



School of International Arbitration

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

*Academic Directors: Ignacio Torterola
Loukas Mistelis**

VANNESSA VENTURES LTD.

V.

**THE BOLIVARIAN REPUBLIC OF VENEZUELA
(ICSID CASE NO ARB(AF)/04/6)**

AWARD

Case Report by Georgios Soumalevris**
Edited by Natasha Dupont ***

In its Award of January 16, 2013, the Tribunal dismissed all claims of a Canadian company concerning an investment in a mining project in Venezuela, under a bilateral investment treaty between Canada and Venezuela.

Tribunal: Professor Vaughan Lowe QC, Hon. Charles N. Brower and Professor Brigitte Stern.

Claimant's counsel: Mr. John B. Laskin and Mr. John A. Terry of Torys LLP.

Defendant's Counsel: Dr. Cilia Flores from Procuradora General de la República; and Mr. Ronald E.M. Goodman, Ms. Janis H. Brennan, Mr. Alberto Wray, and Ms. Mélida Hodgson of Foley Hoag LLP.

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

** Georgios Soumalevris is an associate with EUTRADEDEFENCE. He advises multinational clients and States on international trade and policy, including anti-dumping and anti-subsidy proceedings and foreign investment law.

*** Natasha Dupont is a Senior Associate with The Brattle Group focusing on the estimation of damages and other economic questions arising in international arbitrations. She was previously a litigation attorney.

INDEX OF THE MATTERS DISCUSSED

1. Facts of the Case	2
2. Legal Issues Discussed in the Award.....	3
(a) Jurisdiction.....	3
(i) “Substantial” Investment	3
(ii) Investment “in accordance with host State’s law”	3
(iii) Compatibility of the Transfer with Venezuelan Contract Law and Law 2095	3
(iv) Compatibility of the Transfer with the Law on Public Procurement and Administrative Contracts.....	3
(v) Compatibility with Good Faith and Public Policy	4
(b) Merits	4
(i) Expropriation	4
(ii) Fair and Equitable Treatment and Full Protection and Security	4
3. Decision	4

Digest

1. Facts of the Case

In early 1990s, a Canadian mining company, Placer Dome Inc. (*PDI*), was awarded a contract to explore and exploit gold deposits at Las Cristinas, located in the Guayana region of Venezuela. PDI structured its investment through a local subsidiary, PDV, which together with CVG, a Venezuelan Government Agency, owned the shares of the company, MINCA, which was to undertake all exploratory and mining activities in Las Cristinas.

The Shareholder's Agreement (and a subsequent 1997 amendment to it) between PDI and CVG on MINCA's incorporation, as well as the Work Contract between CVG and MINCA on the exploitation of the mine, prohibited the assignment of rights without the prior consent of the other party. Further, MINCA's by-laws provided that the MINCA shareholders would have a preferential right to purchase the shares that other shareholders wished to sell for a consideration.

Following deteriorating gold market conditions around 1999, PDI, which controlled MINCA, decided to suspend the project despite CVG's disagreement. CVG had the right to rescind the Work Contract after a year from such a suspension, but CVG agreed to an extension of the one-year period, to July 2001, to give PDI and it time to identify an investor to take PDI's place in developing the Las Cristinas mine. Deteriorating market conditions made it difficult for PDI to find investors to take over the project, however, PDI then unilaterally went forward with selling its shares in PDV, and thereby its ownership interest in MINCA to Vanessa Ventures Ltd. (*Vanessa*) for US\$ 50 without informing CVG first or obtaining its consent. CVG protested against the acquisition and finally rescinded the Work Contract with MINCA, alleging that MINCA had breached the contract in a number of fashions. CVG later took physical control of the site and awarded the mining project to another Canadian company.

