Oil & Gas International Dispute Resolution in context: The example of *Exxon Mobil v. Venezuela*

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Abstract

The following article analyses the international dispute resolution tools in the Oil & Gas context. For that purpose, the article uses the example of ExxonMobil v. Venezuela to illustrate several issues in international litigation and arbitration. Likewise, the article explains the important background of arbitration in Venezuela, as well as the particularities of Venezuelan Oil industry and comparison with important changes in the region. Finally, the paper discusses the different arbitration and litigation strategies involving the oil business in Venezuela.

Resumen

El siguiente artículo hace un análisis a las herramientas internacionales de resolución de conflictos en el contexto Petrolero. Para ello, el artículo utiliza el ejemplo de Exxon Mobil vs. Venezuela para ilustrar los problemas que surgen en le campo del litigio y arbitraje internacional. De igual forma, el artículo explica antecedentes del arbitraje en Venezuela y las particularidades de la Industria Petrolera Venezolana en comparación con algunos cambios importantes en la región. Finalmente, se discuten las diferentes estrategias de arbitraje y litigio que involucran el negocio petrolero en Venezuela.

Key words

Oil & Gas. International Dispute Resolution. Enforce awards.

Summary

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Introduction

Over the past two decades, Venezuela has changed to become a problematic country from the perspective of investment. Venezuela's legal system is characterized by its overregulation, slow judicial resolution, active participation of the government into the economy and courts with preference to their own forum rather than foreign jurisdiction. Since the enactment of the 1999 Constitution[1], the idea of welfare state[2] governs the application of the law and how the government handles regulatory matters.

Venezuela's political and economic history also supports the assertion that Venezuela has and continues to be a risky place to make investments, especially for political reasons. The distinction between law and politics is confusing in practice. Beginning with the President Chávez's Administration, it has been custom to implement expropriations and nationalizations upon the idea of socialism. In this indiscriminate populism, the Chávez era was famous for expropriations of different corporations for political purposes, taking from the hands of investors tens of millions of dollars.

Due to the liberalization period of the nineties initiated by Venezuelan president Carlos Andrés Pérez, there is a body of different treaties that provide access to international mechanisms rather than domestic courts. Beyond this, there is a huge problem: there is no confidence in the Venezuelan judicial system. In this regard, some authors argue that, since 2002, the government siting at domestic courts has never lost against private individuals[3], decreasing the trust in the administration of justice each day. Hence, businesses shy away from bringing their complaints against the government to court where they are not only discouraged from doing so, but where biases overwhelmingly favor the government. To further complicate matters, Venezuela denounced the Convention on the Settlement of Investment Disputes between States and

[1] Constitution of the Bolivarian Republic of Venezuela, *Official Gazette* Nr. 36.850, 30 December 1999.

[2] Under the European vision of the state, the term "welfare state" is not precise. In Latin America's neoconstitutionalism, influenced by European scholars, the idea of "*Estado Social de Derecho*" is a dogmatic principle in most constitutions of the continent in which states take active participation in the wellbeing of their citizens. *See also* Begg, Ian / Fabian Mushövel / Robin Niblett, The Welfare State in Europe Visions for Reform, in: *Chatam House, The Royal Institute of International Affairs,* 2015.

[3] *See* Canova, Antonio / Luis Herrera Orellana / Rosa Rodríguez Ortega / Giusseppe Graterol Stefanelli, *El TSJ al servicio de la Revolución,* Caracas, Editorial Galipán, 2014.

Nationals of Other States ("ICSID") in January 2012, which had been in force since 1993. However, Venezuela is still party to a network of bilateral investment agreements that provide access to international arbitration by foreign investors. This is one of the reasons why the country is a recurrent respondent in the ICSID tribunals.

At the moment of writing this case note, Venezuela has 22 pending cases before ICSID arbitration tribunals[4], mainly in cases involving domestic expropriations without just compensation under Venezuelan law in a variety of economic sectors. Hence, it has been pointed out in the international forum that "most foreign investors' grievances against the government are the fallout of these claw-back policies; the main issue in dispute is usually whether the amount of compensation offered by the government is sufficient"[5].

