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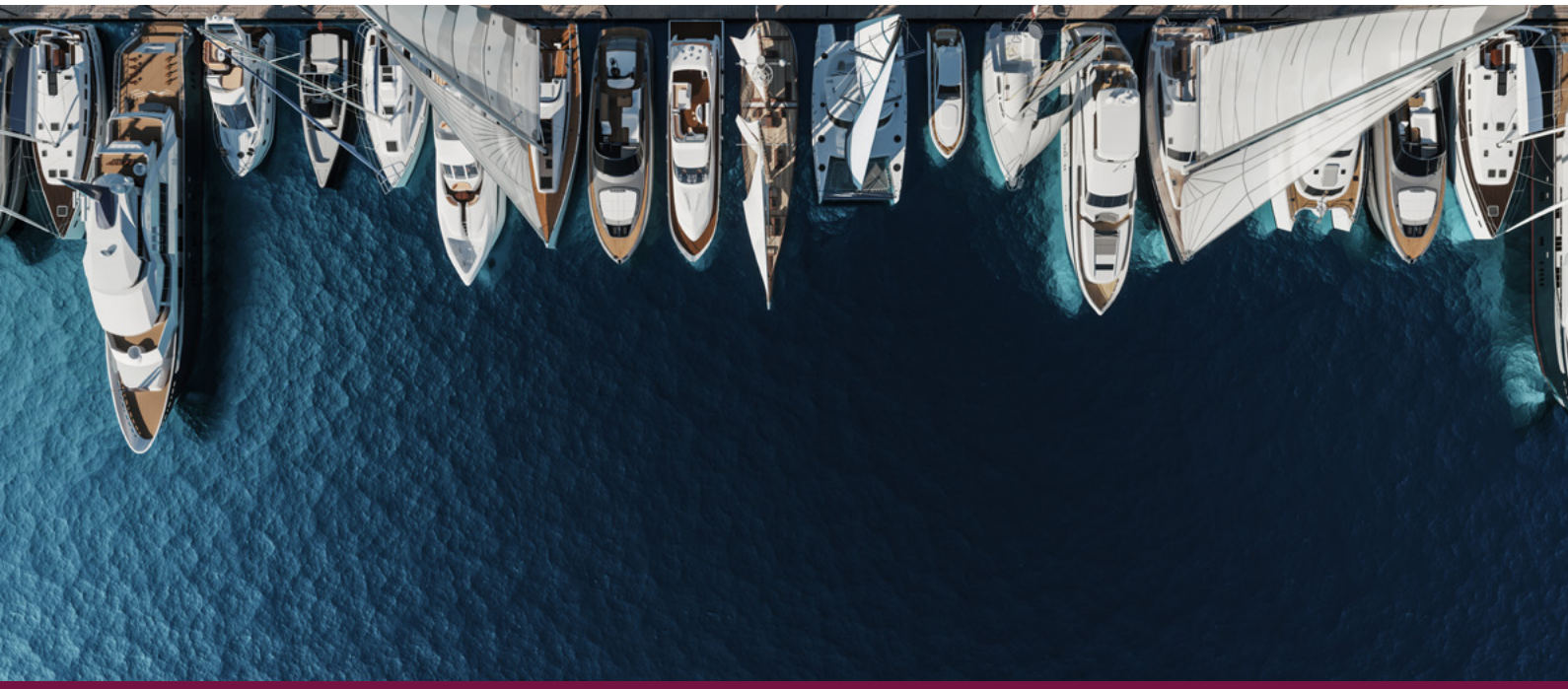

Arbitral Tribunal rejects Claimant's request for an Additional Award in PACC Offshore Services Holdings LTD v. Mexico

10 Nov 2022

This is the second instalment of our discussion and analysis of the investment dispute brought by PACC Offshore Services Holdings LTD ("***POSH***") against Mexico. Our previous client alert discussed the Award in PACC Offshore Services Holdings LTD v. United Mexican States (ICSID Case No. UNCT/18/5) of 11 January 2022 (the "***Award***"). This client alert analyses a subsequent decision (the "***Decision***") in the same case which was rendered, after the issue of the Award, in May 2022 by the tribunal (the "***Tribunal***") comprising Dr. Andrés Rigo Sureda (President), Professor W. Michael Reisman and Professor Phillipe Sands. In the Decision, the Tribunal rejected a request (the "***Request***") by POSH for an additional award regarding claims allegedly left undecided in the Award. As in the Award, Professor Reisman concurred, and dissented, in part with the majority of the Tribunal (the "***Majority***").

THE AWARD

As explained in our previous client alert, POSH's dispute against Mexico arose under the Mexico-Singapore bilateral investment treaty ("BIT") and related to measures taken by Mexico against Oceanografía S.A. de C.V. ("OSA"), a company with which POSH had formed a joint venture. POSH claimed that some of the measures targeting OSA, following allegations of money laundering and fraud by OSA, had a detrimental impact on POSH's investments which amounted to unlawful expropriation and a breach of Mexico's obligation to provide fair and equitable treatment ("FET") and full protection and security ("FPS") under the BIT.

