Review of Crystallex International Corporation v. Bolivarian Republic of Venezuela Arbitration Case

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Abstract. The fair and equitable treatment provision and indirect expropriation provision are crucial elements within international investment agreements between foreign investors and the host countries. However, due to their vague meanings and criteria, the tribunals often interpret these issues broadly, leading foreign investors to regard them as tools to confront the administrative powers of the host country. In order to better balance the interests of both parties, this article analyzes the classic case of Crystallex v. Venezuela to clear the jurisdiction of the tribunals and the distinction between contract claims and treaty claims. Meanwhile summarizing the elements of fair and equitable treatment and indirect expropriation. Finally, this article proposes some recommendations to promote the sustainable development of international investment, therefore, the host countries can abide by regulations and administer in accordance with the law, as well as enhance stability, transparency, and predictability, so that can encourage investors to invest boldly and foster internationalization and facilitation of investments.

Keywords: International invest arbitration; fair and equitable treatment; indirect expropriation; investors' legitimate expectations.

1. Introduction

The Crystallex International Corporation (Crystallex) is a company incorporated under the laws of Canada. Provided that previous notification is given to the Ministry of Mines of Venezuela.CVG has the right to enter into contracts with third parties to explore, exploit as well as sell the gold mineral called Las Cristinas which is located in the areas in the Bolívar State [1].

On 2 September 2002, the Board of Directors of the CVG approved the Mine Operation Contract (MOC) with Crystallex. Meanwhile, CVG was responsible for obtaining the permits make sure the project development. To achieve the development of the gold mineral in Las Cristinas, with the communication between Crystallex and CVG. The Feasibility Study of Crystallex was approved by the Ministry of Mines on 6 March 2006 [1].

On 16 May 2007, the Ministry of Environment issued a request to Crystallex, urging them to offer a bond as an assurance of the actions outlined in the Environmental Impact Evaluation document for the project. On May 18, 2007, Crystallex issued the Bond and fulfilled its obligation to pay the environmental taxes [1].

On April 14, 2008, the Ministry of Environment rejected the permit request from the CVG, noting environmental concerns and the impact on the local population residing in the Imataca Forest Reserve. Nevertheless, during a public speech on September 19, 2008, President Chávez declared the intention to taking back gold mines [1].

Crystallex inquired about the present status of the MOC from CVG. However, on February 3, 2011, CVG notified Crystallex of its decision to revoke the MOC. It is based on the opportunity and convenience, as well as one year cessation, according to Clause of the MOC [1].

On February 16, 2011, Crystallex filed a request for relief ICSID, alleging that Venezuela violated Article II(2) of the BIT between Canada and Venezuela,because of failing guarantee the FET, and full protection and security, to its investments in Venezuela. Additionally, it had breached Article VII(l) of the treaty because of expropriating [1].

On February 14, 2019, the tribunal made a decision based on the grounds outlined in the award. The tribunal determined that it has jurisdiction concerning the whole dispute. It further concluded

that Venezuela violated the fair and equitable treatment（FET）, as well as expropriated investments. Consequently, the tribunal demanded the Respondent to compensate the Claimant with damages totaling US$ 1,202 million [1].

2. Case Issues and Relevant Analysis

2.1. The Tribunal's Jurisdiction Concerning the Revocation of the Mining Operation Contract in the Case

2.1.1 Revoking the mining operation contract is an extension of the license dispute

To find out whether the revocation of the mining operation contract in November 2008 was a continuation of the dispute submitted for arbitration and also to figure out whether new notices and a six-month"cooling-off" period needed to be recalculated, the tribunal inquired whether the disputes involved the same "subject matter [1]."

The tribunal referred to the CMS v. Argentina case, and the Swisslion v. Macedonia case, and concluded that "without any doubt," the two main areas of dispute within the same arbitration, which means the denial of the permit and the revocation of the mining operation contract related to the same dispute [2,3]. The tribunal held that the dispute merely expanded and added a series of facts when the mining operation contract was terminated, rather than creating a new dispute [1].

The tribunal pointed out if adopt the respondent's requirement, it would allow a state to continue taking new actions to trigger new notices and "cooling-off" period requests, leading to "supplementary procedure issues." This would not be consistent with the reasonable intention included in the Canada-Venezuela BIT concerning the notification and friendly settlement requirements [1].

