THE IMPLEMENTATION OF UNJUST ENRICHMENT IN INVESTMENT ARBITRATION: CASE STUDY CHURCHILL MINING PLC V. THE GOVERNMENT OF THE REPUBLIC OF INDONESIA

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ABSTRACT

Unjust enrichment is a general principle which states that no one shall be unjustly enriched if such enrichment was derived from the impoverishment of another (Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem). The principle of unjust enrichment arises as a final resort when no other remedy or law can provide enforcement to the injuring party. This is a principle that has been recognized for centuries. In international law, unjust enrichment protection manifests in claims in many cases of litigation and arbitration proceedings, especially in foreign investment disputes. In this context, unjust enrichment either seeks to protect a foreign investor from a host-state's unilateral misconduct or a host state from a foreign investor profiting from infringement of local and/or international laws. Certain requirements must be met in order to prove unjust enrichment. With time, Foreign Investment has expanded to cover different markets and infrastructures and has become more in line with the notion of global economical liberalization. However, what also follows are the problems and disputes arising from the now-varied investments to also become broader and more intricate. For the sake of securing international needs, international law must develop and be more proactive in securing states' rights and interests by any available resort including the implementation of general principles. Acknowledging this challenge, this paper/writing aims to elaborate more on the implementation of unjust enrichment protection in investment arbitration by elaborating the fulfillments of its elements, available defences, applicable remedy, and other considerations. This elaboration will be conducted over a case study of the Churchill v. The Republic of Indonesia case(ICSID case No.12/20 and 12/40). The case of Churchill v. Indonesia was comprised of a claim of unjust enrichment by way of termination of foreign corporation investment acivities and also disputes aspects of Intellectual Property (Trade Secret), investment legitimate expectation, forgeries, environmental reservation, national administration, abuse of process, and principle of good faith.

Keywords: Arbitration, General Principle, Investment Law, Restitution, Unjust Enrichment.

BACKGROUNDS

A. THE PRINCIPLE OF UNJUST ENRICHMENT

There are several principles of law which gives one a right to restitution. Some principles are based on wrongs, likes breach of contract or tort, while others are based on unjust enrichment, like mistaken payment (Burrows, 2011). The principle of unjust enrichment is deemed as a general principle of law as it is a principles complied to by many civilized nations, which provides its status as a general principle of law in accordance with Article 38 (1) of the PCIJ Statue. Academics and courts have realised that unjust enrichment is a concept which could fill a void that cannot be covered by tort, criminal or contract law to invoke party right to claim restitution (Bergqvist,2018). In English law, Unjustness can be established where a defendant freely accepted performance for which it knew, or ought to have known, would result in an expectation to pay (Whaley, McAdam, Crowe, 2015). The year 1890 is historical owing to the *Lena Goldfields* case, for it was the first-known claim that relied on unjust enrichment in an investment dispute. The case arose after the USSR breached a concession agreement with a gold mining company named Lena Goldfields, for which Lena incurred huge losses. The dispute was adjudicated by an ad-hoc arbitral panel that ruled the USSR as having been unjustly enriched. In consequence, Lena is entitled to be relieved by being compensated in money in line with the benefits from which it has been wrongfully deprived.(Vohryzek, 2009)

i. ELEMENTS

To accuse and establish another party in a dispute as violating certain elements must be fulfilled. These elements were elaborated upon by the case of Saluka Investments BV v. The Czech Republic in Partial Award, The Panel laid out the elements of unjust enrichment by asserting "*There must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or another remedy available to the injured party whereby he might seek compensation from th e party enriched*". (Saluka Investments BV v. Czech Republic, 2006, Permanent Court of Arbitration)

ii. DEFENSES AND REMEDY

The above-mentioned elements are not the only elements that can be considered to establish a violation of principle of unjust enrichment. In some cases, the respondent is also given a chance to "justify" or defend against an unjust enrichment claim. A

defence could be a full or partial denial of unjust enrichment or an acceptance of the cause of action in order to argue that the liability should be reduced or eliminated (Dyson, Andrew, Goudkamp, James, Smith, 2016). Scholars elaborate 5 key defences that are not cumulative: Change of Position, Agency/Ministerial receipt, Bona fide purchaser for value without notice, Counter-restitution, and illegality. (Dickson, 1995).

In brief, the five defences are as follows: "Change of Position" is a defence whereby the respondent aims to prove that the particular enrichment was under good faith. A "Agency/Ministerial receipt" defence is used to justify the respondent as a party who obtained such enrichment through its role as an agent. In a "Bona fide purchaser for value without notice" defence, the light is shed on a third party who received the claimant's property indirectly. A "Counter-restitution" defence is raised when a case of restitution is arguably far too burdensome for the respondent to fulfil. Finally, an "Illegality" defence prevents claimant of restitution as they themselves is argued to have conducted their own illegal acts. (Vohryzek, 2009).

