



School of International Arbitration

IACLC
International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law

*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date:

Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/26) – Award

Case Report by:

Louise Woods **, editor Maria I. Pradilla Picas***

Summary:

In the Award rendered on January 29, 2016, the Tribunal found that it had jurisdiction to hear the dispute between Tenaris S.A. and Talta -Trading E Marketing Sociedade Unipessoal LDA, on the one hand, and the Bolivarian Republic of Venezuela, on the other hand under the Venezuela-Belgium-Luxembourg Economic Union and the Venezuela-Portugal BITs because: (1) contrary to Venezuela’s contention, Tenaris and Talta were “investors” for the purposes of the BITs, having their effective places of management in their respective countries of incorporation; (2) their investments (with the exception of one claim relating to an Off-Take Agreement which the Tribunal found was not an “investment” for the purpose of either BIT) qualified for protection under the terms of the relevant BITs; (3) Claimants’ fair and equitable treatment and protection and security claims were properly notified to Respondent in accordance with the requirements of the BITs; and (4) the Tribunal was entitled to determine Claimants’ claims arising under a supply contract with a State-owned entity where those claims were expressed to be breaches of the relevant BITs.

However, the Tribunal went on to find that Venezuela’s pre-expropriation conduct vis-à-vis Claimants’ investments did not violate either BITs’ fair and equitable treatment standard, nor did it violate either BITs’ protection and security guarantee, even though the Tribunal expressly acknowledged that such protection and security is not limited to physical protection from third parties. Nonetheless, the Tribunal did conclude that Respondent’s nationalization of the Claimants’ investment was contrary to Venezuelan law, without payment of compensation and therefore amounted to a breach of the relevant BIT provisions. On that basis, the Tribunal awarded damages to Claimants to compensate them for the value of their expropriated investments, actualized to the date of the Award and with interest, compounded semi-annually from the date of Award until paid in full.

Main Issues: Jurisdiction – personal: “registered office” versus place of “effective management”; jurisdiction – material: contents of notice of dispute; purely commercial transaction; contractual claims; Fair and Equitable Treatment: whether organ of the State; Protection and Security: not limited to physical protection; Expropriation: no compensation, renvoi to local law; Damages: fair market value, asset-based approach; Costs: no order as to costs.

Tribunal:

Mr. John Beechey (President); Mr. Judd L. Kessler (Appointed by Claimants), Mr. Toby T. Landau QC (Appointed by Respondent).

Claimant's Counsel:

Mr. Nigel Blackaby, Mr. Alex Yanos, Ms. Caroline Richard, Mr. Jeffery Commission, Ms. Natalia Zibibbo, Mr. James Freda, Mr. Ricardo Chirinos, Ms. Guagalupe Lopez (Freshfields Bruckhaus Deringer US LLP, Washington, D.C.); and Mr. José Humberto Frias (D’Empaire Reyna Abogados, Venezuela).

Respondent's Counsel:

Procuraduría General de la República Bolivariana de Venezuela, Caracas, Venezuela; Dr. Ronald E. M. Goodman, Mr. Kenneth Juan Fuigeroa, Mr. Alberto Wray, Ms. Jannis Brennan, Mr. Diego Cadena, Ms. Alexandra Kerr Meise, Dr. Constantinos Salonidis, Ms. Oonagh Sands (Foley Hoag LLP, Washington, D.C.).

* Directors can be reached by email at ignacio.tortero@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Louise Woods is a senior associate in the London office of Vinson & Elkins LLP, and holds an honours degree from University College London. IACL’s case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which she is associated. Ms. Woods can be contacted at lwoods@velaw.com.

*** Maria I. Pradilla Picas is an associate in the Washington, D.C. office of Jones Day, and holds a J.D. from Georgetown University Law Center and a Master in International Business from Florida International University. IACL’s case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which she is associated. Ms. Pradilla Picas can be contacted at mpradillapicas@jonesday.com.