Notwithstanding, Venezuela is still attractive for foreign investment for one reason: oil. This should not be a surprise having in consideration that "Venezuela is one of the world's leading petroleum producing countries"[6], "has the largest proven reserves of crude oil of any country which consists of about 298,400 million barrels (about 18% of the world's crude oil reserves)"[7] and is relatively close to the United States market. In brief, the country has been privileged by nature. However, investments are not easy in the country. "[W]hen crude oil price changes dramatically, some parties that are engaged in

[4] *See* https://icsid.worldbank.org.

[5] Ripinsky, Sergey, *Venezuela's Withdrawal from ICSID: What it Does and Does Not Achieve, Investment Treaty News* (3 April 2012), available at: https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/#_ftn3

[6] ICSID, Case Nr. ARB/07/27, (*Venezuela Holdings, B.V. et al v. Bolivarian Republic of Venezuela)*, Award on the merits, at ¶ 35.

[7] Vojvodic, Natalija / Sergio Casinelli, *Oil and gas regulation in Venezuela: overview* (3 October 2014), available at: https://content.next.westlaw.com/Document/Id4af1a871cb511e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1. To get an overview of Venezuelan Oil industry "about 75% of Venezuelan crude oil is extra heavy crude. Venezuelan reserves of crude oil are mainly located in the western and eastern parts of the country, as well as in the Orinoco Oil Belt. Venezuela has the eighth largest proven reserves of natural gas. Venezuelan proven reserves of gas amount to 195.101 trillion cubic feet. Most of the Venezuelan gas reserves are located in the North and Northeast areas of Venezuela, and in the shores of the Caribbean and Atlantic continental platforms, and mainly correspond to associated gas. [In addition,] Venezuela is a member of the Organization of the Petroleum Exporting Countries (OPEC) and of the Gas Exporting Countries Forum (GECF). Currently, LNG projects are under review by Petroleum of Venezuela (Petróleos de Venezuela S.A.) (PDVSA), the state-owned oil company".

long-term contracts might have strong incentives to renegotiate [...] when renegotiation is not feasible, disputes arise"[8]. In addition, there is a huge phenomenon going on, fracking and the revolution of the oil industry. Oil prices that rose up to one hundred dollars per barrel on the late last decade, fell down dramatically. OPEC quotas trying to stabilize the oil price haven't been effective while United States has increased substantially its domestic production. Exporting countries has been affected in their market and new investments are being done to continue with the fracking boom. This situation does not seem to stop constantly increasing.

As it has been mentioned supra, despite this entire phenomenon, Venezuela is still a key market. Being Venezuela an oil country with an important oil and gas industry, international dispute resolution has been crucial in all controversies resulted from changes of policy and the current political crisis. Still there is a lot of oil in South America. As it has been said "Venezuela is home to one of the world's largest oil reserves, located in the Orinoco Oil Belt in Eastern Venezuela, north of the Orinoco River"[9] with deposits of extra-heavy oil which are attractive for oil investment[10]. However, expropriation of assets or commercial disputes in Venezuela have been litigated nationally and internationally to protect huge foreign investment. Now, more than any time, dispute resolution has meant the only way to protect investment in the Venezuelan oil industry. But, how to do this? Which is the best vehicle to challenge a party with such power as the Venezuelan State?

Our plan in these words is to explore different ways using the example of *Exxon Mobil v. Venezuela* to show how difficult is the international litigation practice. This is why we propose to explore the world of investor-state arbitration and international oil arbitration in the context of *ExxonMobil* case. Nonetheless, we believe this topic is so specialized that is necessary to create an introductory path to explore all the issues arising Oil & Gas Arbitration. Indeed, the topic is challenging in several fronts, being the perfect example

[8] Abdala, Manuel A., Compensation Issues in Oil and Gas International Arbitration Cases, in: *American University International Law Review,* 2009, Vol. 24, Nr. 3, pp. 539 ff., at p. 539.

[9] ICSID, Case Nr. ARB/07/03, (*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela)*, at ¶ 19.

[10] This extra-heavy oil requires a special treatment, which traduces into the readjustment of the industry, and by consequence: an important investment.

of international cross border litigation and international arbitration in practice.

