ICSID Review, Vol. 33, No. 3 (2018), pp. 653–659
doi:10.1093/icsidreview/siy020 Published Advance Access February 28, 2019

CASE COMMENT

Bear Creek Mining Corporation v Republic of Peru:[1] *Two Sides of a 'Social License' to Operate*

Jean-Michel Marcoux[2] and Andrew Newcombe[3]

I. INTRODUCTION

The idea that private actors should hold a 'social license' to operate relies on expectations from community members surrounding the operations of a corporate actor and the integration of those expectations in business practices over time.[4] While the concept is widely used in the literature on corporate social responsibility (CSR), it is often considered, at most, as 'soft law' that fails to rise to the realm of legal obligation.[5] Given that the term 'social license' does not appear to be used in the text of international investment agreements (IIAs),[6] the fact that it has not been discussed by tribunals is not surprising. With the exception of a brief reference to the concept in *Copper Mesa v Ecuador*,[7] the idea of a social license to operate had not appeared in any publicly available IIA arbitral decisions until *Bear Creek v Peru*.

The discussion of 'social license' in the *Bear Creek v Peru* Award is both novel and significant. An important part of the Tribunal's reasoning is premised on the assumption that, in light of relevant international instruments, consultations with

[1] *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award (30 November 2017) (Karl-Heinz Böckstiegel, President; Michael Pryles; Philippe Sands) (*Bear Creek v Peru* Award).

[2] Postdoctoral Fellow, McGill University, Faculty of Law, Quebec, Canada. Email: jean-michel.marcoux@mail.mcgill.ca.
[3] Associate Professor, University of Victoria, Faculty of Law, British Columbia, Canada. Email: newcombe@uvic.ca.

[4] See, eg, Sally Wheeler, 'Global Production, CSR and Human Rights: The Courts of Public Opinion and the Social Licence to Operate' (2015) 19 Intl J Hum Rts 757, 765.

[5] For the distinction between social norms and legal norms at the international level, see Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2011). See also Andrea Bjorklund and August Reinisch, *International Investment Law and Soft Law* (Edward Elgar Publishing 2012).

[6] In contrast, references to CSR are becoming more common in IIAs. A search of the United Nations Conference on Trade and Development (UNCTAD) IIA Mapping Project database identifies 39 IIAs with CSR provisions. See UNCTAD, 'IIA Mapping Project' <http://investmentpolicyhub.unctad.org/IIA/mappedContent> accessed 11 June 2018).

[7] *Copper Mesa Mining Corporation v Republic of Ecuador*, UNCITRAL, PCA Case No 2012-2, Award (15 March 2016) (*Copper Mesa v Ecuador*). In this Award, the Tribunal merely recalled the Claimant's contention that obtaining a 'social license' was not a legal requirement, without addressing the issue any further (para 6.28).

indigenous communities must be held with a view to obtaining consent from all relevant communities impacted by an investment project. While the express consideration of this social license did not prevent the Tribunal from finding that the measures adopted by Peru violated the provisions of the Free Trade Agreement between Canada and the Republic of Peru (Canada–Peru FTA),[8] the Award sheds light on two diverging conceptions of a social license to operate. On the one hand, the majority of the Tribunal emphasized an obligation of the State to monitor closely the efforts conducted by the investor to obtain consent from indigenous communities and to voice its concerns throughout the consultation process. On the other hand, the Partial Dissenting Opinion of Professor Philippe Sands suggests that obtaining a social license is the responsibility of the investor and that failure to secure this license should have been taken into consideration by the Tribunal. These diverging views evidence the two sides of a 'social license' to operate: the foreign investor's obligation to obtain a 'social license', and the State's role in monitoring the process by which that consultation and consent occur.

II. SUMMARY OF FACTS AND FINDINGS OF THE TRIBUNAL

Bear Creek Mining Corporation (Bear Creek) is incorporated under the laws of Canada and has its headquarters in Vancouver.[9] In December 2006, it initiated a procedure to obtain mining rights relating to the Santa Ana Project,[10] a mining project located close to indigenous communities in Peru. In November 2007, the President and Council of Ministers of Peru enacted Supreme Decree 083-2007, which authorized Bear Creek to own mining concessions corresponding to the Santa Ana Project.[11] Bear Creek subsequently acquired titles to these mining concessions from a Peruvian national who was its employee.[12] In parallel to agreements and workshops initiated by Bear Creek with a number of communities, opposition to the Santa Ana Project started to grow.[13] Between March 2011 and June 2011, strikes and protests against the negative environmental impacts of mining activities and the Santa Ana Project were held in the Department of Puno.[14]

