

ICSID TRIBUNAL AWARDS US\$1.6 BILLION AGAINST VENEZUELA IN LAWFUL EXPROPRIATION OF OIL ASSETS DISPUTE

Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Venezuela, ICSID Case No. ARB/07/27

Introduction

In a decision handed down on 9 October 2014 in the matter of *Mobil Corporation et al v. Venezuela* (ICSID Case No. ARB/07/27), an ICSID tribunal awarded Mobil over US\$1.6 billion in damages arising from the direct expropriation of Mobil's investment in various oil assets in Venezuela, despite finding that the expropriation had been lawful.

Background

During the 1990s and 2000s, Mobil Corporation (through various subsidiaries) made a number of investments in oil assets in Venezuela, specifically the Cerro Negro project and the La Ceiba project.

Following Mobil's investment, the Venezuelan government took a number of steps which impacted negatively on Mobil's investment, including:

- the imposition of an extraction tax;
- an increase in the income tax rates; and
- production and export curtailments imposed on the Cerro Negro project.

Subsequently, Venezuela directly expropriated Mobil's interests in both the Cerro Negro project and the La Ceiba project.

As a result, the Claimants (Mobil and various subsidiaries) commenced ICSID arbitration proceedings based on the bilateral investment treaty between Venezuela and the Netherlands).

In addition, in 2008, a subsidiary of Mobil, Mobil Cerro Negro, commenced ICC proceedings against the Venezuelan state-owned entity, Petróleos de Venezuela, S.A. ("PDVSA") pursuant to an Association Agreement between PDVSA and Mobil Cerro Negro for compensation for the economic consequences of the measures taken by Venezuela. That tribunal considered the same measures as those at issue in the present proceedings. On 23 December 2011, the ICC Tribunal awarded Mobil Cerro Negro a sum of US\$746,937,958.

Decision

The Tribunal (comprising of H. E. Judge Gilbert Guillaume as President of the Tribunal,

along with Professor Gabrielle Kaufmann-Kohler and Dr. Ahmed Sadek El-Kosheri) awarded the Claimants US\$1.6 billion.

Jurisdiction

The Tribunal held that it had no jurisdiction over the claim arising out of the increase in the income tax rate for the participants to the Cerro Negro Project, but did have jurisdiction over the remaining claims, including the claims relating to the imposition of the extraction tax, production and export curtailments in 2006-2007 and expropriation.

The Tribunal rejected jurisdiction over the claim relating to income tax on the basis of its previous decision on jurisdiction handed down on 10 June 2010 in which it held that Mobil's decision to restructure its investments only in order to gain jurisdiction under a BIT for such disputes constituted an abusive manipulation of the system of international investment protection under the ICSID Convention and the BITs. As the dispute over income tax had been raised between the parties prior to the restructuring, the Tribunal therefore had no jurisdiction over that matter. However, the other claims had not been raised until after that restructuring, and therefore in line with its previous decision, the Tribunal had jurisdiction.

Substantive dispute

Extraction tax/production and export curtailments

The Tribunal considered whether the extraction tax and curtailment measures constituted a violation of the fair and equitable treatment standard, or alternatively the arbitration or discriminatory treatment standards.

The Tribunal found that on a true construction of the Netherlands-Venezuela BIT, fiscal measures (including the imposition of tax) were governed by Article 4 which required investors to be given the same treatment as nationals/most favoured nations, and were not subject to the fair and equitable/arbitrary or discriminatory standard.

In contrast, the production and export curtailments were not considered fiscal measures by the Tribunal which held that those curtailments were incompatible with the Claimants' reasonable and legitimate expectations, and thus breached the fair and equitable treatment/arbitrary and discriminatory standards contained in Article 3(1) of the Netherlands-Venezuela BIT.

Expropriation

The Tribunal held that while there had been an expropriation of the Claimants' investment (a fact which Venezuela did not dispute), that expropriation had not been unlawful. In coming to this decision, the Tribunal noted in particular that:

- The measures taken by Venezuela had complied with the due process requirements of Article 6 of the Netherlands-Venezuela BIT. The process implemented by Venezuela in connection with the passing of the laws (the purpose of which was to create new mixed companies in which the State would own more than 50% of the shares) provided for negotiations between the State and oil companies, and therefore enabled the participating companies to weigh their interests and make decisions during a reasonable period of time.

- There was no evidence that the expropriation had been carried out contrary to undertakings given by Venezuela to the Claimants.
- The mere fact that an investor had not received compensation did not in itself render an expropriation unlawful.
- An offer of compensation may have been made to the investor and, in such a case, the legality of the expropriation would depend on the terms of that offer.
- In order to decide whether an expropriation was lawful or not in the absence of payment of compensation, a tribunal must consider the facts of the case.

Damages and effect of the ICC arbitration award

Based on the above findings, the Tribunal awarded the Claimants:

- US\$ 9,042,482 in compensation for the production and export curtailments imposed on the Cerro Negro project in 2006 and 2007;
- US\$ 1,411.7 million in compensation for the expropriation of their investments in the Cerro Negro Project; and
- US\$ 179.3 million in compensation for the expropriation of their investments in the La Ceiba Project.

As the expropriation was not held to be an unlawful expropriation, compensation was to be determined at the time of the expropriation rather than at the time of the award.

The Tribunal noted that although the dispute before the ICC Tribunal and the dispute before this Tribunal are different, the measure that gave rise to the dispute before the ICC Tribunal was also a measure at issue in this proceeding, and one of the Claimants in the present case had already been compensated for the loss incurred as a consequence of that measure. There was, therefore, the risk of double recovery in the present case for the Cerro Negro Project.

However, the Association Agreement between Mobil Cerro Negro (the claimant in the ICC proceedings) and PDVSA provided for repayment to PDVSA if any other recovery was made. Effectively, therefore, double recovery would be avoided.

Comment

The approach of the tribunal in this case can be contrasted with the similar case of *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Venezuela* (ICSID Case No. ARB/07/30), in which an ICSID tribunal, in a decision dated 3 September 2013, held that the expropriation was unlawful. Accordingly, compensation is to be assessed in a later hearing as at the date of the award.

Venezuela is no longer a party to the ICSID Convention, having withdrawn in January 2012 (becoming the third country, after Bolivia and Ecuador) to do so. However, a number of cases (which pre-date its effective withdrawal) are still pending against it.

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