I. The Oil Business: hybrid investment scheme under Venezuelan Law

Traditionally, there has been the understanding that Latin America has a different concept of property law and subsoil rights. It is true indeed. Mexico's Constitution of 1917 was and still is the best example of the state-owned conception of subsoil property in representation of the people and clearly was an inspiration to several constitutions in Latin America. Some authors have called this phenomenon resource nationalism. In this respect, it has been pointed out that "resource nationalism has raised concerns about access to energy resources and political interference with the level of energy production and investment in the region"[11]. This is a framework characteristic of Latin America and Venezuela has not been an exception to this practice.

In this operative scheme, the State is the owner of natural resources in representation of the people with absolute control over them. Then, oil and natural gas, as natural resources, are deemed owned by the State either through state-owned companies or concessions. In this scenario, from the commercial perspective as some authors have pointed out, "sovereign power and business interests can be much more important than even the most well-drafted contract"[12].

Indeed, this scheme has several implications in practice for the private sector in the Oil industry. First, there is a mandatory negotiation with the government and its agencies to set the business into the internal regulatory framework. And second, there is an imposed partner, the State, who will decide the policy considerations in the domestic oil industry. Generally speaking, this school of thought has been followed by almost all Latin-American countries in protection of their territorial interests and as a way of protectionism against developed countries and their companies. In contrast, for the private

[11] Brunet, Alexia / Juan Lentini, Arbitration of International Oil, Gas, and Energy Disputes in Latin America, in: *Northwestern Journal International Law & Business,* 2007, Vol. 27, Nr. 3, pp. 591 ff., at p. 621.

[12] Witten, Emily, Arbitration of Venezuelan Oil Contracts: A Losing Strategy?, in: *Texas Journal Oil Gas & Energy Law*, 2008, Vol. 4, Nr. 1, pp. 55 ff., at p. 56.

sector this implies an "adaptation" to foreign policies and practices in the foreign oil and gas sector.

This last affirmation is not absolute. In fact, it is fair to affirm that constant lobbyism and international influence by transnational oil companies have resulted in changes in the original scheme, which had been thought in the most of Latin-American countries' constitutions. Thanks to the changes in the industry and important investments in the sector, a hybrid framework has shown up where somehow the American standards are imposed to foreign branches of mayor foreign oil companies but at the same time respecting the regulatory framework of the home states where the investment is placed. Therefore, a scheme has been created where corporate and administrative laws are in some way related in a routine basis.

This has been key in the transformation of the oil sector and has generated the change of the traditional concept of concession over natural resources. Evidently, there is a huge interest on Latin America natural resources. This is because "Latin America continues to be a leading producer of oil and natural gas and a leading supplier to the United States"[13] being this market accessible in many ways, especially because it lowers costs and its strategic geographic location.

In the case of Venezuela, "one reason most companies have declined to fight the various measures squeezing their operations is that Venezuela remains a relatively friendly place to do business"[14]. In fact, if we compare Venezuela with several countries of Africa or Middle East, we may realize that Oil companies in Venezuela do not have the problem of constant armed conflicts or difficulties of transportation of resources, which usually tends to occur in these parts of the world. Coming back to Venezuelan law, concession is generally a term used in Administrative law to mean "permission". In fact, a concession is indeed a permission to act or carry out an economic activity[15]. This concession scheme was held in Venezuela for several decades before the nationalization of the oil industry in the seventies as a way of control of natural

[13] Brunet / Lentini, Arbitration of International Oil..., ob. cit., p. 620.
[14] Witten, Arbitration of Venezuelan Oil Contracts..., ob. cit., p. 84.
[15] Under Venezuelan Administrative law, a concession is a public authorization to do something based on the rights of a public entity. Thus, when we're talking about concessions, really, we're talking about a public authorization to exercise particular activity to own benefit, but it is always in representation of the entity entitled to such right.

resources[16]. Then, the industry worked under concession contracts with the Venezuelan State as a copartner. But Venezuela left behind the concession scheme –as it was initially conceived– long time ago, although it is still used in other sector such as mining[17].

