VENEZUELA WATCH

ICSID Committee Strips $1.4 billion From Award to ExxonMobil

By **MIHALIS GOUSGOUNIS** *(mgousgounis@cgsh.com) and* **TANYA MARTINEZ** *(tmartinez@cgsh.com)*

On March 9, 2017 an ICSID committee annulled approximately $1.4 billion in damages from the approximately $1.6 billion award against Venezuela granted to entities owned by ExxonMobil. The original ICSID award had been rendered by an ICSID tribunal in October 2014 pursuant to the Netherlands/Venezuela bilateral investment treaty, ordering compensation mainly for the expropriation of the Cerro Negro and La Ceiba oil projects, which had been nationalized in 2007. Venezuela had filed for annulment of the award in February 2015.

The crux of the dispute centered on the nature and magnitude of the damages arising from the expropriation. Interestingly, the parties were not in dispute as to whether or not expropriation had occurred or whether the expropriation of the oil projects carried with it an obligation by Venezuela to pay compensation. The annulment decision focused on how the damages for the expropriation of the Cerro Negro project in particular had been justified and calculated.

In its annulment submissions, Venezuela argued that the contractual agreements between Exxon and Venezuela related to the Cerro Negro project incorporated a legislatively-enacted limitation of liability clause in the event that certain government actions were taken, also referred to as the "price cap," and that the price cap was ignored by the tribunal in assessing the damages via a discounted cash flow model. Exxon had maintained all along that the price cap was not relevant, as Exxon was bringing a bilateral investment treaty claim and not a contractual claim, with respect to which domestic legislative actions were not applicable.

The ICSID committee found in its annulment decision that, among other things, the tribunal failed to consider the relevance of the price cap when calculating damages, and that such failure was "unsupported by analysis and [was] based on contradictory reasoning," and, thus, annulled approximately $1.4 billion of damages awarded for the Cerro Negro project. The committee did not take a view as to how the price cap could or should have been applied; rather its decision was directed "simply at [the price cap's] *a priori* exclusion" from the calculation of damages. In short, the committee appears to have sided with Venezuela's view that, when assessing damages, the bundle of property rights themselves for which compensation was sought were effectively constituted and circumscribed by the contractual agreements, which in turn incorporated the legislatively enacted price cap, and as such the price cap should have been taken into account.

What happens next?

Within the annulment proceedings, Venezuela made a binding undertaking to promptly pay any part of the award that was not annulled, but it remains to be seen whether Venezuela will in fact follow through with its commitment.

Exxon has already indicated its intention to seek to enforce the remaining non-annulled $188 million of the award (to the extent it is not paid). However, Exxon's enforcement may be frustrated by procedural uncertainty. The District Court for the Southern District of New York confirmed the award before the ICSID committee reduced the amount awarded and had stayed the enforcement proceedings pending an appeal of the confirmed award in the Second Circuit. Shortly after the annulment decision, Exxon asked the District Court to lift the stay of enforcement with respect to the non-annulled portion of the award, but the District Court declined to do so absent guidance from the Second

Circuit given the pendency of Venezuela's appeal. The Second Circuit could potentially, among other things, (a) vacate the $1.4 billion judgment of the District Court confirming the original award on the ground that Venezuela did not receive notice of the actions before the Court entered judgment, and remand for further proceedings, or (b) reject Venezuela's appeal as to notice, but direct the District Court to reduce to $188 million the amount of the judgment to reflect the modification of the award as modified.

Separately, Exxon could initiate a new claim (submitted to a new ICSID tribunal) asking for redetermination of the damages that the ICSID Committee annulled. Such claim, in addition to being limited by the tribunal's finding that any damages awarded for the expropriation of the Cerro Negro project must be offset against the $908 million awarded in a parallel ICC proceeding, could take years to be decided and could also be subject to subsequent annulment proceedings.

Currently there are over 20 pending ICSID cases that have been brought by investors of allegedly nationalized projects against Venezuela in different stages, including a number of multi-billion dollar claims. Each claim is very fact specific and the Exxon annulment will not necessarily affect the other proceedings, but it does underscore the uncertainty and hurdles that such investors have to face on the road to recovery. More broadly, the market has been closely monitoring these ICSID cases, as Venezuela's failure to pay a final/non-appealable judgment over $100MM within 30 days will trigger an event of default under the Venezuela bonds. An ICSID award in and of itself would not constitute a "judgment" for purposes of the bond documentation; such award would have to be turned into a "judgment" in domestic courts and become non-appealable, a time consuming process that is ongoing with respect to some other ICSID awards against Venezuela (e.g., Crystallex, Gold Reserve, OI European Group, etc).

Timeline

Spring 2007	Venezuela nationalizes Exxon projects
October 2007	Exxon files ICSID claim
October 2014	Initial ICSID award ($1.6 bn) granted
October 2015	US District Court recognizes ICSID Award
February 2015	Venezuela files for annulment of ICSID Award
March 2015	Venezuela appeals recognition decision
March 2017	Annulment of $1.4bn out of $1.6bn granted