On 24 June 2011, the Government of Peru revoked Supreme Decree 083-2007 through the adoption of Supreme Decree 032-2011-EM, thus ending Bear Creek's rights to operate the mining concessions.[15] The day after, it adopted two other decrees suspending new mining concessions in the Department of Puno for 36 months, requiring new rounds of consultations for previously granted mining concessions and preventing the authorization of future mining concessions without prior consultation.[16] While the Ministry of Energy and Mines initiated a civil law

[8] Free Trade Agreement between Canada and the Republic of Peru (signed 28 May 2009, entered into force 1 August 2009) (Canada–Peru FTA).
[9] *Bear Creek* Award (n 1) para 2.
[10] ibid para 140.
[11] ibid para 149.
[12] ibid paras 121 and 150.
[13] ibid paras 152–71.
[14] ibid paras 172–73.
[15] ibid para 202.
[16] ibid para 203.

suit pertaining to the transfer of the mining concessions,[17] Bear Creek filed constitutional actions seeking the annulment of Supreme Decree 032-2011-EM.[18]

Bear Creek discontinued its constitutional challenges[19] and on 11 August 2014 submitted a claim against the Republic of Peru pursuant to the provisions of the Canada–Peru FTA.[20] More specifically, Bear Creek alleged that Peru violated its obligations pertaining to expropriation, fair and equitable treatment, and full protection and security, as well as protection against unreasonable and discriminatory measures.[21]

After acknowledging that issues pertaining to alleged illegality and the relevance of a social license to operate had to be addressed in the merits and the quantification of damages,[22] the Tribunal focused on the expropriation claim. When examining whether Supreme Decree 032-2011-EM constituted an indirect expropriation, the Tribunal relied on three 'factors' that are mentioned in annex 812.1 of the FTA (i.e. the 'economic impact' of the measure, its interference with 'distinct, reasonable investment-backed expectations' and the 'character of the measure').[23] While the fulfillment of the first two factors appeared to be fairly straightforward, in order to address the character of the measure the Tribunal analyzed the reasoning provided in Supreme Decree 032-2011-EM and the circumstances under which it was enacted.[24] The Tribunal considered that neither the alleged new circumstances that would render the initial decree illegal nor the social unrest in the Department of Puno justified the derogation of Supreme Decree 083-2007 through the enactment of Supreme Decree 032-2011-EM,[25] thus finding that the measure constituted an indirect expropriation.[26] In considering that Bear Creek had not been given an opportunity to be heard before the adoption of Supreme Decree 032-2011-EM, the Tribunal also concluded that Peru had not granted due process of law and that the measure constituted an unlawful indirect expropriation.[27] When addressing whether the measure at hand was a valid exercise of police powers, the Tribunal relied on the 'very detailed provisions of the FTA' regarding expropriation and general exceptions found at article 2201 of the FTA to find that 'no other exceptions from general international law or otherwise can be considered applicable in this case'.[28]

With respect to the other alleged violations of the FTA that were raised by Bear Creek, the Tribunal provided very limited reasoning. Recalling its finding that Supreme Decree 032-2011-EM constituted an unlawful indirect expropriation, the Tribunal emphasized that it did not have to examine whether the measure was a

[17] ibid para 206.
[18] ibid paras 207 and 211.
[19] ibid para 215.
[20] ibid para 9.
[21] ibid paras 113 and 115.
[22] ibid paras 324 and 335.
[23] Canada–Peru FTA (n 8) annex 812.1(b).
[24] *Bear Creek* Award (n 1) paras 375–77.
[25] ibid paras 399 and 414.
[26] ibid para 416.
[27] ibid paras 446 and 449.
[28] ibid para 473.

direct expropriation,[29] whether Peru failed to grant fair and equitable treatment to Bear Creek,[30] whether Peru afforded Bear Creek full protection and security,[31] and whether Peru afforded Bear Creek protection against unreasonable or discriminatory measures.[32]

