

ICSID CASES: UPDATE

Introduction

There have been a number of decisions published by ICSID recently, including those on annulment and provisional measures.

- In *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), a split Tribunal handed down a decision on provisional measures, granting in part the relief sought by the claimant. The dissenting opinion in that matter focused on the arbitrator's objection to the setting out of contentious factual positions in the decision, which could be interpreted as determining issues which should be determined in the final award.
- In *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, an ICSID tribunal awarded the claimant almost US\$1.4 billion for breach of the fair and equitable treatment standard/expropriation;
- In *TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23), the tribunal declined to grant an application for annulment of an award in full but did annul the parts of the award relating to damages on the basis that the Tribunal's reasoning was "not clear at all" such that the Committee for Annulment had "struggled to understand the Tribunal's line of reasoning."

***Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), Decision on Provisional Measures (April 8, 2016)**

In *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic* (ICSID Case No. ARB/09/1), a split Tribunal handed down a decision on provisional measures, granting in part the relief sought by the claimant.

The dispute arose out of Argentina's alleged re-nationalisation of and other measures taken in respect of the Claimants' investments in two Argentinian airlines. There were subsequent disagreements regarding the remedy to be given by Argentina for their expropriation of the Claimants' shares.

On 29 July 2015, the claimants submitted an application for provisional measures, the basis of which was that the respondent had allegedly threatened criminal prosecution against them, their representatives, lawyers and their funder. The claimants requested the following provisional measures:

- (i) Enjoining Argentina from aggravating the dispute between the Parties;
- (ii) Ordering Argentina to refrain from altering the status quo;
- (iii) Ordering Argentina to refrain from harassing the Claimants through baseless domestic litigation and unlawful resort to the media; and
- (iv) Ordering Argentina to cease and desist from its criminal investigation, which violates

Article 26 of the ICSID Convention.

Following a hearing on the application on 3 November 2015, the tribunal issued its decision on 8 April 2016. The Tribunal (Judge Thomas Buergenthal, President; Henri C. Alvarez QC and Dr Kamal Hossain) ordered that the Respondent refrain from publicizing the complaints or the criminal investigation and any relation they may have to the arbitration, whether by communications to the press or otherwise; and deferred its decision in the claimant's applications so far as it related to the suspension of the criminal proceedings in regard of counsel for the Claimants and the Claimants' court-appointed receivers.

Dr Kamal Hossain, who delivered a dissenting opinion, took issue with what he considered the setting out of contentious factual matters in the decision which were "not necessary for the order made". Dr Hossain's position was that it was inappropriate to deal with such matters (which included the identity of the claimants, the time and nature of the "investment") in a decision on provisional measures as it conveyed the "*erroneous impression that these issues may be treated as settled*" which was unacceptable "*as it would amount to determining issues which are to be determined in the final award.*"

Crystallex International Corporation v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2), Award (April 4, 2016)

In a decision dated 4 April 2016 in *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, an ICSID Tribunal awarded the claimant damages of US\$1.2 billion as a result of expropriation and a breach of the fair and equitable treatment standard set out in the Canada-Venezuela bilateral investment treaty (the "BIT").

Crystallex, a Canadian mining company, invested in the areas called "Las Cristinas", which is reported to contain one of the largest undeveloped gold deposits in the world. Subsequently, Venezuela terminated Crystallex's rights to build, operate and exploit the Las Cristinas gold mine.

On 16 February 2011, Crystallex filed a request for arbitration with ICSID in which it alleged that the actions of Venezuela (in particular its April 2008 denial of a permit to Crystallex to exploit the gold deposits at Las Cristinas, and of the rescission by the CVG, a state-run corporation tasked with stimulating economic activity in the Guayana region, of the Mine Operation Contract in February 2011) represented a breach of the fair and equitable treatment standard, and of full protection and security, and also constituted expropriation of the purposes of the BIT.

The Tribunal (Dr. Laurent Lévy, President; Dean John Y Gotanda and Prof. Laurence Boisson de Chazournes) dismissed Venezuela's jurisdictional objections and awarded Crystallex US\$1.2 billion (plus pre- and post-award interest, which brought the total to around US\$1.38 billion).

Venezuela raised various jurisdictional challenges, including that the claimant had not given notice of the dispute and attempted amicable settlement in relation to the Mine Operation Contract claims; and that the ICSID tribunal had no jurisdiction with respect to the contract

claims. The Tribunal dismissed these objections.

As to the merits, the Tribunal found that Venezuela was liable under Article II(2) (fair and equitable treatment) and Article VII(1) (expropriation). However, the Tribunal dismissed the claim in respect of full protection and security, rejecting the more extensive interpretation of other tribunals in favour of a more “traditional” interpretation and finding that the claimant had not alleged, let alone shown, that it was subjected to a violation of its physical security attributable to Venezuela.

***TECO Guatemala Holdings, LLC v. Republic of Guatemala* (ICSID Case No. ARB/10/23),
Decision on Annulment (April 5, 2016)**

In a decision dated 5 April 2016, the Tribunal annulled in part an award handed down in the case of *TECO Guatemala Holdings, LLC v. Republic of Guatemala* as a result of a lack of clarity in the reasoning of the previous tribunal.

The original dispute between the parties arose from the alleged violation by the Comisión Nacional de Energía Eléctrica (“CNEE”) of the Guatemalan regulatory framework for the setting of energy distribution tariffs, with respect to EEGSA, the electricity company in which TECO had an indirect share. An Award dated 19 December 2013 was rendered by a Tribunal composed of Mr. Alexis Mourre (President, appointed jointly by the Parties), Prof. William W. Park (appointed by the claimant) and Dr. Claus von Wobeser (appointed by Guatemala). The claimant had claimed for US\$243.6 million. The Tribunal ordered Guatemala to pay damages of US\$21.1 million.

On 18 April 2014, both the claimant and Guatemala filed applications for annulment of the award. The claimant requested that the ICSID Annulment Committee issue a decision annulling the damages section of the award and ordering Guatemala to pay the claimant’s legal fees and costs. Guatemala requested a decision annulling the award in its entirety, and ordering the claimant to pay Guatemala’s legal fees and the costs of the arbitration.

The Committee (Bernard Hanotiau, President; Tinuade Oyekunle and Klaus Sachs) rejected Guatemala’s application in full. It granted the claimant’s application insofar as it sought annulment of certain provisions of the award relating to damages. In its decision, the Committee described the original tribunal’s reasoning on the annulled damages portion of the award as “not clear at all”, adding that the Committee “struggled to understand the Tribunal’s line of reasoning.” This conclusion was based, in part, on the apparent failure of the tribunal to consider certain categories/pieces of evidence which appeared to be relevant to its decision (including the four expert reports submitted by the parties which “were deemed unsatisfactory and amounted to “no sufficient evidence””). The Committee distinguished between an assessment of the evidence (which was not grounds for annulment) and a complete absence of any discussion of the expert reports (which could lead to annulment).

10th May 2016