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Glencore v. Bolivia: A Long-Awaited Award Finds Expropriation and FET Breaches by the State

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On 8 September 2023, a tribunal comprising Prof. Ricardo Ramírez Hernández (President), Prof. John Gotanda and Prof. Philippe Sands issued its award in *Glencore Finance (Bermuda) Ltd v. Bolivia* (PCA Case No. 2016-39), a bilingual (English and Spanish) UNCITRAL arbitration under the UK-Bolivia bilateral investment treaty (the "Treaty"). A decision on interpretation and correction of the award followed on 6 November 2023.

The dispute centered on a mining lease for the Colquiri Mine, a tin smelter, and an antimony smelter. All three assets had been privatized around 2000. In early 2005, Swiss company Glencore International acquired the assets and assigned them to Glencore Finance (Bermuda). Following social unrest and the occupation of the mine by members of mining cooperatives ("*cooperativistas*"), Bolivia then decided to renationalize the assets by government decrees: the tin smelter in 2007, the antimony smelter in 2010, and the Colquiri Mine lease in 2012,

In 2016, Glencore brought claims against Bolivia under the Treaty for expropriation (Article 5) and violations of fair and equitable treatment ("FET") and full protection and security ("FPS") (Article 2(2)).

In summary, the Tribunal dismissed Bolivia's jurisdictional objections and found that Bolivia had breached the Treaty by expropriating Glencore's assets and violating the FET standard. The Tribunal ordered Bolivia to pay USD 253 million in damages, representing fair market value plus simple interest up to the date of the award. The Tribunal ordered each party to bear its own costs.

In the following, we will discuss some of the Tribunal's key findings.

Applicable Law: Bolivia's Treaty Obligations Unaffected by Its Other Human Rights Obligations

The Tribunal considered the Treaty as well as Bolivian law to be the applicable law. While it accepted that other provisions of international law could "shed light on the interpretation of the Treaty's substantive provisions", the Tribunal rejected Bolivia's "general" argument that its obligations under the Treaty were limited by obligations under human rights treaties. The Tribunal saw no such intention in the language of the Treaty, noting also that the different obligations each applied in their own spheres and were "not necessarily mutually exclusive."

Jurisdiction Upheld

Bolivia raised numerous jurisdictional objections, all of which were rejected. We summarize two of them below.

Abuse of Process

Bolivia argued that Glencore International had committed an abuse of process by "rerouting" its investment through Bermuda in order to obtain protection under the Treaty.

The Tribunal accepted the *Philip Morris v. Australia* tribunal's pronouncement that "the mere fact of restructuring an investment to obtain BIT benefits is not *per se* illegitimate." It followed the two-pronged analysis of *Philip Morris* and looked at whether (1) the restructuring took place when the dispute was foreseeable, and (2) the investor had legitimate alternative reasons for restructuring.

The Tribunal concluded that a treaty dispute was not foreseeable in 2005. It found that (1) Glencore could not have foreseen a "wave of political change" in Bolivia that would make a dispute likely to arise; (2) Glencore had no reason to suspect the alleged illegality of the privatization processes (in which Glencore had not participated and which were never challenged before local courts); and (3) social unrest with *cooperativistas* was common in Bolivia and it had been handled satisfactorily at the Colquiri Mine up to that point.

The Tribunal added that even if the dispute had been foreseeable, Glencore International appeared to have had other valid reasons to restructure, which would have also led to the dismissal of the objection.

Unclean Hands

Further to its allegation that the privatization of the assets was tainted with illegality, Bolivia argued that Glencore had "unclean hands" and therefore could not invoke the protections of the Treaty.

The Tribunal noted that the Treaty contained no "illegality clause" but recognized that some tribunals had applied a version of the "unclean hands" doctrine in particularly serious cases. However, because it found that there was no evidence of illegality in the privatization processes, the Tribunal rejected the objection without deciding whether the "unclean hands" doctrine applied in this case.

Illegal Expropriation and Breach of FET but Not FPS

Expropriation

According to Article 5 of the Treaty, covered investments:

> “shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation *[…]* except for a public purpose and for a social benefit” and “against just and effective compensation.”

The Tribunal applied the following test:

- Did the State deprive the investor of its rights relating to the investment?
- If so, does the measure fall within the police powers doctrine? Under this doctrine of customary international law, “legitimate and general regulatory measures” do not constitute expropriation.
- If there was an expropriation, (i) did it serve a public purpose and social benefit, and (ii) was just compensation paid?