After specifying that the conduct of Bear Creek did not lead to any contributory fault or liability,[33] the majority of the Tribunal turned to the issue of damages and costs. Adopting the standard of fair market value as an appropriate method of quantification, the Tribunal concluded 'that there was little prospect for the Project to obtain the necessary social license to allow it to proceed to operation, even assuming it had received all necessary environmental and other permits',[34] thus preventing the consideration of expected profitability. As a result, the majority of the Tribunal chose to calculate damages by relying on the costs invested by Bear Creek (US$18,237,592).[35] The majority of the Tribunal also considered that Peru should bear its own arbitration costs and 75 percent of the reasonable costs incurred by Bear Creek.[36]

In his Partial Dissenting Opinion, Professor Sands disagreed with the majority of the Tribunal with respect to damages and costs. Although he agreed that Peru had violated its obligations under the Canada–Peru FTA, he maintained that 'the protests and unrests were caused in part by the Santa Ana Project'.[37] Highlighting the majority of the Tribunal's 'failure to reduce [the amount of damages] by reason of the fault of the Bear Creek in contributing to the unrest',[38] Professor Sands concluded that this amount should be reduced by one half and that the costs of the proceedings should be split equally between the parties.[39]

III. DIVERGING VIEWS ON A SOCIAL LICENSE TO OPERATE

The issue of a social license to operate was extensively discussed in the *amici*'s submissions from the Asociación civil Derechos Humanos y Medio Ambiente (DHUMA) and Dr Carlos López (Senior Legal Adviser to the International Commission of Jurists in Geneva).[40] From the outset, the Tribunal highlighted the disagreement between Bear Creek and Peru with respect to the issues raised by the *amici*. According to Bear Creek, no Peruvian law provided any standard by which a social license could be granted to a mining project at the time of the acquisition of the mining concessions by Bear Creek[41] and no international instrument imposed direct obligations on private companies.[42] By contrast, Peru's response to

[29] ibid para 429.
[30] ibid para 533.
[31] ibid para 544.
[32] ibid para 553.
[33] ibid para 569.
[34] ibid para 600.
[35] ibid paras 657 and 716.
[36] ibid para 731.
[37] *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC (12 September 2017), para 1 (*Bear Creek* Partial Dissenting Opinion).
[38] ibid para 4.
[39] ibid paras 39–40.
[40] For a summary of these submissions, see *Bear Creek* Award (n 1) paras 218–30.
[41] ibid para 238.
[42] ibid para 241.

the *amici* submissions had focused on an 'internationally-accepted concept of the "social license"' that aligns with Peruvian laws and that Bear Creek had failed to meet.[43] According to Peru, the failure of Bear Creek to obtain a social license to operate rendered the claim inadmissible.[44]

In addition to the disagreement between the parties with respect to the consideration of a social license to operate, more profoundly diverging views emerged between the Members of the Tribunal. In its reasoning, the majority of the Tribunal emphasized that '[e]ven though the concept of "*social license*" is not clearly defined in international law, all relevant international instruments are clear that consultations with indigenous communities are to be made with the purpose of obtaining consent from all the relevant communities'.[45] However, when determining whether the social unrest had been caused by Bear Creek, the majority of the Tribunal concluded as follows:

> The evidence summarized above shows that from the very beginning until the time before the meeting of June 23, 2011, all outreach activities by Claimant were known to Respondent's authorities and were conducted with their approval, support, and endorsement, and that no objections were raised by the authorities in this context. While, as mentioned above, further actions by Claimant would have been feasible, on the basis of the continued coordination with and support by Respondent's authorities, the Tribunal concludes that Claimant could take it for granted to have complied with all legal requirements with regard to its outreach to the local communities. *Respondent, after its continuous approval and support of Claimant's conduct, cannot in hindsight claim that this conduct was contrary to the ILO Convention 169 or was insufficient, and caused or contributed to the social unrest in the region.*[46]

The same reasoning was also used by the majority of the Tribunal to conclude that there was no contributory fault or liability on the part of Bear Creek.[47] In other words, the majority of the Tribunal concluded that Peru's failure to denounce the inadequacy of consultations ultimately prevented it from relying on Bear Creek's contribution to social unrest to justify the adoption of Supreme Decree 032-2011-EM. Instead of understanding the 'social license' concept as imposing an obligation on the investor to consult with indigenous communities and obtain consent, the majority of the Tribunal viewed it as Peru's obligation closely to scrutinize the investor's outreach activities and voice its concerns.

