

Enrique Silva/ Luis Cordero
Law Report
Executive Summary

Mr. Enrique Silva Cimma is a lawyer from Universidad de Chile. A former Senator, Foreign Affairs Secretary, Supreme Court Justice, President of the Constitutional Court and Contralor General de la República, Mr. Silva Cimma dedicated his academic life to the teaching of public and administrative law at Universidad de Chile, where he is currently an Emeritus Professor. Enrique Silva Cimma holds a Honoris Causa Doctor's Degree from Universidad Erasmus de Rotterdam. He was President of the Social Democrat Radical Party and Honorary President of the Socialist International.

Mr. Luis Cordero Vega holds a Master in Law from Universidad de Chile and a Master in Public Policy and Economics from the same university. Mr. Cordero is a Doctor in Law from Universidad Lleida in Spain (*summa cum laude*). He is a Research Fellow in the Regulation and Competition Center from Universidad de Chile ("RegCom") and an administrative law professor in several undergraduate and postgraduate courses in Universidad de Chile. Luis Cordero Vega obtained his lawyer degree from Universidad de La República.

The main conclusions of their report are the following:

1° *"In our opinion, regardless of our preferences over the regulatory framework for the Great Copper Mine and taking the Law as the only point of reference, Anglo American has made legitimate use of a contractual right established in its favor in 1978 and reinforced by the interpretative agreement of 2002. For its part Codelco, as a state company, has taken action not supported by the law, nor could it be invoked via the protection motion, given its nature and purpose, in such a way that this action is implicitly seeking to resolve a widely known problem, transforming the protection motion into a declarative or constitutive procedure addressing a disputed contractual right."*

2° *"[...] if Codelco wishes to purchase some of the shares from the ex-Challenged in the exercise of a contractual right arising in 1978 with a specific purpose, to then sell on a portion of the shares to a third party, this constitutes a contract infringement, as the motivating factor behind the regulation that authorized Enami – and the State in particular – was the possibility that they might be a partner of a private investor in the exploitation of copper. This restriction was imposed on the state and not on Exxon or their successors, so that in our opinion, if such an agreement was signed it is prone to being regarded as an illicit act."*

3° *“[...] there is abundant evidence in the jurisprudence which affirms that the interpretative problems of contractual clauses are matters of wide knowledge, as the plaintiff’s purpose is not to reestablish the rule of law, but in particular the declaration of ownership or granting of a right, which is a consequence of the right they are trying to invoke being challenged and, as a consequence, it cannot be unquestionable.”*

4° *“Under these conditions, then, the question we must answer is; is it the case that Codelco has an unquestionable right which is eligible for protection five months before the option to purchase?*

In our opinion the answer is categorically no.”

5° *“Can Codelco extend a right to purchase to before it can contractually be extended and furthermore for a specific number of shares?*

Obviously this is not possible.”

6° *“[...] As Codelco does not possess any property right for the acquisition of a specific number of shares before January 1st of each year the option is exercised, Anglo has a perfect right to sell the shares which it considers opportune before this date.*

Codelco’s option can only be exercised in accordance with the contract, i.e. with regard to the number of shares which exist at the moment of exercising the option and only during pre-agreed time and in no other way, as is stated under the literal terms of the contract.

As a consequence, in our opinion, the sale of 24.5% which Anglo made to Mitsubishi is expressly supported in the content and terms of the contract.”

7° *“It is not admissible, without affecting the good faith and loyalty which should exist between the Administration and the citizenry, for the former to take opportunistic action affecting favorable conditions and creating negative consequences for legal stability and security.”*

8° *“Regardless of our sympathy for Codelco as a public company, it is not possible to ignore the demands the Constitution makes with regard to State enterprises and the activity of public authorities [...] the Fundamental Charter prevents State companies from reaping direct or indirect benefits of any kind when they must separate themselves from the development of their businesses [...] given the constitutional requirement that governmental authorities, which were also expressly excluded by the legislator of Corporate Governance in order to achieve the state of equality previously stated, preventing them from intervening in public*

functions that apply to them and taking the side of one of the parties in conflict as in this manner they make declarations completely outside the scope of their jurisdiction [...]”.

9° *“On acting in the manner related in the present report, the authorities involved, regardless of their particular enthusiasms, find themselves at the very limits of the powers which have been conferred upon them by the law, adopting a position which benefits one of the parties in conflict and, as a consequence, they are in danger of infringing administrative probity or the public good in the dictation of an act associated with these companies, this constituting a deviation of purpose or power.”*

10° *“[...] the governmental authorities must abstain from publically intervening in a conflict like this, in which a State company is involved, as otherwise constitutional and legal rules requiring that the authorities act objectively, in good faith, loyalty and subject to the rules of administrative probity might be infringed, which among other points makes it impossible to intervene in conflicts between parties. ”*
