

DISSENTING OPINION OF CO-ARBITRATOR MANUEL CONTHE

1. I respectfully disagree with my colleagues on three questions which I consider to be related: Bolivia's alleged compliance with *due process*, the Tribunal's finding of a lack of jurisdiction of over the spot price and capacity payment claims, and the equal division of costs.
2. In my opinion:
 - (i) Bolivia's expropriation failed to comply with the requirements of *due process*.
 - (ii) The Tribunal should have dismissed the spot price and capacity payment claims on the merits, not for lack of jurisdiction, but limiting itself to explain why they did not violate the Treaty.
 - (iii) The Tribunal should have ordered Bolivia to pay costs, at least partially.

Bolivia failed to comply with the requirements of due process.

3. In my view, the expropriation of EGSA by Bolivia constituted a "seizure" because, besides not paying compensation, the process Bolivia followed to determine the market value of EGSA did not respect the requirements of "*due process*" set forth in Article 5 of the UK-Bolivia BIT. It is true that the Spanish version of the Treaty renders "*due process*" as "*por procedimientos jurídicos*", an unfortunate expression, as it lacks the long history, jurisprudence, and legal background of the English term "due process" and is rather obscure. But, in keeping with the principles of the Vienna Convention, such obscure Spanish term should be understood as "*due process*", a term frequently translated into Spanish as "proceso debido".
4. As it is evident that a "*due process*" requirement must establish some minimum standard if it is to merit the title of "*due*"—amongst other reasons, because this is required by the principle of "*most favoured nation*" standard enshrined in Article 3 of the Treaty—the question arises: what are the minimum requirements that the expropriation procedure should have complied with?
5. In my view, an expropriation—as an administrative act limiting the rights of an individual—must meet, from a legal point of view, three minimum procedural requirements:-

- (i) It must be reasoned—i.e. accompanied by a justification of its key features (in this case, a report or analysis that justified the zero value attributed to EGSA).
 - (ii) Both the act and its reasons must be formally communicated to the individual.
 - (iii) The legal procedure in question should allow the individual, after being notified of such reasons, to be heard before the State adopts its final decision (i.e. sets the final fair value).
6. Bolivia appeared to *intend* to fulfil the first requirement because ENDE retained the PROFIN consulting firm to prepare a valuation report. However, promptly thereafter it disregarded the minimum requirements of “*due process*”:
 - (i) As noted in the “basis and limitations” section of the PROFIN report, the consulting firm conceived of the report as a secret “strategic document” for the Bolivian Government’s use in its negotiations with GAI, from which it can be surmised that PROFIN did not act with full impartiality.
 - (ii) That report was never communicated to Rurelec, who became aware of it only when it was submitted by Bolivia in this arbitration as exhibit R-154.
 - (iii) Bolivia never gave Rurelec the opportunity to make allegations in response to that valuation.
7. In sum, a secret strategic report cannot legally constitute the required justification for an administrative act which limits rights.
8. Bolivia thus breached its Treaty with the United Kingdom, not only because it underestimated the value of EGSA, but also because it failed to comply with the minimum requirements of *due process* under Article 5 when establishing that zero valuation.

The Tribunal should have upheld its jurisdiction over the “New Claims”

9. The breach of *due process* by Bolivia in the expropriation strengthens the Claimants’ argument that the Tribunal had jurisdiction over what Bolivia has called the “New Claims” despite the stipulation in Article 8 of the Treaty to a 6-month waiting period following written notice “of the claim.”
10. The Claimants refer to several awards (in particular, *Lauder, Abaclat, SGS v. Pakistan, Biwater Gauff v. Tanzania*, etc.) characterizing such waiting periods as purely procedural,

rather than jurisdictional, in nature. Those arguments become stronger still, in my opinion, when a tribunal must determine whether it has jurisdiction to rule on certain claims ancillary to a main claim relating to a seizure.

11. If Bolivia did not respect the most basic requirements of due process when expropriating EGSA, how could it be entitled to require the Claimants to separately notify claims concerning spot prices and capacity payments and wait six months, even though such claims, if accepted by the Tribunal, would have increased the value of EGSA and, consequently, the amount of compensation due? In my view, given that Bolivia failed to abide by minimum standards of due process in the nationalization of EGSA, it is unreasonable to interpret Article 8 of the Treaty so as to require separate notification by the expropriated individuals of these claims, which were ancillary to the main claim.
12. By the same token, a person who is expelled from a foreign country by a public authority who, without any administrative procedure, *de facto* takes his or her home without paying compensation, should be entitled to claim not only its value when it was taken, but also the loss of value suffered when, shortly beforehand, the same authorities—in that person’s eyes, unfairly—reduced the surface of the garden or the property’s building rights.
13. I nevertheless share the rest of the Tribunal’s view on substance that the 2007 and 2008 decisions did not violate the Treaty, since they were not discriminatory or arbitrary and, hence, should have been dismissed by the Tribunal. I find however somewhat paradoxical that the Tribunal, after rejecting its jurisdiction on the “new claims”, included in its award a long, unrefined *obiter dicta* on the States’ unrestrained right to introduce regulatory changes, provided they do not put in jeopardy the financial viability of affected firms.

The Tribunal should have ordered Bolivia to pay costs, at least partially

14. Bolivia’s breach of *due* process should have also led the Tribunal order costs against Bolivia, at least partially.
15. Indeed, Bolivia’s failure to comply with due process forced the Claimants to commence this arbitration and has produced costs that will reduce their effective compensation. It is true that, like so many other aggrieved Claimants, Rurelec “inflated” its claims and the Tribunal has rejected a substantial part of them. However, it is particularly appropriate to point out, in a case concerning a power sector applying the principle of “marginal cost”, that the Claimants’ dismissed claims produced only a small “marginal cost” for these proceedings: the Tribunal’s and Parties’ costs were largely fixed and would not have been much lower

had Rurelec claimed exactly the amount of compensation that the Tribunal has awarded. Thus, the Claimants' exaggeration of their claims has not imposed a significant "marginal cost" upon Bolivia, while Bolivia—by forcing Rurelec to initiate proceedings in order to assert its rights—has imposed a high "marginal cost" on the latter that the Tribunal should have ordered Bolivia to cover, at least in part.

16. This conclusion would have also been consistent with a basic economic principle in the design and application of mandatory rules, including those embodied in international treaties: it should not prove more advantageous to breach a rule than to comply with it. Therefore, given an expropriation that has been shown to be unlawful by the full Tribunal on the basis of the failure to pay compensation, and by me on the additional basis of a breach of "due process", the Tribunal should have ordered costs against Bolivia, at least partially.
17. Finally, concerning CAPEX, I regret that the Tribunal, just relying on its own hunches, took at face value statements from a party's witness, Mr. Paz, which Bolivia's own expert, unable to document, did not consider appropriate to include in his own valuation model.
18. Even if I was unable to persuade my colleagues on the points mentioned in this opinion, I am glad that, thanks to our president, we were able to discuss them in a non-confrontational manner.