

## **ICSID TRIBUNAL DELIVERS US\$740 MILLION AWARD AGAINST VENEZUELA IN GOLD MINING DISPUTE**

*Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1)

### **Introduction**

On 22 September 2014, an ICSID tribunal rendered its award in *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/09/1) in which it awarded Gold Reserve Inc. over US\$740 million in respect of Venezuela's breach of the fair and equitable treatment standard set out in the bilateral investment treaty between Venezuela and Canada.

### **Background**

In 1992, Gold Reserve Inc. acquired and began developing what is now known as the Brisas gold and copper project, located in the historic Km 88 mining district of the State of Bolivar in southeastern Venezuela (the "Brisas Project"). The Brisas deposit, which is one of the largest undeveloped gold/copper deposits in the world, contains ore reserves of 10.2 million ounces of gold and 1.4 billion pounds of copper. From 1992 to 2009, Gold Reserve Inc. invested close to US \$300 million in acquisition, land exploration, development, equipment, and engineering costs.

In April 2008, after Gold Reserve Inc. developed the Brisas Project to the point of construction, the Bolivarian Republic of Venezuela arbitrarily revoked the previous authorization to proceed with construction of the Brisas Project, eliminating Gold Reserve Inc.'s ability to exploit the Brisas Project.

As a result of this and other acts by or on behalf of Venezuela, on 21 October 2009 the Company filed a Request for Arbitration with ICSID against Venezuela, seeking compensation for the losses caused to Gold Reserve Inc. on the grounds of Venezuela's alleged violations of the Agreement between the Government of Canada and the Government of the Republic of Venezuela for the Promotion and Protection of Investments ("Canada-Venezuela Treaty") in regard to Gold Reserve Inc. and its investments in Venezuela.

### **Decision**

The ICSID Tribunal (comprising of Piero Bernardini as President, along with Pierre-Marie Dupuy and David A.R. Williams) found in favour of Gold Reserve Inc., awarding the company over US\$740 million (comprising \$713 million for the fair market value of the Brisas Project, \$22.3 million for interest and \$5 million for reimbursement of legal and technical costs).

In relation to each of Gold Reserve's claims, the Tribunal found as follows:

### Fair and equitable treatment

Venezuela had breached Article II(2) of the BIT by failing to accord fair and equitable treatment to Gold Reserve's investment. The Tribunal noted:

- Even if a measure or conduct by the State, taken in isolation, does not rise to the level of a breach of the FET, such a breach may result from a series of circumstances or a combination of measures, particularly where the measures are part of a State policy aimed at gaining control of the object of the investment.
- The investor's legitimate expectations are a central consideration in the analysis of whether treatment was fair and equitable in the circumstances. Legitimate expectations are based on undertakings and representations made explicitly or implicitly by the host State and are created when a State's conduct is such that an investor may reasonably rely on that conduct as being consistent. A reversal of assurances by the host State that have led to legitimate expectations will violate the principle of fair and equitable treatment.
- In the present case, Venezuela had violated the BIT's fair and equitable treatment provision in many different respects, and certain actions amounted to conduct evidencing (through acts and omissions) a lack of transparency, consistency and good faith in dealing with an investor.
- The Tribunal held that the number, variety and seriousness of the breaches make the FET violation by Venezuela particularly egregious, and the compensation due to Gold Reserve for such breaches should reflect the seriousness of the violation.

### Full protection and security

The Tribunal dismissed Gold Reserve's claim under Article II(2) of the BIT (providing for the duty to accord full protection and security to investments).

- While some investment treaty tribunals have extended the concept of full protection and security to an obligation to provide regulatory and legal protections, the more traditional, and commonly accepted view is that this standard of treatment refers to protection against physical harm to persons and property.
- There was no suggestion in the present case that Venezuela failed to protect Gold Reserve's investment from physical harm, and therefore no breach of the full protection and security standard occurred.

### Expropriation

The Tribunal dismissed the claim for expropriation on the basis that the reasons given by Respondent for terminating the Concessions were sufficiently well founded that the terminations cannot be considered as a form of expropriation under international law.

- The Tribunal concluded that the nature of the breach by Claimant (failure to exploit within the required timeframe) was such that termination on this ground could not be said to be merely "pretextual". Neither Respondent's prior reassurances nor its political motivations alter the fact that a contractual right to terminate existed upon plausible grounds.

21 October 2014