



School of International Arbitration

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International Arbitration Case Law

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

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**Award Name and Date:** Anglo American plc v Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/14/1) – Award (18 January 2019)

**Case Report by:** Giacomo Gasparotti\*\*, Editor Diego Luis Alonso Massa\*\*\*

**Summary:** Anglo American instituted arbitral proceedings against Venezuela under the Venezuela-UK BIT and ICSID Additional Facility Rules (2006) in order to obtain compensation for damages caused by Venezuela’s supposed unlawful conduct with respect to Anglo American’s investment in a local indirect subsidiary involved in the exploration and exploitation of an ore deposit under several mining concessions. Venezuela filed a counterclaim based on alleged violations of the obligations of Anglo American’s local subsidiary as a concessionaire. Both parties challenged the Tribunal’s jurisdiction over the respective claims. The Tribunal affirmed its jurisdiction over Anglo American’s claims but dismissed such at the merits stage and denied its jurisdiction over Venezuela’s counterclaim.

**Main Issues:** definition of “investment” (in particular, whether indirect shareholding interests and indirect stakes in the assets of a subsidiary company qualify as a protected investment); arbitrability of disputes arising out of mining titles setting out forum selection clauses; notion of “reversionary” and “non-reversionary” assets and relevance thereof for the purposes of establishing whether there has been an expropriation; relation between fair and equitable treatment standard and minimum standard under customary international law; circumstances under which the conduct of the host-State’s administrative authorities can give rise to a breach of the fair and equitable treatment standard; scope of the full protection and security obligation; burden and standard of proof with respect to alleged breaches of the obligation of no less favourable treatment.

**Tribunal:** Mr. Yves Derain (President), Dr. Guido Santiago Tawil (Arbitrator) and Dr. Raúl E. Vinuesa (Arbitrator)

**Claimant's Counsel:** Mr. Nigel Blackaby, Ms. Sylvia Noury, Mr. Jean-Paul Dechamps, Mr. Michael Kotrly, Ms. Katrina Woolcock and Ms. Annie Pan (Freshfields Bruckhaus Deringer LLP); Mr. Eugenio Hernández Bretón (Baker & McKenzie); Mr. Ben Keisler and Mr. Michael Schottler (Anglo American plc); Mr. Alfonso Almenara (Minera Loma de Níquel CA).

**Respondent's Counsel:** Dr. Reinaldo Enrique Muñoz Pedroza (Attorney General of the Republic); Dr. Henry Rodríguez Facchinetti (Head of the Litigation Department, Office of the Attorney General of the Republic); Ms. Mélida Hodgson, Mr. Kenneth Figueroa, Ms. Tafadzwa Pasipanodya, Mr. Diego Cadena, Ms. Analía González, Ms. Erin Argueta, Ms.

Patricia Cruz Trabanino, Ms. Anna Toubiana, Ms. Manuela de la Helguera, Ms. Carol Kim, Ms. Francheska Loza and Ms. Angélica Villagrán (Foley Hoag LLP<sup>1</sup>).

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## Digest:

### 1. Relevant Facts

The claimant in this arbitration is Anglo American plc (“**Anglo American**” or the “**Claimant**”), a company incorporated under the laws of the United Kingdom (¶ 2). The respondent is the Bolivarian Republic of Venezuela (“**Venezuela**” or the “**Respondent**”).

The underlying dispute concerns the Claimant’s alleged investment in Minera Loma de Níquel C.A. (“**MLDN**”), a Venezuelan company involved in the exploration and exploitation of the Loma de Níquel ore deposit, the processing of the ore, and the marketing of the resulting ferronickel (¶ 2). Specifically, the Claimant held a 91.37% indirect shareholding in MLDN (¶¶ 2, 87), which, in turn, held several mining concessions in Venezuela. Following the enactment of a new mining law in September 1999 (the “**1999 Mining Law**”), replacing the previous mining law of 1945 (the “**1945 Mining Law**”), some concession agreements were revisited (¶¶ 95-96). Under the mining titles, upon the expiry or termination of the concessions, certain assets acquired by MLDN (so-called “reversionary” assets) would be transferred free of charge to the State (¶ 98). In December 2007 and January 2008, the Ministry of Mines declared the *caducidad* of 13 of the 16 mining concessions (¶ 101). The three remaining concessions (the “**Remaining Concessions**”) expired on 10 November 2012 (¶ 105). MLDN’s request for an extension of the concessions was rejected (¶ 104). Following the expiry of the concessions, Venezuela took several MLDN’s assets, including a plant for the processing of the ore and some raw material, spare parts and consumables held in inventory (respectively, the “**Processing Assets**” and the “**Inventory**”) (¶ 108).

