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School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law

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Award Name and Date: Venezuela US, S.R.L. v. The Bolivarian Republic of Venezuela (PCA Case No. 2013-34) – Partial Award (Jurisdiction and Liability) – 5 February 2021

Case Report by: *Agata Zwolankiewicz***, Editor Ignacio Torterola***

Summary: The Claimant brought an action against Venezuela under the Agreement between the Government of Barbados and the Republic of Venezuela for the Promotion and Protection of Investments ('Treaty' or 'BIT'). The Claimant alleged that the Respondent violated its obligations under the BIT, namely the fair and equitable treatment ('FET') obligation and prohibition against arbitrary or discriminatory conduct. The Claimant also alleged that the Respondent breached its obligations under the BIT's umbrella clause and that the Respondent's actions led to the effect equivalent to nationalization or expropriation. Tribunal found that the acts alleged by the Claimant (except for refusal to give consent to the transfer of the Claimant's shares in Petroritupano by the Minister of Energy and Petroleum) are not attributable to the Respondent and, thus, the Claimant's claim concerning the breach of FET obligation by Respondent could not be upheld. Furthermore, Tribunal determined that the fact that no dividends were paid for 2008 and 2009 was discriminatory, and therefore Respondent had violated its obligations under the BIT. As to the breach of the umbrella clause contained in the BIT, the Tribunal concluded that since the Respondent did not enter into any contractual relationship with the Claimant regarding its investment in Petroritupano, the Respondent could not have breached such a clause. Finally, the Tribunal determined that the lack of payment of dividends could not amount to an indirect expropriation.

Main Issues: attribution to the State, discriminatory conduct, umbrella clauses

Tribunal: H.E. Judge Peter Tomka (Presiding Arbitrator), the Honourable L. Yves Fortier PC CC OQ QC (Arbitrator) and Professor Marcelo Kohen (Arbitrator)

Claimant's Counsel (until 13 February 2020): Mr. John P. Bowman (King & Spalding LLP), Ms. Jennifer L. Price (Price Arbitration PLLC); **(since 15 February 2020):** Mr. Elliot Friedman, Mr. Sam Prevatt, Mr. Lee Rovinescu, Ms. Madeline Snider, Ms. Paige von Mehren (Freshfields Bruckhaus Deringer US LLP)

Respondent's Counsel (until 30 June 2020): Mr. Mark H. O'Donoghue, Prof. Tullio R. Treves, Mr. Renato R. Treves, Mr. Eloy Barbará de Parres, Mr. George Kahale III, Ms. Claudia Frutos-Peterson (Curtis, Mallet-Prevost, Colt & Mosle LLP); **(since 1 July 2020):** Mr. Osvaldo César Guglielmino (Guglielmino & Asociados S.A.).

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Digest:

1. Relevant Facts

Venezuela US, SRL ('Claimant') is a company organized and existing under the laws of Barbados. The Respondent in these proceedings is the Bolivarian Republic of Venezuela ('Venezuela' or 'Respondent') (jointly referred to as 'Parties') (¶¶ 1-2).

In 2003, Venezuela began with an oil nationalization strategy. Pursuant to the Venezuelan Hydrocarbons Law of 2001, all activities relating to the exploration and search of hydrocarbons reservoirs, the extraction of those hydrocarbons in their natural state, and the initial gathering, transportation, and storage were to be performed by the State either directly or through corporations completely owned or controlled by it (i.e. mixed companies) (¶ 77).

The dispute between the Parties related to an oil and gas development. The Claimant commenced the arbitral proceedings over its investments in Petroritupano, a mixed company established between Corporación Venezolana de Petróleo ('CVP'), Petrobras Energía Venezuela, S.A., APC Venezuela, S.R.L., and Corod Producción, S.A., and their respective affiliates (¶ 88). The Minister of Energy and Petroleum and the President of the Republic approved the constitution of Petroritupano respectively on 20 and 22 June 2006 (¶¶ 89-90). The Contract for Conversion to a Mixed Company was concluded between CVP, Petrobras Energía Venezuela, S.A, Petrobras Energía S.A. ('Petrobras Argentina'), APC Venezuela, S.R.L., the Claimant (as direct owner of APC's shares), and Corod Producción, S.A. (¶ 91).

