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Berman-led tribunal agrees to rectify 2016 award, confirming finding of satisfaction as remedy for denial of justice, but hits claimants with costs order; annulment application now in motion

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A tribunal at the International Centre for Settlement of Investment Disputes (ICSID) has granted a request for rectification of an award in the long-running case of Pey Casado v. Republic of Chile.

The claimants had sought rectification of the September 2016 'resubmission' award, which ruled on certain resubmitted questions after the original 2008 award was partially annulled in 2012.

Notably, in granting the minor rectifications requested, the resubmission tribunal confirmed that one of its findings – namely, that a declaration of denial of justice itself constituted a remedy for the claimants – was an independent finding by the tribunal, unaffected by the fact that the original 2008 tribunal had made the same finding in parts of the original award which were later annulled.

As we discuss below, only days after the tribunal's October 6, 2017 decision on rectification, the claimants have now filed for annulment of the newly-rectified award.

Arbitrators in the case are Franklin Berman (chair), VV Veeder (claimants' nominee) and Alexis Mourre (Chile's nominee).

Procedural complications slow rectification proceedings

As with many elements of the decades-long Pey Casado case, the rectification proceedings were beset by procedural complications, including two unsuccessful challenges (see here and here) against two members of the tribunal. The claimants themselves then requested ICSID to terminate the rectification proceedings in April 2017 (see here), citing ongoing concerns over the tribunal's impartiality. (Alongside this request, the claimants also commenced an entirely new arbitration against Chile under UNCITRAL rules, for which a tribunal was recently constituted.)

Chile opposed the suggested termination of the rectification proceedings, asking the tribunal to continue its work at least to issue a costs order. In light of

Chile's opposition, the tribunal determined that it would proceed to rule on the rectification request.

(A parallel proceeding commenced by the claimants at ICSID, seeking an official interpretation of the original 2008 award, was discontinued in May 2017.)

Three 'purely formal' rectifications granted

As we've detailed (see here), the claimants asked for rectification of the 2016 resubmission award in four respects. Chile generally did not oppose rectification, but questioned some of the reasons given by the claimants in support of rectification, and proposed a slightly different rectification of one passage in the award.

The tribunal began by noting that, under the ICSID Convention, it only had the power to correct a 'clerical, arithmetical or similar error' which must be 'purely accessory' to the underlying dispute.

Three of the proposed rectifications were swiftly accepted by the tribunal. The first claimed error – a reference to 'Decision No. 43' instead of 'Decree No. 165' – was clearly a mistake, the tribunal accepted. Similarly, the tribunal found that the next two claimed errors were simple mistakes of transcription from the claimants' filings into the award, where the award had used different language to the claimants' filings. Since the award was intending to do no more than summarise the claimants' submissions at those points, the tribunal said, the claimants' own language should have been used. Thus, 'before' was rectified to 'by', and, elsewhere in the award, 'by' was rectified to 'since', the tribunal confirming that this was 'without impact on the substance of the Resubmission Award'.

Rectification of finding on remedy for denial of justice also granted, due to footnote citing annulled parts of original award

The only proposed rectification requiring any significant comment from the tribunal was the fourth proposal.

Here, the claimants took issue with the dispositif of the 2016 award, in that the dispositif confirmed that, 'as has already been indicated by the First Tribunal', that tribunal's finding of denial of justice itself constituted part of the remedy for the claimants. The claimants maintained that the original tribunal's analysis on remedies, including the view that a finding of denial of justice could itself constitute a remedy, was annulled in 2012. Because of this, the phrase just quoted (ie, 'as has already been indicated by the First Tribunal') should be deleted, the claimants argued.

The tribunal firstly noted that it was debatable whether the 2012 annulment decision had annulled the entirety of the 2008 award's Part VIII (which contained that tribunal's damages analysis), or only the parts of Part VIII that were 'related to damages'. However, this point did not affect the present rectification question, the tribunal said.

More relevant, the tribunal confirmed that its own finding – that a declaration of denial of justice constituted in itself a remedy of satisfaction – was an independent finding, unaffected by the fact that the 2008 tribunal had made the same finding. Although this finding from the 2008 tribunal might strictly speaking have been annulled, the tribunal noted that it was made 'on the basis of findings earlier in the First Award which the Annulment Decision had expressly declared to be *res judicata*'.

Because of this, the tribunal saw 'no imperative need' for rectification on this point.

However, since both parties appeared to agree that the 2016 resubmission award should not have included a footnote to a paragraph of the 2008 award that was annulled, the tribunal determined that it would rectify part of the 2016 award's dispositif to read as follows, with no footnotes:

'That the formal recognition by the First Tribunal of the Claimants' rights and its finding that they were the victims of a denial of justice constitutes in itself a form of satisfaction under international law for the Respondent's breach of Article 4 of the BIT;'

Claimants penalised in costs order, despite rectification success

Turning to costs, the tribunal observed that it had granted the claimants' rectification requests, but that three of these were 'purely formal', and that none of them had any impact on the meaning of the resubmission award.

Given this – and also the fact that the rectification proceedings were complicated by two unsuccessful arbitrator challenges – the tribunal ordered the claimants to pay nearly US$46,000 in ICSID costs for the proceedings, with no order on legal costs.

New annulment filing targets findings on remedy for denial of justice and arbitrator impartiality

Meanwhile, on October 10, 2017, the claimants also filed a request for annulment of the 2016 resubmission award.

The annulment request focuses in part on the 2016 award's conclusion, mentioned above, that a finding of denial of justice itself constituted a sufficient remedy. In the claimants' view, the 2008 award confirmed a right to financial compensation, which the 2016 tribunal failed in its mandate to calculate.

Issues of arbitrator impartiality are also raised again in the annulment request, broadly similar to the issues underpinning the earlier unsuccessful challenges to two of the resubmission tribunal members.

The claimants are represented in the case by Garces y Prada Abogados, Gide Loyrette Nouel and Robert Howse, while Chile is represented by Arnold & Porter Kaye Scholer LLP and Chilean firm Carey.