Restitution is the only remedy available from a successful unjust enrichment claim. This means that a successful claim only seeks to re-establish the situation which would in all probability have existed if the unjust enrichment was never committed. In applying restitution, tribunals apply restitutionary calculation and techniques based on the Case of *Factory of Chorzow* (*Factory at Chorzow*, Germany v. Poland, 1927 P.C.I.J.) as many investment cases, especially those resolved in ICSID, have accepted *The Factory of Chorzow* judgment for restitution as a customary international law. Those cases could be seen within the judgments of *Metacald Corp v Mexico, CMS Gas Transmission Co. V. Argentine Republic,* and *Petrobart Limited v. The Kyrgyz Republic.* The Case *of Factory of Chorzow* asserted that restitution must be awarded for the value of damages for loss sustained, assets being acquired from the defendant, and beneficiaries of the profit/losses.

B. CASE STUDY

2016 brought with it an ICSID arbitration between Churchill Mining Pty Ltd and The Government of The Republic of Indonesia. The claimwas a case of unjust enrichment of a previous case, whose judgment Churchill seeked to annul In ad. Churchill claimedthey were deprived of invested funds, efforts, intellectual property, and investment expectations. Previously, the tribunal had adjuged that Churchill is not entitled forprotection considering that their investment was surrounded by fraudulent schemes involving multiple forgeries. In elaborating the implication of unjust enrichment in investment arbitration, this paper's discussion aims to highlight Churchill's particular claim as a case study in hand. This paper will analyze the fulfillment of theelements of unjust enrichment, available defences in this particular case, and alsothe right of restitution.

i. THE EXECUTIVE SUMMARY OF THE CASE.

The Claimant in this particular case was Churchill Mining Plc, a public limited company incorporated in England and Wales on 24 February 2005 (Registration No. 5275606). Churchill had developed a mining project named The East Kutai Coal Project (EKCP) with various Indonesian private companies, grouped together under the "Ridlatama Group" banner, in the Regency of East Kutai on the island of Kalimantan Indonesia. The mining site allegedly held the seventh largest coal deposit on earth, with approximately 2.7 billion metric tons of coal. This site would potentially provide 500 million US dollars worth of production per year. (Churchill Mining PLC. v. Indonesia, 2012 ICSID) To develop EKCP, Churchill acquired an Indonesian private mining company named PT. Indonesian Coal Development (ICD) in 2006. This acquisition was authorized by the Indonesian National Coordinator Investment Body, or *Badan Koordinasi Penanaman Modal* (BKPM).

In 2010, The Indonesian Ministry of Environmental and Forestry dispatched a letter to the Regency of Kutai Timur to recommend the revocation of Ridlatama Group Companies' IUP, considering that the companies had established the EKCP without permission from The Ministry of Environmental and Forestry. The Ministry's permission was necessary since The EKCP was established in an area that was also a preserved forest. In the recommendation, the Ministry also alleged that the EKCP's KP licenses were forged. Thereafter, responding to the recommendation from The Ministry, The Regent issued revocation decrees for Ridlatama Group Companies' IUP licenses. (Churchill Mining PLC. v. Indonesia, 2012 ICSID)

Deeming those actions to be impartial for The Claimant, in 2012, Churchill filed a Request for Arbitration to ICSID pursuant to the ICSID Convention, and the UK-Indonesia Bilateral Investment Treaty (UK-Indonesia BIT). (Churchill Mining PLC. v. Indonesia, 2012. ICSID) Churchill alleged that the investment had been unlawfully expropriated and violated the Fair and Equitable Treatment (FET) standard provided by the UK-Indonesia BIT. The proceeding lasted until its award in 2016, where the tribunal found a large-scale fraud scheme conducted in order to obtain the coal mining conccession areas. The Tribunal found repeated acts of forgery, starting with the fabrication of the Survey and Exploration Licenses to gain access to the coal reserves. The record also shows that Ridlatama sent copies of these licenses to "affected governmental departments" so as to "ensure that our licenses were officially recognized at all government levels".