Digest:

1. Relevant Facts and Procedural Dates

The First Claimant, Tenaris S.A. (“**Tenaris**”), is a company incorporated in Luxembourg, with its registered office in Luxembourg. The Second Claimant, Talta – Trading e Marketing Sociedade Unipessoal Lda (“**Talta**”), is a company incorporated in Portugal, with its registered office in Madeira (¶ 1). Tenaris is a global supplier of steel tubes and related services for the world’s energy industry and Talta is Venezuela’s only producer of stainless steel pipes for the oil and gas industry (together, “**Claimants**”). Talta is wholly-owned by Tenaris Investments S.a.r.l., which in turn is 100% owned by Tenaris (¶ 4). Respondent is the Bolivarian Republic of Venezuela (“**Venezuela**” or “**Respondent**”) (¶ 1).

The dispute arose from the alleged indirect expropriation of Claimants’ investment in, and pre-nationalization interference with, their investments in Matesi Materiales Siderurgicos S.A. (“**Matesi**”) (¶ 6), a company in which Tenaris, through Talta, held a 50.1997% shareholding (¶ 5). Claimants complained of pre-expropriation interference with their investment, in particular the discrimination in the supply of pellets to Matesi and the assumption by Respondent of full managerial and operational control of Matesi in breach of Venezuelan law and due process, without payment of compensation (¶ 6).

Claimants alleged that Respondent’s acts constituted a breach of the protections afforded to (i) Tenaris under the Agreement between the Government of the Republic of Venezuela and the Belgium-Luxembourg Economic Union for the Reciprocal Promotion and Protection of Investments (the “**Luxembourg BIT**”); and (ii) Talta under both the Luxembourg BIT and the Agreement between the Government of the Republic of Venezuela and the Government of the Portuguese Republic for the Reciprocal Promotion and Protection of Investments (the “**Portuguese BIT**”) (¶ 7).

Claimants filed a Request for Arbitration with the ICSID Secretariat on August 24, 2011 (¶ 11). The Secretariat registered the Request on September 30, 2011 (¶ 12). The Tribunal was constituted on April 26, 2012 (¶ 14).

Following submission of Claimants’ Memorial on the Merits on August 24, 2012, the Respondent sought bifurcation of the proceedings and a determination as a preliminary matter of its objections to jurisdiction (¶ 16). Following an exchange of submissions, on December 5, 2012, the Tribunal denied Respondent’s request for bifurcation (¶ 18).

Respondent filed its Counter-Memorial on Jurisdiction and Merits on May 10, 2013, and the parties filed Reply and Rejoinder Memorials thereafter (¶ 19). A substantive hearing on the merits was held in Washington, D.C., between January 31 and February 7, 2014 (¶ 22). A further hearing was held in London on July 9 and 10, 2014, to hear evidence from the parties’ experts on Portuguese and Luxembourg law (¶ 25). The parties filed Post-Hearing Briefs on August 8, 2014, and Submissions on Costs on November 28, 2014 (¶ 26).

2. Tribunal’s Analysis with regard to Jurisdiction

As a preliminary matter, the Tribunal provided a summary of the relevant facts relating to the privatization of the Venezuelan steel industry between 1974 and 1993 (¶ 33), and the subsequent nationalization (¶ 63) and expropriation (¶ 83) of Matesi. The Tribunal then

addressed Respondent's jurisdictional objections (¶ 112), before turning to the merits of Claimants' claims. Respondent raised four jurisdictional objections.

2.1. *Analysis of Respondent's First Jurisdictional Objection: Tenaris and Talta are not "investors" for the purposes of either BIT because of a lack of a "siege social" in Luxembourg and a "sede" in Portugal*

Respondent's first jurisdictional objection was premised on the fact that neither Tenaris nor Talta qualified as "*investors*" for the purposes of the Luxembourg and Portuguese BITs respectively (¶ 114). Venezuela argued that it was not sufficient for Claimants to have been incorporated in these jurisdictions, but that they must also have their effective place of management in the jurisdictions of Luxembourg and Portugal respectively (¶ 116).

