



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London

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**Award Name and Date:** Venezuela Holdings, B.V. et al v. Bolivarian Republic of Venezuela ICSID Case No. ARB/07/27 – *Decision on Annulment* (9 March 2017)

**Case report by:** Puneeth Ganapathy\*\*, Editor Diego Luis Alonso Massa\*\*\*

**Summary:**

An *ad hoc* ICSID annulment Committee ruled on the application made by the Republic of Venezuela (‘the Applicant’) seeking the annulment of the award of damages made in the arbitral proceedings between Venezuela Holdings B.V. et al. (‘Mobil’) and the Bolivarian Republic of Venezuela.

The Applicant raised three broad grievances against the aforementioned award, invoking grounds under Art 52 (1(b), (d) and (e)) of the ICSID Convention. The Applicant argued that first, the award was to be annulled as the tribunal had erred in exercising jurisdiction despite the alleged ‘abusive’ restructuring employed by Mobil to gain access to ICSID arbitration. This grievance was raised in terms of two grounds, viz. ‘manifest excess of powers’ and ‘failure to state reasons’. Second, that the order of the tribunal denying Mobil’s application regarding document production constituted a ‘serious departure from a fundamental rule of procedure’. Third, that the award in relation to the Cerro Negro Project had not adequately considered the special agreement between parties regarding compensation. This ground was canvassed in terms of both, ‘manifest excess of powers’ and ‘failure to state reasons’.

With respect to the first two grievances, the Committee rejected the application for annulment. It found there to be no failure to state reasons or a manifest excess of powers with respect to the tribunals analysis of the issue concerning abuse of process and corporate restructuring. Regarding the non-production of certain documents, the tribunal stated that an annulment Committee could not judge the exercise of a discretionary power of the tribunal, and that in any case this was irrelevant, since there was no demonstrable harm caused from the non-production of the relevant documents.

On the issue of the damages calculation, the Committee found merit in the application and annulled the relevant parts of the award that errantly dealt with damages relating to the Cerro Negro Project. The Committee held that the tribunal’s reasoning and analysis was unclear and that it did not consider or comprehend the principal submission of the Applicant regarding the calculation of damages being limited by agreement between parties. The Committee accordingly allowed the application for annulment in relation to this grievance on account of both ‘manifest excess of powers’ and ‘failure to state reasons’.

**Main issues:** Applicable law, Compensation, Custom, Damages, Limitation of Liability

**Members of the *ad hoc* Committee:** Tan Sri Cecil Abraham; Prof. Dr. Rolf Kneiper; Sir Franklin Berman (President)

**Applicant's Counsel:** Dr. Reinaldo Pedroza (Prurador General de la Republica, Venezuela); Mr. George Kahale III, Mr. Bernard Preziosi Jr., Ms. Miriam Harwood (Curtis, Mallet-Prevost, Colt & Mosle LLP, New York); Ms. Gabriella Alvarez-Avilla (Curtis, Mallet-Prevost, Colt & Mosle S.C., Mexico)

**Respondent's Counsel:** Mr. Thomas Cabbage III, Mr. Miguel Forastier, Ms. Mary Hernandez (Covington and Burling LLP, Washington D.C); Mr. Gaetan Verhoosel, Mr. Scott Vesel, Mr. Simon Maynard (Three Crowns LLP, London); Mrs. Alice Brown, Mr. Eugene Silva II (Exxon Mobil, Texas)

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## Digest:

### 1. Facts of the Case

The Applicant is the Bolivarian Republic of Venezuela. The respondents are Venezuela Holdings B.V. et al. ('Mobil'). The Applicant seeks annulment of the award rendered in the ICSID arbitration between the parties on 9 October 2014 (¶ 1).

The Applicant requested for three distinct reliefs: *first*, that award was to be annulled on account of manifest excess of powers and lack of reasoning, in assuming jurisdiction despite the alleged abuse of process under the Dutch treaty (¶ 30, 35, 59).

*Second*, that the compensation awarded by the tribunal was to be annulled due to a 'serious departure from a fundamental rule of procedure' in failing to order document production relating to the special agreement on compensation (¶ 30, 35, 52, 57). The Applicant further argued that the order disregarding the request for document production was also in manifest excess of powers and suffered from a failure to state reasons (¶ 55, 56).

*Third*, that the portion of the award dealing with compensation substantively failed to take account of the special agreement on compensation and was therefore to be annulled for failure to state reasons and manifest excess of powers (¶ 30, 35, 37, 47). The Applicant argued that Article 9(5) of the Dutch Treaty required the application of the special agreement, which

was disregarded by the tribunal in its analysis on compensation (¶ 40). The Applicant also argued that the scope of Mobil's rights in the investment were itself defined by domestic law and therefore by the special agreement on compensation (¶ 44).