Against this background, the Claimant commenced proceedings against the Respondent under the Agreement between the Government of the Republic of Venezuela and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments dated 15 March 1995 and entered into force on 1 August 1996 (the “**Treaty**” or

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<sup>1</sup> The representation of the Respondent by Foley Hoag LLP terminated on 19 March 2018.

the "Venezuela-UK BIT") and the International Centre for Settlement of Investment Disputes ("ICSID") Additional Facility Rules (2006). The Claimant's final requests (as amended and modified in the course of the proceedings) concern two measures of the Respondent. The first measure relates to the seizure of some MLDN's assets considered non-reversionary by the Claimant (¶ 107). The second measure relates to the denial of some applications for VAT credit certificates (the "VAT CERTS") to which the Claimant, as an exporter, considered to be entitled on its purchases of Venezuelan goods and services (¶ 111). According to the Claimant, the first measure amounted to a violation of Article 5 of the Treaty (expropriation) and two violations of Article 2(2) of the Treaty (violation of the standard of fair and equitable treatment (or "FET") and of the obligation of full protection and security (or "FPS")) (¶ 110). The second measure allegedly amounted to two breaches of Article 2(2) of the Treaty (again, violation of the FET standard and of the FPS obligation) and to a breach of Article 3 of the Treaty (obligation of no less favourable treatment) (¶ 112). The Claimant sought, *inter alia*, compensation in the amount of US\$235.4 million (¶ 116).

The Respondent filed a counterclaim based on the alleged breach by MLDN of its obligations as concessionaire with respect to exploitation taxes and special advantages (¶ 113). Accordingly, the Respondent sought, *inter alia*, compensation in the amount of US\$123,583,598.84 (¶ 140).

## 2. Procedural History

On 13 March 2014, the Claimant filed a request for arbitration with the ICSID (¶ 8). On 9 June 2014, the Claimant appointed Dr. Guido Santiago Tawil as Arbitrator (¶ 11). On 28 July 2014, the Respondent appointed Dr. Raúl E. Vinuesa as Arbitrator (¶ 12). On 30 September 2014, the parties notified ICSID of their agreement to appoint Mr. Yves Derains as President of the Tribunal (¶ 13). On 26 November 2014, the Tribunal's first session was held (¶ 19). On 2 December 2014, the Tribunal sent the parties the final version of Procedural Order No. 1, setting out that the place of the arbitration would be Paris and the languages of the proceedings and the award would be English and Spanish (¶ 20). On 25 April 2015, the Claimant submitted its Memorial on the Merits, subsequently amended on 28 April 2015 (¶¶ 22-3). On 15 May 2015, the Respondent submitted a Request for Bifurcation (¶ 25). On 29 May 2015, the Claimant submitted its Response to the Respondent's Request for Bifurcation (¶ 27). On 19 June 2015, the Tribunal dismissed the Respondent's Request for Bifurcation (¶ 28). On 13 November 2015, the Respondent submitted a Memorial on Jurisdiction and Counter-Memorial on the Merits with a counterclaim (¶ 23). On 12 February 2016, the Tribunal issued Procedural Order No. 3 with its decisions regarding the production of documents requested in the Parties' respective *Redfern Schedules* (¶ 37). On 14 May 2016, one day after the agreed-upon deadline, the Claimant filed its Reply on the Merits and Response to the Respondent's Counterclaim (¶ 49). On 29 August 2016, the Respondent submitted its Rejoinder on the Merits and Response to the Counterclaim (¶ 53). On 26 September 2016, the Claimant submitted a rejoinder on the Counterclaim and a pleading in which it withdrew part of its claims. On 11 November 2016, the Respondent submitted a response to such pleading (¶ 68). On 9, 12, 13, 14, 15 and 16 December 2016, a hearing on jurisdiction and on the merits was held (¶ 73). On 31 March 2017, the Parties submitted their respective Post-Hearing Briefs (¶ 78). On 28 April 2017, the Parties submitted their respective Submissions on Costs (¶ 80). On 1 August 2018, the Tribunal declared the proceedings closed (¶ 86).

### 3. Positions of the Parties

#### 3.1 Jurisdiction

##### 3.1.1 Respondent's position

The Respondent challenged the Tribunal's jurisdiction to hear the Claimant's claims on two grounds.

