



School of International Arbitration

School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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VENOKLIM HOLDING, B.V.

V.

REPÚBLICA BOLIVARIANA DE VENEZUELA

(ICSID CASE NO. ARB/12/22)

AWARD

Case Report by Maria I. Pradilla Picas**
Edited by Hernando Otero***

In the Award rendered of April 3, 2015, which was accompanied by a concurring and dissenting opinion by the Claimant-appointed arbitrator, the Tribunal decided it did not have jurisdiction to hear the dispute between Venoklim Holding, B. V. and the Republic of Venezuela because Venoklim did not meet the nationality requirements under Article 22 of Venezuela's Investment Law and the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela. However the Tribunal also rejected Venezuela's additional objections to jurisdiction, which were that (1) Venezuela did not consent to ICSID arbitration in light of Venezuela's denunciation of the ICSID Convention; (2) Venezuela was not a Contracting Member of ICSID when the request for arbitration was registered; (3) Venezuela's Investment Law did not constitute a valid ground for jurisdiction under the ICSID Convention; and (4) Venoklim violated Article 36 of the ICSID Convention when it raised, for the first time in its counter-memorial, the BIT as a new ground for jurisdiction in violation of the ICSID Arbitration Rules.

An annulment proceeding was initiated by Claimant on August 6, 2015, and the *ad hoc* Committee was constituted on 23 September 2015.

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| Main Issues: | Jurisdiction – personal – nationality; jurisdiction – temporal; consent – ICSID denunciation – investment law. |
| Tribunal: | Yves Derains – President, Enrique Gómez-Pinzón, Rodrigo Oreamuno. |
| Claimant’s counsel: | Mr. Gerardo Jiménez Umbarila and Mr. Juan Pablo Liévano (Jiménez & Liévano Abogados, Bogotá, Colombia). |
| Respondent’s Counsel: | Procuraduría General de la República, Caracas, Venezuela; George Kahale III, Eloy Barbará de Parres, Gabriela Álvarez-Ávila, and Claudia Frutos-Peterson (Curtis, Mallet-Prevost, Colt & Mosle, Mexico City, Mexico, New York, NY, and Washington, D.C., U.S.A.). |

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Digest

1. Relevant Facts and Procedural Dates

The Claimant, Venoklim Holding, B.V. (“Venoklim” or “Claimant”), was a company incorporated in the Netherlands which owned the majority of shares of Lubricantes Venovo, C.A. (“Lubricantes Venoco”); Aditivos Orinoco de Venezuela, C.A. (“ADINOVEN”); Servicios Técnico Administrativos Venoco, C.A. (“Servicios Venoco”); Nacional de Grasas Lubricantes; and Química Venoco, C.A. (“Química Venoco”) (¶ 2). The Respondent was the Bolivarian Republic of Venezuela (“Venezuela” or “Respondent”). (¶ 4).

The dispute arose from the alleged expropriation of Claimant’s property through government Decree No. 7712 of October 10, 2010. Per the Decree the real and movable property of the Claimant’s five subsidiaries were taken. (¶ 7). In response, the Claimant filed a request for arbitration with the ICSID Secretariat pursuant to Article 22 of Venezuela’s Investment Law on July 23, 2012. The Secretariat registered the request on August, 15, 2012.

Following the filing of the Claimant’s counter-memorial on jurisdictional objections, the Respondent objected to the Claimant’s reliance on Article 9(1) of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela (the “BIT”) “as a new jurisdictional ground in the present case.” (¶ 19) (emphasis added). As a result, the Tribunal bifurcated the proceedings and the hearing on jurisdiction took place in Washington, D.C. on March 26-27, 2014. (¶¶ 25-26, 28).

After the hearing, the Tribunal requested the parties to make further submissions on the issue of Venoklim’s nationality. (¶ 29). Claimant filed a notarized certificate indicating that Venoklim was a company registered in the Netherlands, owned by Industrias Venoco, C.A. (a Venezuelan company), which was in turn majority-owned (69.96%) by Inversora Petroklím, C.A. (*Id.*). Inversora Petroklím, for its part, was registered in Venezuela and owned by two Venezuelan citizens: Franklin Durán Guerrero (99% ownership) and Carlos Eduardo Kauffman Ramírez (1% ownership). (¶¶ 30-32).