Petroritupano was profitable between 2006 and 2009 (¶ 108). Despite the Shareholders' Assembly of Petroritupano approving the distribution of dividends, they were never distributed (¶¶ 109, 113). In 2010, Petroritupano suffered a loss (¶ 111). The Claimant alleges that PDVSA and its affiliates "wrongfully manipulated Petroritupano's finances to make it appear that Petroritupano had no profits and could not declare dividends" (¶ 115). Further, the Minister of Energy and Petroleum did not authorize the change of indirect control in its capital stock so that Anadarko could sell its holding in Anadarko Venezuela Company (the Claimant's sole shareholder) to PetroFalcon for USD 200 million (¶ 104).

The Claimant filed for arbitration under the BIT. The Claimant alleged that Venezuela's actions led to an unlawful expropriation, or alternatively, that Venezuela breached other BIT obligations (¶ 126). The Respondent alleged that the Tribunal does not have jurisdiction and that the Claimant's claims are inadmissible (¶ 127).

2. Procedural History

The proceedings were initiated in 2013. On 22 March 2013, the Claimant filed a Notice of Arbitration pursuant to Article 8 of the BIT (¶ 3). After its constitution, the Tribunal circulated a Draft Terms of Appointment to the Parties on 4 December 2013. The Parties submitted their comments on it (¶ 12). Similarly, on 18 December 2013, the Tribunal circulated a Draft Procedural Order No. 1 and the Parties submitted their comments (¶¶ 13-14). On 17 January 2014, the Claimant submitted its Statement of Claim (¶ 15). On 24 January 2014, the Tribunal issued Procedural Order No. 1 (¶ 16). On 3 March 2014, the Respondent submitted its Statement of Defence. The Respondent challenged the jurisdiction of the Tribunal and requested the bifurcation of the proceedings (¶ 17). The first procedural meeting was set to be held in person on 19 March 2014 at the Peace Palace in The Hague, the Netherlands (¶ 21). Following an exchange of correspondence, the Claimant agreed to the bifurcation of the Respondent's first jurisdictional objection relating to the Tribunal's jurisdiction *ratione voluntatis* (¶ 22). On 14 March 2014, the Respondent notified the Tribunal and the Claimant of a challenge to Mr. Fortier under Articles 10 and 11 of the UNCITRAL Rules for lack of independence and impartiality and requested that the scheduled procedural meeting be postponed (¶ 23). On 14 March 2014, the Claimant raised concerns regarding the statement of independence and impartiality of Mr. Bottini and did not agree with the Respondent's proposal regarding the postponement of the procedural meeting (¶ 24). On 16 March 2014, the Tribunal acknowledged the Parties' agreement to bifurcate the Respondent's first jurisdictional objection and decided to cancel the scheduled procedural meeting (¶ 26). On 25 March 2014, Professor Bernardini resigned as appointing authority (¶ 29). Mr. Jernej Sekolec was designated as appointing authority by the Secretary-General of the PCA on 4 April 2014 (¶ 31). The Parties exchanged memorials on the Respondent's objection to the jurisdiction of the Tribunal (¶¶ 32-34,37). The appointing authority rejected the challenge to Mr. Fortier (¶ 35). On 10 July 2014, the hearing on jurisdiction was held at the Peace Palace in The Hague (¶ 39). Further, on 30 October 2015, the Claimant notified the Tribunal and the Respondent of a challenge to Mr. Bottini (¶ 41). The appointing authority sustained the challenge against Mr. Bottini, and the Respondent appointed Professor Marcelo Kohén as a substitute arbitrator (¶¶ 43-44). The Tribunal issued its Interim Award on Jurisdiction and a Dissenting Opinion from Prof. Marcelo G. Kohén on 26 July 2016 (¶ 46). The Respondent submitted its Counter-Memorial on Jurisdiction and Liability on 2 February 2017 (¶ 53). After exchanging document production requests and objections between the Parties, the Tribunal issued Procedural Order No. 3 and ruled on the document production requests (¶ 54). On 16 June 2017, the Claimant submitted its Reply Memorial on Jurisdiction and Liability and the Respondent submitted its Rejoinder Memorial on Jurisdiction and Liability on 13 October 2017 (¶¶ 63-64). Procedural Order No. 4 was issued on 24 October 2017 (¶ 68). Then, the hearing on jurisdiction and liability was held in The Hague on 28 and 29 November 2017 (¶ 70).

3. Positions of the Parties

3.1 *The Claimant's Position*

The Claimant asserted that (i) the conduct of PDVSA and its affiliates is attributable to Venezuela under the Articles on Responsibility of States adopted by the International Law Commission ('ILC Articles') (¶ 131); (ii) the dispute related to Petroritupano should be submitted to international arbitration (¶ 161), (iii) Venezuela violated its obligations under the BIT, in particular, the FET obligation (¶ 167), the prohibition against arbitrary or

discriminatory conduct (¶ 213), as well as its obligations under the BIT's umbrella clause (¶ 225), and (iv) Venezuela subjected the investment to measures having the effect equivalent to nationalization or expropriation, and it did so for other than a legitimate public purpose, on a discriminatory basis, and without prompt, adequate, and effective compensation (¶ 238).

