

**IN THE MATTER OF AN ARBITRATION PROCEEDING UNDER THE UNITED
MEXICAN STATES – SINGAPORE AGREEMENT ON THE PROMOTION AND
RECIPROCAL PROTECTION OF INVESTMENTS AND
THE UNCITRAL ARBITRATION RULES (2010)**

PACC OFFSHORE SERVICES HOLDINGS LTD

Claimant

and

UNITED MEXICAN STATES

Respondent

(UNCT/18/5)

Concurring and Dissenting Opinion of Professor W. Michael Reisman attached to the Decision
on Claimant's Application for Additional Award and on the Applicable Interest Rate

Members of the Tribunal

Dr. Andrés Rigo Sureda, President
Prof. W. Michael Reisman, Arbitrator
Prof. Philippe Sands, Arbitrator

Secretary of the Tribunal

Ms. Mercedes Cordido-Freytes de Kurowski

INTRODUCTION

1. As the Majority indicates, the Claimant presented four claims for an Additional Award: (A) on all its claims concerning the direct treatment of OSA by the Respondent; (B) on its FPS claim with respect to the Detention Order; (C) on its claimed breaches of FET and FPS arising out of the Diversion Order; and (D) on its claimed breaches of FET and FPS stemming from the Blocking Order. I concur with the Majority in rejecting the first and second claims. I believe that Majority errs when it rejects the third and fourth claims. The Claimant's requests, as I will explain, are a direct consequence of the Award's treatment of the BIT's distinct standards of treatment and its focus on what it takes to be general questions of arbitral policy rather than the facts and law of the dispute before it.

A. CLAIMANT'S FIRST AND SECOND REQUESTS: ADDITIONAL AWARD FOR CLAIMS ARISING FROM THE RESPONDENT'S TREATMENT OF OSA AND THE FPS CLAIM WITH RESPECT TO THE DETENTION ORDER

2. With respect to the Claimant's first claim, while the Claimant may be correct in its critique of the Award's decision on jurisdiction, as elaborated in my Concurring and Dissenting Opinion,³⁹ the Tribunal did consider and *decide* on the Claimant's jurisdictional claim. Therefore, the Article 39 procedure of the 2010 UNCITRAL rules does not lie for revisiting the Award's decision to reject its jurisdiction over these claims. Accordingly, I agree with the Majority that the Claimant's application with respect to this particular claim should be denied.⁴⁰

³⁹ Dissent, ¶¶ 4 – 29.

⁴⁰ The Majority's comment on the purported time-bar in paragraph 42 of its decision is irrelevant to the question before it now, and in, any event, was wrongfully applied in the Award.

3. With respect to the Claimant's second claim, while I believe that the compensation could have been calculated differently for FET, and ought to have been different if the Tribunal were to conclude that the Detention Order was an unlawful expropriation,⁴¹ the Award considered and rejected the expropriation claim. The Claimant did not show that the compensation would have been different if the Award were to conclude that the Detention Order was a breach of FPS as well as FET. I therefore concur with the Majority that the Claimant's request in this regard be rejected.⁴²

B. CLAIMANT'S THIRD REQUEST: ADDITIONAL AWARD FOR CLAIMED BREACHES OF FET AND FPS STEMMING FROM THE DIVERSION ORDER

4. Arbitral economy, though a legitimate practice, is only called for in instances where a tribunal finds liability due to a breach of a specific standard and then refrains from considering other standards because the claimed compensation would not be altered. When, however, a tribunal rejects a claim based on one standard, it must fully consider whether the facts constitute a breach of another standard calling for a separate finding of compensation. Different facts may be relevant inasmuch as each standard of treatment includes different elements and thus requires a different analysis. For example, the same set of facts may sound in expropriation but not in FET.

5. The Majority's decision to reject the Claimant's Application for an Additional Award for its claims arising out of the Diversion Order flows from its mix-and-match approach to treaty interpretation and application. It is unfortunate that rather than recognizing that the Claimant's

⁴¹ Dissent, ¶¶ 68 – 96.

