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International Arbitration Case Law

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Award Name and Date:

Crystallex International Corporation v Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/11/2) Award

Case Report by:

Marina Kofman**, edited by Dr. Ileana M. Smeureanu***

Summary:

The dispute arose out of certain measures taken by Venezuela which, according to the Claimant, wrongfully affected the Claimant's investment in the areas called "Las Cristinas". Las Cristinas is reported to contain one of the largest undeveloped gold deposits in the world and is divided into four mining concessions, Cristina 4, 5, 6, and 7, which are located within the municipality of Sifontes in the State of Bolívar in the Guayana region in southeast Venezuela (¶ 6). Crystallex contended in the arbitration that through its actions and omissions vis-à-vis Crystallex, Venezuela breached several of its obligations under the Agreement between the government of Canada and the Government of the Republic of Venezuela for the Protection and Promotion of Investments ("BIT") including failure to afford Crystallex's investments fair and equitable treatment under Article II(2) and unlawful expropriation of its investments in breach of Article VII(1). It particularly pointed to Venezuela's April 2008 denial of a permit to Crystallex to exploit the gold deposits at Las Cristinas, and of the rescission by the *Corporación Venezolana de Guayana* ("CVG"), a state-run corporation tasked with stimulating economic activity in the Guayana region, of the Mine Operation Contract in February 2011.

Main Issues: jurisdiction - one or two disputes - cooling-off period - conceptual difference between contract and treaty claims - fair and equitable treatment - reasonable expectations - arbitrariness (lack of) transparency and consistency - full protection and security - direct and indirect expropriation - valuation - fair market value - full reparation

Tribunal: Dr. Laurent Lévy (President), Dean John Y Gotanda (Arbitrator) Prof. Laurence Boisson de Chazournes (Arbitrator)

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Digest:

1. Relevant Facts

The Claimant, Crystallex International Corporation (“**Claimant**” or “**Crystallex**”), is a company incorporated under the laws of Canada (¶ 2). The Respondent is the Bolivarian Republic of Venezuela (“**Respondent**” or “**Venezuela**”). Pursuant to an Administrative Agreement entered into by the Ministry of Mines and CVG on 16 May 2002, the Ministry of Mines “authorize[d] [CVG] to explore, exploit and sell the gold mineral found in the deposits located in the areas of the concessions identified as Cristina 4, Cristina 5, Cristina 6 and Cristina 7, in the municipality of Sifontes in the Bolívar State [...]”. It also authorized CVG to enter into contracts with third parties subject to prior notification to the Ministry of Mines (¶ 15-16).

On 2 September 2002, the CVG Board of Directors approved the execution of the future Mine Operation Contract with Crystallex (“MOC”). On 17 September 2002, Crystallex and the CVG concluded the MOC, which set forth the rights and responsibilities of the parties for the development of Las Cristinas (¶ 18). CVG assumed the obligations of, *inter alia*, securing the permits required for the development of the project (¶ 19). The MOC provided for an initial duration of 20 years, which was extendable for two 10-year periods, for a maximum lifetime of 40 years (¶ 20).

Crystallex had to go through a permitting process and obtain a number of authorizations and permits from Venezuelan entities in order to start operating Las Cristinas. In particular, Crystallex requested an Authorization to Affect Natural Resources (*Autorización Para Afectar Recursos Naturales*) from the Ministry of Environment (the “**Permit**”). Crystallex had to take a number of steps to obtain the Permit, namely, to obtain a Land Occupation Permit issued by the Ministry of Environment, to prepare and submit a Feasibility Study for approval to CVG and the Ministry of Mines, and to prepare and submit an Environmental Impact Study (“**EIS**”) to CVG for approval by the Ministry of Environment. Crystallex also had to post a construction compliance guarantee bond and to pay certain environmental taxes (§ 21).

On 26 April 1993, CVG obtained the land permit from the Ministry of Environment, which was subsequently ratified as valid on three further occasions (§ 22). Crystallex submitted the Feasibility Study on 10 September 2003 and after some exchanges between Crystallex and CVG, on 19 December 2003, Crystallex submitted some “Additional Clarifications”. On 8 March 2004, CVG approved the Feasibility Study, and on 15 April 2004 sent it to the Ministry of Mines for its review and approval (§ 25-28). On the same date, CVG delivered the EIS to the Ministry of Environment (§ 34).