The definition of "*investor*" in both BITs requires not only that an investor be incorporated in the jurisdiction but also that it have its "*siege social*" or "*sede*" in that jurisdiction (¶ 115). Venezuela argued that since the act of incorporation necessarily involves the designation of a registered office, the additional requirement of a "*siege social*" or "*sede*" in the jurisdiction must demonstrate an intention to limit the BITs' coverage to cases where there is a genuine link between the individual claimant corporate entity and the national State—a link that could not be effected by formal requirements alone (¶ 117). Venezuela contended that the ordinary meaning of "*siege social*" connotes the place where the "*effective management*" of the company takes place (¶ 118). With regard to this case, Venezuela submitted that there was no evidence that the Board of either Tenaris or Talta met in Luxembourg and that both companies were in fact Argentine (¶ 119).

Claimants contended that, given a proper interpretation in accordance with the Vienna Convention on the Law of Treaties, the terms "*siege social*" or "*sede*" must be construed as meaning "*registered office*" or "*statutory seat*" and that the evidence Claimants had provided was sufficient to prove they had their statutory seats in Luxembourg and Portugal respectively (¶ 129).

As a preliminary matter, the Tribunal considered that while the terms "*siege social*" or "*sede*" could mean simply "*registered office*" or "*statutory seat*," that was not possible in the context of these BITs for the reason Venezuela had identified. As such, the Tribunal held that the terms "*siege social*" and "*sede*," in this case meant the place of actual or effective management of the company in question (¶ 150). However, the Tribunal went on to find that the test of actual or effective management is a flexible one that takes into account the precise nature of the company in question and its actual activities (¶ 198). The Tribunal proceeded to consider the evidence of the nature of Claimants and their activities on that basis.

In so doing, the Tribunal held that it did have jurisdiction *rationae personae* over Claimants because (i) Tenaris had a valid existence in Luxembourg in its own right as a holding company that is distinct from the existence and operation of its subsidiaries and that its "*siege social*" or "place of effective management" was therefore in Luxembourg and (ii) Talta had established that, in accordance with the terms of the Portuguese BIT, its "*sede*" was in Portugal (¶ 226).

2.2. *Analysis of Respondent’s Second Jurisdictional Objection: Respondent Did Not Receive Proper Notice of all of Claimants’ Claims*

Venezuela argued that Claimants failed to give proper notice in accordance with the BITs of all of its substantive claims in the arbitration and that that constituted a failure on Claimants’ part to fulfill the jurisdictional requirements of the BITs. Specifically, Respondent claimed that it did not receive notice of Claimants’ fair and equitable treatment (“FET”) and protection and security (“P&S”) claims (¶ 228).

Claimants’ position was that (1) Venezuela had notice of all three of its claims, (2) even if it did not have specific and separate notice of the FET and P&S claims, they were sufficiently related to the expropriation claim such that no notice was required, and (3) notice and amicable settlement provisions have been considered by many tribunals not to be strict jurisdictional requirements (¶ 237).

The Tribunal first considered the notices in question and concluded that it was apparent from their content that any settlement negotiations were intended to encompass the totality of what Claimants perceived as the effects of the Respondent’s interventions in Matesi’s business. On that basis, the Tribunal found that Claimants’ notices articulated its claims with a reasonable degree of specificity as envisaged in *Burlington*¹ and *Tulip* (¶ 242).² The Tribunal went on to find that even if it were wrong on that front, Claimants’ FET and P&S claims arose out of the same subject matter as their expropriation claim and, consistent with the awards in *CMS v Argentina*³ and *Teinver v Argentina*,⁴ no separate notice of those claims was called for, and the initial notices satisfied the amicable settlement requirement (¶¶ 245, 246).