⁴² Majority Decision, ¶ 45.

Application is a direct result of mistakes in the Award, the Majority's response is simply beside the point:

“As explained in the Award, a tribunal considering a claim of judicial expropriation should only interfere with the findings of a domestic court in the context of a claim in very exceptional circumstances. As the factors to be considered by the Tribunal in this regard *closely resemble aspects of the FPS and FET standards relied on by the Claimant* (namely unreasonableness, arbitrariness and a lack of due process), it follows that the Award's findings on expropriation are of equal relevance to the FET claim. The Award decided both matters and rejected them as part of the expropriation claim. The Award determined that the Claimant failed to establish that the courts were not available. As to the Trust, the Mexican courts found that the Trust was illicit because it was established at a time when OSA was already in financial difficulty. The circumstances that justified the rejection of the expropriation claim in the Award equally justify the rejection of FPS and FET claims” [emphasis added].⁴³

6. The Majority explains that because it evaluated the Claimant's expropriation claim using the standard of FET, *i.e.*, denial of justice, instead of the expropriation standard required under the BIT, and because the Claimant relied on the FET standard for its FET and FPS claims, the Award in fact decided on the Claimant's FET and FPS claims when it decided on expropriation. The Majority tries to justify its merging between FET, FPS, and expropriation through a claim of “resemblances” between the factors to be considered for evaluating each standard of treatment. It is worth repeating the different standards which the Tribunal was asked to apply. For FET it is Article 4 of the BIT:

“1. Each Contracting Party shall accord to investments of investors of the other Contracting Party treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of the other Contracting Party. The concepts

⁴³ Majority Decision, ¶46.

of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard and do not create additional substantive rights.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.”

And for expropriation it is Article 6 of the BIT:

“Neither Contracting Party may expropriate or nationalize an investment either directly or indirectly through measures tantamount to expropriation or nationalization (hereinafter referred to as "expropriation"), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law; and
- (d) on payment of compensation in accordance with paragraph 2 below.”

7. There are no resemblances between these distinct standards of treatment. In fact, the BIT makes it clear with respect to FET and FPS: “A determination that there has been a **breach of another provision of this Agreement**, or of a separate international agreement, **does not establish that there has been a breach of this Article.**”⁴⁴ The BIT not only provides for a different and objective standard for expropriation, but it makes clear that a finding of expropriation is different from finding a failure to provide FET and FPS. Yet, again in contrast to the BIT, for the Majority the standard for an expropriation claim seems to have undergone a metamorphosis into one of FET because a State Organ, which partook in the acts complained of, was a domestic court.

8. Even if, *arguendo*, the factual findings of the Award which underly its decision on expropriation, as reproduced in the Majority’s decision quoted above, may be relied upon to reject

⁴⁴ Emphasis added.

the FET and FPS claims, that would be so only because the Award failed to apply the standard of expropriation to the expropriation claim. The absurdity created is that, in fact, it would have been appropriate for an Additional Award to actually evaluate the Claimant's claim through an independent analysis of the expropriation provision because the Award applied FET and called it expropriation. Given this unfortunate redraft of the BIT's provisions by the Award, the Claimant could not have asked for an Additional Award on expropriation so it was forced to ask for one on its FET and FPS claims. Rather than accepting the mistakes it made in the Award, the Majority attempts to escape the results by trying to justify its merging the different standards.

9. Article 39 of the UNCITRAL rules is not concerned with language but with claims:

“1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to *claims presented* in the arbitral proceedings but *not decided* by the arbitral tribunal.”