## **2. Procedural Background**

The Applicants filed the application for annulment and for a provisional stay over the enforcement of the award on 2 February 2015 (¶ 1). The award was stayed provisionally, pursuant to Rule 54(2) of the ICSID Rules (¶ 3). Mobil contended that the order for provisional stay stood automatically vacated on 8 June 2015 on rejection of Venezuela's revision application before the arbitral tribunal (¶8, 11). On submissions from both parties as to the continuance of the stay, the Committee passed a procedural order on 28 July 2015, granting the continuance subject to an undertaking to be received from the Applicant, to promptly comply with all parts of the award not annulled subsequently (¶ 15). The Applicant complied with this request on 28 August 2015 (¶ 18).

## **3. Analysis of Legal Issues by the *Ad hoc Annulment Committee***

The Committee dealt with the three broad grounds of annulment in the following sequence: (i) the tribunal's erroneous assumption of jurisdiction under the Dutch treaty (ii) the tribunal's refusal to order document production and (iii) the tribunal's decision not to consider the agreement on compensation (¶ 104).

### *3.1. The assumption of jurisdiction under the Dutch treaty and the alleged abuse of process*

#### *3.1.1 The Applicant's submissions*

The Applicant argued that the abuse of process in the case resulted from the corporate restructuring undertaken by Mobil in 2005, for the sole purpose of gaining access to ICSID jurisdiction (¶ 107). The Applicant also argued that the contradiction of the tribunal disallowing the tax claims based on the timing of the claim, while recognizing the alleged abusive restructure, vitiated its decision (¶ 118).

#### *3.1.2 The Respondent's submissions*

First, Mobil argued that the question of abuse of process resulting from a restructuring was an issue of admissibility and not one of jurisdiction (¶ 108), thereby falling out of the scope of annulment. Second, that the restructuring was legitimate and that the tribunal had considered the degree of foreseeability of the dispute in its analysis (¶ 108).

#### *3.1.3 The Committee's analysis*

The Committee began with stating that it is not easy to apply the 'manifest' criterion, when it comes to a question of jurisdiction (¶ 110). The Committee then considered the fact that the tribunal had devoted an adequate portion of the award in its analysis of the underlying issue concerning restructuring and the alleged abuse (¶ 111).

The Committee found that the tribunal had clearly decided that the criterion to be employed was whether the dispute was a potential one based on a potential measure or a real dispute based on an existing decision (¶112, 122). Therefore, this part of the award was held not to

suffer from any manifest excess of power or failure to give reasons for the limited purposes of the ICSID annulment procedure (¶ 115,118).

In response to the argument on contradiction with respect to the denial of tax claims, the Committee additionally held that there was no qualitative defect in the reasoning of the tribunal and that such a defect could amount to a failure in terms of Article 52 only when (i) there was a contradiction apparent on the face of the decision and (ii) that the contradiction was serious enough to vitiate the entire reasoning (¶ 119). The Committee found it sufficiently clear as to how the tribunal excluded the tax claims while considering the restructuring to be legitimate. The Committee accordingly rejected this ground for annulment (¶ 124).

### *3.2. The non-production of documents*

#### *3.2.1 Standard of review in Annulment*

The Committee held that it would be rash to pronounce on the discretionary exercise of powers by a tribunal without a full investigation of the facts and the relevant arguments. However, this would be, in the view of the Committee, an investigation that lies plainly outside its scope of functions (¶ 127). With respect to the ‘serious departure from a fundamental rule of procedure’ argument, the Committee stated that (i) there is a high threshold, in that (ii) the rule must be fundamental and that (iii) the departure must be serious (¶ 129).

#### *3.2.2 The Committee’s analysis*

The Committee held that the only question before it with respect to this ground of annulment was whether there was any adverse effect on the Applicant’s ‘right to be heard’ as a result of the tribunal’s refusal to order disclosure (¶ 132). The Committee found that the award indicated that both parties had adequate opportunity to engage on all issues in the proceedings (¶ 133), and that in any case, Venezuela had itself submitted that there were other documents available on record that would serve the same purpose (¶ 134). Accordingly, the tribunal rejected this ground of annulment (¶ 136).