The Tribunal concluded that the entire EKCP project is an illegal enterprise, affected by multiple forgeries, and that all claims relating to the EKCP - Claimant's investment - was unable to benefit from investment protection under the UK-Indonesia BIT and International Law. In addition, although Churchill was not be proven to have played a direct part in the fraudulent schemes, they were also deemed to have failed to conduct due diligence and good faith in conducting their investment. (Churchill Mining PLC. v. Indonesia, 2016 ICSID)

The following year, the Claimant filed a request for an annulment proceeding of the abovementioned judgment. The Claimant's request was accepted, with the annulment tribunal finding that the tribunal in the Churchill case has exceeded its powers, and its annulment was pursuant to Article 52 of the ICSID Convention. (Churchill Mining PLC. v. Indonesia, 2017 ICSID)

The Claimant argued that The Tribunal had exceeded its powers since the previous proceeding is deemed to have failed in taking into consideration the principle of unjust enrichment, which was an infringement conductedby The Government of Indonesia, Irrespective of the Climant's illegal investmennt. The Claimant contended that the principle of unjust enrichment can be separated from the consideration of the fraudulent schemes. (Churchill Mining PLC. v. Indonesia, 2017 ICSID)

In Claimant's prayer for relief, they asserted that they were entitled to be compensated based on the substantial funds (approximately USD 70 Million) and effort that they had invested in good faith in developing the EKCP. (Churchill Mining PLC. v. Indonesia, 2017 ICSID) In fact, since The EKCP had yet to operate , the Claimant has not even profited from the EKCP. This "profitless" investment was used as a justification by the Claimant in accusing the Government of Indonesia as being unjustly enriched by the Claimants' significant investment.

Churchill also pointed out that the violation of the Government of Indonesia is made all the more obvious since The Government of Indonesia had received multiple intellectual properties (IP) of the Claimant, including work plans and budgets for general survey - exploration and exploitation/production; quarterly activity reports, including drilling data and results; and feasibility studies concerning The EKCP. These IPs had been distributed by The Claimant to various bodies at three levels of government within the Regency and the Province of East Kalimantan. Furthermore, by the IP being transferred, The Claimant asserted that The Government of Indonesia had learned the location of a major natural resource and source of revenue and how it may be exploited, which in essence allows for more enrichment. (Churchill Mining PLC. v. Indonesia, 2017 ICSID)

I. ANALYSIS.

The Tribunal has concluded the proceedings by procuring a decision on annulment at 19 March 2019, which asserted that the claim of unjust enrichment and other claims cannotsurvive as The EKCP has been affected by forgeries. (Churchill Mining PLC. v. Indonesia, 2019 ICSID) In having this discussion on the implementation of the principle of unjust enrichment in investment arbitration, this paper will elaborate the existing elements of the claim, provided defenses which could be applied in this particular case, and also the application for the restitution.

This analysis will also refer to the cases of *Barcelona Traction*, *Saluka Investment*, *ADC v Hungary*, *Sea-Land case*, *the Ahmadou Sadio Diallo*, *Landreau Arbitration*, and the case of *El Paso v. The Argentine Republic* to determine how to fulfil satisfy a claim of unjust enrichment, and in the present case the available defences for the Republic of Indonesia.

A. THE EXISTENCE OF IMPOVERISHMENT RESULTING FROM THE ENRICHMENT

In a matter of satisfying the unjust enrichment claim, Churchill has to prove a legitimate basis on justifying Indonesia's enrichment and accordingly their impoverishment, and also the connection between the two. In the case of *Barcelona Traction* (Belgium v. Spain, ICJ 1970), the award explicitly stated that

> "*Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons…. for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed*".

This case emphasized that the damages from the loss can only be claimed exclusively by the infringed party. The elaboration in *Barcelona Traction* has also been brought forward in the case of *Saluka Investment*, whereby the Tribunal adjudge that allegations of unjust enrichment were beyond its proper scope if the impoverishment claim came from a third party. The Tribunal stated that "*The notion of one party being an accessory to an unjustified transfer between two other parties is not part of the concept of unjust enrichment*".

In Churchill v. Indonesia, the dispute emerged from Indonesia's revocation of the Ridlatama Group companies' IUP licenses. *Mutatis mutandis* to the case of *Barcelona Traction*, the claimed detriment of Churchill could not be justified to be exclusively as their distress, and therefore the right to claim as result of the suffered loss was exclusive to the Ridlatama Group Companies. As a result, in the eye of international law, the distress suffered by Churchill cannot be recognized as sufficient for a claim of unjust enrichment, since they were merely an indirect third party between the State and the domestic licenseholder..