The Majority ought to recognize that, in reality, the claim presented but not decided in the Award was the claim of expropriation with respect to the Diversion Order and the Invex Trust. I believe that the Claimant is entitled to an Additional Award on its expropriation claim with respect to the Diversion Order inasmuch as the Award in fact decided on its FET claim, but mistakenly used the terminology of “expropriation”. As I explained in my Dissent, I believe that once the standard of expropriation in the BIT is applied to the facts of the case, the Tribunal should conclude that the Respondent is in breach of its obligations per the BIT.

C. CLAIMANT'S FOURTH REQUEST: ADDITIONAL AWARD FOR CLAIMED BREACHES OF FET AND FPS STEMMING FROM THE BLOCKING ORDER

10. The Award in fact did not evaluate the Claimant’s FET claim with respect to the Blocking Order but solely as a claim of expropriation. The Majority’s failure to do so rests again in its misconceived treatment of the different standards of treatment provided for in the BIT by mixing FET and expropriation. For the Diversion Order, the Award applied the standard of FET and called it an expropriation analysis; for the Blocking Order, the Award applied an expropriation analysis and now calls it an FET analysis. The reasoning put forth by the Majority is that:

“Although the Claimant relies on the language of arbitrariness in relation to the Blocking Order and the subsequent decisions of domestic courts, the Claimant did not refer to the usual indicia of arbitrariness (such as a lack of due process, acting for improper purposes and acting on the basis of prejudice or personal opinion), or suggest that the FET or FPS standards had been breached for another reason such as discrimination. The Claimant’s argument in relation to the Blocking Order therefore appears to rest on a having a right to the new contracts. The Tribunal had concluded in respect of the expropriation claim that the claim must fail because the Claimant had not shown that it had a right to new contracts, and similar reasoning and conclusion apply to the FET and FPS claims.”⁴⁵

11. The Majority’s reading of the Claimant’s submissions concerning the Blocking Order and FET is unsupported by the pleadings. In the Statement of Claim, the Claimant explained that:

“188. Mexico had the opportunity to save POSH’s Investment in Mexico by allowing PEMEX to assign the contracts with OSA to POSH’s Subsidiaries. However, SAE did not cancel the GOSH Charters in the interest of preserving the insolvency estate, nor did the Insolvency Court allow PEMEX to rescind the GOSH and the SMP Service Contracts. These arbitrary and unreasonable measures directly impacted OSA’s business partners, including the Subsidiaries, and culminated the destruction of the Investment.

□

192. Mr. Montalvo also engaged in discussions with SAE which, as Conciliator, had the ability to cancel the GOSH and SMP Service Contracts with PEMEX in the interest of preserving the estate. SAE conveyed, however, that it would only cancel the contracts in exchange for a “hair cut to the debt of POSH Group” and “a higher

⁴⁵ Majority Decision, ¶47.

amount of commission” for OSA. SAE’s proposal was coercive, abusive and arbitrary. POSH’s Subsidiaries were OSA’s rightful creditors for services rightfully performed, and OSA’s commission (2.5%) was commercially reasonable, which SAE never denied. SAE was using its position of power to obtain undue benefits so they could “report back to the Ministry of Finance that they... managed” to reduce OSA’s debt. In a desperate attempt to salvage operations in Mexico, POSH conveyed that it would even be “agreeable to [SAE’s] proposal... of a partial waiver of the ‘pre-trust debt from OSA/SAE in return for the cancellation of all the 8 contracts with OSA/PEMEX.’”

□

194. In fact, while the discussions with SAE and PEMEX were ongoing, OSA—under SAE’s administration—requested that the Insolvency Court forbid PEMEX from rescinding its contracts with OSA, including the GOSH and the SMP Service Contracts. On August 15, 2014, the Insolvency Court so ordered. This eliminated any possibility for POSH’s Subsidiaries to contract directly with PEMEX and save POSH’s Investment in Mexico. PEMEX could not assign existing contracts per the court’s resolution, and refused to award new contracts to POSH’s Subsidiaries, on the ground that their vessels were still registered in PEMEX’s system as being used in the contracts PEMEX had with OSA

