



ARTICLE

GOLD MINING SPARKS DISPUTES AND INDUCES INTERESTING DECISIONS

| 07/03/17 | Marie Danis



A Canadian company, Gold Reserve Inc. (the “Investor”), disputed a permit revocation that affected a gold and copper ore deposit exploration project in Venezuela. In this dispute pertaining to a number of mining titles held by its Venezuelan indirect subsidiary, an ICSID award was issued on September 22, 2014.

Said award found that Venezuela had breached Article II (2) of the Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (the “Treaty”), by “*failing to give fair and equitable treatment to Gold Reserve’s investment*”. Venezuela was ordered to pay the Investor US\$ 740 million as compensation, and initiated an action seeking annulment of the award.

Venezuela had raised several arguments in support of its annulment claim, based on Article 1520 of the Code of Civil Procedure, namely, the arbitral tribunal’s lack of jurisdiction, the breach of the right to a fair trial, the disregard for the principle of adversarial proceedings, the breach by the arbitrators of their mission, and the violation of international public policy.

In its ruling of February 7, 2017, the Paris Court of Appeal denied said annulment claim with remarkable clarity and rigor. This review specifically focuses on the annulment grounds pertaining to the concepts of investor, fair and equitable treatment, and compensation for damages sustained by the investor.

The concept of investor and foreign investment

Venezuela claimed that the Tribunal lacked jurisdiction in that under the Treaty, the Investor was not a Canadian investor, and that its reorganization did not qualify as an investment made in Venezuela.

The Paris Court dismissed this argument, ruling that the Investor was not a shell company established for the sole purpose of serving as a vehicle for US investment, and that its group restructuring was not intended solely to gain protection under the Treaty.

It reasoned that the investment, as defined under the Treaty, applies unequivocally “*to the indirect ownership of shares in a Venezuelan subsidiary holding title to mining right*”. Such investment is defined as “*any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly, including through an investor of a third State*”. The Paris Court held that “*protected investment is not affected by the fact that the acquisition took place outside Venezuela*”.

Fair and equitable treatment of the investor, and its legitimate expectations

Venezuela contended that the arbitrators had breached their duties when seeking to determine whether the investment was protected under the Treaty. It thus asserted that the award was “*based ex aequo et bono*” and “*on ideological considerations*”. The Paris Court dismissed this argument, holding that fair and equitable treatment under the Treaty meant that the State was required to act in an unbiased, even-handed, transparent and consistent way. In the Paris Court’s opinion, the State had failed to meet the Investor’s legitimate expectations by leading it to believe that the mining project would proceed. The Court of Appeals held that the State’s “*shift*” in its environmental policy and its “*statements and public announcements on the new national mining policy*” deprived the Investor of actual protection.

With this decision, the Paris Court ruling on the annulment is in line with prevailing interpretation doctrine whereby the investor’s “*legitimate expectations*” play a central role in the analysis of the fair and equitable treatment obligation. It is about identifying the existence of a State’s conduct upon which the investor was legitimately entitled to rely in making its investment, and the damages resulting from the shift in the State’s conduct.

Compensation for damages sustained by the parent company as a result of the State’s treatment of its indirect subsidiary

Lastly, the Paris Court dismissed the argument based on the alleged confusion made in the award between the Investor’s group companies. Venezuela claimed that the Tribunal wrongly granted compensation to the Investor when the sole holder of the mining rights was its indirect subsidiary. Yet, the Paris Court found that the damages granted in the



award, as calculated on the basis of “an assessment of the quantum of the mineral deposits likely to be extracted during the extended concession granted to its indirect subsidiary, metal recovery rates, discounted price after deduction of production costs”, were not damages sustained by the subsidiary but rather by its parent company, as Investor.

Accordingly, under the Paris Court ruling, compensation was awarded for the Investor's damages, irrespective of whether the damages occurred via its indirect subsidiary.

This decision and reasoning deserve our full approval as it strictly complies with the scope of its annulment referral, while conducting a thorough review.