2.3. *Analysis of Respondent’s Third Jurisdictional Objection: the Talta Loan and Off-Take Agreement are not “investments” for the purposes of either BIT*

Respondent maintained that the Talta Loan was “a legal fiction” because there was no repayment, no interest was collected, and it carried no investment risk other than the normal commercial risk of default (¶ 252). In relation to the Off-Take Agreement, Venezuela contended that it was a simple sale and purchase agreement that did not amount to a contribution to the State (¶ 256) and any suggestion that it involved investment risk was misconceived (¶ 257). In contrast, Claimants argued that both the Talta Loan and the Off-Take Agreement fell squarely within the definition of “investment” and that even if the Tribunal found that they did not, they were part of a larger transaction that, considered as a whole, was itself an “investment” (¶ 262).

The Tribunal first held that there is nothing in either BIT that purports to deviate from the ICSID Convention notion of investment (¶ 280). The Tribunal also considered that the question of whether the Talta Loan and the Off-Take Agreement were investments had to be considered in light of Venezuela’s acknowledgment that the acquisition of Matesi was an investment for the purposes of the BITs (¶ 281). In so doing, the Tribunal adopted the

¹ *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010.

² *Tulip Real Estate & Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014.

³ *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB/01/8, Decision on Jurisdiction, 17 July 2003.

⁴ *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012.

“combined” effect test referenced in the *Mytilineos*⁵ and *Inmaris*⁶ decisions and the integrality test in the *CSOB* case (¶ 284).⁷ On the evidence before it, the Tribunal concluded that the Talta Loan qualified as an investment in its own right under the BITs and that it was an essential element of Claimants’ investment in Matesi (¶ 289). With regard to the Off-Take Agreement, the Tribunal accepted Venezuela’s submission that it was not an investment in its own right (¶ 291).

2.4. *Analysis of Respondent’s Fourth Jurisdictional Objection: Claimants’ Alleged Contractual Claims cannot be elevated to BIT Claims and Accordingly the Tribunal has no Jurisdiction over them*

Respondent argued that the State entity through which it supplied raw material to Matesi under the terms of a Supply Contract acted in a commercial and private capacity as a seller of raw materials and that Venezuela’s sovereign capacity under the BITs cannot have been invoked by any acts of that State entity (¶ 296). In support of its position, Respondent pointed to the fact that in all of the correspondence passing between the parties on this issue, discussions had only ever been around contractual obligations (¶ 297).

Claimants argued that the State entity in question has a sovereign monopoly over the supply of raw material and that Venezuela’s responsibility for the discriminatory treatment afforded to Matesi by that State entity is thereby engaged (¶ 299).

In its analysis, the Tribunal identified two separate questions: (1) whether it was entitled to determine Claimants’ claims with respect to the supply of raw material; and (2) whether Claimants’ claims in respect of raw material supply actually constituted a breach of either BIT for which Venezuela is responsible (¶ 300). The Tribunal found that (1) it was entitled to determine Claimants’ claims as those claims were expressed to be breaches of the BITs (¶ 301) and (2) it was not required at the jurisdictional stage to determine whether or not the actions complained of actually constituted breaches of either BIT, as that was a question reserved for an enquiry into the merits and not this prima facie jurisdictional enquiry (¶ 302).

2.5. *Decision on Jurisdiction*

In light of the above, with the exception of the Off-Take Agreement, the Tribunal found that it had jurisdiction to hear all of Claimants’ claims and that Venezuela’s jurisdictional objections should be dismissed (¶ 313).

3. Tribunal’s Analysis of the Merits

The Tribunal analyzed the Claimants’ claims in two distinct categories: the pre-expropriation claims, arising out of the Respondent’s actions in the pre-nationalization stage and the claims arising out of Matesi’s nationalization itself.

3.1. *Pre-expropriation claims*

⁵ *Mytilineos Holdings SA v. State Union of Serbia and Montenegro*, Partial Award on Jurisdiction, 8 September 2006

⁶ *Inmaris Perestroika Sailing Maritime Services GmbH et al v. Ukraine*, ICSID Case No. ARB/8/08, Decision on Jurisdiction, 8 March 2010.

⁷ *CSOB v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999.

3.1.1. *The Fair and Equitable Treatment/Discrimination Claim*

Claimants argued that Respondent was in breach of the FET/non-discrimination standard in both BITs by virtue of its discrimination of Matesi in the supply of raw material by its State-owned entity (¶ 317).