195. SAE’s actions and the Insolvency Court’s ruling were arbitrary and unreasonable, and culminated in the destruction of POSH’s Investment. □

202. In sum, POSH engaged in consultations with PEMEX and SAE seeking to contract eight vessels directly with PEMEX. This would have saved POSH’s Investment in Mexico. SAE and the Insolvency Court blocked that possibility. Their measures were arbitrary and unreasonable, as anticipated by all Mexican public entities and confirmed by subsequent events.”⁴⁶

And in the Reply:

“317. However, SAE blocked this path forward by refusing to cancel the GOSH Charters, citing the interest of preserving the insolvency estate, and the Insolvency Court did not permit PEMEX to rescind the GOSH and SMP Service Contracts until it was too late. These arbitrary and unreasonable measures directly impacted OSA’s business partners, including the Subsidiaries, and ultimately sealed the destruction of the Investment.”

⁴⁶ Claim, ¶¶ 188 – 202 [references omitted].

And in both the Reply and Claim:

“539. *Eleventh*, Mexico arbitrarily prevented PEMEX from rescinding the contracts with OSA and replacing them with new contracts with the Subsidiaries. SAE refused to cancel OSA’s contracts and the Insolvency Court prohibited PEMEX from rescinding them, fatally condemning POSH’s operations in Mexico. This measure was unreasonable and arbitrary for three reasons:

‘One: SAE was aware, or had an obligation to be, that OSA could not receive new contracts while it was undergoing insolvency proceedings since it did not meet the necessary economic requirements therefor. Two: SAE was aware of, and had acknowledged, that without new contracts, OSA could not meet its obligations under the current contracts with Pemex. Three: SAE was aware of, and had acknowledged, that the breach of the Pemex contracts resulted in conventional penalties, which would constitute claims against the estate...

The reasonable decision by the judge would have been to permit the rescission of the contracts. The reasonable decision by the Conciliator would have been to cancel the contracts in the interest of the estate’.”⁴⁷

12. It is one thing to conclude that a claimant did not have property rights subject to expropriation and an entirely different thing to conclude that a claimant was treated fairly and equitably or afforded a safe investment environment by the host-State. Thus, the conclusion that the Claimant arguably did not show “that it had a right to new contracts”⁴⁸ is only relevant for expropriation. If, in fact, the State blocked the Claimant’s attempt to restart its business operations through what was described in contemporaneous communications as blackmail,⁴⁹ that would constitute a breach of FET and perhaps FPS irrespective of whether there was or was not a right to new contracts.

⁴⁷ Reply, ¶ 505; *see also* Claim, ¶ 388.

⁴⁸ Majority Decision, ¶ 47.

⁴⁹ Email from J. Phang to G. Seow et al., August 20, 2014 [**Exhibit C-188**] (“Marcia Fuentes is basically blackmailing us.”; “Especially since Marcia seems to be able to get the Bankruptcy Judge to approve all sorts of ridiculous Court Orders in the name of saving OSA”).

13. In my Concurring and Dissenting Opinion I mentioned that the Blocking Order was hardly a treatment which was fair and equitable.⁵⁰ Whether or not the Majority reaches the same conclusion with respect to the treatment of POSH concerning acts composing and surrounding the Blocking Order, the Claimant is entitled to have its claims of FET and FPS evaluated based on the FET and FPS standards rather than the standard of expropriation.

14. The task of an arbitral tribunal is to decide the dispute before it within the four corners of the investment protection treaty; it is not to redraft the treaty to suit what it deems to be broader questions of policy or a desired outcome. Nor should a tribunal dispense with subsequent requests by a claimant to correct a failure by the tribunal to decide its claims by refashioning the claims. Accordingly, I concur in part and dissent in part to the Tribunal's rejection of the Claimant's application for an Additional Award.

W. Michael Reisman

⁵⁰ Dissent, ¶ 85.

[Signed]

W. Michael Reisman
Arbitrator

Date: May 2, 2022