2.1.2 The tribunal confronts a treaty claim rather than a contract claim

Just as Prof. Zachary Douglas said before, "Numerous significant foreign investments have been recorded through agreements with the host state or its entities, contributing to the unexpected observation that many investment conflicts are closely linked to such contractual relationships [4].

In investment disputes arising under bilateral or multilateral investment treaties with a series of facts such as contractual relationships between the parties may be involved. However, this does not imply that the tribunal is dealing with contract claims rather than treaty claims [1].

(1) The tribunal held the view that contract claims are different from treaty claims in investment arbitration [1].

(2) Clause 19 of the mining operation contract addresses jurisdiction when disputes arise from the execution of the contract, but it does not mention its right to pursue arbitration. Thus, the exclusive jurisdiction clause within the contract cannot deprive the tribunal of its jurisdiction under an international treaty [1].

(3) Finally, refers to the Claimant give up the right to initiate arbitration through Clause 19 of the mining operation contract, t even if investors can give up treaty rights through a contract, any such waiver must be explicitly and specifically articulated [1].

The tribunal finally ruled that it has jurisdiction over all treaty disputes, including the revoked mine operating contract jurisdiction.

2.2. The reasons Venezuela Violated the Principle of Fair and Equitable Treatment

The Tribunal reckons that the principle of FET isn't simply equal to the Most-Favored-Nation Treatment under Customary International Law, which is found in Article II(2) of the Canada-Venezuela BIT. The reason is since the Neer case, relevant international customary law standards, as well as international customary law itself, have gradually developed. In this case, unlike the North American Free Trade Agreement, does not explicitly incorporate the Most-Favored-Nation Treatment. Therefore, the tribunal considers this standard to be an autonomous standard.

Subsequently, the Tribunal quotes the general meaning of FET as defined in the MTD case, which means fairness and legality [5]. And summarizes the fundamental elements of FET, which include: protection of legitimate expectations, protection against arbitrary and discriminatory treatment, transparency, prevention of coercion and harassment by the host country, providing a predictable and stable legal framework and consistency.

2.2.1 The investors have the legitimate expectations

Legitimate expectations refer to the situation where authorities promise or represent substantive benefits to investors, who rely on these assurances when making investment decisions. If these benefits are frustrated due to governmental actions, it gives rise to the protection of vested interests.

The Tribunal reckons that the statement in the letter on May 2007 is the positive statement, which states Once the Bond has been submitted, reviewed, and determined to be in accordance with the requirements of this Office, the Permit will be transferred to the applicant [1]. This conclusion is made clear by the use of the indicative mode, the future tense.

Moreover, the trust was further strengthened by the Ministry of the Environment required Crystallex to pay the tax on the environment on the same day. Hence, this letter meets the principle of legitimate expectations.

When the host country reneges on the guarantees it has made, and the investor forms a reasonable expectation based on this, it constitutes a violation of the standard of fair and equitable treatment [6].

In contrast, statements made by State officials that lack clarity and precision do not meet the required standard to be considered as representations capable of generating legitimate expectations [7].

Take the minutes of the National Assembly gathering on October 4, 2007, as an example, based on the minutes provided, the sole representative present from the Ministry of Environment during that session, its then Planning Director, merely offered "referred, to environmental aspects." According to the Tribunal's perspective, the inaccurate information fails to fulfil the criterion of legitimate expectations. Consequently, if these expectations are subsequently hindered, it will breach FET [1].

2.2.2 The arbitrariness while lacking transparency and consistency of the action of Venezuela

The tribunal adopted the International Court of Justice's definition of arbitrariness from the ELSI case, which is defined as "deliberate disregard of due legal process or at least disregarding the applicable rules of procedure and judicial propriety." Furthermore, it determined that "a measure is arbitrary if it is based on excessive uncontrolled discretion, bias, and the reasons given by the decision-maker do not correspond to reality [1]."

Here are the arguments：

(1) The worries expressed by the respondents relate to the issue of global warming and the carbon emissions.

(2) Have not been analyzed in the applicant's submissions over the years to which the applicant cannot adequately respond.