First, it submitted that Anglo American had not made a protected investment in Venezuela. In this respect, it noted that the Claimant's alleged investment consisted in two interests: (i) an indirect shareholding interest in MLDN, and (ii) an indirect stake in MLDN's assets (¶ 126). It argued that neither of such interests constituted an investment for the purposes of the Treaty. With respect to the indirect shareholding in MLDN, the Respondent observed that, in its definition of "investment", the Treaty does not expressly mention indirect shareholding interests. It went on to show that, in the silence of the Treaty, the Treaty should be interpreted in the sense that indirect shareholding interests are not covered (¶¶ 128-133). It also stressed the fact that there were seven levels of corporate ownership between MLDN and Anglo American and that the company-chain comprised a Dutch and two Luxemburg companies. It followed that the Claimant's claim included claims of entities that were not protected under the Treaty (¶¶ 133-135). Hence, according to the Respondent, extending the Treaty protection to the Claimant's indirect shareholding would have been contrary to the bilateral nature of the Treaty (¶ 133) and the principle of legal personality (¶ 136). With respect to the indirect stake in MLDN's assets, the Respondent mainly relied on the argument that, according to international tribunals case law, "[...] a shareholder cannot 'ask for compensation for interference with [the] assets' belonging to the company in which it has a stake" (¶ 138). It added that Article 5(2) of the Treaty (granting persons or nationals of either contracting State compensation for expropriation of the assets of companies incorporated in the other contracting State) does not apply to indirect shareholding interests (¶ 142).

Second, the Respondent submitted that, in any event, a reversionary claim was to be decided by the Venezuelan courts. In this respect, it observed that the forum selection clauses contained in the mining concessions and the 1945 Mining Law, providing for jurisdiction of the Venezuelan courts, prevented the Claimant from submitting the reversion claim to ICSID arbitration (¶ 144). The Respondent considered that such clauses were binding on the Claimant even if the latter, unlike MLDN, was not a party to the mining concessions (¶ 146). It went on to argue that, contrary to the Claimant's objections, the Claimant's reversion claim was contractual in nature, and not based on the Treaty. Thus, it fell within the scope of the forum selection clauses (¶¶ 148-151).

##### 3.1.2 Claimant's position

The Claimant contended that the Tribunal had jurisdiction since, in its view, first, the Treaty protects both direct and indirect investments and, second, the forum selection clause in the mining concessions did not deprive the Tribunal of jurisdiction.

With respect to the first aspect, according to the Claimant, the wording of the Treaty definition of "investment", which uses the expression "every kind of asset", should be interpreted in the sense that indirect shareholding interests are covered (¶¶ 157-159). In light of the foregoing, the indirect shareholding in MLDN did constitute an investment protected under the Treaty (¶¶

168-172). In addition, the Claimant presented arguments to show that also the indirect participation of Anglo American in MLDN's assets constituted a protected investment under the Treaty (¶¶ 173-80).

With respect to the second aspect (the forum selection clauses), the Claimant submitted that Anglo American was not a party to the MLDN concessions. Thus, Anglo American was not bound by the dispute resolution clauses set out therein (¶ 182). It added that Anglo American's claims were based on its own rights under the Treaty and were not contract-based claims (*ibid.*). Furthermore, the Claimant observed that for the tribunal to exercise jurisdiction it sufficed that the Claimants' invocation of the substantive protections of the Treaty was not *prima facie* implausible (¶ 185).

### *3.2 The merits of the Claimant's claims*

#### *3.2.1 Claims based on the alleged expropriation of the assets that the Claimant considers to be non-reversionary*

##### *3.2.1.1 Claimant's position*

The Claimant put forward that Venezuela had seized from MLDN the Processing Assets and the Inventory, which the Claimant considered non-reversionary assets. It followed that Venezuela had no ownership rights over the same and the seizure thereof without compensation, due process, or for a public purpose, amounted to an unlawful expropriation of Anglo American's investment in the shares and assets of MLDN, in breach of Article 5 of the Treaty (¶¶ 223-224).

In this respect, the Claimant presented extensive arguments to show that the Processing Assets and the Inventory were non-reversionary based on the interpretation of the 1945 and 1999 Mining Laws and of MLDN's mining concessions (¶¶ 226-260). Such arguments move from the idea that the reversion principle is aimed at ensuring that certain assets used for activities that are reserved to the State, and which can therefore only be performed by private parties under a concession, revert to the State upon the expiry or termination of the concession. According to the Claimant, pursuant to the Mining Law and the Remaining Concessions, only exploration and exploitation were reserved activities, whereas other "ancillary" activities such as processing were not. It followed that the Processing Assets were to be considered non-reversionary. Alternatively, the Claimant submitted that, even if the Processing Assets were to be considered reversionary assets, according to a Venezuelan 1999 investment law (i.e. the Law on Promotion of Private Investment under the Concession System of 17 September 1999) (the "**Investment Law**"), the Respondent would have still been obliged to pay compensation for the non-amortized value thereof (¶¶ 261-8).

