

ICC Tribunal Recognizes Guaidó's Intervention and Stays Proceedings in PDVSA v. PETROPAR

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On March 19, 2019, an ICC tribunal seated in Paris and comprised of Claus von Wobeser (chairman), Francesca Mazza, and Horacio Grigera Naón, issued a procedural order staying the arbitration proceedings between Petróleos de Venezuela S.A. ("**PDVSA**" for its acronym in Spanish, the Venezuelan state-owned oil company) and Petróleos Paraguayos ("**PETROPAR**" for its acronym in Spanish, the Paraguayan state-owned oil company), following, first, a request from PETROPAR to stay the proceedings considering that Guaidó's government should have the opportunity to submit its position in the arbitration, and second, an intervention from Mr. José Ignacio Hernandez, Guaidó's Special Attorney General, stating its agreement with the stay of proceedings.

Through the stay, the tribunal decided to cancel the hearings on the merits that were scheduled to take place from June 10 to 14, in Paris. PETROPAR also asked the tribunal to strike out PDVSA's reply on the merits filed on February 12, 2019, arguing that it represented the views of the Maduro government. The tribunal decided that it would rule on this issue until after the stay is lifted.

While the stay is a new and interesting development for the cases in which Venezuela (or an instrumentality of it) is involved, it is not the only approach taken in light of the political turmoil the country is experiencing. Recently, the ICSID annulment committee in the *Favianca* case (ARB/12/21) rejected arguments by Mr. José Ignacio Hernandez that Nicolas Maduro's government attorneys have no longer authority to represent Venezuela. The committee observed that Venezuela "as such" is the respondent and that it is being represented by attorneys from the Attorney General's Office "as required by [its] domestic law", and therefore, there is no basis to change the *status quo*.

The Dispute

In short, the dispute arose in July 2016, from the Energy Cooperation Agreement of Caracas (the "**Cooperation Agreement**"), signed between Paraguay and Venezuela in 2004. The Cooperation Agreement provided that Venezuela would provide Paraguay a certain volume of crude oil, refined products, and gas liquid processing, under a special financing regime and at a fixed interest rate. Between 2006 and 2008, PETROPAR experienced a risk of oil shortage because of tight supply in the region and a strong demand, and as such, PETROPAR failed to make timely payments on its debt to PDVSA. This situation led to a September 2009 agreement between PETROPAR and PDVSA on the renegotiation of the outstanding debt that amounted to USD 269 million.

PDVSA initiated ICC arbitration in June 2016, based on the 2009 refinancing agreement, claiming that after several attempts of settlement "*the futility of trying to reach a friendly solution is obvious.*" PETROPAR, while not disputing the debt, argued that such debt was not payable until 2023 and, in addition, argued that the arbitral tribunal had no jurisdiction to hear the case, since the Cooperation Agreement provided for "friendly negotiations" between Paraguay and Venezuela for the settlement of disputes. However, further agreements signed between PDVSA and PETROPAR did contain arbitration clauses providing for ICC as the administering institution. On June 2018, the tribunal declared itself competent to hear the dispute. [fn]CIAR Global, *Arbitraje Pdvsa vs. Petropar: Tribunal de la CCI se declara competente*, June 7, 2018; ABC Color, *Tribunal resolverá disputa*, June 6, 2018[/fn]

A Politically Charged Conflict

From the date the Cooperation Agreement came to force until 2012, the relationship between both countries was positive. This was mainly due to the affinity between both Hugo Chávez and then Paraguayan president, Fernando Lugo. In June 2012, President Lugo was impeached, and in 2013, a new president was elected, Horacio Cartes, who from the start demonstrated its opposition to the Chávez/Maduro regime.

These facts suggested a political motivation behind the arbitration initiated by PDVSA. Moreover, for some time now, Venezuela has been going through a rough and extreme economic crisis, with hyperinflation rates up to 1.300.000%. To this, we must add that its production of crude oil, which is one of the country's top - if not the main - source of income, reached new long-term lows, due to U.S. sanctions and constant blackouts that the country is experiencing.

