention (*i.e.*, the police powers doctrine, the fulfillment of elements of standards of protection, and the different kinds of damages that may result from State conduct), but also with a series of notable jurisdictional issues.

The *Leopoldo Castillo Bozo v. Panama* ("Castillo") tribunal, composed of Deva Villanúa (President), Rodrigo Barahona Israel (Co-arbitrator), and Gabriel Bottini (Co-arbitrator) provided in its recently released Award (8 November 2022) answers to significant jurisdiction-related inquiries as well as substantive issues.

**Background**

This arbitration was initiated by Leopoldo Castillo Bozo against the Republic of Panama as a result of a series of actions exercised by interim administrators and the Superintendency of Insurance and Reinsurance of Panama (SIRP) against the Claimant's insurance company, Seguros BBA. These actions ranged from a regularization process and the subsequent placement of the company under temporary administration, to a final liquidation decision (all based on the company's financial deterioration).

As the regularization process was lifted following a nine-month investigation, the Claimant expected to operate free of any disturbances by the SIRP. This is, in essence, what motivated the Claimant to pursue claims against Panama alleging that the posterior resolutions ordering the company's placement under temporary administration and the liquidation order by the SIRP constituted surprising acts which equate to breaches of the FET standard by Panama and also resulted in an expropriation.

Relevantly, it is worth noting that the Claimant was a Venezuelan national in 2008 when he incorporated Seguros BBA in Panama along with his brother. In 2011, the two brothers transferred

their shares in Seguros BBA to an irrevocable trust, whose trustee was under an obligation to exercise the shares' voting rights according to the brothers' instructions. Also, the Claimant acquired Dominican citizenship in 2015.

**Jurisdictional Objections**

The Claimant's transfer of shares in Seguros BBA to a Panamanian trust made him no longer the owner of the alleged investment

By finding that the ownership of a corporation typically grants two rights: (1) voting rights and (2) economic rights (Award, ¶173), and by following relevant investment treaty arbitration precedent, the Arbitral Tribunal determined that the beneficiaries of a corporate vehicle such as a trust could be awarded protection under investment treaties.

The Tribunal noted that if the beneficiary of a corporate vehicle suffers the consequences of State acts, and if the same has economic interests and control powers over the corporate vehicle, then this person could be granted protection under the APRI and any treaty with similar language (Award, ¶178). This analysis goes hand-in-hand with that particularly developed by the Tribunal in *Blue Bank v. Venezuela*, the first public decision addressing in detail the question of whether trustees can be considered protected investors with regard to trust assets under international investment agreements. In the absence of beneficial ownership, trustees will typically not be protected.

*Ratione Temporis* objection: the Claimant's dominant and effective nationality prevented him from benefitting from the protection of the APRI

The *Castillo* Tribunal confirmed that, even if applying the *Ballantine* dominant and effective nationality test – not provided for by the APRI – Castillo was able to demonstrate that his nationality was indeed Dominican (Award, ¶¶205–210). It is worth mentioning that, even if not included by the Arbitral Tribunal in its analysis, the *Ballantine* dual nationality test resulted applicable in this case as it is a non-ICSID case where, as analyzed in this post, the doors are not entirely closed for dual nationals.

Considering that both Parties supported their respective positions by relying on *Serafin Garcia*, the Tribunal confirmed that although the *Serafin Garcia* award was partially set aside by the Paris Court of Appeals, as reported in this post, the Award was later confirmed in its entirety by the French *Cour de Cassation*. In this sense, the Tribunal concluded that, as confirmed by ample doctrine, the relevant moments to determine nationality are the date in which the dispute arose and the date in which the investor offered its consent to arbitration (Award, ¶252).

The conduct advanced by Castillo was not attributable to Panama

Here, both Parties agreed that State responsibility is governed by the Draft Articles on Responsibility of States for Internationally Wrongful Acts. By interpreting Articles 4 and 5, the

Arbitral Tribunal found that during a liquidation process, and in accordance with Panamanian law, liquidators are exercising public duties.

The Arbitral Tribunal noted that in only one case cited by Panama, *Plama Consortium Limited v. Bulgaria*, a tribunal has denied attribution of responsibility to the State for individuals carrying liquidation processes or interventions. However, the Tribunal pointed out that at least seven of the cases cited by the Parties to this arbitration attribute the acts of liquidators appointed by a respondent State to the State, without even having a debate about it (Award, ¶331). As such, the Tribunal denied this objection as well.

**Substantive Claims**

Fair and Equitable Treatment Standard

The Tribunal relied on *Alex Genin*, *Vestey Group*, and *Saluka* to restate that a State's police powers are not absolute and that the Tribunal had the power to review whether the State conduct is manifestly or blatantly out of place. The Arbitral Tribunal found that the measures were proportional as the measures were (1) legitimate, (2) adequate to the objective pursued, (3) pursued a public interest, and (4) were adopted in good faith according to the evidence submitted (Award, ¶¶516-521) (The proportionality test was discussed in a recent post here). Specifically, the Tribunal found that Seguros BBA's precarious situation justified the adoption of regulatory measures such as the liquidation in order to protect the public interest, consistent with market security.