Based on both Venezuela's failure to produce materially relevant documentation and the evidence before it, the Tribunal first found that Matesi suffered a shortage of pellet supply in the course of its operations, that technical issues at the State-owned supplier were a significant contributing factor to the disruption of supply, and that there was a preferential supply to other producers at the expense of Matesi (¶ 374).

The Tribunal then went on to consider whether these failures constituted breaches of a commercial supply contract or whether the international responsibility of the Venezuelan state was thereby engaged (¶ 379). Claimants asserted that only the Venezuelan state could use governmental authority to modify contracts with a private party and that even if the State entity in question was not an organ of the state, it was exercising governmental authority in supplying raw materials to Matesi (¶ 381). Venezuela, on the other hand, argued that the State entity in question was not an organ of the State, nor could its actions be attributed to the State and the contract was simply a commercial arrangement (¶ 382).

The Tribunal first held that there would be grounds for holding Respondent in breach of its FET obligations under the BITs if the actions of the relevant State entity could be attributed to Venezuela. As to this issue, the Tribunal concluded that the State entity in question was not an organ of the State, largely because its functions were commercial in nature and it was not the holder of the iron ore monopoly in Venezuela (¶ 413). Further, the Tribunal went on to find that there was no evidence that the State entity in question was exercising any element of governmental authority and the Tribunal accepted Venezuela's contention that the State-owned entity's obligations towards Matesi were contractual in nature (¶ 417). On that basis, the Tribunal dismissed Claimants' claims as to Venezuela's alleged breach of the FET/non-discrimination protections afforded to them by both BITs (¶ 424).

3.1.2. *The Protection and Security Claim*

Claimants' case relied on serious labor unrest in the form of industrial action in November 2008, which prevented access to the plant and involved the holding against their will assault against its staff in numerous cases (¶ 425). Respondent contended that Claimants' allegations amounted to a claim that Venezuela had actively colluded with Matesi's labor union, and rejected the claim on the basis, *inter alia*, that no evidence of such collusion had been adduced (¶ 427).

In deciding this issue, the Tribunal accepted Claimants' submission that the obligation on Respondent is not limited to physical protection from third parties (¶ 439).

Nonetheless, the Tribunal questioned whether it was necessary to consider the allegations in detail, on the basis that Claimants were seeking declaratory relief only, for events before the date of the expropriation when in fact, the incidents upon which Claimants relied all fell much later in time, after Matesi's seizure (¶ 441). On that basis, the Tribunal concluded that Claimants' request for relief had become moot (¶ 442) and that, in any event, there was insufficient evidence before it to support Claimants' contention that Venezuela colluded with

the labor union or encouraged violence against Claimants' investment. On that basis, the Tribunal dismissed the Claimants' P&S claim (¶ 443).

3.2. *Nationalization and Expropriation Claim*

The Tribunal then went on to consider the second category of claims advanced by Claimants, those arising out of the nationalization of Matesi (¶ 450). The Tribunal first noted that there was no dispute over the fact that Matesi was nationalized by a process initiated by President Chavez in April 2008 when he announced that the country's steel industry would be put to the service of the country. The announcement was followed by a number of decrees which addressed the nationalization and expropriation in more detail (¶ 452).

Claimants contended that the nationalization amounted to an indirect expropriation of their investments, the effects of which were compounded by Respondent's attempt to reduce the compensation that ought to have been payable (¶ 453). One effect of Respondent's approach was that, having appropriated only the assets of Matesi, Venezuela avoided its debts, leaving Claimants to deal with those. Claimants further contended that Respondent's actions rendered Claimants' shares in Matesi worthless. Claimants also submitted that Matesi's consequent inability to manufacture and generate income amounted to a further indirect expropriation of the Off-Take Agreement and the Talta Loan (¶¶ 454, 456).