In the Award, the Tribunal: (i) found that it did not have jurisdiction in respect of most of POSH's claims; (ii) dismissed all of POSH's claims that its investments had been unlawfully expropriated; (iii) found that Mexico breached the FET standard in the context of a detention order by the State (the "Detention Order"); and (iv) did not consider the measures complained of by POSH from an FPS perspective for judicial economy.

THE REQUEST

POSH made its Request under Article 39 of the UNCITRAL Rules, according to which a party may request an arbitral tribunal, within 30 days of the receipt of an award, to make an (additional) award as to claims presented in the arbitral proceedings, but not decided by the arbitral tribunal. POSH argued that the Tribunal: (i) had declined jurisdiction over most of POSH's claims by creating the jurisdictional requirement of "*proximate causation*" which did not exist in the BIT; (ii) had not analysed whether certain measures taken by Mexico breached its obligation to provide FET; and (iii) had misapplied the theory of judicial economy when it did not decide the alleged breach of Mexico's obligation to provide FPS.

THE DECISION

(i) Article 39 of the UNCITRAL Arbitration Rules

The Tribunal highlighted its wide discretion under Article 39(2) of the UNCITRAL Rules, noting that an additional award will be rendered only if the arbitral tribunal considers the request to be justified. The Tribunal also stressed that "*Article 39 does not create a mechanism for appeal on a matter (or matters) that have already been decided*", and that "*it is not a door to revise the Award or to introduce new arguments, or present new claims*".

(ii) Jurisdictional arguments

The Tribunal considered that POSH's Request was intended to overturn the Tribunal's previous jurisdictional findings in respect of certain claims. The Tribunal noted that "the purpose of an additional award under Article 39 is to permit the Tribunal to fill a gap in the Award, to complete it" – not to revoke it.

(iii) FET and FPS

The Tribunal held that: (i) a determination that the Detention Order was in breach of the obligation to provide FPS would not have increased the amount of damages due, and would have served no purpose, (ii) the factors that justified the rejection of POSH's expropriation claim were of equal relevance to, and justified the rejection of, the claims for breach of the FET and FPS standards as well, and (iii) POSH did not show the need for an additional award in respect of its FET and FPS claims.

As such, the Tribunal found POSH's Request unjustified, and rejected it. The Tribunal also ordered POSH to bear the costs of the Tribunal and ICSID which related to the Request.

PROFESSOR W. MICHAEL REISMAN'S CONCURRING AND DISSENTING OPINION

In his concurring and dissenting opinion, Professor W. Michael Reisman agreed with the Majority that: (i) Article 39 of the UNCITRAL Rules did not allow POSH to revisit the Tribunal's previous jurisdictional findings; and (ii) POSH did not show that the compensation due would have been different had the Award concluded that the Detention Order had amounted to a breach of FPS as well as FET.

However, Professor Reisman dissented from the Majority's Decision as follows:

(i) In relation to the question as to the proper definition and application of the concept of arbitral economy, Professor Reisman considered that arbitral economy applies where an arbitral 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. Arbitral economy is, however, not called for when a tribunal rejects a claim based on one standard, as each standard includes different elements, and therefore requires a different analysis. Professor Reisman considered the Majority's Decision to be the result of a "mix-and-

match approach to treaty interpretation and application". He also believed that POSH was entitled to an additional award on its expropriation claim with respect to certain measures by Mexico (i.e. the Diversion Order); and

(ii) Professor Reisman found that the Majority had failed to evaluate the compliance of a different class of measures by Mexico (i.e. the Blocking Order) with the FET and FPS standards by analysing it solely as an expropriation claim. He noted that the Majority had "misconceived" the different standards of treatment provided for in the BIT by "mixing FET and expropriation". He then concluded that POSH was "entitled to have its claims of FET and FPS evaluated based on the FET and FPS standards rather than the standard of expropriation".

COMMENT

As in the case of the Award and Professor's Reisman accompanying dissenting opinion, the Tribunal members' differing reasoning in the Decision and Professor Reisman's latest dissenting opinion is stark. Professor Reisman's particularly critical approach of the Majority is notable, as he concluded his dissent by reiterating that "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".

As discussed in our previous client alert, it remains to be seen whether, and how, the two dissenting opinions of Professor Reisman in this case will impact the reasoning of the arbitral tribunals in two pending investment arbitrations against Mexico *(Shanara Maritime International, S.A., y Marfield Ltd. Inc. v. United Mexican States* and *Terence Highlands v. United Mexican States)*, which similarly relate to measures taken by Mexico in the context of OSA's alleged money laundering and fraud.

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