

## **ICSID PANEL RULES AGAINST VENEZUELA IN EXPROPRIATION CASE**

*ConocoPhillips Petrozuata B.V. and Ors. v Bolivian Republic of Venezuela* (ICSID Case No. ARB/07/30)

### **Introduction**

In *ConocoPhillips Petrozuata B.V. and Ors. v Bolivian Republic of Venezuela* (ICSID Case No. ARB/07/30) (3 September 2013) the International Centre for the Settlement of Disputes (ICSID) handed down its decision as to the jurisdiction and the merits of a dispute between subsidiaries of a leading multinational oil company and Venezuela, in which the latter was held to have breached Article 6 of the Netherlands-Venezuela BIT by failing to negotiate in good faith over expropriated oil assets.

### **Background**

In the early 1990s, ConocoPhillips, a large multinational energy corporation, helped develop the Petrozuata and Hamaca projects in the Orinoco heavy-crude belt, and the offshore Corocoro project in Venezuela. These were intended to represent “substantial long-term investments.” During the left-wing administration of the now deceased former President of Venezuela, Hugo Chavez, however, a wave of nationalisations were undertaken in which a number of multinational oil producers, including various subsidiaries of ConocoPhillips responsible for exploiting the aforementioned projects, were forced to form joint ventures as minority partners with government owned enterprises. In the process, ConocoPhillips claimed to have suffered losses amounting to approximately \$4.5 billion. The substance of the present dispute concerns the level of compensation ConocoPhillips and its subsidiaries are entitled to, which, it is claimed, is substantially more than that received from Venezuela.

The Tribunal was required to consider both its jurisdiction and the merits of the dispute.

### **Jurisdiction**

ConocoPhillips contended in the alternative that Venezuela had consented to the jurisdiction of the Tribunal under Article 22 of Venezuela’s Investment Law, promulgated by President Chavez in October 1999 (“Investment Law”), and/or under Article 9 of the Netherlands-Venezuela BIT (‘BIT’).

Venezuela disputed that it had consented by virtue of Article 22 of the Investment Law, contending additionally that even if it had given consent, jurisdiction over the claims was lacking because ConocoPhillips did not qualify as an “international investor” under its terms. Venezuela also disputed that it had given consent under Article 9 of the BIT on the grounds both that the claimant companies were “corporations of convenience” created in anticipation of litigation against Venezuela for the sole purpose of gaining access to ICSID; and that the investments relied upon by the claimants were indirect investments falling outside the

definition of an investment under the terms of the BIT, which does not extend to investments owned or controlled indirectly by Dutch nationals through one or more intermediaries.

### Merits

On the merits, it was argued by ConocoPhillips that Venezuela had breached Article 3 of the BIT, by failing to treat it fairly and equitably, as well as Article 6 of the BIT, by taking measures which amounted to unlawful expropriation.

Venezuela countered by arguing that the fair and equitable treatment requirement was subject to an exception under Article 4 in relation to tax and fiscal matters, which covered the substance of ConocoPhillips' complaint, and which it was required merely to apply in a non-discriminatory fashion.

### **Decision**

#### Jurisdiction

The Tribunal ruled that it did not have jurisdiction by virtue of Article 22 of the Investment Law and therefore did not need to consider Venezuela's second argument as to ConocoPhillips' status as an international investor under that law.

The Tribunal ruled that it did have jurisdiction, however, under Article 9 of the BIT, dismissing both of Venezuela's objections on the grounds of a lack of evidence in support of the first, and the considerable number of previous ICSID cases treating subsidiaries as direct investors in connection with the second.

#### Merits

The Tribunal upheld Venezuela's argument in relation to Articles 3 and 4 of the BIT, dismissing that limb of ConocoPhillips' claims, as well as dismissing a number of its arguments in relation to Article 6. However, in relation to Article 6(c), the Tribunal accepted ConocoPhillips' argument, stating "[t]he respondent breached its obligation to negotiate in good faith for compensation for its taking of the ConocoPhillips assets in the three projects on the basis of market value." To this important extent it decided in favour of ConocoPhillips.

### **Comment**

Although this decision, in substance, marks a clear victory for ConocoPhillips, it does not resolve the amount of final damages Venezuela will be required to pay. That part of the Award could take more than two years to be made.

24<sup>th</sup> September 2013