After some exchanges between Crystallex, CVG and the Ministry of Mines, the Ministry of Mines approved the Feasibility Study on 6 March 2006. Meanwhile between 2004-2007 the Ministry of Environment sought further clarifications in relation to the EIS from Crystallex and CVG (§ 35-37). On 16 May 2007, the Ministry of Environment requested Crystallex to pay a bond to “guarantee the implementation of the measures proposed in the document presented for the Environmental Impact Evaluation of the project, which have been analyzed and approved by this Office [...]” (§ 38). On 18 May 2007, Crystallex posted the bond and paid environmental taxes (§§ 38-41).

On 14 April 2008, the Ministry of Environment informed the CVG that the request for the Permit was rejected on grounds of “concern for the environment and the indigenous peoples of the Imataca Rainforest Reserve” (§ 44). Crystallex filed an unsuccessful motion for reconsideration of the decision. On 4 August 2008, Crystallex submitted another report to the Ministry of Environment regarding minimising the environmental impact of the project (§ 48).

On 19 September 2008, President Chávez made public statements about ‘taking back big mines’, and on 5 November 2008 the Minister of Mines expressed the intention to nationalize Las Cristinas (§ 49-51). On 24 November 2008, Crystallex notified the Ministry of Mines of a dispute under the Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments (the “**BIT**” or the “**Treaty**”) (§ 53).

On 13 January 2009, President Chávez publicly announced that the Venezuelan State had taken over the exploitation and control of the gold deposits at Las Cristinas, goal towards which it created a mixed Russian-Venezuelan company, Venrús, for the deposits of Las Cristinas (§ 54). Crystallex sought clarification in February 2009 about the status of the MOC, and was reassured by CVG that that the MOC was valid and in the process of obtaining the required permits for the development of the project (§ 55).

After further statements from President Chávez during 2010 in relation to nationalisation of gold mines, CVG informed Crystallex on 3 February 2011 that it was rescinding the MOC, citing “reasons of opportunity and convenience and due to the cessation of activities for more than 1 year” (¶¶ 56-59). Las Cristinas was formally transferred to Venezuelan authorities on 31 March 2011 (¶ 63).

2. Procedural history

On 16 February 2011 Crystallex filed a Request for Arbitration against Venezuela with the ICSID Secretariat (¶ 61). The Secretariat registered the request on 9 March 2011 (¶ 65). The original Tribunal, made up of Professor John Y. Gotanda, Justice Florentino Feliciano and Dr Laurent Lévy, was constituted on 5 October 2011 (¶ 67).

Claimant filed a memorial on the merits on 10 February 2012, (¶ 73) and on 2 April 2012 Respondent filed a request for bifurcation of jurisdictional objections (¶ 74). On 23 May 2012, the Tribunal rejected the request for bifurcation (¶ 77). On 21 November 2012, Respondent filed its Counter-Memorial on jurisdiction and the merits (¶ 83) and on 9 May 2013 Claimant filed its reply (¶ 91). On 18 September 2013, Respondent filed its Rejoinder on Jurisdiction and the Merits.

A hearing on jurisdiction and the merits took place in Washington, D.C. in November 2013. On 18 November 2013, Respondent filed a proposal for the disqualification of Justice Florentino Feliciano, the hearing was suspended on 19 November 2013, and on 5 December 2013 Justice Feliciano submitted his resignation (¶ 113-115). On 15 December, the Respondent appointed Professor Laurence Boisson de Chazournes who accepted her appointment on 19 December 2013 (¶ 116-117). The continuation of the hearing on jurisdiction and the merits took place in Washington, D.C. from 16-19 February 2014 (¶ 120).

The Tribunal invited the Parties to file further submissions with related evidence and expert reports, as well as answer a set of questions from the Tribunal, in relation to quantum (¶ 130). A further hearing on quantum took place in Paris on 22 November 2014 (¶ 148). The Parties filed their submissions on costs on 23 January 2015 and the proceeding was closed on 24 December 2015 (¶ 157).