2. Analysis by the Tribunal

The Tribunal began its analysis by highlighting that under Article 25 of the ICSID Convention, its jurisdiction was determined by three conditions: *rationae materiae*, *rationae personae* and *rationae voluntatis*; but only the latter two were in dispute between the parties. (¶¶ 41-43). The Tribunal addressed Venezuela’s objections to jurisdiction as follows:

2.1. *Analysis of Respondent's First Jurisdictional Objection: Lack of Respondent's Consent in Light of its Denunciation of the ICSID Convention*

The Respondent's objection stated that its January 24, 2012, denunciation of the ICSID Convention had two consequences based on Article 72 of the ICSID Convention: (i) the effects of denunciation were immediate with respect to its consent to jurisdiction *rationae personae*; and (ii) the effects of the registration of Claimant's request for arbitration precluded ICSID arbitration from being properly commenced. (¶ 47).

The Tribunal first observed that denunciation did not have retroactive effect, and only was applicable to future disputes. (¶ 59). Accordingly, the first step for the Tribunal was to determine the time at which the denunciation was effective. To do this the tribunal read Article 72 in conjunction with Article 71 of the ICSID Convention and found that Venezuela's position that Venoklim had to file its request for arbitration prior to ICSID's receipt of notification, and not during the six month period after denunciation, was contrary to common sense. (¶¶ 61-62). For the tribunal, the Respondent's position would violate basic principles of judicial certainty because investors could not know ahead of time when a State was going to denounce the Convention. (¶ 63). Furthermore, the Tribunal remarked that a distinction between special and general norms is inapplicable to Articles 71 and 72, and that consent under Article 72 referred to the unilateral offer by the State and not the State's perfected consent. (¶¶ 64-65).

In light of this analysis, the Tribunal concluded that when Venoklim filed its request for arbitration, Venezuela was still a Contracting Party to the ICSID Convention. (¶ 67).

2.2. *Analysis of Respondent's Second Jurisdictional Objection: Respondent Was Not a Contracting Party to the ICSID Convention*

The Respondent maintained that ICSID Rule 6(2) indicated that the date of registration of the request determined whether Venezuela was still a Contracting Party to the ICSID Convention at the time. (¶ 69). The Respondent explained, the ICSID Secretary registered the arbitration on August 15, 2015, which postdated the six-month period provided by Article 71. (*Id.*).

The Tribunal rejected Venezuela's argument, and explained that "registration" and "consent" are different concepts that were not to be confused. (¶ 76). In reviewing ICSID Rules 6(2) and 2(3), the Tribunal observed that Rule 6(2) indicated the moment when the arbitral proceeding began, but not when consent was formed. (¶ 74). Rather, Rule 2(3) provided the date of consent; that is when Venoklim filed the request for arbitration. (¶ 75). Otherwise a claimant would be penalized merely because the ICSID Secretary registered the dispute after the six-month period elapsed. (¶¶ 77-78).

Consequently, the Tribunal concluded that consent was perfected on July 23, 2012, the date the request for arbitration, and on which Venezuela's denunciation had not taken effect. (¶ 79).

2.3. *Analysis of Respondent's Third Jurisdictional Objection: Venezuela's Investment Law Does Not Constitute a Valid Ground for ICSID Jurisdiction*

Basing its argument on other ICSID arbitral decisions and a decision by a Venezuelan court, the Respondent maintained that because Article 22 of Venezuela's Investment Law was not a general and open offer to arbitrate under ICSID, the Tribunal could not find it had jurisdiction.

As a preliminary matter the Tribunal noted that Article 22 of Venezuela's Investment Law was a complex and confusing text and, as such, the Tribunal would interpret it in light of its context and considering the circumstances that led to its enactment. (¶¶ 88-91). The Tribunal looked at the declarations of Mr. Werner Corrales—who according to Claimant could testify as to Venezuela's intention in enacting the Investment Law—as well as other tribunals' opinions about Mr. Corrales' declarations, and found that because he was an economist and not a lawyer his opinion did not represent the position of the Venezuelan Government at the time. (¶¶ 94-98). Agreeing with previous ICSID arbitral decisions,¹ the Tribunal concluded that Article 22 of Venezuela's Investment Law did not contain an autonomous consent by Venezuela to ICSID jurisdiction. (¶ 111).

