

Exxon sees US\$1.4 billion chopped from Venezuela award



Douglas Thomson
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An ICSID annulment committee has dramatically chopped US\$1.41 billion from an award won by ExxonMobil against Venezuela, holding that the damages were granted based on contradictory reasoning, “straw man” arguments and the assertion of powers under international law that were not mandated by the relevant bilateral investment treaty.

In a decision dated 9 March and published yesterday, the committee annulled a section on damages in the US\$1.6 billion award that had compensated five Exxon subsidiaries for Venezuela’s expropriation of their stakes in the Cerro Negro oil project in the Orinoco Belt.

The committee, composed of chair **Franklin Berman QC**, **Cecil Abraham** and **Rolf Knieper**, left intact the tribunal’s findings on jurisdiction and liability, as well as part of the award that granted Exxon US\$188.3 million for other claims under the Netherlands-Venezuela BIT. Venezuela had sought to annul the award in its entirety.

Exxon obtained the award in October 2014 from an ICSID tribunal composed of **Gilbert Guillaume**, **Ahmed Sadak El-Kosheri** and **Gabrielle Kaufmann-Kohler**.

The US oil company had at one time sought as much as US\$16 billion in the ICSID case. But in a 2010 jurisdictional decision, the tribunal struck out claims concerning matters pre-dating a 2006 corporate restructuring by Exxon, including significant royalty and income tax increases imposed on the project.

In 2014, the tribunal awarded Exxon US\$1.6 billion, holding that this sum should be offset by US\$908 million which Exxon had already won in a related ICC claim against Venezuelan state oil company PDVSA in 2012.

Venezuela applied to annul the ICSID award in February 2015 and a hearing on the request took place in March last year.

In its 80-page decision, the annulment committee said that the ICSID tribunal's conclusions on the value of compensation to be awarded to the Exxon parties failed to take proper account of a cap imposed on the value of the Cerro Negro project as a condition of its approval by Venezuela's legislature.

The committee agreed with Venezuela that the cap materially affected the value of the asset, and that the tribunal had not taken account of this in its award.

It said the tribunal's treatment of Venezuela's arguments had been "unsupported by analysis and based on contradictory reasoning". The only references made to the cap in the award were to defeat "straw man" arguments that the state had not actually made.

The committee added that the tribunal had taken the view that by invoking the cap in argument, Venezuela had breached a "fundamental" principle that a state cannot plead its own internal laws to evade its international law obligations.

It accepted that Venezuela had in fact sought to rely on the cap only to assess the market value of the asset.

Rather than incorporating the cap into its thinking on quantum as it should have done, the committee said the tribunal devoted the "overwhelming" part of its compensation discussion – more than 60 paragraphs of the award – to applying a discounted cash flow analysis to the uncapped value of the asset.

It also condemned the tribunal for committing itself to "general propositions about the relationship between 'national law' and 'international law,' which appear in turn to have foreclosed in advance the proper application of the BIT to the case."

It said the tribunal manifestly exceeded its powers in several instances by invoking an unspecified jurisdiction under international law that was apparently separate from the BIT. This led to an unexplained calculation of quantum "from which it is not possible to detract by domestic legal means or by any other form of action other than on the international plane."

"In its anxiety to dismiss any thought that national law can be invoked as a defence to the breach of an international obligation, the tribunal ended up falling into another version of exactly the same type of proposition", the committee said.

It maintained that its decision should not be understood to offer its own determination of how damages should be assessed.

Venezuela's counsel, **George Kahale** of Curtis Mallet-Prevost Colt & Mosle, tells *GAR*: "We were confident all along that our legal position was correct and are very pleased that the committee agreed. It is a courageous decision that deserves to be studied by the [investor state dispute settlement] community and international lawyers everywhere."

Counsel to ExxonMobil in the arbitration and annulment proceeding were Covington & Burling and Three Crowns. Lawyers from both firms declined to comment. However, a spokesman for ExxonMobil stressed that parts of the award have been upheld.

"We are evaluating the [decision] to determine next steps," the spokesman told *GAR*.

The annulment is likely to have an impact on enforcement proceedings that Exxon had been pursuing in the US courts. The oil company obtained ex parte recognition of the ICSID award in 2014 in the Southern District of New York. Venezuela's appeal of that decision is pending before the Second Circuit. The ICSID committee last year ordered a stay of enforcement to remain in place, following assurances from the state that it would promptly pay any part of the award that was not annulled.

The latest decision would appear to represent the largest amount ever annulled at ICSID, a record previously held by the annulment decision in *Occidental Petroleum v Ecuador*, in which an ad hoc committee shaved US\$700 million from a US\$1.76 billion award in 2015.

Venezuela Holdings BV and others v Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27)

Annulment committee

- **Franklin Berman** QC (UK)
- **Cecil Abraham** (Malaysia)
- **Rolf Knieper** (Germany)

Arbitral tribunal

- **Gilbert Guillaume** (France) (Chair)
- **Ahmed Sadek El-Kosheri** (Egypt)
- **Gabrielle Kaufmann-Kohler** (Switzerland)

Counsel to Venezuela Holdings and others

- In-house counsel **René Mouldoux** and **Eugene Silva**
- Covington & Burling
Partners **Oscar Garibaldi** (until 2013),* **Miguel Lopez Forastier** and **Thomas Cubbage**, with senior counsel **Eugene Gulland** in Washington, DC
- Three Crowns
Partner **Gaëtan Verhoosel** and counsel **Scott Vesel** in London

*Garibaldi retired from the firm and the case in 2013 to become an independent arbitrator

Counsel to Venezuela

- Procuradoría General de la República
Manuel Enrique Galindo Ballesteros
- Curtis Mallet-Prevost Colt & Mosle
Partners **George Kahale III**, **Benard Preziosi**, **Mark O'Donoghue** and **Miriam Harwood** in New York, with partner **Gabriela Álvarez Avila** in Mexico City