Venezuela argued, on the other hand, that its expropriation of Claimants' investment was lawful and consistent with its own procedures, which mandated either a negotiated transformation of Matesi into a State enterprise within 60 days or the initiation of the expropriation procedure under local law (¶ 458). Under the terms of the relevant decree, it was envisaged that (1) Matesi's activities would be transferred to the State by June 30, 2008, (2) a transition commission responsible for the transfer would be constituted within seven days of the publication of the decree and (3) a technical commission comprising State and company representatives would be set up and seek to agree to the compensation payable within 60 days (¶ 469).

In its analysis of the procedure leading to the nationalization of Matesi, the Tribunal found, *inter alia*, that Matesi was notified of the appointment of a transition commission only on May 25, 2009 (¶ 470), and that, although Matesi nominated its representatives to serve on the Technical Commission, no such commission was ever constituted (¶ 471). Some two months later, another decree was passed by which President Chavez ordered the forced acquisition of Matesi's assets pursuant to a similar process (¶ 472). However, before such process could be instigated, control of Matesi was seized in a manner described by Matesi at the time as a demonstration of unnecessary violence and intimidation (¶ 473).

The Tribunal went on to observe that Matesi's plant had been under State control since August 2009, operating as BriqVen, and that there has been no attempt formally to change the name of the company and no State corporation has been constituted to hold Matesi's assets (¶ 477). Almost two years later, in 2011, President Chavez by decree ordered the Attorney General to carry out the expropriation process such that title to Matesi's assets was finally transferred to the State but to date no compensation has been paid (¶¶ 478, 479).

The Tribunal concluded that the failure on Venezuela's part to pay compensation to Claimants was sufficient to render the expropriation unlawful as a matter of Venezuelan law (¶ 481). It went on to conclude that the taking over of Matesi's assets without the prior appraisal of those assets was contrary to Venezuelan law and that critical aspects of the

nationalization procedure were not followed (¶ 484). The Tribunal rejected any suggestion that Respondent's failure to follow its own procedures amounted to a mere administrative fault such that the Tribunal should decline jurisdiction on the basis that the investor failed to undertake a reasonable effort to obtain correction, per the Tribunal's findings in *Generation Ukraine* (¶ 491).⁸

In the circumstances, the Tribunal concluded that Venezuela failed to implement the procedures that it had put in place to effect the nationalization and, in so doing, failed to conform with the requirements of its own laws and to ensure that the provisions of its various decrees were consistent with one another, and capable of being given full and consistent effect (¶ 493). The Tribunal was satisfied that these breaches of local law were sufficient to constitute breaches of the relevant provisions of the BITs, which referenced the need to accord with "*the legislation in force*" and "*with legal procedures.*" Further, the Tribunal concluded that the Respondent's failure to pay compensation amounted to a breach of both BITs (¶ 497).

4. The Tribunal's Analysis on Quantum

The Tribunal noted that there was no dispute that the correct date of expropriation is April 30, 2008 (¶ 518).

Having considered the parties' positions with respect to the appropriate method of valuation, the Tribunal rejected as inappropriate in this instance the discounted cash-flow and market multiples approaches and favored as the best evidence of the value of Talta's interest in Matesi, the fair market value of Matesi's assets. Having examined the circumstances surrounding the sale of the Matesi plant, the Tribunal concluded that the agreed price of US\$ 60.2 million for Talta's interest in Matesi was an appropriate reflection of the fair market value of Talta's interest in the Matesi plant (¶ 449). To this sum, the Tribunal added US\$ 27.1 million as the value of the Talta Loan, resulting in a total loss of US\$ 87.3 million (¶ 570), which, actualized to the date of the Award, amounted to a total compensation amount of US\$ 172,801,213.70 million (¶ 594). The Tribunal also awarded post-Award interest at 9% compounded semi-annually, from the date of the Award to the date of payment in full of all sums due (¶ 595).

5. Costs

Save that Respondent was ordered to pay Claimants' 50% share of (1) the Tribunal's fees and expenses and (2) the costs attributable to ICSID, the Tribunal made no order as to costs (¶ 625(10)).

⁸ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003.