The Tribunal explained however, that through Article 22 Venezuela had ratified its offers to submit disputes to international arbitration contained in other international treaties. (¶ 113). The Tribunal further confirmed that these international treaties could be complementarily invoked by a foreign investor as a basis for ICSID jurisdiction. (*Id.*)

¹ The Tribunal relied on: *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010; *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 Dec. 2010; *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Award, 2 Aug. 2011; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 Feb. 2013; *Opic Karimum Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/14, Award, 28 May 2013; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction, 3 Sept. 2013.

2.4. *Analysis of Respondent's Fifth² Jurisdictional Objection: To Add a New Basis for Jurisdiction at this Stage of the Proceeding Violates Fundamental Rules of Procedure*

The Respondent's objection to Venoklim invoking the BIT as a basis for jurisdiction pertained to the fact that Venoklim had first invoked the BIT in its counter-memorial, which Respondent argued was a violation of Article 36 of the ICSID Convention and ICSID Rule 2. (¶ 115). According to Respondent, Article 36 and Rule 2 required the claimant to include all the necessary elements for jurisdiction in its request for arbitration. (¶ 116).

The Tribunal first explained that ICSID Arbitration Rule 40(1) permitted a party to present an incidental or additional claim so long as the claim was within the scope of the parties' consent. (¶ 123). For the Tribunal, it was logical that the offer to arbitrate and its acceptance through the request for arbitration constituted the limits of the parties' consent, and that additional claims could be presented thereafter. (¶ 123). Consequently, Venoklim had been entitled to modify, complete and develop its initial claim so long as it had done so within the limits of that consent. (¶ 124).

The Tribunal observed, Claimant had not enlarged its basis for jurisdiction in the counter-memorial, but rather developed the original basis for jurisdiction invoked in its request for arbitration (Venezuela's investment law) by invoking the BIT as a complement to Article 22 of the Investment Law. (¶¶ 126-28). But, to benefit from the protections of the BIT, the Tribunal clarified that Venoklim had to prove that it met all of Article 22's requirements—in particular, the nationality requirement. (¶ 129).

Accordingly, the Tribunal rejected Venezuela's fifth objection to jurisdiction because invoking the BIT in the counter-memorial did not constitute a new basis for jurisdiction, but rather it was a complement to Article 22 of Venezuela's Investment Law within the limits of the parties' consent. (¶ 130).

2.5. *Analysis of Respondent's Fourth Jurisdictional Objection: Claimant Is Not a Foreign Investor*

The Respondent objected to jurisdiction on the grounds that Venoklim was not a foreign investor because it was ultimately controlled by Venezuelan nationals. (¶¶ 131-34).

² The Tribunal decided to address Respondent's fifth jurisdictional objection before analyzing the fourth one to maintain the continuity of its analysis. (¶ 114).

Claimant countered that shareholder registries, financial statements, and the place of incorporation³ are the relevant factors for nationality. (¶ 135).

The Tribunal explained that Venoklim had to comply both with the nationality requirements of Article 22 of Venezuela's Investment Law and those in Article 25 of the ICSID Convention. (¶¶ 137-39).

2.5.1. Nationality under Article 22 of Venezuela's Investment Law

In reading Article 22, the Tribunal identified two criteria to determine the nationality of the investor and investment: ownership and control. (¶ 142). Given the parties only discussed control (and not ownership), the Tribunal decided to analyze only the issue of control and requested the parties submit proof of the ultimate entity or person that could be considered to have control over Venoklim. (¶¶ 142-43).

Venoklim, the Tribunal found, was a company registered in the Netherlands, wholly owned by International Petroklím, C.A (Swedish), which was controlled by Industrias Venoco, C.A. (Venezuelan). (¶ 145). Industrias Venoco's president was a Venezuelan national, who was also a member of Venoklim's Board of Directors, president of International Petroklím, and president of four of Venoklim's five subsidiaries. (¶ 146). Furthermore, Industrias Venoco was controlled by Inversora Petroklím (Venezuelan), which was owned by two Venezuelan nationals: Franklin Durán Guerrero (99% ownership) and Carlos Eduardo Kauffman Ramírez (1% ownership). (¶¶ 145, 148).

In view of this chain of ownership, which ultimately culminated in ownership and control by Venezuelan nationals, the Tribunal declared that Venoklim could not be treated as a foreign investor under Article 22 of Venezuela's Investment Law. (¶ 149).