The Tribunal addressed as a preliminary matter in Section III of the Award Venezuela’s procedural objections that were raised during the proceedings. This was done for the sole purpose of the avoidance of doubt and out of an abundance of caution (¶ 168). The Tribunal upheld one of five of the Respondent’s procedural objections (¶ 178), dismissing the rest (¶ 169 -183).

The Tribunal then set out the positions of the parties on the merits in Section V, before moving on to assess jurisdiction in Section VI of the award, before analyzing liability in Section VII.

3. Tribunal’s Analysis with regard to Jurisdiction

It was undisputed between the Parties that the Tribunal has jurisdiction over the denial of Permit in April 2008 (¶ 427). Respondent raised two objections to the Tribunal’s jurisdiction over the claims concerning the rescission of the MOC.

3.1 Positions of the Parties

Firstly, the Respondent argued that the denial of the Permit and the rescission of the MOC were two separate disputes. As such, Respondent argued that the Tribunal lacked jurisdiction over the MOC claim because the Claimant failed to satisfy the notice and amicable settlement requirements in Article XII(2) of the Treaty (¶ 428 a.). Secondly, Respondent argued that Claimant's claims regarding the rescission of the MOC were contractual claims, which in the absence of an umbrella clause in the Treaty, could not be decided by an international tribunal. Further, Respondent argued there was an exclusive dispute resolution mechanism in Clause 19 of the MOC, which barred the jurisdiction of an investment treaty tribunal (¶ 428 b.).

In response, Claimant submitted that it had complied with notice and amicable settlement requirements, as the Notice of Dispute of 24 November 2008 covered not only the Permit denial but also the rescission of the MOC, which it considered an aggravation of the existing dispute. In relation to the second jurisdictional objection, Claimant argued that its claims were not contractual in nature, but based on the Treaty, and Clause 19 of the MOC could not deprive an investment tribunal of jurisdiction due to the "analytical distinction between contract and treaty claims" (¶ 429).

3.2 Tribunal's analysis

The Tribunal recalled that its jurisdiction derived from Article XII of the BIT, which provides for a multi-layered sequential dispute resolution system including the filing of a Notice of Dispute, a six month amicable settlement period and then a right to submit an unresolved dispute to arbitration (¶ 445-446).

To determine whether the rescission of the MOC was a continuation of the same dispute for which the November 2008 Notice of Dispute was submitted or a new notice with a new amicable dispute period should have been necessary, the Tribunal asked whether the disagreements at issue related to the same "subject matter" (¶ 450). Citing *CMS v. Argentina*, *Teinver v. Argentina* and *Swisslion v. Macedonia*, the Tribunal found that "there could be no doubt" that the two main areas of disagreement in the arbitration related to the same dispute (i.e., the denial of Permit and the rescission of the MOC) and had the same subject matter. The Tribunal found that at the time when the MOC was terminated, the dispute had simply evolved and "only entailed an enlargement of the set of facts rather than new facts giving rise to a new dispute" (¶ 454).

The Tribunal noted that adopting the Respondent's position would allow a state to continue to adopt new measures with a view to triggering new notices and amicable settlement requirements, which would have entailed "supplemental procedural issues" like consolidation, relationship between two proceedings if not consolidated, which could not have been "the intention of what the notice and amicable settlement requirements in the Treaty reasonably entail" (¶ 456).

Regarding the second objection that the MOC claim was contractual, Respondent submitted that CVG acted as a "contracting partner, and not pursuant to its delegated sovereign authority as an instrumentality of Venezuela"; and that Clause 19 was an exclusive forum selection clause in favor of the Venezuelan courts, the effect of which deprived the Tribunal of jurisdiction over Claimant's contractual claims (¶ 462).