3.1.1 The conduct of PDVSA and its affiliates is attributable to Venezuela

The Claimant argued that actions of PDVSA and its affiliates are attributable to Venezuela under Articles 4,5,8 of the ILC Articles, and under the structural and functional tests that inform the application of these provisions (¶ 131). In the Claimant's view, PDVSA may be regarded as a *de facto* organ of the Government of Venezuela under Article 4 of the ILC Articles (¶ 132). The Claimant further purported that PDVSA was not acting in a capacity of a commercial company and that PDVSA and its subsidiaries are described as affiliates to the Government of Venezuela and subordinated to the Venezuelan State (¶ 135). In the alternative, the Claimant submitted that even if PDVSA and its subsidiaries were not acting as a *de facto* organ of the Government of Venezuela, their conduct is attributable to the Respondent under Article 5 of the ILC Articles because they were exercising governmental authority as authorized by law (¶ 137). As the last alternative, the Claimant raised that in any event actions of PDVSA and its affiliates were attributable to Venezuela under Article 8 of the ILC Articles. In its view, even if perceived as private entities, PDVSA and its affiliates were acting under the instructions, direction and control of the Government of Venezuela to achieve a particular result (¶ 138).

3.1.2 The dispute related to Petroritupano should be submitted to international arbitration

In response to the Respondent's arguments concerning referral of the dispute to the Venezuelan courts, the Claimant submitted that Article 8 of the BIT expressly provides that disputes regarding its breach shall be submitted to international arbitration and the inclusion of an admission clause in the BIT does not subvert the effect of this provision (¶ 161).

3.1.3 The Respondent breached the FET obligation under the BIT

The Claimant submitted that the Respondent breached the FET obligation which should be interpreted as an autonomous standard (¶ 168). The Claimant asserted that FET includes an obligation not to violate the investor's legitimate expectations and to act in good faith toward the investor and investment (¶ 169). It further stated that it expected the Respondent to treat it fairly, would not unjustly discriminate against it, and would make PDVSA and its affiliates follow their contractual and other legal commitments (¶ 171). The main assertions were that the Respondent intentionally failed to distribute the dividends, manipulated Petroritupano's oil sales and purchases to deprive it of its income and failed to act in good faith by denying consent to the indirect transfer of control of the shares (¶ 171).

3.1.4 The Respondent's conduct was arbitrary and discriminatory

The Claimant stated that it was the only shareholder to whom dividends were not distributed and that PDVSA and its affiliates engaged in a scheme to manipulate with Petroritupano's finances to make it appear that it suffered losses, while taking the full value of Petroritupano's oil for itself. In addition to that, it asserted that Venezuela's policy consisting in not paying dividends to foreign investors until they invest additional capital was discriminatory (¶ 213).

3.1.5 The Respondent breached its obligations under the BIT's umbrella clause

The Claimant asserted that the actions of PDVSA's and its affiliates led to the breach of contractual obligations beyond commercial sphere (¶ 226) and that the umbrella clause obligation extends to the contractual commitments of PDVSA and its affiliates (¶ 227). It further argued that the umbrella clause meant that the Respondent was under an obligation to ensure that it and the state enterprises acting on its behalf or exercising governmental authority fulfilled their obligation under the contract as well as followed Petroritupano's Bylaws, and the Hydrocarbons Purchase and Sale Contract (¶ 229).

3.1.6 The Respondent's actions led to the effect equivalent to nationalization or expropriation

The Claimant argued that the Respondent's actions had effect equivalent to nationalization or expropriation, and that it acted for other than a legitimate public purpose, on a discriminatory basis, and without prompt, adequate, and effective compensation (¶ 238). In particular, the Respondent indirectly expropriated the investment by depriving the Claimant of its dividends and its returns, preventing the sale of interest in Petroritupano to a qualified third-party buyer, depriving Petroritupano of sales proceeds by not paying for oil received and resold by PDVSA Petróleo, accepting loans from PDVSA for Petroritupano to cover operating costs, and engaging in a scheme to defraud the foreign shareholders through improper fees, charges and taxes (¶ 239). The indirect expropriation was unlawful because it was not conducted for a public purpose. In fact, it was conducted in a discriminatory manner and the Claimant was not compensated (¶ 240). Lastly, it reiterated that expropriatory acts are not just private disputes among shareholders since PDVSA and its affiliates were acting on behalf of the State (¶ 241).