### *3.3. The portion of the award dealing with compensation*

#### *3.3.1 The Applicant’s submission*

The Applicant argued that the annulment was warranted since the tribunal had failed to give effect to (i) the conditions stated in the Congressional approval of the Cerro Negro project and (ii) the special agreement on compensation between Mobil and a Venezuelan State entity Lagoven (¶ 139). Clause 15 of the agreement effectively limited the liability of the Applicant (¶ 140). The Applicant further argued that the investment consisted of domestic property rights, whose content and fair value was to be investigated taking the agreement on compensation into account (¶ 167).

### *3.3.2 The Respondents submission*

Mobil took the position that the ‘price cap’ was limited to contractual claims under the relevant agreement and not a treaty claim as in the present case. It further argued that in any case Venezuela was not itself a party to the agreement (¶ 142).

### *3.3.3 The Committee’s analysis*

The Committee preliminarily referred to the conclusion of the tribunal that the expropriation was lawful and the resulting compensation was to be calculated in conformity with Article 6(c) of the Treaty, which called for ‘just compensation’ in terms of fair market value (¶ 141,142).

#### *3.3.3.1 The relevant applicable law*

The Committee began by determining the law applicable to the arbitral proceedings before the tribunal. The Committee noted that Art 9(5) of the BIT constituted the applicable law, which included Venezuelan domestic law as well as provisions of special agreements on investments (¶ 154, 159). The Committee also found that Article 9(5) only contained references to general principles of international law and the treaty and that the tribunal had made an ‘additional’ consideration in referring to customary international law (¶ 159).

#### *3.3.3.2 The relevance of the principle that national law cannot be used to override international obligations*

The Committee found that the analysis of the Tribunal was unclear in its conclusion that the agreement and congressional conditions could not ‘exempt or excuse Venezuela from its obligations under customary international law’ (¶ 157). While the Committee recognized the principle that domestic legislation cannot be used to avoid international obligations, the context of the tribunal in applying this principle was doubted (¶ 161). The Committee noted that the tribunal’s reasoning was plausible if it stated that the applicable law for assessment of compensation was the BIT (¶ 162).

However, the fact that the tribunal had suggested that there was a conflict between the international obligations of Venezuela under the treaty and its national law ‘troubled’ the Committee (¶ 162). The Committee considered that it did not find Venezuela seeking to employ any provision of internal law to avoid the payment of compensation altogether (¶ 162). The Committee also considered the fact that the tribunal had itself found the expropriation to be lawful, and that the offer of compensation that had earlier been made by Venezuela was not incompatible with the requirement of ‘just’ compensation (¶ 162). Therefore, the Committee did not see the relevance and application of the principle applied by the tribunal in indicating there was a conflict.

#### *3.3.3.3 The relevance of the price cap in determining fair valuation and the failure to consider submissions on the same*

The Committee found fault in the structure of the award, since before proceeding to deal with the substantive relevance of the price cap on damages, the award already determined a compensation figure (¶ 165). The Committee further found that the tribunal’s reasoning that the price cap only applied to compensation payable in the contractual arbitration by Lagoven,

as irrelevant, since it was a purely procedural objection and had no bearing on considering the price cap substantively as a factor in assessing fair compensation (¶ 166).

The Committee noted that this submission was made by Venezuela before the tribunal and was radically different from being an attempt to evade its international obligations using domestic law (¶ 181). The Committee therefore concluded that the tribunal, at no stage, gave any consideration to the relevance of the limitations on investors rights through the price cap, for an analysis of fair compensation. This would, in the view of the Committee, be relevant in determining the value a hypothetical buyer would be willing to consider (¶ 184).

#### *3.3.3.4 Content of property rights circumscribed by domestic law*

The Committee also acknowledged and accepted the Applicant's submission that reference to the agreement on compensation or price cap is warranted since these provisions form part of the content of the property rights of the investments made by Mobil (¶ 174).

#### *3.3.3.5 The annulment Committee's conclusions*

The Committee found (i) a lack of linkage between the postulated 'liability under international law' and the compensation criteria under the BIT and (ii) a lack of reasoning to justify the application of international law in exclusion of the express provision of the BIT that referred to domestic law and the agreement on compensation (¶ 187).

The Committee therefore decided that the portion of the award in relation to the Cerro Negro project, dealing with compensation be annulled on account of (i) manifest excess of powers in applying general international law (¶ 188 a); (ii) failure to state reasons for the application of justiciable international rules outside the BIT (¶ 188 b); and (iii) failure to state reasons for disregarding the relevance of the limitation provisions in its analysis on valuation, the purported reasons being based on unsupported and contradictory reasoning (¶ 188 c).

### **4. Costs**

In light of the rejection of two of the three grounds for annulment, the Committee directed both parties to bear their own costs of preparation and presentation, and to equally bear the costs in relation to the ICSID and the Committee (¶ 195).