In response, Claimant submitted that the mere fact that treaty claims involve a contract did not mean “that the analytical distinction between claims based on contract and those based on treaty fails to exist”. Its claim was that Venezuela through a series of sovereign acts expropriated and mistreated Claimant’s investments in breach of the Treaty (¶ 467). Claimant also rejected Respondent’s arguments concerning waiver of its right to bring a claim before an investment tribunal based on Clause 19 of the MOC, referring both to the analytical distinction between contractual and investment treaty claims, and pointing to the high threshold of an unambiguous and knowing waiver that would be required in foregoing rights under a BIT (¶ 470).

The Tribunal recalled that investment disputes under a bilateral or multilateral investment treaty may involve a set of facts for which there may be a contractual relationship between the Parties. The Tribunal further stated that the fact a contract “plays a role” does not “*per se* entail a Tribunal is faced with contract claims rather than treaty claims”, which it noted is well established in investment treaty claims, citing the *Vivendi I* Decision on Annulment (¶¶ 473-474).

The Tribunal was unable to find any indication of contractual claims dressed up as treaty claims as alleged by Respondent (¶ 476) and found that Claimant did not allege MOC violations by Respondent (¶ 478). The Tribunal upheld the distinction between contractual breaches and Treaty breaches, in relation to which an exclusive jurisdiction clause such as Clause 19 of the MOC may not operate to divest an international tribunal of its jurisdiction (¶ 480). Quoting *Aguas del Tunari v. Bolivia* in relation to specific indications of common intentions between the Parties, the Tribunal dismissed the waiver argument as there was no evidence whatsoever of an intention that the Parties specifically intended to waive rights under the Treaty by Clause 19 of the MOC (¶¶ 481 – 482).

The Tribunal decided in had jurisdiction over all Treaty claims including the MOC rescission was part (¶ 483).

4. Tribunal’s Analysis of the Merits

4.1 Positions of the Parties

Claimant advanced three broad arguments, firstly, that Respondent breached Article II(2) of the Treaty by failing to afford Claimant’s investments in Las Cristinas fair and equitable treatment. Respondent breached the fair and equitable treatment standard under the BIT because (i) it frustrated Claimant’s legitimate expectations to operate the Las Cristinas project over the life of the MOC and further (ii) by negligent and arbitrary conduct, lack of due process, transparency and consistency. Secondly, Claimant argued that Respondent failed to afford Claimant’s investments full protection and security, which Claimant argued includes legal security. Finally, Claimant alleged that Respondent breached Article II(1) of the Treaty by unlawfully expropriating Claimant’s investment by a number of cumulative indirect measures, and also directly by rescission of the MOC and transfer of all assets to CVG (¶ 485).

Respondent argued that it did not breach the fair and equitable treatment standard in the Treaty, which was the “minimum standard of treatment” under customary international law. Respondent further contended that Claimant could not have had any legitimate expectations regarding the Las Cristinas project as Respondent made no specific promises that it would

grant the Permit, nor that it would not exercise contractual rights of rescission under the MOC. Respondent disagreed that the full protection and security standard extends to legal security, but even if it did, legal remedies existed under Venezuelan law which Claimant chose not to avail itself of. In relation to expropriation, Respondent argued its acts were legitimate and lawful both in relation to the Ministry of Environment's denial of the Permit and CVG's rescission of the MOC (¶ 486).

4.2 Analysis - Fair and equitable treatment

The Tribunal held that the content of the fair and equitable treatment standard could not be equated with the minimum standard of treatment under customary international law by virtue of the words "in accordance with the principles of international law" in Article II(2) of the Treaty. The Tribunal noted a line of cases decided since the *Neer* case, including *Vivendi v. Argentina*, *Arif v. Moldova*, *SAUR v. Argentina* and *Gold Reserve v. Venezuela* that have moved away from *Neer* jurisprudence on this issue, and have recognised that the customary international law standard as well as customary international law itself has developed ever since. In this case, the Tribunal found the standard was an autonomous treaty standard, which in contrast to NAFTA does not expressly incorporate the minimum standard of treatment (¶ 530 et seq.). The Tribunal found that the fair and equitable treatment standard comprises

"inter alia protection of legitimate expectations, protection against arbitrary and discriminatory treatment, transparency and consistency. The Tribunal believes the state's conduct need not be outrageous or amount to bad faith to breach the fair and equitable treatment standard."(¶ 543)

The Tribunal proceeded to an analysis of whether Claimant held any legitimate expectations, and then to an analysis of arbitrariness, transparency and consistency of Respondent's actions, before dealing with the residual allegations of discrimination, due process and bad faith. The Tribunal analysed whether the overall pattern of conduct breached the fair and equitable treatment standard (¶ 545).