Furthermore, the Claimant presented arguments relating to the existence of an expropriation (¶¶ 269-278). In this respect, it submitted, in essence, that under the Treaty and international law, the unlawful taking by Venezuela of MLDS's non-reversionary assets without paying compensation could be characterized both as an indirect expropriation of Anglo American's indirect shareholding in MLDN (to which those assets conferred significant value) and a direct expropriation of Anglo American's interest in MLDN's assets (¶ 271).

Finally, the Claimant presented arguments as to the illegal nature of the said expropriation (¶¶ 279-87). Specifically, it pointed out: that no compensation had been paid by Venezuela; that

Anglo American had not received due process; and that the assets seizure had not occurred for a public purpose.

### *3.2.2 Respondent's position*

The Respondent put forward several arguments relating to the ownership of MLDN's assets having been allegedly expropriated (¶¶ 291-303). The Respondent's main argument is that "the reversion was contractually agreed without any compensation upon expiration of the concession, with the assets used for the purpose of the concession reverting to the State" (¶ 291). Specifically, according to the Respondent, upon the expiration of the concessions, such assets had ceased to be owned by MLDN. It followed that no expropriation had occurred (*ibid.*). In this respect, the Respondent rejected the distinction relied on by the Claimant between assets subject to "mining activities" and assets involved in "related or ancillary activities" (including processing), which, according to the Claimant, were not reversionary (¶ 295). The Respondent also rejected the Claimant's subsidiary claim that Venezuela had to pay compensation for the reversionary assets having not been fully amortized (¶¶ 304-13).

Furthermore, the Respondent contested the alleged existence of an expropriation (¶¶ 314-19). In this respect, it again relied on the argument that Anglo American held no property rights over the Processing Assets at the expiry of the concessions due to the operativity of the reversion principle (¶¶ 314-315).

Finally, the Respondent rejected the Claimant's arguments related to the unlawfulness of the alleged expropriation (¶¶ 320-329). It contended, in short: that there had been no violation of due process; that reversion had a public purpose; and that the mere lack of compensation does not make an expropriation unlawful.

### *3.2.2 Claims regarding the alleged breach of the standard of fair and equitable treatment*

#### *3.2.2.1 Claimant's position*

According to the Claimant, Venezuela had committed two violations of the FET standard under the Treaty: the first violation resulted from the seizure of the non-reversionary assets, the second violation from Venezuela's denial to issue the VAT CERTS requested by MLDN.

The Tribunal felt no need to summarise the Claimant's arguments in relation to the first alleged violation, since it rejected *de plano* the Claimant's claim based on such alleged violation (as explained *infra* at ¶ 4.2.1).

With respect to the second alleged violation of the FET standard, preliminarily, the Claimant did not share the Respondent's view that the FET standard required by the Treaty is limited to the minimum standard under customary international law (¶ 406). It further stressed that the four core elements of the Treaty FET standard are "legitimate expectations, consistency and stability, transparency and due process, and non-arbitrariness" (¶ 407).

The Claimant went on to show that Venezuela had breached such elements in the case at stake. In this respect, the Claimant argued that, as an exporter, MLDN was entitled to reimbursement for VAT paid on its purchase of Venezuelan goods and services through the issuance of VAT CERTS (¶ 408). Yet, whereas – according to the Claimant – at first, and for a period of around 10 years, Venezuela had granted MLDN the requested VAT CERTS, subsequently, Venezuela

ceased to do so and even to respond to the respective requests by MLDN (¶ 409). Venezuela (and, specifically, the National Integrated Service of Customs and Tax Administration (“SENIAT”)) had justified such conduct by maintaining that, in order to successfully apply for VAT CERTS, MLDN first had to “[...] deduct from its monthly VAT returns the VAT credits being requested (rather than those granted) [...]”, as prescribed in an internal manual for taxpayers (¶ 409). According to the Claimant, such requirement was contrary to the applicable VAT law and inconsistent with SENIAT’s previous practice. It followed that Venezuela’s conduct was arbitrary and in breach of the Claimant’s legitimate expectations; of Venezuela’s obligation to accord a consistent, stable, and predictable legal framework; and of the principles of transparency and due process (¶¶ 410-4). The Claimant added that the Respondent’s conduct was also discriminatory (*ibid.*).

