

Bolivia fails to annul mining arbitration award

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Twelve years after the dispute first came to the International Centre for Settlement of Investment Disputes (ICSID), an ad hoc committee has upheld a US\$48 million award in favour of Chilean mining company Quiborax against Bolivia – finding that the tribunal’s decision to order the suspension of domestic criminal proceedings was not a basis for annulment.

In a decision [dated](#) 18 May, a committee chaired by Spain's Andrés Rigo Sureda and including Guatemala’s Milton Argueta Pinto and Sweden’s Christer Söderlund rejected Bolivia’s application to annul the award in favour of Quiborax and its Bolivian subsidiary Non-Metallic Minerals. Each side was ordered to bear its own legal fees, though Bolivia was required to pay the costs of the annulment proceeding.

The committee also lifted a stay of enforcement over the award. Last year, it had rejected an application by Quiborax to lift the stay while the annulment application was being heard, accepting statements by Bolivia that it would comply with the award if it was not annulled.

The dispute relates to the expropriation of 11 mining concessions in the Salar de Uyuni region of southern Bolivia. Quiborax and Non-Metallic Minerals filed the claim in 2006, alongside Chilean national Allan Fosk.

The parties had reached an oral settlement in 2008, but resumed arbitration after Bolivia initiated criminal proceedings against Non-Metallic Minerals, accusing the company and its shareholders of forging board minutes to include Quiborax and Fosk so that it could have standing to bring the ICSID claim under the Chile-Bolivia bilateral investment treaty (BIT).

An ICSID tribunal chaired by Swiss arbitrator Gabrielle Kaufmann-Kohler, sitting with Canada's Marc Lalonde and France's Brigitte Stern, issued a decision on provisional measures in 2010, ordering the state to suspend the criminal proceedings while the arbitration was pending. Bolivia argued that the decision amounted to an infringement of its sovereignty and requested the disqualification of all three arbitrators on grounds of bias. That challenge was rejected by the chairman of the ICSID administrative council, who ruled that the state had failed to provide evidence of bias.

A decision on jurisdiction in 2012 allowed Quiborax and Non-Metallic Minerals to proceed with their claims, but refused to hear claims by Fosk personally.

The tribunal issued a final award in September 2015, holding the state liable for the expropriation of the concessions. Stern, the state's appointee, [issued](#) a partially dissenting opinion.

The state filed its annulment application days after the award was issued, with Bolivian attorney general Hector Arce Zaconeta releasing a statement alleging that the award contained "serious violations of procedural rules" and that the tribunal acted "outside of its powers to the detriment of Bolivia".

Bolivia advanced multiple grounds for annulling the award, including that the tribunal's decision to order the suspension of the criminal proceedings had been a manifest excess of powers as it had prevented the state from advancing its case based on the alleged illegality of the investment. The committee rejected those arguments, noting the tribunal's finding that as Bolivia had actually never suspended the criminal proceedings, it was difficult to argue that it had not had sufficient opportunity to find evidence of illegality.

Bolivia had also argued that the provisional measures decision was contrary to Bolivian law, as it ignored the separation of powers and failed to recognise that a criminal complaint in the Bolivian legal system may not be suspended or interrupted unless expressly provided by law.

On this point, the committee agreed with the tribunal that there was a direct relation between the arbitration and the criminal proceedings, and maintained that it is within the jurisdiction of the ICSID tribunals to recommend the suspension of legal proceedings in the state party to the arbitration, in order to avoid aggravating differences and to protect the integrity of the arbitration procedure.

Bolivia also complained that the tribunal majority had relied upon a different method of quantum valuation than had been proposed by either of the party-appointed experts, calculating the damage using data from before and after the expropriation took place. The tribunal's use of this methodology had been the issue on which Stern dissented.

The state said the "ad hoc methodology" relied upon by the tribunal was "inherently speculative" and "ignores the rules on causality and predictability of damage". However, the committee concluded that the use of ex ante and ex post information was not contrary to the principle of full reparation and was compatible with international law standards.

In the annulment and the arbitration proceedings, Quiborax was represented by a team from Chilean firm [Bofill Mir & Alvarez Jana Abogados](#) led by partner Andres Jana in Santiago. Bolivia instructed a team from Dechert led by Eduardo Silva Romero in Paris for the annulment proceedings. Dechert had initially represented the state in the arbitration, before GST of counsel Diego Brian Gosis took over in 2013. Neither counsel responded to a request for comment on the decision.

Quiborax SA, Non-Metallic Minerals SA & Allan Fosk Kaplún v Plurinational State of Bolivia (ICSID Case No. ARB/06/2)

Ad hoc committee

Andrés Rigo Sureda (Spain) (President)
Milton Argueta Pinto (Guatemala)
Christer Söderlund (Sweden)
Counsel to Quiborax, Allan Fosk and Non Metallic Minerals

Bofill Mir & Alvarez Jana Abogados

Partners Andres Jana and Rodrigo Gil, and associates Johanna Klein Kranenberg and Constanza Onetto and Carla Sepulveda in Santiago

Counsel to Bolivia

Procurador General del Estado
Pablo Menacho Diederich, Ernesto Rossell Arteaga and Yovanka Oleden Tapia

Dechert

Partners Eduardo Silva Romero and José Manuel García Represa in Paris, international counsel Alvaro Galindo and special legal consultant Juan Felipe Merizalde Urdaneta in Washington, DC and senior associate Audrey Caminades and associate Luis Miguel Velarde in Paris

Tribunal

Gabrielle Kaufmann-Kohler (Switzerland)
Marc Lalonde (Canada)
Brigitte Stern (France)
Counsel to Quiborax, Allan Fosk and Non Metallic Minerals

Bofill Mir & Alvarez Jana Abogados

Partners Andres Jana and Rodrigo Gil, with associates Johanna Klein Kranenberg, Constanza Onetto, Carla Sepulveda and María Victoria Demarchi in Santiago
Guevara & Gutiérrez SC - Servicios Legales
Partners Ramiro Guevara and Jorge Luis Inchauste in La Paz

Counsel to Bolivia

Gomm & Smith (from September 2013)
Partner Diego Brian Gosis in Miami
Dechert (from March 2010 to 2013)

Partners Eduardo Silva Romero and Pierre Mayer with associate José Manuel García Represa in Paris

Foley Hoag (until December 2009)

Partners Paul Reichler and Ronald Goodman, with counsel Alberto Wray in Washington, DC

Experts for Quiborax, Allan Fosk and Non Metallic Minerals

Partner Juan Pablo de Luca on jurisdiction

Professor Carlos Rosenkrantz from Yale University on jurisdiction

Behre Dolbear & Company on valuation

Navigant Consulting on valuation

Experts for Bolivia

Professor Iván Salame from the Universidad Católica Boliviana on jurisdiction

Econ One Research on valuation

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- Industry : Mining and Metal

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