Following numerous unsuccessful legal proceedings and requests to local authorities to protect its claimed rights to the Las Cristinas project, in 2004, Vanessa filed a Request for Arbitration (under the Additional Facility Rules) seeking damages of approximately US\$ 1 billion, claiming that Venezuela had breached the Canada-Venezuela BIT (*BIT*). In its 2008 Decision on Jurisdiction, the Tribunal decided to join to the merits the question as to whether Vanessa's investment was protected under the BIT. (¶110).

2. *Legal Issues Discussed in the Award*

(a) *Jurisdiction*

(i) *“Substantial” Investment*

The Tribunal held that the existence of an investment should be read in light of the BIT and debated whether Vanessa made a “real” investment or merely bought a legal claim against Venezuela. (¶¶ 119-124). While the nominal price and Vanessa’s interest in MINCA’s loans pointed to the second, the Tribunal concluded that the BIT did not require that an investment be “substantial” in order to be protected. (¶ 126).

(ii) *Investment “in accordance with host State’s law”*

Notwithstanding Vanessa’s arguments, the Tribunal held that the BIT’s MFN provision could not apply to the issue of the definition of an “investment” in order to expand such definition. (¶ 133). Further, the Tribunal ruled that the host State’s laws refer only to laws and regulation made by a public authority and does not include any contractual obligations. (¶¶ 134-135).

(iii) *Compatibility of the Transfer with Venezuelan Contract Law and Law 2095*

While the Tribunal agreed with Venezuela that PDI’s identity was a key element in the conclusion of the contracts, it held that the *intuitu personae* character of the contracts did not preclude the protection of Vanessa’s investment under the BIT. (¶¶ 147-151, 154).

Further, the Tribunal dismissed Venezuela’s objection that Vanessa failed to give notice of the transfer of the shares and register the investment because “reporting obligations concerning the registration of foreign investments” were not relevant to the issue of jurisdiction. (¶¶ 165, 167).

(iv) *Compatibility of the Transfer with the Law on Public Procurement and Administrative Contracts*

The Tribunal dismissed Venezuela’s argument that the transfer violated Venezuelan public procurement and administrative law which limits a private party’s ability to transfer rights and obligations under a contract awarded in a bid process because the public procurement law was irrelevant for jurisdictional purposes. (¶¶ 155, 160).

(v) Compatibility with Good Faith and Public Policy

While Venezuela claimed that Vanessa made a bad-faith investment which was not protected by the BIT, the majority of the Tribunal held that public policy and good faith did not matter for jurisdictional purposes. (¶¶ 161, 164). However, one of the arbitrators disagreed with the Tribunal's assumption of jurisdiction over the matter because Vanessa's investment was made in bad faith and the BIT did not cover such investments. (¶¶ 110, 164, 169).

Having dismissed all jurisdictional objections, the Tribunal moved on to the merits of the case. (¶¶ 168-169).

(b) Merits

(i) Expropriation

The Tribunal dismissed Vanessa's expropriation claim, agreeing with Venezuela that CVG had rightfully terminated the Work Contract because (a) PDI failed to work with CVG to find a mutually-acceptable new investor, and (b) PDI was not entitled to bring a new investor into the project without CVG's consent. (¶¶ 172, 181, 196).

(ii) Fair and Equitable Treatment and Full Protection and Security

Vanessa claimed that Venezuela violated the BIT provisions of: (a) fair and equitable treatment (*FET*), because it unilaterally terminated the Work Contract without resorting first to arbitration, as provided for in the Work Contract; and, (b) full protection and security (*FPS*), because it failed to exercise due diligence in protecting Vanessa from injurious acts of Venezuelan officials and agencies. (¶¶ 217-218).

The Tribunal found that the treatment of Vanessa's investment and any delays in the local legal proceedings did not amount to conduct that fell below the minimum standard demanded by the BIT. (¶¶ 222, 227). Further, it concluded that even the most demanding formulation of the FPS standard had not been violated in the circumstances of the case. (¶ 223).

3. Decision

The Tribunal dismissed Vanessa's claims on the merits and decided that each side should bear its own costs and one-half of the Tribunal's and ICSID's costs. (¶¶ 236-237).