### *3.2.2.2 Respondent’s position*

The Respondent defended its understanding of the FET standard as the minimum standard under customary international law, emphasizing that the wording of Treaty refers to “treatment in accordance with international law” (¶ 415). Furthermore, it submitted that, even assuming the Claimant’s interpretation of the Treaty FET clause to be correct, there had been no frustration of the Claimant’s legitimate expectations, as the State had not given the investor any specific guarantee and had made no promise to induce the expectation (¶ 417).

In another vein, the Respondent submitted that the reason why the VAT CERTS had not been issued was MLDN’s repeated refusal to comply with the requirements indicated by the Venezuelan tax authorities, notwithstanding MLDN being repeatedly told to do so (¶ 418). In the Respondent’s view, such requirement (and the manual where it was set out) did not conflict with the Venezuelan VAT law (¶¶ 422-423). Nor was it an arbitrary change in the practice of SENIAT, but, rather, a faithful implementation of the law (¶ 426). Finally, the Respondent pointed out that, in 2015, MLDN had filed an administrative tax appeal against SENIAT (¶ 424). In the Respondent’s view, “a difference in interpretation of domestic law or of administrative practice could only have consequences for the Treaty if Venezuela had denied access to national courts”, which was not the case (¶ 425).

### *3.2.3 Claims for alleged violation of the full protection and security standard*

#### *3.2.3.1 Claimant’s position*

According to the Claimant, the same measures that gave rise to a breach of the FET standard, also amounted to a violation of the obligation to ensure FPS set out in the Treaty. In the Claimant’s view, the scope of such obligation is not limited to physical security, but also comprises a duty to afford legal security to investments (¶¶ 475-6).

#### *3.2.3.2 Respondent’s position*

The Respondent contended that the Claimant had not met the burden of proving that a violation of the FPS standard had occurred (¶ 477). It also submitted that, in any event, the standard should be interpreted pursuant to customary international law, in the sense that only physical protection is to be allowed to investments (¶ 478).

### 3.2.4 *The alleged violation of the national treatment standard*

#### 3.2.4.1 *Claimant's position*

The Claimant submitted that the Respondent's refusal to issue the VAT CERTS to which MLDN was entitled constituted a breach of the Respondent's obligation to accord Anglo American's investment no less favourable treatment than that accorded to its own investors or to investors from another State (¶ 487). In support of such claim, the Claimant alleged that Venezuela had continued to issue VAT CERTS to exporters other than MLDN (¶ 488).

#### 3.2.4.2 *Respondent's position*

The Respondent put forward, in essence, that Anglo American had failed to show that a violation of the national treatment standard under the Treaty had actually occurred (¶¶ 489-494). In this respect, it contended, *inter alia*, that other companies that had received CERTS, unlike MLDN, had complied with the requirements set out by SENIAT (¶ 491).

### 3.3 *Respondent's counterclaim*

Since the Tribunal dismissed the Respondent's counterclaim on jurisdictional grounds, only the parties' submissions on jurisdiction are summarised in the award.

#### 3.1.1 *Jurisdiction*

##### 3.3.1 *Claimant's position*

The Claimant put forward two objections on jurisdiction. First, it alleged that there was no consent to arbitrate counterclaims under Article 8 of the Treaty (¶¶ 508-511). Second, it argued that Venezuela's counterclaim lacked a close connection with Anglo American's claims for breach of the Treaty (¶¶ 514-17).

##### 3.3.2 *Respondent's position*

The Respondent argued, *inter alia*, that, by accepting the arbitration offer under the Additional Facility rules included in the Treaty, the Claimant had also agreed to the right of counterclaim provided for in Article 47(1) of the said rules (¶ 518). It also contended that the facts giving rise to the counterclaim (i.e. the Claimant's refusal to pay taxes and comply with the special advantages set out in the concessions) were closely related to the Claimant's claims (¶ 521).

### 3.4 *Costs*

#### *Claimant's position*

The Claimant asked that the Respondent be ordered to pay the costs of the proceedings in their entirety, maintaining, *inter alia*, that the Respondent had put forward "meritless jurisdictional objections and a frivolous Counterclaim" and that the Respondent had introduced new issues in an untimely manner and had misrepresented the facts (¶¶ 533-6).

#### *Respondent's position*



The Respondent, in turn, asked that the Claimant be ordered to pay the costs of the proceedings. It put forward, *inter alia*, that the conduct of the Claimant had caused the arbitration to be longer and more complicated and, therefore, expensive than necessary for several reasons (including the fact that the Claimant had withdrawn and modified several claims) (¶¶ 543-549).

#### **4. Tribunal's analysis**

##### *4.1 Jurisdiction*

The Tribunal analysed in turn the first and the second objection of the Respondent on jurisdiction.