4.2.1 Legitimate expectations

In relation to legitimate expectations, the Tribunal found that

"a legitimate expectation may arise in cases where the Administration has made a promise or representation to an investor as to a substantive benefit, on which the investor has relied in making its investment, and which later was frustrated by the conduct of the administration. To be able to give rise to such legitimate expectations, such promise or representation - addressed to the individual investor - must be sufficiently specific, i.e. it must be precise as to its content and clear as to its form." (¶547)

Claimant submitted that its legitimate expectations arose at three points in time. At the time of making its initial investment, Claimant expected that Respondent would act with 'economic rationality', 'reasonableness' and 'proportionality' regarding the treatment of its investment. Further, Claimant believed that if it fulfilled its contractual and regulatory obligations it would enjoy the exclusive right to exploit Las Critinas and that the process to

issue the permit pursuant to the Venezuelan legal framework would be a technical process (¶ 549.A).

Upon receipt of the 16 May 2007 letter from the Ministry of Environment which approved Claimant's EIS and stated that the Permit would be "handed over" upon payment of the requisite bond, Claimant submitted it had a legitimate expectation that the Permit would be delivered promptly (¶ 549. B).

Between July 2008, the rescission of the MOC, and the Government's takeover of Las Cristinas, Claimant maintained that "it continued to have a legitimate expectation that Respondent would act coherently, transparently and in good faith" in deciding Claimant's appeal of the Permit denial, and its adjusted proposal submitted to the Ministry of Environment. Further, its expectation that it would be allowed to develop the Las Cristinas Project was fuelled by representations of high-level Venezuelan Government officials (¶ 549. C).

The Tribunal found that but for the May 2007 letter, the expectations that Claimant put forward were not "legitimate expectations" protected under the FET standard (¶ 550). Referring to *Arif. v. Moldova*, it criticised the circularity of reasoning in holding an expectation that Respondent would "act coherently, transparently and in good faith" as tantamount to saying one has a legitimate expectation to be treated "fairly and equitably" (551). It also rejected the argument that a state's laws and an expectation that a state will comply with its own laws can as such and without further conduct form the basis of an FET claim, holding that

"It would form such a basis if evidence is given that a specific representation as to a substantive benefit has been frustrated, or there is proof of arbitrary, or non-transparent conduct in the application of the laws in question or some sort of abuse of power." (¶ 552)

While noting that laws are general and impersonal in nature and leave a degree of discretion to state agencies in the making of case-specific decisions, the Tribunal observed that an investor would have difficulty founding an actual expectation akin to a vested right (¶ 552). The Tribunal considered the balance of the statements and representations relied on by Claimant to assert its legitimate expectation were too general and indeterminate "to meet the level of specificity required to create legitimate expectations which are relevant for a finding of breach under the fair and equitable treatment standard (¶¶ 553-555).

By contrast, the Tribunal found the representations in the May 2007 letter to be "on its face a positive representation" specifically to Crystallex in clear and precise terms. It referred to the language of the letter, which stated "once the Bond has been posted, checked and found to be compliant by this Office... [the Permit] will be handed over" (¶ 562). As such, the letter was susceptible of creating a legitimate expectation that, if later frustrated, would be protected under the fair and equitable treatment standard (¶ 563).

In the Tribunal's view, Claimant legitimately relied on the Ministry of Environment's representation, which was further strengthened by the Ministry's request, made on the same day, to pay the environmental taxes which under the Venezuelan Tax Stamp Law become due "simultaneously" with the issuance of the relevant document (¶ 564).