Expropriation

The Tribunal found that the administrative control and subsequent liquidation of Seguros BBA indeed constituted expropriation. However, the Arbitral Tribunal emphasized that these were measures taken by the State through the use of its police powers. The Tribunal indicated that the liquidation process is intended to make the Claimant whole and, consequently, no breaches of any expropriation obligations under the APRI were found. In addition, the Tribunal added that even if an expropriation in the sense of the APRI had taken place, then this expropriation fulfilled the conditions of lawfulness set out in the APRI: public interest, non-discrimination, due process, and appropriate compensation.

Finally, the Tribunal also found the calculation of damages by the Claimant to be unconvincing.

**Dissenting Opinion**

In his Dissenting Opinion, Mr. Barahona Israel mainly advanced two arguments which would have led to a positive outcome to the Claimant on liability and quantum. First, he argued that the Panamanian State had breached the APRI's amicable negotiation requirement by not engaging in negotiations with Castillo under the pretext that he was a Venezuelan national.

Second, he claimed that, as evidenced by the record and contrary to the Tribunal's majority

opinion, he believed the Claimant's legitimate expectations were not balanced *vis-à-vis* the State's right to regulate which is not absolute and whose basis must be analyzed as stated by the tribunal in *Gold Reserve v. Venezuela*. This last point is supported by arbitration practitioners:

> "*a nuanced and context-based approach that considers political, social, economic and environmental considerations of the host State is required to find a right balance between the States' right to regulate in a manner sensitive […] to the investor protections contained in BITs.*"

**Conclusion**

The *Castillo v. Panama* award constitutes a global radiography of investment treaty arbitration precedent to further develop and confirm the reasoning grounds for a series of important issues on jurisdiction and merits such as the standing of trusts' beneficiaries, issues on dual nationality, State responsibility arising from a liquidation proceeding or administrative intervention, and the proportionality analysis inherent to potential findings of FET violations.

Although the *Castillo* award takes a democratic and logical stand on most issues, the Dissent by Mr. Barahona Israel sheds light on questions that apparently remain debatable such as (1) the degree of deference given by arbitral tribunals to State acts *vis-à-vis* State's police powers, and (2) the fulfillment of the 'amicable negotiations' requirement by States.

In any case, it is likely that the *Castillo* award will be used by investors and States as a point of reference for a wide array of key investment treaty arbitration issues for years to come.

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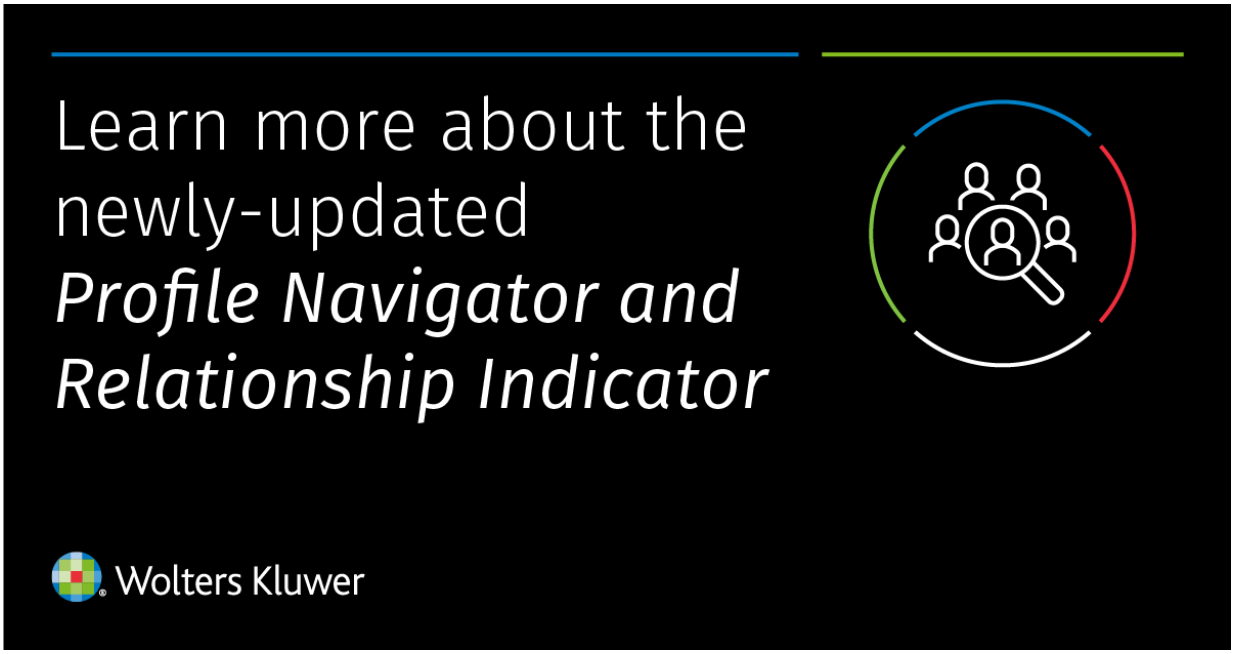


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