With respect to the Respondent's first objection, in the first place, the Tribunal dealt with the interpretation of the Treaty definition of "investment". In this respect, it observed that Article 1(a) of the Treaty uses the inclusive expression "every kind of asset" and sets out a non-exhaustive list of assets that qualify as an "investment" (¶ 191). Accordingly, the concept of "investment" should be given a non-restrictive interpretation to include indirect investments (¶¶ 191-193). Furthermore, the Tribunal considered that the fact that, unlike other BITs entered into by the UK or Venezuela, the Treaty makes no express reference to indirect investments does not mean that the States party to the Treaty wanted to exclude indirect investments from its scope (¶¶ 196-197). In another vein, the Tribunal rejected the Respondent's argument that the Treaty, by including protection for indirect investments, violated the reciprocal nature of the agreement (¶¶ 198-201). In fact, Anglo American had submitted its claims "in its capacity as an effective investor and ultimate holder of the investment" (¶ 202). Finally, the Tribunal disposed of the remaining arguments presented by the Respondent in respect of the interpretation of the term "investment" under the Treaty, namely that the interpretation of the Treaty advocated by the Claimant violated the objective of prosperity in both States and that it was contrary to the principle of personality, as formulated in the International Court of Justice *Barcelona Traction* case (¶¶ 202-203).

Thereafter, the Tribunal assessed whether, in light of the above, Anglo American's indirect shareholding in MLDN might be considered as an investment protected by the Treaty. It found that such question should be given a positive answer, since not only does the Treaty protect "shares in and stock and debentures of a company", but also "any other form of participation in a company" (¶ 205).

Finally, the Tribunal considered whether Anglo American's indirect shareholding in the assets of MLDN constituted an investment protected under the Treaty. Again, the Tribunal found that the answer was "yes". In the Tribunal's reasoning, Article 5(2) of the Treaty "[...] reflects that the Contracting States contemplated the possibility of a shareholder of a local company being able to claim for the assets of the local company in which it has a shareholding" (¶ 210), which shareholding might as well be indirect (¶ 211).

For the reasons underlined above, the Tribunal dismissed the first Respondent's objection to the Tribunal's jurisdiction.

With respect to the Respondent's second objection on jurisdiction (relating to the forum selection clauses set out in MLDN mining titles and the 1945 Mining Law), the Tribunal did not share the Respondent's view that said clauses excluded the Tribunal's jurisdiction over the Claimant's reversion claims. In fact, the Tribunal considered that such claims were based on

the Treaty. In the Tribunal's view, though it was true that the Claimant's claims involved interpreting some domestic laws of Venezuela, that did not make such claims contractual in nature (¶¶ 218-9).

Accordingly, the Tribunal dismissed also the Respondent's second objection to the Tribunal's jurisdiction.

#### *4.2 The merits of the Claimant's claims*

##### *4.2.1 Claims based on the alleged expropriation of the assets that the Claimant considered to be non-reversionary*

With respect to the Claimant's main and secondary claim, based on the alleged expropriation of MLDN's assets, preliminarily, the Tribunal determined whether the Processing Assets and the Inventory were reversionary assets or not. For if, upon the expiry of the concessions, the ownership of such assets had legitimately passed to the State, there would have been no case for expropriation. In doing so, the Tribunal carried out an extensive analysis of: (a) the content of the mining titles and (b) their effects on the Claimant's property right at the expiry of the concessions in the light of the Venezuelan applicable legislation.

With regard to the mining titles, the Tribunal noted that the Remaining Concessions set out a "special advantages clause", namely clause 18, providing for, in essence, that any assets "used for the purpose of the concession and that form[ed] an integral part thereof" would become the full property of the State without any compensation upon termination of the concessions (¶¶ 338-339). In order to establish whether the Processing Assets and the Inventory fell within the scope of such provision, the Tribunal went on to analyse the law in force at the time the concessions were issued, i.e. the 1945 Mining Law, and found that the answer should be positive (¶¶ 344-347). Specifically, it found that not only exploration and extraction activities, but also processing activities, were part of the purpose of the concessions (¶¶ 348-353). It also found that the Processing Assets and the Inventory formed an integral part of the concessions for the purposes of Clause 18 (¶¶ 354-360). Thus, the Tribunal considered that "the Parties agreed in the Mining Titles, interpreted in light of the 1945 Mining Law, that upon the expiry of the concessions, ownership of the Processing Assets and the Inventory would pass to the State without compensation" (¶ 361).

In addition to the above, the Tribunal examined also the 1999 Mining Law and the Investment Law (which entered into force after the issuance of the mining titles) in order to assess if the application of such laws could lead to a different conclusion (¶¶ 363-398).