4.2.2 Arbitrariness, lack of transparency and consistency

The Tribunal relied on the definition of arbitrariness given by a Chamber of the ICJ in the *ELSI* case (“a willful disregard of due process of law, an act which shocks or at least surprises, a sense of judicial propriety”) as authoritative and further gave its own view that a measure is arbitrary “if it is not based on legal standards but on excess of discretion, prejudice or personal preference, and taken for reasons that are different from those put forward by the decision maker” (¶ 578).

The Tribunal noted the settled jurisprudence that fair and equitable treatment “requires that any regulation of an investment be done in a transparent manner”. (¶ 579) It also referred to *EnCana v. Ecuador* on the related notion of consistency, which requires that “one arm of the State cannot [...] affirm what another denies to the detriment of a foreign investor” (¶ 579).

The Tribunal then agreed with Respondent in principle, rejecting Claimant’s arguments that Claimant had a “right” to a Permit, as a State could not be said to be under an obligation to grant a permit to affect natural resources, which is a sovereign prerogative. It went on to qualify that approvals in a permitting process needed to be granted or denied only after conducting a procedure which was not arbitrary and in which the applicant was treated fairly (¶ 581). It went on to emphasize that it is not for an investor-state tribunal to second guess the substantive correctness of the reasons for administrative decisions or the weight assigned to certain policy objectives (¶ 583), but rather, to assess whether there have been serious procedural flaws (¶ 585).

The Tribunal concluded on the facts that up to the May 2007 letter, Claimant was overall treated in a straightforward manner; however, the Permit denial letter of 14 April 2008 manifested a complete *volte-face* (¶ 588-589). Although Venezuela had the right and the responsibility to raise concerns related to environmental and other issues in relation to the project, the manner in which these concerns were put forward presented significant elements of arbitrariness and evidenced a lack of transparency and consistency (¶ 591), meeting the *ELSI* definition of arbitrariness (¶ 597).

Respondent’s concerns about global warming and carbon emissions were raised in the absence of any analysis of the issue or without any references to the documents submitted by Claimant throughout the years, denying Claimant the opportunity to be able to properly respond (¶ 592). Further, the reference to technical studies and research carried out in the area was vague. The Tribunal held that these indeterminate references in the denial letter were entirely incapable of providing any possibly sound justification for a decision (¶ 594).

The Tribunal then criticized the technical report relied on by Respondent(which Claimant alleged was fraudulent), as in any event deficient by its own terms due to its brevity, generality and vagueness (¶ 595). The Permit denial letter therefore frustrated Claimant’s legitimate expectation arising out of the specific promise contained in the May 2007 letter (¶ 597).

Further still, the Tribunal identified inconsistencies in the communications on record, which further reflected a lack of transparency. Those communications showed changes in policy at the national level after the May 2007 letter and political pressure by high Venezuelan officers affecting the project (¶ 598-599). The Tribunal cited examples of communications on record in concluding that the political climate became more and more unfavourable to Crystallex after the Permit denial, and culminating with MOC rescission (¶ 601-611). This pattern of

conduct demonstrated that the MOC rescission was not based on legal standards, which constituted in the eyes of the Tribunal a clear form of arbitrary conduct, contrary to fair and equitable treatment (¶ 614).

The Tribunal dismissed Claimant's allegations that Respondent discriminated on the basis of nationality. It could not rule out that discrimination actually occurred but was of the view that a finding of discrimination would require more conclusive evidence of facts than those on record (¶ 616). Similarly, Claimant's due process arguments in relation to the motion for reconsideration of the Permit denial and hierarchical appeal had not been sufficiently established, but in any event would not add anything to the breach of fair and equitable treatment (¶ 620).

4.3 Analysis - Full protection and security

The Tribunal relied on a number of authorities to dispense briefly with Claimant's argument that the full protection and security standard extended to legal security. In the Tribunal's view, the full protection and security standard was not to be equated with the minimum standard under international law, but did not extend beyond a host state's duty to grant physical protection and security (¶ 632). The Tribunal acknowledged there had been contrary decisions but preferred this interpretation because in its view it better accorded with the ordinary meaning of the terms (¶ 634).

4.4 Analysis – Expropriation

Claimant argued that the destruction of contractual rights can amount to an expropriation; that Respondent indirectly expropriated its entire investment through a series of cumulative and interconnected measures; that the rescission of the MOC further constituted a direct expropriation of the investment and the expropriation of the investment was unlawful (¶¶ 636-647).