i. CONSIDERATION OF THE "LACK OF PROFITS" FROM THE INVESTMENT ASIMPOVERISHMENT

In its arguments for annulment, Churchill contended that they have the right to be compensated considering that they had taken risks in investing significant money into Indonesia only to receive nothing. To answer this notion, reference can be made to the case *El Paso v. The Argentine Republic* (El Paso Energy Int. Company. v. The Argentine Republic, 2015, ICSID) resolved in ICSID in 2015. The case established the doctrine of legitimate expectation, and elaborated that such "expectations" could be used as a basis for compensation but that it cannot solely be seen in a subjective manner. Those "expectations" must also correspond to the objective expectations deduced from the circumstances that surrounds the investment and with due regard to the rights of the State. In other words, a balance should be established between the legitimate expectation of the foreign investor to make a fair return on its investment and the right of the host State to regulate its public interest. In light of the fact that Indonesia enacted the revocation decree under the reasoning that itfound convincingfacts that The Ridlatama Group Companies

did not hold any environmental permit from The Ministry of Forestry, which was a prerequisite to the investment according to Law Number 2009 on Mining of Mineral and Coals and subject to the Indonesian 1999 Forestry Law, the right of The State to enact such actions within its administrative capacity has to be respected, as it had clear grounds of matters related to environmental protection.

ii. IMPOVERISHMENT FROM TRANSFERRED INTELLECTUAL PROPERTY.

Within the dispute, Churchill also contended that Indonesia had been unjustly enriched through the transferred IPs that had arisen through Churchill's position as an IUP holder. Here, Churchill's disputed Intellectual Property in International Law was recognized as undisclosed information. World Trade Organization (WTO) generally defined undisclosed information in Article 39 of Agreement on Trade-Related Aspects of International Property Rights (TRIPS), subject to Article 10bis of Paris Convention. Article 39 of The Agreement elaborates on the elements of Undisclosed Information: secret, in the sense that it is not, as a body or in its precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; has commercial value because it is secret; and has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.(Trade-Related Aspects of International Property Rights. 1995). The Agreement in paragraph 39 (3) also elaborate obligations for the state in holding the particular information as an obligation to protect the disclosure over unfair commercial use. According to Article 39 of TRIPS, violation of the protection of undisclosed information by a state comes in the from a failure to protect the disclosure of the particular information or having commercial use of that information without prior notification of the rightful holders.

The general rule is that the accounting of unjust enrichment damages commences at the moment that use of the misappro-priated trade secret confers a benefit on the defendant (Almeling, Bratic, Cooper, Cox, Sammi, 2018). A similar case regarding disputed IPs can be found in the case of *The Landreau Arbitration* (Landreau Arbitration, U.S. v. Peru, International Arbitration, 1948). The case was between two brothers and the Peruvian Government in and a concession agreement to find guano in Peru. The brothers provided the Peruvian government with information concerning guano deposits for the purposes of the concession. The Peruvian Government repudiated the agreement and refused to make payments. The United States then brought this dispute on one brother's behalf to the International Arbitration. The Tribunal found that Peru's rescission was legal, but they were nevertheless "bound to pay on a quantum meruit for the discoveries which they appropriated for their own benefit.".

Pursuant to what has been elaborated it can be concluded that Indonesia's could potentially be said to violate the principle of unjust enrichment when breaking disclosure terms related to the IPs in question, and were indeed enriched by the particular information. However, Churchill had no assertion on Indonesia for breaking the disclosure of the transferred information, and that they had no proof of Indonesia in being in a more advantageous commercial position through its possession of the information. This conclusions is reached if one were to look at the disputed EKCP area that have yet to be mined or possessed by any other party.

Additionally, there are several facts to suppor the notion that Indonesia had no clue over the forgeries before the revocationthat led to the repossession of the IPs. The state had only acted in a manner of good faith as a Host-State. This also supports the argument that Indonesia had no hand in the fraud and forgeries since the fraudulent schemes were not attributable to the Government of Indonesia, which was affirmed by the Tribunal.

B. DEFENSES AVAILABLE REGARDING THE MEASURE OF ENRICHMENT

A claim in unjust enrichment is underpinned by the principle of corrective justice, which not only goes for the claimant but so too for the defendant. At the very least, if the party is no worse without the enrichment, the claim for restitution should be accepted. (Burrows, 2011) It is under this reasoning that the tribunal in the Churchill case found that Indonesia had no obligation to provide reparation to Churchill for their distress, even in the form of restitution, for the state would be "worse off" without the enrichment.

i. CHANGE OF POSITION

Ridlatama Group Companies' IUP was revoked by The State since they had not acquired the Borrow-Use permit needed from Indonesian Minister of Energy and Natural Resources in conducting the mining activity.. According to Article 38(3) Indonesian 1999 law of Forestry , any mining activity conducted in a forested area has to be permitted by The Minister, under concerns ofenvironmentalprotection (Indonesian Forestry Law, 1999). In Article 50 (3) (g) of Indonesian Law of Mining of Mineral and Coals, it is also stipulated that any person or legal subjects are not permitted any general survey, exploration, or exploitation within a forested area without the permission of The Minister (Indonesian Law of Mining of Mineral and Coals, 2009). Consequently, In violation of the aforementioned regulations, Indonesia, through the Minister of Energy and Natural Resources, has a right to revoke any IUP or IUPK licenses from the holders pursuant to Article 119 (a) of Indonesian Law of Mining of Mineral and Coals.