By contrast, the Partial Dissenting Opinion of Professor Sands offered an understanding of the 'social license' concept that is anchored in an express recognition of foreign investors' obligations. After referring to consultation requirements that are included in article 15 of the Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169),[48] Professor Sands concluded that the Tribunal 'is entitled to take the Convention into account in determining whether the Claimant carried out

[43] ibid paras 256–59.
[44] ibid para 264.
[45] ibid para 406.
[46] ibid para 412 (emphasis added).
[47] ibid paras 567–69.
[48] Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries (opened for signature 27 June 1989, entered into force 5 September 1991).

its obligation to give effect to the aspirations of the Aymara peoples in an appropriate manner, having regard to all relevant legal requirements, including the implementing Peruvian legislation'.[49] Professor Sands then stressed that obtaining a 'social license' to operate remained Bear Creek's obligation:

> It may be the function of a State or its central government to deliver a domestic law framework that ensures that a consultation process and outcomes are consistent with Article 15 of ILO Convention 169, but it is not their function to hold an investor's hand and deliver a 'social license' out of those processes. *It is for the investor to obtain the 'social license'*, and in this case it was unable to do so largely because of its own failures. The Canada–Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a license.[50]

Even if the majority of the Tribunal and Professor Sands both engaged with the idea of a 'social license' to operate, their understandings of this concept demonstrate two sides of the same coin. While the majority of the Tribunal focused on the responsibility of the State to monitor a foreign investor's attempt to seek consent from surrounding communities, the Partial Dissenting Opinion is rooted in an express recognition of the possibility of imposing obligations on foreign investors. This distinction remains crucial, as a meaningful application of the 'social license' concept is possible only if one acknowledges that foreign investors can bear responsibilities under international law.

IV. THE ELEPHANT IN THE ROOM: FOREIGN INVESTORS' OBLIGATIONS

These diverging approaches adopted by the members of the Tribunal demonstrate ongoing changes regarding the consideration of foreign investors' responsibilities in international investment law. While some arbitrators focus strictly on the obligations of States, express references to foreign investors' obligations are becoming more common in international investment arbitration case law. For example, in *Al-Warraq v Indonesia*, the Tribunal relied upon a provision of the applicable international investment agreement that 'imposes a *positive obligation on investors* to respect the law of the Host State, as well as public order and morals'.[51] According to the same Tribunal, this provision 'raises this obligation from the plane of domestic law … to a treaty obligation binding on the investor in an investor state arbitration'.[52] In *Urbaser and Bilbao Bizkaia v Argentina*, when assessing the merits of Argentina's counterclaim, the Tribunal concluded that 'it is therefore to be admitted that the human right for everyone's dignity and its right for adequate housing and living conditions are complemented by an *obligation on all parts, public and private parties*, not to engage in activities aimed at destroying such rights'.[53]

[49] *Bear Creek* Partial Dissenting Opinion (n 37) para 11 (emphasis added).
[50] ibid para 37 (emphasis added).
[51] *Hesham Talaat M Al-Warraq v Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014) para 663 (emphasis added).
[52] ibid para 663.
[53] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) para 1199.

While the majority of the Tribunal in *Bear Creek v Peru* refused expressly to acknowledge the existence of foreign investors' responsibilities derived from international instruments,[54] the Partial Dissenting Opinion can be added to the number of decisions that expressly engage with this issue. Interestingly, the Partial Dissenting Opinion includes a reference to *Urbaser v Argentina*.[55] After acknowledging that ILO Convention 169 does not directly impose obligations on private foreign investors, Professor Sands submitted that this international agreement is not 'without significance or legal effects'.[56] With respondent States submitting counterclaims based on investor misconduct and also relying on such misconduct as a defense to justify the adoption of measures interfering with a foreign investment, in the future tribunals will increasingly have to address foreign investors' obligations in addition to States' obligations to protect foreign investments.

V. CONCLUSION

The Award in *Bear Creek v Peru* is the first publicly available IIA award that engages with the issue of a 'social license' to operate in international investment law. Yet, the members of the Tribunal addressed this concept according to two sharply distinct approaches. While the majority of the Tribunal ultimately imposed an obligation on the State to articulate its opposition to the consultation process that was carried out by the investor, the Partial Dissenting Opinion opted for an understanding of the 'social license' that reflects a consideration of foreign investors' obligations. Taken from a broader perspective, a more consistent consideration of a social license to operate depends upon the development of an international arbitration case law that acknowledges the existence of foreign investors' obligations and that identifies the scope of these obligations.

[54] *Bear Creek* Award (n 1) para 664.
[55] *Bear Creek* Partial Dissenting Opinion (n 37) para 10.
[56] ibid para 10.