3.2 The Respondent's position

In turn, the Respondent argued that (i) actions of PDVSA and its affiliates cannot be attributable to Venezuela (¶ 140), (ii) the dispute should be decided by the Venezuelan courts (¶ 160), (iii) the Respondent did not violate its obligations under the BIT: the FET obligation (¶ 173), prohibition against arbitrary or discriminatory conduct (¶ 214), neither its obligations under the BIT's umbrella clause (¶ 230), and (iv) an indirect expropriation did not occur (¶ 242).

3.2.1 The conduct of PDVSA and its affiliates cannot be attributable to Venezuela

In response to the Claimant's assertions, the Respondent argued that the actions of PDVSA and its affiliates cannot be attributable to Venezuela as Venezuela was not a party to the Contract for Conversion to a Mixed Company (¶ 142). It further argued that a State can only be liable for a breach of contract to which it is not a party if the act is attributable to the State and inconsistent with the State's international law obligations which was not the case in this dispute (¶ 142). In the Respondent's view, PDVSA and its affiliates cannot be considered State organs because Venezuelan law does not recognize them as such (¶ 143) and that they cannot be regarded as *de facto* State organs simply due to the fact that private participation in the oil industry is limited and highly regulated (¶ 144). The Respondent denied the Claimant's contention that PDVSA and its affiliates exercised elements of governmental authority (¶ 145). It further observed that mere acting under the instructions, direction or control of a State is not sufficient to allow attribution under Article 8 of the ILC Articles because such attribution requires the conduct to breach an international obligation of the State (¶ 147).

Apart from that, the Respondent alleged that the Claimant did not meet its burden of proof (¶ 151) and that delay in the payment of dividends and mismanagement of Petroritupano could have been explained by its cashflow situation and other relevant facts of the case (¶ 152).

3.2.2 The dispute should be decided by the Venezuelan courts

The Respondent alleges that the claims are inadmissible due to the fact that the Claimant agreed to the Venezuelan courts deciding any dispute related to Petroritupano in Annex A to the Contract for Conversion to a Mixed Company (¶ 160). Such a condition is effective through the BITs admission clause – in its view, a State can condition the admission of the investment on the resolution of related disputes by domestic courts (¶ 160).

3.2.3 The Respondent did not violate the FET obligation

The Respondent argued that the FET obligation was not violated (¶ 173). It began with rejecting the Claimant's assertions that FET constitutes an autonomous standard and claimed that it is to be equated with the minimum standard of treatment under customary international law (¶ 174). It further argued that the FET obligation cannot be breached as a result of PDVSA or its affiliates' alleged breach of contract as it cannot be attributed to the Respondent (¶ 176). In addition to that, in its view, lack of payment by a contracting party cannot amount to a breach of the FET obligation and that the Claimant's claim is nothing more than a contractual claim based on the lack of payment of dividends by Petroritupano (¶ 177). It also rejected the Claimant's argument regarding legitimate expectations. Pursuant to the Respondent's assertions, the statutory framework did not change and aside from contractual commitments entered into by third parties, the Claimant was not able to point to any specific promise given by the Respondent (¶ 178).

3.2.4 The allegations of discrimination against foreigners are false

The Respondent reiterated that management of Petroritupano by PDVSA and its affiliates cannot be attributed to it, and further argued that continuous participation of foreign oil companies in Venezuela contradicts the Claimant's assertions of discrimination against foreigners (¶ 214).

3.2.5 The umbrella clause does not automatically give rise to breaches of the BIT

The Respondent rejected the Claimant's arguments and asserted that an umbrella clause does not automatically give rise to breaches of the BIT especially if the State is not a party to a contract (¶ 230). It further added that the Claimant cannot enforce the contractual obligations and at the same time refuse to abide by an exclusive jurisdiction clause providing for dispute resolution by Venezuelan courts (¶ 233).

3.2.6 There was no indirect expropriation

The Respondent disagreed with the Claimant's arguments concerning the issue of indirect expropriation. It stated that it had the contractual right to deny change in control of any of the Class-B Petroritupano Shareholders and that any actions mentioned by the Claimant constituted a dispute between private parties which cannot give rise to an indirect expropriation (¶ 242). In addition to that, there was no expropriation as the Claimant remained a shareholder of Petroritupano and was in possession of its claim for the 2008-2009

dividends (¶ 244). Lastly, in its view, the Claimant did not take into account factors such as the declining volume of oil produced by Petroritupano and the fluctuation of the price of oil in the international market which affected the financial situation of Petroritupano (¶ 244).