Therefore, it can be concluded that Indonesia has justification over its revocation decreeand that such decree should be considered lawful. Furthermore, The State's administrative act in revoking Ridlatama Group Companies' IUP has fulfilled the "good faith" defense, specifically the element ofchange of position that ought to be proven.

ii. BONA FIDE PURCHASER

In the annulment application, Churchill argued that the invested funds and its effort in developing EKCP gives it the right to be compensated regardless of if the Tribunal concludes that the particular investment is considered as an enrichment unjustly taken from the State. Churchill was in the position of having invested substantial funds, which gave rise to the agreement betweenChurchill and Ridlatama Group Companies. However, the party that truly profited from this investment was the Ridlatama Group Companies, with state only being indirect profiteers through "bona fide purchase". This particular indirect enrichment, according to the Tribunal, did not warrantcompensation.

C. THE APPLICATION FOR RESTITUTION

The factual basis of Churchill's arguments i.e. the lack of return profits from the investment, can also be said to fall under profit expectation loss. One can refer to thethe case of *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of Congo, 2007 I.C.J), where the Court rejected the claims concerning loss of profits under the reason that the claim of profits proposed by the Applicants was highly speculative and uncertain. This was because Guinea failed to establish that Mr. Ahmadou received any profits during the period of where Guinea's profits were "withheld". Moreover, in the case of Sea-Land (Sea-Land Serv., Inc. v. Iran, Iran, 1984, U.S. C1. Trib. Rep.).

Judge Jimenez de Ar~chaga also contended that where the "enriched" state has obtained no benefit, no compensation should be payable at all. The loss of profit in the Churchill case could be deemed as impoverishment similar to that which was referred to in the Ahmadou Sadio Diallo Case, but only if there existed proof that there was detention of profit before the dispute arose. However, since Churchill had no proof of withheld profits before the case. Furthermore, Churchill also lacked a clear legal basis to stipulate a "no profit investment" as impoverishment in the context of unjust enrichment.

In any event, even if Indonesia's enrichment through Ridlatama's transferred Intellectual Property to the State constitutes as unjust enrichment, the claimed detriment does not give rise to rights of restitution or compensation if reference was made to the case of ADC v Hungary (ADC Affiliate Ltd. v. The Republic of Hungary (Cyprus v. Hung.) ICSID Case No. ARB/03/16). In that case, the Tribunal rejected claims (including the know-how claimed distress) of unjust enrichment since the impoverishment does not constitute as pecuniary damages, pursuant to the standard calculations laid out in the Factory of Chorzow case. In conclusion, The calculations of damages must also be a part of the considerations in providing restitution or compensation as remedy

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CONCLUSION

The principle of unjust enrichment is a protection provided to any party who, through another party's commission or omission, has been impoverished and that other party be enriched. In implementing the principle of unjust enrichment, especially in investment arbitration, many considerations must be taken and elements be fulfilled. These elements arethe existence of impoverishment, and direct correlation between the impoverishment and the actions taken by the other party as laid out in the Barcelona Traction and Saluka Investment cases. In relation to claims of legitimate expectations, the case of El-Paso asserted that the claimant has to possess a sufficient proof supporting that the claimant had conducted in a manner of good faith and with due regard to the host-state's right of public interest in order to claim their right of investment loss. Moreover, ccording to the case Landreau Arbitration, intellectual property is also regarded as an "investment" to be protected, but that to claim under such a basis requires the proving of the transferred IP being in accordance with any law subject to it. In addition, enrichment in the form of profit accrued by the respondent in bad faith from those IPs must also exist. This applies especially for claims related to Undisclosed Information under IP protection, where proof of the act of disclosure is of utmost importance.

In regard to the defences available, the conduct of the host-tate can be justified as long as the state can prove that the measures taken had been conducted in a manner of good faith, also known as "change of position". A "bona fide purchaser" defense is also available, whereby the enrichment is proven to have been obtained through a third-party purchase.

Finally, it must be known that restitution is the only remedy available. The proof needed to claim such reparation is the existence of "withheld profits", to be calculated accordingly to the customary international law laid out in the case of Factory of Chorzow.

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