(3) The letter of permit denial also cites further issues, such as the potential impact of illegal mining activities and alterations to the hydrological system, as reasons for refusing the permit. The letter uses ambiguous language and lacks any substantiating evidence or authoritative sources. The letter includes recent environmental studies conducted in this area, research conducted by experts in the subject issue, and technical inspection reports. Nevertheless, this did not include any attachments of the aforementioned "studies," "research," or "reports."Furthermore, the letter fails to provide any identification of the aforementioned papers, their respective authors, or the specific recommendations that are contained within them. Hence, it can be argued that these ambiguous quotations lack the necessary clarity and coherence to offer any valid basis for an option [1].

The Tribunal additionally finds that the sole internal report upon which the letter of permit denial seems to rely is the in-name-only Technical Inspection Report of September 2006, also known as the "Romero Report," which advised against granting the Permit. Upon careful examination, the

former mentions of the Environmental Impact Statement (EIS), nevertheless, merely constitute superficial acknowledgment of the document. Similar to the Permit denial letter, the Romero Report lacks any inclusion or even reference to scientific facts or studies.

In addition, the arbitral tribunal found numerous inconsistencies in the communications on record, which further reflects a lack of transparency. Following the May 2007 letter, there was a change in national policy and political pressure from senior Venezuelan officials [1]. Especially following the denial of the permit, the political atmosphere increasingly turned against Crystallex, ultimately resulting in the revocation of the mining operation contract.

The series of government actions shows that the revocation of the mining operation contract is not based on legal standards. In the tribunal's view, this is a clearly arbitrary act that violates FET.

2.3. The Reasons for Venezuela Illegitimately Expropriate Crystallex's Investment

2.3.1 Crystallex has capable of being expropriated

First of, the threshold question should consider whether the Crystallex possessed the right of being expropriated.

The Tribunal noticed that the "investments" defined in the Treaty had an extensive scope. It additionally highlights that "investments" include The term "rights" refers to granted through legislation or contractual agreements, that allow individuals or entities to engage in economic and commercial operations, such as exploration, cultivation, extraction, and utilization of natural resources.[1] This provision distinctly illustrated that contractual rights are deemed as investments as outlined in Article I of the Treaty.

2.3.2 Venezuela illegitimately expropriated Crystallex's contract right

The arbitral tribunal provides an overview of the characteristics of direct and indirect expropriation reflected in precedents.

It goes through a "three-step" analytical approach, leading to an indirect expropriation of the Claimant's rights [1].

(1) The first step leads to expropriation which occurred when the action of denying the permit in April 2008.

(2) The second step involves statements made by senior Venezuelan government officials who devalued the Claimant's investment, leading to the revocation of the mining operation contract.

(3) The revocation of the mining operation contract is the third step, representing the gradual expropriation of the Claimant's investment through a series of coordinated measures.

The tribunal holds the view that the disputed actions do not simultaneously satisfy the four conditions laid out in Article 7(1) of the Canada-Venezuela BIT regarding not being seen as illegitimate expropriation, which includes public purpose, under due process of law, in a non-discriminatory manner and against prompt, adequate and effective compensation.[2]

The expropriation was indeed carried out for a public purpose, public interest generally refers to the basic interests of society or a state and law and moral norms of this state [8]. Meanwhile, the claimant neither has demonstrated any violation of due process during the expropriation process nor has it been able to provide sufficient evidence to support the claim that the expropriation was carried out in a discriminatory manner [1].

However, it goes without saying that Venezuela never provided any compensation. Regarding the compensation claim, the tribunal refers to several sources and asserts that when a treaty's requirements for lawful expropriation are met simultaneously with various conditions, it is recognized that failing to adhere to any of these conditions violates the expropriation provision [1].

[1] Canada-Venezuela BIT, Article I(f)(vi).

[2] Canada-Venezuela BIT, Article vii.

3. Recommendations for the Trial of Multinational Investment and Summary of Experience in This Case

3.1. Contract Claims and Treaty Claims Indeed Exist Boundaries

The Tribunal further delineated the distinction between contract claims and treaty claims.

In this case, the dispute concerning the destruction of the Claimant's investment in Venezuela, extending beyond mere obstruction of the performance of the mining operations contract. Therefore, investment disputes under IIAs refer to contractual relationships and a range of other facts. This does not mean that the content of the dispute is exclusively contract-based claims rather than treaty-based claims.

