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Vásquez Legal

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Anglo American – National Copper Corporation (CODELCO), a new investor-State dispute?

In 2011 the sale of 24,5% of the shares of the Mining Company ex *Disputada de Las Condes* owned by Anglo American (AA) and the alleged breach of a put option granted to a State property-owned company, generated extensive debate both in the public opinion and the legal world regarding, among other things: the interpretation of the contracts which rule the rights of the parties concerned; AA's right to sell its shares to a third party; Codelco Board of Directors' negligence by publicising its interest in exercising the put option mentioned; and the implications at an international level if the State of Chile adopts any measures which could affect AA's rights.

This article will analyse the latter, namely, the international angle of a potential conflict against the State of Chile.

AA, the investor, is a company set up in Chile with its headquarters in the United Kingdom. The investor made an investment in Chile by signing a Decree Law 600 Foreign Investment Statute contract (DL 600).[1]

In 1997 Chile and the United Kingdom signed a Bilateral Investment Treaty (hereinafter BIT), currently in force.

Article 2 of the BIT defines the terms investor and investment. With respect to the United Kingdom, investor means any natural persons having the English nationality in accordance with its laws, and any corporations, incorporated or constituted under the law in force in the United Kingdom and having their registered office, central administration or principal place of business in that territory. This definition is complemented by Article 7(4) of the BIT that refers to Article 25.2(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the Convention). The cited article rules that if the States have agreed (which is the case), any juridical person incorporated under the Chilean law, but owned or controlled by English investors, will be treated as an investor.

In turn, investment means every kind of assets and in particular, though not exclusively, includes movable and immovable property, such as real estates, company shares and commercial concessions granted by law or a contract.

For the purpose of this article, the BIT protects any investments made in the territory of Chile, under its laws, by investors from the United Kingdom before or after the entry into force of the BIT, with the sole exception of any differences or disputes that have arisen prior to its entry into force, which are not covered.

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Chile accepted the international arbitral jurisdiction under the Convention when they signed the BIT. Thus Article 7(2) of the BIT establishes *"…the investor may submit the dispute to the International Centre for the Settlement for Investment Disputes (ICSID) for settlement by arbitration under the Convention…"* To take legal action, all that is required is the request for arbitration made by the investor. Under the BIT only the investor, in this case AA, has the locus standing to sue the State. Chile cannot sue or counterclaim AA before the arbitral tribunal.

The investor must choose between bringing legal action before a domestic court or an ICSID tribunal. In this matter we will refer briefly to the forum choice, or so-called 'fork in the road'.

In order to avoid parallel or subsequent claims before international arbitral tribunals started by the same investor, certain mechanisms are established within international agreements that seek to lodge a dispute definitely, before a domestic court or an international tribunal. As a general rule it is established that if an investor chooses to file a claim before an administrative or judicial court of the host State, that choice is final and the same claim cannot be filed before an international tribunal afterwards.

Article 7(3) of the BIT states that *"…the Centre shall not have jurisdiction if the investor has already submitted the dispute to the courts of the Contracting Party which is a party to the dispute."*

Notwithstanding the above mentioned, several ICSID tribunal decisions have stated that the threshold which triggered the forum choice is high, thus establishing a rigid criteria, namely: a) the parties before the local court and the arbitral tribunal must be the same; and b) the cause of action must be identical in both forums (local and arbitral). For that reason it is vital for the investor to bear in mind during the *prima facie* study of the case if what it wants is to file a claim before an ICSID tribunal, or a domestic court, thus avoiding State jurisdiction objections during the proceedings.

As previously mentioned, the investor made and investment through a DL 600. This is an important matter to determine if the obligations and rights derived from a contract, the investment contract, are covered by the BIT's scope.

It is very common to find the so-called "umbrella clause" in BITs, also known as "elevator", "mirror effect", "parallel effect", or *"pacta sunt servanda"*.

This clause demands from the contracting State to respect any obligation or commitment undertaken under the agreement, including any contractual commitment made to an investor of the other contracting Party. The United Kingdom model BIT contains a clause with this feature: *"…Each Contracting Party shall observe **any obligation** it may have entered into with regards to investments of investors of the other Contracting Party"*. This clause has been used by the United Kingdom in at least 69 BITs, including the one with Chile, found in Article 2(2) *Promotion and Protection of Investment*.

The impact of this kind of clause is not minor. Experience shows that it may result in difficulties for the State, given the application and interpretation made by ICSID tribunals, which have changed the juridical status of a contract signed between the investor and the host State to a higher standard under the rules of international law.