The problems of this scheme were the absolute powers of the state over the concession and the difficulties to carry out normal business transactions in the industry. This is still a problem as we shall see in our discussion of the current practice. Of course, this still happens because the State is the owner of the land and the mineral state in such track of land. As such, the State may dispose its rights at its convenience as a matter as a constitutional right. Undoubtedly, the relationship between private and public sectors were highly risky and heavy influenced by the political scenario.

This core conception has been evolving to the current practice, which started with huge variations in the nineties during the period of liberalization[18], and even Mexico, the main example of Latin American constitutionalism, has changes as well with respect to its oil industry[19]. Nowadays, it is not accurate to say that there is an absolute concession scheme. In fact, it's true that the state still owns natural resources in its land but now private companies look to set partnerships or corporations to exploit natural resources in conjunction with the Venezuelan State-owned company Petróleos de Venezuela, S.A,

[16] This scheme took place since the late 19th century. The first concession from which there is evidence, was given to Camilo Farrand (an American citizen) in August 24th, 1873. This permission was given by the Government (not only the national Government but the local) to either natural or businesspersons to receive a percentage of their profit. Further, they could operate freely and independently. (Arráiz Lucca, Rafael, *El Petróleo en Venezuela: una historia global*, Caracas, Editorial Alfa, 2016).

[17] *See* Venezuelan Mining law, Bolivarian Republic of Venezuela, Presidential Decree Nr. 295, 5 September 1999, published in the Special *Official Gazette* Nr. 5.382, 28 September 1999.

[18] In addition, this period of liberalization resulted in the sign of several Bilateral Investment Treaties.

[19] The Mexican government has amended Mexico's Constitution to allow private investment in the petroleum sector. Even though "privatization was not accomplished, but incentives to foreign firms working with Pemex were provided". (Vietor, Richard / Haviland Sheldahl-Thomason, *Mexico's Energy Reform*, Harvard Business School Case 717-027, January 2017). In fact, "Mexico is among the most important non-OPEC producers in the world" and "the reforms now permit international energy companies to operate in Mexico and include provisions for competitive production sharing contracts and licenses". (U.S. Commercial Service, *Mexico-Oil and Gas*, (Aug, 2017), available at: https://www.export.gov/article?id=Mexico-Upstream-Oil-and-Gas).

("PDVSA"). Still today it has been an important oil actor in decades. In Venezuela, PDVSA controls the sector with mandatory capital participation in the foreign corporations through mixed companies with limited scope in their commercial transactions[20]. Just to exemplify its importance, PDVSA "is the sole owner of Citgo, which operates refineries and gasoline retailers in the U.S. Citgo, the eighth-largest oil refiner in the United States, is Venezuela's most valuable overseas asset"[21]. PDVSA has been an important actor in the Oil and Gas industry in the Americas, with several refineries and related industries in the sector, having offices in Netherlands, the Caribbean and access to the American market through CITGO.

But indeed, neither the concession, contract or joint venture scheme may explain the current Venezuelan Oil & Gas practice. As a matter of fact, it is the combination of all these institutions. So, there is not a joint venture because there isn't a partnership in fact. There is not a concession because the parties are private parties using different contractual vehicles (although one of these parties is the Venezuelan public oil companies in its private forms). And it is not entirely contractual, because the Venezuelan State remains with imperium over the transaction, controlling policy considerations and behind the scenario, taxing the oil industry in a particular way under the Venezuelan Hydrocarbons Act[22]. Among this heterogeneous picture, one thing remains clear: handling relationships with state-owned companies is complex all the time[23].

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[20] As Vojvodic and Casinelli point out "the commercialization of natural hydrocarbons is reserved to state-owned companies, since mixed companies can only sell any natural hydrocarbons that they produce to state-owned companies." (Vojvodic / Casinelli, *Oil and gas regulation in Venezuela*..., ob. cit.).

[21] Ellsworth, Brian, Venezuela Slams Exxon Over Asset Freeze, in: *Globe and Mail*, 9 February 2008, B6.

[22] Hydrocarbons Law, Bolivarian Republic of Venezuela, Decree Nr. 1.510, 2 November 2001, reprinted in the *Official Gazette* Nr. 38.493, 4 August 2006.