The Tribunal found that Glencore was deprived of its rights to the assets by all three government decrees. None of the decrees provided a specific legal basis that satisfied either the police powers doctrine or the public purpose exception. The Tribunal scrutinized the wording of the three decrees and found, for example, with respect to the Colquiri Mine, that the decree did not mention a public safety crisis or maintenance of public order as reasons for the reversion. The Tribunal also found that no compensation was paid for any of the assets. It thus concluded that Bolivia had illegally expropriated Glencore’s investments.

FPS

Article 2(2) of the Treaty provides that covered investments “shall enjoy full protection and security”.

The Tribunal noted that due diligence should not be construed as a warranty that property will never be occupied or disturbed. The analysis must be conducted on a case-by-case basis, assessing the reasonableness of Bolivia’s conduct in the specific circumstances and taking into account the country’s resources.

The Tribunal accepted Bolivia’s argument that it had limited capacity to control violent outbursts at the Colquiri Mine and that the use of force by police must be a last resort. Accordingly, it found that Bolivia’s actions were reasonable in the circumstances.

FET

Article 2(2) of the Treaty provides that covered investments “shall at all times be accorded fair and equitable treatment.”

The Tribunal found an FET violation in the “arbitrariness” of the tin smelter decree, as the main reason for reverting the asset – the alleged illegality of the privatization process – was not supported by evidence.

The Tribunal's Decision on Quantum Partly Deviates From Existing Case Law

Valuation Date

Article 5 of the Treaty refers to the market value of the investment immediately before the expropriation or before the impending expropriation became public knowledge. The Tribunal adopted the day before each of the three reversion decrees, being the dates of the expropriations. The Parties agreed as to the valuation date for the tin smelter but differed as to the mine and the antimony smelter.

For the Colquiri Mine, Glencore proposed two dates that were several weeks before the reversion decree: either the day before the mine was physically taken over by *cooperativistas*, or the day before Bolivia publicly announced the impending nationalization. The Tribunal rejected these earlier dates on the basis that Glencore had continued to make decisions as though it had rights and control over the mine. The Tribunal thus focused on Glencore's behavior, without addressing Bolivia's public announcement of the impending nationalization or its potential impact on the asset's fair market value.

For the antimony smelter, Glencore argued that because the land had appreciated in value since the reversion, the valuation date should be the date of the award in order to reflect the situation that would have existed but for Bolivia's wrongful conduct. In its Statement of Claim, Glencore cited a number of decisions in support of its position that the principle of full reparation requires valuation at the date of the award if an expropriated investment has increased in value, including the *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary* Award (ICSID Case No ARB/03/16) and the *ConocoPhillips Petrozuata BV and others v. Bolivarian Republic of Venezuela* Decision on Jurisdiction and Merits (ICSID Case No ARB/07/30). While it acknowledged the existence of the case law, the Tribunal summarily rejected Glencore's argument, finding that the purpose of Article 5 of the Treaty was to ensure that compensation was given when an expropriation took place.

Valuation Inputs

Addressing the technical valuation inputs relied on by the Tribunal exceeds the scope of this article. However, it bears noting that the Tribunal dismissed some of the input used by Bolivia's mining expert because he relied on testimony from one of Bolivia's witnesses who failed to attend the hearing on quantum and thus could not be cross-examined.

Simple Interest

Article 5 of the Treaty provides for "interest at a normal commercial or legal rate" applicable in the expropriating State. The Tribunal found that rates established by Bolivia's Central Bank for commercial loans in USD met this standard. Since such rates pay simple interest, and compound interest is generally prohibited in Bolivia, the Tribunal applied simple interest. In so doing, it departed from previous rulings by the *Rurelec* and *South American Silver* tribunals under the same treaty.

A High Standard for Contributory Fault

Bolivia argued that Glencore was at least partly responsible for any damages. The Tribunal considered the appropriate standard under international law to be whether a claimant's actions "manifest a lack of due care" and "materially contribute to the damage". The Tribunal found no evidence of illegality in the privatization processes nor of mismanagement of social issues by Glencore, and thus no contributory fault.

Conclusion

The *Glencore v. Bolivia* award is interesting for various reasons beyond its main findings. On the applicable law, the Tribunal clarified that Bolivia's obligations under the Treaty are unaffected by its other international human rights obligations. On expropriation, the Tribunal made a close reading of the reversion decrees to assess a basis for the police powers doctrine or public purpose for the taking. On FPS, the Tribunal clarified that the reasonability of a State's actions in the face of social unrest must be assessed considering the State's resources. Finally, the Tribunal recalled the impact that a fact witness's failure to attend the hearing can have on the credibility of his or her testimony.

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