As regards the 1999 Mining Law, the Tribunal found that the entry into force thereof did not impact on the effects of Clause 18 of the mining titles (¶ 369). Interestingly, the Tribunal added, *inter alia*, that, contrary to the Claimant's position, the logic underlying the concept of reversion is not the fact that some assets have been used for an activity reserved to the State, and shall therefore revert to the State at the end of the contractual relationship. Rather, it is the "compensation for the economic benefits obtained by the concessionaire" and "continuity in the provision of the service [...]" (¶ 377). The Tribunal also denied the relevance of the distinction relied upon by the Claimant between primary activity and related activity as a criterion for deciding whether an asset is reversionary or not (¶ 378-386).

The Tribunal went on to examine the Investment Law, which is relevant to the Claimant's secondary claim. In doing so, it recognised that, in principle, under the Investment Law "if there is an unamortized portion of a reversionary asset, the ownership of said unamortized part of the reversionary asset remains the property of the concessionaire [...]" (¶ 398). Yet, it considered that the Investment Law (alike the 1999 Mining Law) reserved the application and validity of contracts entered into prior to the entry into force of said law (¶ 399). Hence, the abovementioned Clause 18 of the mining titles, providing that reversion would take place "without any compensation", took priority also over the provisions of the Investment Law (¶ 404).

In light of the above, the Tribunal reached the conclusion that "[...] as a result of the contractual agreement contained in Clause 18 of the Mining Titles, the ownership of the Processing Assets and the Inventory passed to the State without the Claimant having the right to be compensated" (¶ 401).

Consequently, it dismissed both the Claimant's main claim and its secondary claim.

#### *4.2.2 Claims regarding the alleged breach of the standard of fair and equitable treatment*

With respect to the Claimant's first alleged violation of the FET standard (*see supra* ¶ 3.2.2.1), which is related to the Claimant's expropriation claims, the Tribunal considered that – in light of its previous findings – there could be no breach of the FET standard as well (¶ 405). Consequently, the Tribunal dismissed the claim of violation of the FET standard in relation to the seizure of MLDN's assets (*ibid.*).

In respect of the Claimant's second alleged violation of the FET standard, the Tribunal first reached a finding on the level of protection granted by the FET clause set out in the Treaty. In this respect, it parted from the Respondent's view and considered that the formula "in accordance with international law" is not synonymous with the "minimum standard of treatment under international law" (¶ 439). It also pointed out that the debate on the relation between FET and minimum standard of treatment is "somewhat sterile", given that "the minimum standard of treatment under customary international law has evolved since the definition of the standard in the 1926 *Neer* case" (¶ 442). Accordingly, in the Tribunal's view, the FET standard granted by the Treaty, encompasses respect for legitimate expectations, transparency, reasonableness, and due process, as well as the absence of discrimination and arbitrariness (¶ 443).

Second, the Tribunal assessed the Respondent's alleged violation of the FET standard, namely the failure to issue the VAT CERTS and to respond to the Claimant's requests. In this respect, in the first place, the Tribunal analysed the applicable VAT law and found that the requirement relied on by the Respondent – i.e. that exporters deduct from their VAT Return the refund or reimbursement amounts requested as recovery of export tax credits – is not a requirement contrary to the law (¶ 456). Hence, Venezuela's denial to issue VAT CERTS was not unjustified or unreasonable (¶ 457).

However, in the Tribunal's view, such conclusion was not sufficient to dispose of the Claimant's claim. Accordingly, the Tribunal went on to ascertain whether the conduct of Venezuela, nonetheless, amounted to a violation of the FET standard. In doing so, the Tribunal observed, *inter alia*, that, with the introduction of the manual which Venezuela required MLDN to follow, there had been a change in the Venezuela's administrative practice (¶ 460). The

Tribunal recognised that Venezuela had to inform the Claimant of such change and of the reason for the non-issuance of the VAT CERTS (¶ 462). However, the Tribunal further considered, first, that “[...] once the Claimant was informed of the deduction requirement and was offered the opportunity to regularize the status of its claims in respect of previous tax periods it chose not to do so” (¶ 463). The Tribunal added that – though it is true that, to be able to invoke a violation of the FET standard, an investor has no obligation to exhaust local remedies – nonetheless the investor has to “make sure that the attitude of an isolated official is representative of the State’s position” (¶ 464). That said, the Tribunal noted that, in the case at stake, the Claimant had appealed SENIAT’s silence only in February 2015, and had not challenged the application of the disputed requirement (¶ 464). In light of the above, the Tribunal considered that the Claimant could not allege a violation by the Respondent of its obligation of transparency and predictability of its legal framework, nor could the Claimant allege a violation of due process (¶¶ 465-466). In addition, the Tribunal, relying on the *Crystallex* and *Parkerings* cases, considered that there had been no violation of the Claimant’s legitimate expectations (¶¶ 467-468). In fact, the Claimant had failed to identify a specific representation of promise made by the Respondent which formed the origin of its expectation (*ibid.*).