[23] As Eljuri and Trevino point out "the relationship between a foreign investor and the host State is infused with at least three tensions: The State, as *owner* of the oil resources, determines the scope of property rights or participation that the foreign investor may acquire in the energy sector." (Eljuri, Elisabeth / Clovis Trevino, Energy Investment Disputes in Latin America: The Pursuit of Stability, in: *Berkeley Journal of International Law*, 2015, Vol. 33, Nr. 2, p. 337). Then "the State, as contracting party, makes direct promises to the foreign investor (and vice-versa). And the State, as *sovereign*, controls the legal and physical framework in which the contract takes shape". (*Id.* p. 336). In addition, oil prices should be taken

The framework has its own characteristics. Then, something that is generally common under U.S law, such as disputing property rights over the mineral state in the state of Texas for example, simply does not happen under Venezuelan law because there is no private ownership over mineral rights. Indeed, the Venezuelan state is constitutionally the sole owner of the natural resources and so the practice is fundamentally different. This is because the ownership of minerals is not challengeable under contract or tort law. Therefore, the domestic oil and gas contracts are not so developed in the matter of property rights, but do they are in commercial terms. By consequence, there is no judicial action to seek relief under property law, instead, there are judicial remedies through contracts and administrative law bases if we are talking about litigation against PDVSA as a state-owned company. As a matter of fact, PDVSA as a private company may enter into several contracts as a private party and therefore being liable for the breach of such legal and commercial obligations.

The situation is different in a commercial litigation against an oil contractor and oil related companies. In this case, the challenging of contractual provisions will never change the general rule about ownership. Then, we have a litigable controversy related to obligations in service contracts among oil companies. But in any event the litigation would be around ancillary obligations and not about ownership provisions over minerals or forms of acquisitions over them due to the absolute ownership by the Venezuelan State. In all this complex corporate structure, arbitration clauses and Bilateral Investment Treaties ("BITs") may come to play as a way of dispute resolution. As we will see, even though Venezuela has a special framework in the oil sector, it does not mean an exception of the basic principles of international commerce in a world essentially globalize.

As a conclusion, these explanations help us to think about the following: which contractual vehicle can protect the interests of the State as well as allow private investment in harmony? As we see, there are several reasons why states are so worry about its resources[24] as well as there are several profitability

into account in the negotiations. Then, "in times of high oil prices, the bargaining power of the investor will tend to be lower, and vice-versa". (*Id.* p. 335).

[24] The problem of the control over the industry is because the question of policy behind the exploitation of natural resources. These are, of course, difficult questions. It seems clear, at

and investment risk issues from the private perspective. Undeniably, there are conflicts of interest between the state and oil companies. The only true is that the State has not the capacity to exploit its natural resources alone. Simply, it does count with the necessary resources and technology to carry out such complex activities. That is why the private sector is so important: it helps the development of the land and makes it productive. But, of course, this is because there is an obvious interest to make profits and growth the business to its maximum. Either way, natural resources are not valuable in the subsoil but out of it.

In this balance, it is where both State and private sector may find a perfect equilibrium and establish a win-to-win relationship. On one hand, the State preserving its resources and generating some revenue, and on the other hand, private companies exploiting resources to generate energy, and several goods and services. At the end of the day, in macroeconomic terms a big and strong oil industry is not only the extraction of crude, it is the employment that generates and the collateral jobs and services resulted from such economic activity, which benefits the general economy of any country. But as we have already discussed, there is not always a friendly environment to resolve disputes that naturally may occur and arbitration has arisen as the perfect mechanism to handle them.

II. Venezuelan Arbitration Law and Oil & Gas

Since the Republic was founded, Venezuelan law has been reluctant to arbitrate, especially with respect to the arbitration of territorial claims between neighboring countries[25]. This is one of the main reasons Venezuelan constitutional history has recognized the necessity of constitutional provisions that provide safeguards against foreign courts in monetary claims[26]. So has been

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least in Latin American, that States must oversee such considerations. If such approach is right or wrong, it is still open to debate.