Chile has a bad experience in this matter. An ICSID tribunal in the case "*MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile"*, Case Nº. ARB/01/7[2] applying the Most-Favored-Nation clause (MFN), "imported" an umbrella clause in a BIT between Chile and Denmark, and made it applicable to a dispute between a Malaysian investor and Chile. Thus the tribunal *"… considers the legal basis of the claim valid based on the wide scope of the MFN clause in the BIT…The Tribunal notes the statement of the Respondent* [Chile] *that under*

international law the breach of a contractual obligation is not ipso facto a breach of a treaty. Under the BIT, by way of the MFN clause, this is what the parties had agreed."

As a general rule, the investment contracts signed under the DL 600 hold a clause, which make it obligatory for the investor to inform the Foreign Investment Committee (FIC) on the whole or part of the assignment of the materialized investment subjected to this mechanism. This clause seeks to avoid any foreign investment rights protected under the DL 600, represented by shares or social rights, to be transferred to third parties, without the FIC's authorization.

Can the assignment of rights or a transfer of shares to a third party not related to the foreign investor, give the right to the FIC to put an end to the investment contract? Could the Central Bank of Chile, an autonomous agency, prevent the entry of capital from Mitsubishi - AA' share buyer - if the latter wanted to make its investment through the Chapter XIV of the Compendium of International Foreign Exchange Rules of the Central Bank of Chile to finance the operation?

Without delving deeper into the problem, the State should consider all these arguments if it pretends to restrict or disown any of AA's rights established in the investment contract, or if it seeks to adopt a measure which could breach the BIT and cause indemnifiable damage to the investor.

The majority of the claims against a State heard by ICSID tribunals are based on the supposed violation of the fair and equitable treatment owed to a foreign investor. Article 2 of the BIT states: *"2) investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party."*

Fair and equitable treatment is a term widely accepted which encompasses terms such as 'in good faith', due process, non discriminatory treatment, and proportionality. It supposes that the state hosting the investment will behave in a manner that is coherent, without ambiguities and transparent in its dealings with the foreign investor. In short, it is a guarantee that the State hosting the investment will act free of capricious and arbitrary behaviour.

The State is also obliged to not expropriate the investment, nor subject it to measures which could have a similar effect or be equivalent to nationalisation or expropriation, without prompt, adequate and effective compensation.

This is the standard under which Chile is bound internationally.

It seems prudent, therefore that the executive take certain preventative measures that basically deal with how, when and by whom information pertaining to this case is made public.

The coordination among the different organisms or government agencies involved in the process is absolutely necessary, even in cases where, by law or administrative regulation, only one government body would lead in the controversy's defence.

We must also consider placing certain limitations on actions or statements, which must be put in place in order to prevent other state organism from adopting a particular measure or making declarations, which could have an adverse effect on the outcome.

Finally, Law Nº 20.285, relating to access to public information, through article 21, Nº 4 authorises secrecy and reserve relating to making certain information public, if the publicising of that information can have adverse effects and affect national interests, especially in issues relating to international relations, commercial interests and economic matters. Handling of this information in a thoughtful manner can also be a useful tool when involved in an investor-State dispute.

[1] Through the DL 600, a foreign investor voluntarily signs a contract with the State of Chile, who is represented by the Foreign Investment Committee, which authorizes the transfer of capital or other forms of investment into Chile. In return, the investor receives a series of guarantees and rights. This contract is legally binding for both parties and cannot be modified unilaterally by the State.

[2] Chile lost the case and had to pay 6 million dollars.

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2 comentarios:

Geoffrey Mar 28, 2012 04:26 AM

As a matter of interest, was the DL 600 before or after the BIT? And did the date matter?

Responder

Respuestas

Ricardo Vásquez Urra Mar 29, 2012 07:15 AM

Dear Geoffrey, thanks for your comment.

As far as I know, the contracts were signed after the entry into force of this BIT. Nevertheless, you should bear in mind that the BIT protects any investments made in the territory of Chile, under its laws, by investors from the United Kingdom before or after the entry into force of the BIT, with the sole exception of any differences or disputes that have arisen prior to its entry into force, which are not covered. Therefore, if the contracts were signed before the BIT was in force, the investment is covered by the agreement. If the dispute arose after the entry into force of the BIT, I think the investor is allowed to file a claim before an ICSID tribunal.

However, in my opinion, this particular issue should be discussed at the evidence stage. Probably, the State will try to avoid the application of the umbrella clause based on a ratione temporis objection.

I hope this answer proves useful.

Responder

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