2.5.2. Nationality under Article 25 of the ICSID Convention

Based on its analysis, the Tribunal observed that a finding that Venoklim was a foreign investor under Article 25 given its incorporation in the Netherlands, and in spite of the ultimate ownership of Venezuelan entities, would allow formalism to prevail over reality and betray the object and purpose of the Convention. (¶ 156).

2.6. *Analysis of Respondent's Sixth Jurisdictional Objection: Venezuela's ICSID denunciation Precludes the Tribunal of Jurisdiction even under the BIT*

³ Venoklim relied on *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction (29 Apr. 2004) and *Saluka v. Czech Republic*, UNCITRAL, Award (16 Mar. 2006) for the proposition that place of incorporation is a determining factor of the investor's nationality. (¶ 136).

Having already decided that Venoklim did not meet the nationality requirements for establishing jurisdiction, the Tribunal found it unnecessary to analyze the effects of Venezuela's ICSID Convention denunciation on the BIT. (¶ 159).

3. *Decision*

The Tribunal accepted Venezuela's jurisdictional objections related to the nationality of the investor under Article 22 of Venezuela's Investment Law and the BIT, but rejected the other four objections. (¶ 165). Accordingly, the Tribunal decided that neither ICSID nor the Tribunal had jurisdiction over the case, the parties should split costs equally, and each party should pay for its legal fees.

4. *Concurring and Dissenting Opinion of Enrique Gómes Pinzón (Claimant Appointed Arbitrator)*

Mr. Pinzón concurred with the majority's conclusion regarding Venezuela's fifth jurisdictional objection (i.e. adding a new basis for jurisdiction in the counter-memorial violated a fundamental rule of procedure), but disagreed with the majority's reasoning; and dissented from the Tribunal's majority with respect to Venezuela's fourth jurisdictional objection (Claimant was not a foreign investor).

As to Venezuela's fifth jurisdictional objection, Mr. Pinzón agreed with the majority that the Claimant did not violate the ICSID Rules by invoking Article 9 of the BIT as a complementary basis for jurisdiction in its counter-memorial. (¶ 4). However, in Mr. Pinzón's opinion, the majority's reference to ICSID Rule 40(1) on Ancillary Claims was inappropriate as it suggested an alternative date of consent. (¶¶ 7-8). To Mr. Pinzón, it was clear that Article 9 of the BIT included an unconditional offer to ICSID arbitration, and that Venoklim accepted the offer through its request for arbitration. In his view, , even though Venoklim did not specifically invoke the BIT at that time, Article 22 of Venezuela's Investment Law ratified all obligations and offers to international arbitration contained, particularly, in international treaties. (¶¶ 9-13). Therefore, in his opinion, it could be presumed that the request for arbitration was the acceptance of the BIT's offer, and the later reference to the BIT in the counter-memorial was a good faith clarification at the first possible opportunity after the initial discussion of the issue. (¶¶ 14-15).

With respect to Venezuela's fourth jurisdictional objection, Mr. Pinzón disagreed with the majority that Venoklim had to comply with the nationality requirements of Article 22 of Venezuela's Investment Law given the BIT had its own conditions. (¶ 18). In his view, Article 22 did not constitute in itself an offer, nor did it confer any benefits to foreign investors, and therefore did not create additional conditions beyond those of the BIT and the ICSID Convention. (¶¶ 19-20). In his opinion, even if the Claimant was required to

first meet the conditions of the Investment Law before accessing the BIT, the Tribunal should not have cast aside Venoklim's direct ownership as it was expressly required in the Investment Law's implementing regulations. (¶ 23). As a result, the majority should have analyzed both ownership and control. (¶ 24).

Instead, Mr. Pinzón further observed, the majority failed to properly interpret the nationality requirement under the BIT. (¶ 28). In his view, under the BIT there is no doubt that Venoklim is a company constituted under the laws of the Netherlands and that it owns all five of its subsidiaries. (¶¶ 29-31). Mr. Pinzón disagreed with the majority's decision to revive the concept of reality over form, which has not been adopted by a tribunal other than *Tokio Tokelés v. Ukraine*. (¶ 34). He noted Venezuela and the Netherlands had agreed that the criteria defining nationality under the BIT was the place of incorporation and the Tribunal should not have questioned it by effectively rewriting the BIT. (¶ 35). Mr. Pinzón concluded that the majority incorrectly lifted Venoklim's corporate veil. (¶ 38).