Rusoro Mining Ltd v Bolivarian Republic of Venezuela

By Rouein Momen*

The recent ruling of the Paris Court of Appeal set aside the $1.2B damages ordered against Venezuela in compensation for the expropriation of a Canadian mining company's assets and investment. The French appellate court's decision comes nearly a year after a D.C. federal court upheld the validity of the amount of damages originally ordered.

Rusoro Mining LTD, a Canadian company, controlled 24 Venezuelan subsidiaries holding a total of 58 mining concessions and contracts between the years 2006 and 2008. In 2011, under the radical measures of the then Venezuelan president Hugo Chavez, Rusoro's assets and investments were expropriated. The move was one of the many asset seizures conducted under the nationalisation decree. In 2016, following an investment arbitration under the ICSID rules, per the Venezuela-Canada bilateral investment treaty, Venezuela was ordered to pay $1.2B in damages, and compensation to Rusoro.[1]

In their earlier challenge to this decision, Venezuela argued in D.C. that the calculation of the award was heavily flawed as it was based on an evaluation of Rusoro's value prior to the nationalisation decree of 2011. The D.C federal judge disagreed and upheld the judgement of the tribunal and described it as "commendable".[2] The appeal instigated within the French court system was running simultaneously to the one within the D.C federal circuit, however the D.C. federal judge refused to postpone its judgment until the appeal in France played out. They claimed that any further delay would be unfair on Rusoro, having had to wait more than five years for compensation.

The calculation of monetary damages is always a controversial and difficult task for any investment treaty arbitration. Recourse is regularly made to customary international law principles in delivering this task. According to ILC Articles on State Responsibility Article 31(1),[3] the state, when at fault, has to make a 'full reparation' for the injury caused due to the breach, and the investor is to be restored to its position had the breach not occurred. There is however, some discretion as to the choosing of the evaluation method for calculating the monetary award. Where a reliable record of profits and production for the estimate of future projections seems to be available, the tribunal chooses an income-based approach based on a discount cash flow model.[4]

The news of the annulment of the award by the French Court of Appeal comes a few months after a court in Brazil set aside the ruling of an arbitration tribunal due to arbitrator appointment irregularities.[5] These over-rulings, and the fact that parties to investment arbitration tribunals seek further judgment through further litigation, bring to the foreground some of the old-standing criticisms of the international investment treaty regime.

---

[1] *Rusoro Mining Ltd v Bolivarian Republic of Venezuela,* ICSID Case No.ARB(AF)/12/5.
[2] *Rusoro v Venezuela* - USDC DC - Order Enforcing ICSID Award.
[3] *Responsibility of States for Internationally Wrongful Acts* 2001.
[4] This method was followed in another case involving Venezuela against a mining company called Gold Reserve.
[5] See https://www.internationallawoffice.com/Newsletters/Arbitration-ADR/Brazil/Carvalho-Machado-e-Timm-Advogados/CAM-CCBC-award-set-aside-due-to-alleged-irregularities-in-arbitrators-appointments?utm_source=ILO+Newsletter&utm_medium=email&utm_content=Newsletter+2019-01-31&utm_campaign=Arbitration+%26+ADR+Newsletter.

Critics claim that while treaty regimes, and by extension the mechanism of international investment arbitration, provide minimum standards of treatment for the protection of foreign investors, they fail to impose a set of obligations on the investors. There have been attempts through the United Nations Commission on Transnational Corporations initiative to tame and control multinational investors and companies, however these plans were ultimately dropped. The Organisation for Economic Co-operation and Development has also published guidelines for multinational enterprises to provide non-binding principles of standards for responsible business conduct.

The inefficacy of the treaty regime to bind foreign investors to certain obligations, given that the main landscape of foreign investment is made up of investors from developed countries investing in developing countries, means that the treaty regime will always create the impression that the host nation is not being treated fairly, leaving them to seek further avenues through which they think they can protect their interests.

***Rouein Momen** is an ADC intern currently studying Arts/Law at UNSW. Taking a year off from his Law studies in 2019, Rouein is writing his Arts Honours' thesis on Marxist Critical Theory.