Respondent argued that the MOC did not grant Claimant an unconditional "right" (¶¶ 648-649); that there was no expropriation of Claimant's rights because Respondent acted within its legitimate regulatory authority in denying the Permit; the rescission of the MOC was nothing more than the exercise of a contractual right; and that if the Tribunal were to find any act of expropriation that the conditions required for an expropriation to be lawful under the Treaty were met as the failure to pay compensation does not render expropriation unlawful *per se* (¶¶ 654-658).

The Tribunal analysed the terms of the Treaty and concluded that on its specific, broad terms as to what constitutes an investment, including *inter alia*, contractual rights, that the MOC contained rights capable of being expropriated (¶ 659 -665). The Tribunal outlined the features of direct and indirect expropriation as reflected in the jurisprudence before identifying the three broad groups of actions when it concluded to have amounted to an indirect expropriation of Claimant's rights (¶ 666-672).

The first series of actions constituting the first step in the expropriatory process were those surrounding the denial of the Permit in April 2008 (¶¶ 673-674). The second series of actions were a number of statements made by high level Venezuelan government officials targeting and gradually devaluing Claimant's investment, which led to the MOC rescission (¶ 675). The MOC rescission was the third and last of the measures, which taken together, constituted

a creeping expropriation of Claimant's investment (¶ 685). The Tribunal found that the MOC was terminated by an exercise of sovereign authority (¶¶ 698-708).

The Tribunal concluded the four conditions for expropriation under the Article VII(1) of the Treaty (expropriation must be carried out for a public purpose, under due process of law, in a non-discriminatory manner, and against prompt, adequate and effective compensation) had not been met. Expropriation was for a public purpose (¶ 712), but Claimant failed to establish, under the standard set out in *ADC v. Hungary* that the expropriation was carried out in disrespect of due process standards (¶ 714), or to adduce facts supporting a finding of discrimination (¶ 715).

However, it was undisputed between the parties that no compensation had ever been offered by Venezuela. In relation to the requirement for compensation, the Tribunal stated, referencing several authorities: "When a treaty cumulatively requires several conditions for a lawful expropriation, arbitral tribunals seem uniformly to hold that a failure of any one of those conditions entails a breach of the expropriation provision" (¶ 716).

5. *The Tribunal's Analysis on Quantum*

Until the hearing, the primary remedy sought by Claimant was restitution. However during the course of the hearing, Claimant clarified that restitution had become impossible because Venezuela has entered into agreements with a third party, CITIC, granting it rights to Las Cristinas (¶ 724). Respondent also rejected restitution so the Tribunal moved on to analyze monetary compensation (¶ 728).

The Tribunal addressed the quantum arguments first by setting out the relevant standard of compensation, then the correct valuation date, burden of proof and causation. It then moved on to assess the four methodologies presented by Claimant to determine the "fair market value" of its investment (¶ 840).

The Treaty does not specify a standard of compensation so there arose a question as to whether to follow the BIT expropriation standard or the "full reparation" standard under the *Chorzów* formulation. The issue was that an application of the BIT standard may lead to a valuation date as at the date of the expropriation whereas the full reparation standard could fix the valuation date as at the date of the award. It was largely theoretical for the Tribunal because both Parties submitted the valuation date should be the date of expropriation, on which they disagreed (¶ 843-844).

The Tribunal found the BIT standard in Article VII(1) is only concerned with expropriation and not other BIT breaches. As the Tribunal had found breaches of FET, it was therefore appropriate to apply the full reparation standard under customary international law, applying the *Chorzów* formulation and codified under the ILC Articles on State Responsibility (¶ 846-847). The Tribunal decided to apply the well accepted "fair market value" methodology as described in *Starrett Housing Co v. Iran* and *CMS v. Argentina*.

The Tribunal found 13 April 2008, the date of the Permit denial, was the appropriate valuation date. Firstly because the value of Claimant's investment was negatively impacted with the denial of the permit (¶ 855); secondly because the operation at the site was at an effective standstill with its rights practically useless from that point (¶ 856); and thirdly because Claimant itself knew an investment dispute had by then materialized (¶ 857).