In this case, the tribunal's judgment provides a reference when a host state government argues that the dispute is contractual rather than based on state conduct, meanwhile asserting that the dispute is not subject to treaty claims.

Additionally, this case serves as a warning to host state governments about their making decisions related to international investment. If a series of government actions hinder contract performance and further result in the destruction of an investor's investment in the host state, such actions should be regarded as indirect expropriation and should be subject to treaty claims under bilateral or multilateral investment treaties.

3.2. The Element of FET

In practice, this provision has been interpreted extensively by the tribunal, which has caused uncertainty in the application and will affect the predictive function of the law [9]. This is a crucial question that needs to be clarify.

In this case, the tribunal summarized the fundamental elements of FET, and a specific analysis of the investors' legitimate expectations.

Regarding legitimate expectations, the tribunal believes that there must exist substantive interests between investors and the host country, and the relevant meaning must be sufficiently "specific", as well as accurate in content and clear in form. Meanwhile, the Technical Inspection Report that serves as the foundation for revoking the contract is ambiguous, the altitude of the government official appears capricious.

The Tribunal concurs with the statement made in the Mondev case, which suggests that, in contemporary perspectives, no longer needs unfairness or inequity to be equated to overbearing or extremely flagrant. Specifically, a state may judge the action as unfair and inequitable without necessarily demonstrating bad faith [10].

The Tribunal additionally emphasizes that the evaluation of whether a state's behaviour has been fair and equitable needs a comprehensive examination of all relevant factual evidence, contextual elements, and circumstances related to a specific case.

Regarding the basis and timing for determining investors' legitimate expectations, various arbitration tribunals emphasized that those are founded upon the host country's legal framework at the time the investment occurred [11]. Some tribunals point out the pre-existing legal framework at the time of investment occurred which plays a decisive role in shaping legitimate expectations.What needs to be emphasized is that the political statements have the least legal value, thus, they cannot give rise to legitimate expectations.

3.3. Recognition of Indirect Expropriation

In practice, governments generally do not implement policies that clearly lack a public interest [12]. On the other hand, the standard of public interest is not clear and uniform, especially in different countries and in different contexts. Out of respect for the host state government, most claimants did not challenge the authenticity of the public interest, the tribunals also seldom deem the public interest claims put forth by the host state government as false [1,13]. Therefore, most cases concern violations

of due process of law, discrimination, or inadequate and ineffective compensation and the same applies to this case.

Furthermore, in this case, the tribunal has affirmed the cumulative nature of the elements constituting a lawful expropriation which means if any of the conditions for lawful expropriation is not satisfied, the expropriation would be considered illegitimate. This will affect the allocation of the burden of proof for demonstrating lawful expropriation between the parties in the future.

4. Conclusion

In this case, it can be found that the right of a state to grant or deny the exploit licenses to its natural resources is a significant aspect of state sovereignty, and without any doubt, the foreign investors do not inherently possess the right to obtain exploit permits.

In practice, the tribunals always respect the host state's discretion when grant or deny licenses for natural resources, a point affirmed in this case as well.

However, the host state is eager to express concerns over specific investment projects needs careful scrutiny, particularly when licenses are denied based on environmental considerations.

The reasons are apparent, the host country should point out scientific research and analysis as well as timely and transparent presentation when they make a decision related to the denial of licenses, in order to demonstrate the decisions are scientific and necessary. Otherwise, a country refusing to grant natural resource authorizations and licenses might be seen as arbitrary actions, potentially violating the standard of FET. This could even lead to the destruction of an investor's investment, constituting indirect expropriation and eventually resulting in considerable compensation claims.

Hence, providing foreign investors with fundamental fair and equitable treatment safeguards and protecting their legitimate expectations are the crucial factors which can undoubtedly give us a chance to enhance the sustainable development of international investments.

In the near future, another crucial factor in promoting the sustainable development of international investment is establishing clear and specific criteria for compensation, since such compensation could have significant economic implications for the host country.

Choosing appropriate valuation methods based on different stages of investment and achieving a balance between the interests of international investors and the interests of the host country is essential for fostering the sustainable development of international investment arbitration. Finally, the refinement of valuation models can be explored in the future to facilitate a deeper exploration of this study.

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