In addition, the country has been experiencing a political turmoil which increased even more in the past six months, after Guaidó invoked a constitutional mechanism to declare himself Venezuela's acting president on January 23, 2019. Moreover, the crisis has now worsened with the military-civil uprising of April 30, 2019.

Yet, the contractual context of the conflict is unclear. Under the Cooperation Agreement, Venezuela agreed to grant two financing schemes for Paraguay to pay for the oil supply: (a) short term, up to 90 days, with a 2% flat interest rate; and (b) long term, up to 15 years, with an annual interest rate of 2%. However, it is uncertain whether the parties reached, at any point in time, an agreement to establish option (a) or (b). It is also uncertain if the further agreements signed between PDVSA and PETROPAR provided for a short or a long-term refinancing.

A Chance to Settle

Having cleared the jurisdictional hurdle, the issues that are now before the tribunal to decide include: to what extent is the debt enforceable, its amount, and any applicable interest. Guaidó's team is being cautious. In its intervention before the

tribunal, Guaidó's team indicated that, while agreeing with the stay of the proceedings, they did not agree with the striking out of PDVSA's reply on the merits. This means there is, at least, an interest on Guaidó's side, to somehow collect on PETROPAR's debt.

Being one of the many countries that have recognized Guaidó as Venezuela's rightful President, the stay of proceedings issued by the tribunal poses a unique opportunity to the Paraguayan government to reach an agreement with Guaidó's government, in the expectation that Maduro's government be ousted in the near future.

In this context, it is worth noting that approximately half of ICC arbitrations are withdrawn before a final award is rendered on the merits of the dispute. [fn]]. Fry, S. Greenberg and F. Mazza, *The Secretariat's Guide to ICC Arbitration*, ICC Publication No. 729 E, Paris, 2012, p. 323[/fn] However, a potential settlement with Guaidó's government will need to meet a high standard before it is recorded in a consent award, pursuant to Article 33 of the 2017 ICC Arbitration Rules.

Article 33 empowers a tribunal with discretion to render a consent award, by indicating that "*the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and **if the arbitral tribunal agrees to do so.***" This wording has been interpreted as giving the tribunal the choice not to render a consent award "*if it considers the contents thereof to be legally unacceptable or even unlawful.*" [fn]Herman Verbist, Erik Schafer, et al., *ICC Arbitration in Practice* (2nd edition, Kluwer Law International 2015), p. 180[/fn]

The legal validity of this eventual settlement will probably depend on the powers of Guaidó's team - or even Guaidó's powers - to represent PDVSA in moments like this, an issue that will later play a crucial role in enforcement and annulment proceedings. While Paris, France, the seat of this arbitration, is amongst the countries that recognized Guaidó's interim presidency, Guaidó's powers will certainly be under a different type of scrutiny before the French courts, should the consent award be subject to annulment proceedings. Issues such as the respect for international public order might come to play in these circumstances.

In this context, recent case law in France provides for a high threshold to find a violation of international public policy, which must be done in a "*clear and concrete manner.*" [fn]*Gulf Leaders*, CA Paris, March 4, 2014; *SA Planor Afrique v. Etisalat*,

CA Paris, January 17, 2012

Yet, there is nothing ordinary in the situation Venezuela is going through in the present days.

Conclusion

The little information available about the case makes it difficult to fully understand the underlying issues that gave rise to the arbitration, and it is even harder to predict possible outcomes. However, the political background of the dispute seems evident and right now, either party would not benefit from this kind of dispute, especially Venezuela, which is currently undergoing a major political crisis since Hugo Chávez's death back in 2013.

While the stay runs counter other approaches (like in *Favianca*), taking the opportunity to reach a settlement agreement will certainly benefit both parties, especially considering the Paraguayan government's willingness to honor its debt. However, such a settlement needs to be carefully crafted and guided by the tribunal, so that it can survive any chance of annulment, or enforcement denial.