4. Tribunal's analysis

4.1 Whether the conduct of PDVSA and its affiliates can be attributable to the Respondent

The Tribunal began its analysis by stating that the issue of attribution may be considered at the jurisdictional phase or in the context of the merits (¶ 153). In this dispute, the Tribunal decided that this issue should be decided in the context of the merits (¶ 156). Before doing so, however, the Tribunal underlined that it must first deal with the issue of inadmissibility of the Claimant's claims (¶ 159).

4.2 Whether the dispute should be referred to Venezuelan courts

The Tribunal acknowledged that the Contract for Conversion to a Mixed Company establishes the exclusive jurisdiction of the Venezuelan courts for settling disputes regarding the performance, conditions, rules and actions constituting its subject matter. The subject matter was the approval of the incorporation of the Mixed Company Petroritupano, S.A. and the establishment of the terms and conditions for its operation (¶ 163). The Tribunal further noticed that the Venezuelan courts had exclusive jurisdiction over the differences and controversies arising from the failure to perform and comply with the basic terms and conditions of the Contract for Conversion to a Mixed Company and Petroritupano Bylaws (¶ 165) and thus these matters were inadmissible before this Tribunal (¶ 166).

4.3 Whether the Respondent violated the FET obligation

The Tribunal commenced its analysis by addressing the issue of admissibility. It found that there were no doubts that denial of authorization to sell shares in Petroritupano to a third party is attributable to the Respondent as it was the Minister of Energy and Petroleum (acting as a State organ) who denied the authorization (¶ 182). With regard to other claims, the Tribunal stated that it is necessary to determine the status of CVP and Petroritupano as PDVSA has not itself committed any of the acts complained of by the Claimant (¶ 184). The Tribunal did not follow the Claimant's argumentation that PDVSA or its affiliates constitute State organs and that based on that fact their actions can be attributed to the Respondent (¶ 192). The Tribunal also rejected the Claimant's contention that the failure to distribute dividends and provide financial data to the Claimant were carried out in the exercise of governmental authority (¶ 199) and therefore they cannot be attributed to the Respondent (¶ 201). Ultimately, the Tribunal found that none of the acts complained by the Claimant (except for refusal to give consent to the transfer of the Claimant's shares in Petroritupano by the Minister of Energy and Petroleum) are attributable to the Respondent (¶ 207), and that it cannot uphold the Claimant's claim concerning the breach of FET obligation (¶ 212).

4.4 Whether the Respondent's conduct was arbitrary or discriminatory

The Tribunal reiterated that the previous analysis led to the conclusion that the actions of PDVSA or its affiliates cannot be attributed to the Respondent (¶ 215). Nonetheless, the Tribunal found that the fact that the Claimant was not paid the dividends for 2008 and 2009, (whilst another foreign investor - Petrobras Argentina was) was discriminatory, and the

Respondent violated its obligations under the BIT (¶ 224). In the Tribunal's view, the Government of Venezuela instructed Petroritupano to pay the dividends to Petrobras Argentina (¶ 222).

4.5 Whether the Respondent breached obligations under the BIT's umbrella clause

The Tribunal concluded that since the Respondent did not enter into any contractual relationship with the Claimant regarding its investment in Petroritupano, it could not have breached the umbrella clause contained in the BIT (¶ 237).

4.6 Whether the indirect expropriation of the investment occurred

The Tribunal stated that the lack of payment of dividends did not amount to indirect expropriation (¶ 247). Moreover, these actions cannot be attributed to the Respondent and thus cannot form the basis for any claim of indirect expropriation by the Respondent (¶ 248). The Tribunal further stated that the denial by the Minister of Energy and Petroleum to consent to the intended transfer of shares did not amount to an act of indirect expropriation (¶ 251).

5. Costs

The Tribunal reserved its decision on costs for the final award (¶ 257).

6. Declaration of Professor Marcelo Kohen (jurisdiction and liability)

Marcelo Kohen reiterated that his view regarding the lack of jurisdiction of the Tribunal remained unchanged (¶ 1). He stated that he agrees with the analysis included in the Partial Award to a certain extent, however, the analysis of the attribution to the State of the relevant acts should have been examined through the rubric of jurisdiction *ratione personae* (¶ 2). Professor Kohen agreed with the Tribunal's conclusions as to the discriminatory nature of the non-payment of dividends to the Claimant, and shared the view that such actions are attributable to the Respondent (¶ 3).