The Tribunal found Claimant's losses did result from the destruction of its investment and were incurred by reason of Respondent's wrongful acts (¶ 862). The standard of proof, in the absence of specific rules in the BIT, was that under ICSID Additional Facility Rule 41(1), which granted the Tribunal full discretion with regard to admissibility and probative value of the evidence (¶ 863).

Three principles were specified as guiding the Tribunal's approach to quantification, which included loss of profits. Firstly, the existence of damage must be proved "with certainty" (¶ 867). Secondly, exact quantification does not need to be proven with the same degree of certainty as future damage is inherently difficult to prove and the "with reasonable confidence" standard from *Lemire v. Ukraine* was adopted as satisfactory to both common and civil lawyers (¶ 868-869). Thirdly, the impossibility or difficulty of proving damages with precision does not bar their recovery altogether (¶ 871).

Loss of profits may be compensated in certain circumstances, as recognized by Article 36(2) of the ILC Articles on State Responsibility (¶ 873). However, according to authoritative statements profits "must not be too speculative, contingent, uncertain, and the like. There must be proof that they were reasonably anticipated; and that the profits anticipated were probable and not merely possible" (¶ 874). The Tribunal found that Claimant proved the fact of future profitability (¶ 877) by its exploration activities, and in taking into consideration that the nature of the project was an open pit gold mine - an asset whose costs and future profits can be estimated with greater certainty than other assets the subject of greater market fluctuations (¶ 879).

The Tribunal accepted Claimant's forward looking loss of profit valuation methodologies over Respondent's backward looking cost approach, as that approach would not reflect the fair market value of the investment in the circumstances (¶ 882). Of the four valuation methods proposed by Claimant, the Tribunal accepted as reliable the stock market approach and the market multiples method, but rejected as problematic the P/NAV method as presented by Claimant's evidence, and rejected as speculative the indirect sales comparison method (¶¶ 889-910). As the two favored approaches led to comparable results on quantum, the Tribunal averaged the two figures to give a damages award of \$US 1,202 million (¶ 917).

The Tribunal found an award of both pre and post award interest was due (¶ 928) because an award of interest is an integral component of the full reparation principle under international law (¶ 932). The appropriate rate was held to be the 6-month average U.S. dollar LIBOR plus 1 per cent per year at the valuation date. This was said to approximate a commercially reasonable rate, which experts of both sides confirmed constituted a normal commercial rate in the circumstances (¶ 934). The Tribunal also awarded compound interest on a yearly basis for reasons that modern financial activity such as borrowing and investing normally involves compound interest, and simple interest may not adequately ensure full reparation for the loss (¶ 935).

The Tribunal rejected Claimant's request to declare any award be made net of all applicable Venezuelan taxes on the basis that such a request was premature and speculative. It similarly rejected Claimant's request for Respondent to indemnify Claimant for taxes imposed by Canada because Claimant had not established the award would be subject to such tax, nor had it proved that it would have suffered a distinct and foreseeable loss from any tax imposed by Canada for which Respondent rather than Claimant itself should be held liable (¶ 947).

6. *Costs*

Both Parties requested an award of costs in respect of legal fees and expenses (which for Claimant amounted to US\$ 30.4 million and for Respondent to US\$ 14.3 million) as well as for their arbitration costs (¶ 948). Both sides also argued that a costs award was warranted based on the principle of costs follow the event, and because the other side conducted the arbitration in a manner that led to delay and increased costs (¶ 951). The Tribunal noted that it was vested with the authority pursuant to Article XII(9) of the Treaty to award costs in accordance with the applicable arbitration rules, and Articles 52(1)(j) and 58 of the ICSID Additional Facility Rules grant it considerable discretion in that respect (¶¶ 954-955). In concluding that each Party should bear its own costs and ICSID's costs should be shared equally (¶ 960), the Tribunal observed that each side presented valid arguments and acted fairly and professionally even though Claimant prevailed on jurisdiction and in part on the merits (¶¶ 958-960).