Consequently, the Tribunal rejected the Claimant’s claim based on the alleged breach of the FET standard.

#### *4.2.3 Claims for alleged violation of the full protection and security standard*

According to the Claimant, the seizure of the reversionary assets and the non-issuance of VAT CERTS also gave rise to two violations of the Respondent’s obligation to ensure FPS set out in the Treaty.

The Tribunal dismissed the first Claimant’s claim for the same reasons set out above in ¶ 4.2.2, namely as the seizure of MLDN’s assets had occurred pursuant to a contractual obligation with which the Claimant had to comply.

As regards the Claimant’s claim pertaining to the non-issuance of the VAT CERTS, the Tribunal acknowledged that the FPS obligation under the Treaty is not limited to physical protection but also comprises legal protection (¶ 482).

Yet, the Tribunal observed that, in support of the alleged violation of the FPS obligation, the Claimant asserted (not only the same facts, but also) the same reasons presented in support of the alleged violation of the FET standard. Consequently, having found that the measures relating to the VAT CERTS did not constitute “a lack of transparency, due process, stability, and legal predictability”, the Tribunal found that there had been no violation by the Respondent of the obligation to ensure FPS as well (¶¶ 483-5).

#### *4.2.4 The alleged violation of the national treatment standard*

The Tribunal started from the premise that the burden of proving that Venezuela issued VAT CERTS to exporters that did not meet the deduction requirement rested with the Claimant (¶ 497). It went on to observe that the evidence submitted by the Respondent proved that the Respondent treated exporting taxpayers in a similar situation equally and taxpayers in a different situation differently (¶ 500). Conversely, in the Tribunal’s view, the Claimant had not

proved that Venezuela had issued VAT CERTS to taxpayers not complying with the deduction requirement (¶ 501).

Accordingly, the Tribunal dismissed also the last Claimant's claim, based on the alleged violation of the national treatment standard.

#### *4.3 Respondent's counterclaim*

The Tribunal interpreted Article 47(1) of the Arbitration Additional Facility Rules in the sense that a counterclaim only can be raised if: (i) the parties have not expressly excluded it and (ii) the counterclaim falls within the scope of the parties' arbitration agreement (¶ 525). It went on to assess such conditions in the case at stake and found that the wording of Article 8(3) of the Treaty excluded claims from the host State and limited jurisdiction to disputes related to obligations of that State (¶ 527).

Accordingly, the Tribunal found that it had no jurisdiction over the Respondent's counterclaim. It added that this held true also considering that such counterclaim, contrary to the Claimant's claims, was only based on the alleged violation of the Venezuelan law, not of the Treaty (¶ 529).

#### *4.4 Costs*

In deciding on the allocation of costs, the Tribunal weighed in several factors: the fact that all the Respondent's objections on jurisdiction, and the Claimant's claims, had been dismissed, whereas the Claimant's objections on jurisdiction had been admitted (¶ 557); the fact that the Claimant had withdrawn some of its claims; and the fact that the Respondent had remained silent at ICSID's requests to contribute to the financing of the last phase of the proceedings (¶¶ 557-558).

In light of the foregoing, the Tribunal decided that each party had to bear its own costs and expenses (¶ 560).

### **5. Dissenting Opinion of Prof. Dr. Guido Santiago Tawil**

In his dissenting opinion, Arbitrator Tawil agreed with the findings of the majority with respect to the Tribunal's jurisdiction over the parties' respective claims (¶ 1). Yet, he disagreed over the findings of Arbitrators Derains and Vinuesa on the merits of the Claimant's claims for expropriation and breach of the FET standard under Article 2(2) of the Treaty. Specifically, in the opinion of Professor Tawil, MLDN mining titles and the 1945 Mining Law should be interpreted in the sense that processing did not fall within the scope of the concession and, therefore, the Processing Assets and the Inventory were non-reversionary (¶¶ 1-9). Second, according to Professor Tawil, the conduct of SENIAT was not consistent, free from ambiguity and transparent, and thus it was contrary to the FET standard (¶¶ 10-14). Professor Tawil added, *inter alia*, that the fact that the Claimant had not sought redress against SENIAT's silence until 2015 did not affect such conclusion (¶ 17).