[25] Venezuela has lost part of its territory under different international arbitration disputes, especially with Colombia and Guyana. *See* Armas, Humberto, *El arbitraje internacional. Posición de Venezuela. Problemas de límites con Guayana Británica y Colombia*, Caracas, 1959; Id., *Ministerio de Relaciones Exteriores, la cuestión de límites entre Venezuela y la Guayana Británica,* Caracas, 1962.

[26] Badell Madrid, Álvaro. *La inmunidad de jurisdicción y el arbitraje en los contratos del Estado*, (2005), available at: http://www.badellgrau.com/?pag=17&ct=76

recognized an immunity of jurisdiction provision or "Calvo clause"[27] whose doctrine states that "foreign states may not enforce their citizens' private claims by violating the territorial sovereignty of host states either through diplomatic or forceful intervention"[28]. This was established under article 151 of the Venezuelan Constitution[29]. In addition, even American state courts have discussed the impact of the Calvo clause in domestic disputes when the relationship of the parties is international under the rules of jurisdiction[30].

However, during the nineties, the Venezuelan congress enacted the Commercial Arbitration Law[31] and the government subscribed and enforced a considerable number of Bilateral Investment Treaties[32] to promote foreign investment. In addition, the Venezuelan Supreme Court has upheld several legal opinions promoting arbitration as an alternative dispute resolution. Hence, arbitration is part of judicial administration system under the Constitution[33]. with the only exception being arbitration when the imperium of the

[27] In this regard, Shea (1955) explains Calvo clause background as has been "the most successful and the most widely used technique has been to require the alien to agree, as part of any contract concluded with a Latin American government, [...] by which the alien agrees to waive the right of diplomatic protection and to resort for redress of any grievances exclusively to the local judicial remedies." (Shea, Donald R., *Calvo Clause: A Problem of Inter-American and International Law and Diplomacy*, Minneapolis, University of Minnesota, 1955).

[28] Dalrymple, Christopher K., Politics and Foreign Direct Investment: The Multilateral Investment Guarantee Agency and the Calvo Clause, in: *Cornell International Law Journal*, 1996, Vol. 29, Nr. 1, pp. 161-163.

[29] Venezuelan Constitution, article 151: In the public interest contracts, unless inapplicable by reason of the nature of such contracts, a clause shall be deemed included even if not expressed, whereby any doubts and controversies which may raise concerning such contracts and which cannot be resolved amicably by the contracting parties, shall be decided by the competent courts of the Republic, in accordance with its laws and shall not on any grounds or for any reason give rise to foreign claims.

[30] In dicta, the Supreme Court of Oregon in *Novich v. McClean*, 18 P.3d 424, 428 (Or. Ct. App. 2001) explained the Calvo doctrine as "the conflict between foreign investors [... in which] the Calvo Doctrine arises when a host country nationalizes or expropriates property owned by a foreign investor".

[31] Commercial Arbitration Law, Bolivarian Republic of Venezuela, *Official Gazette* Nr. 36.430, 7 April 1998.

[32] In total, Venezuela has enforced 28 Bilateral Investment Treaties with several countries.

[33] *See* Supreme Court of Justice, Constitutional Chamber, Decision Nr. 573, 3 November 2010 *(Astivenca Astilleros de Venezuela, C.A). See also* Supreme Court of Justice, Political-Administrative Chamber, Decision Nr. 672, 10 May 2015 (*Bariven, S.A. v. Ocean prefect*).

state is involved[34] although Commercial Arbitration with Public Corporations is well debated.

Considering this last exception, most disputes regarding investments are excluded from access to arbitration because they are treated as matters of public law. Expropriation, as a legal institution, is a matter of public interest and imperium of the state, in which the domestic administrative courts must decide under Venezuelan law[35]. Therefore, the investor is obliged to negotiate under the Expropriation Law if he wants to get some compensation for his investments[36]. At this point, many issues arise between private corporations and the government. As we will see, the term expropriation is matched with concession, being its application broad in international law.

There is not a particularity in Oil & Gas arbitration more than the specific industry regulated. Then, the generally principles apply to this sector without distinction and are tools of dispute resolution. In the Oil & Gas practice with Latin America, and in Venezuela, either investment or commercial arbitration are tools which may be tailor-made depending on the particular circumstances surrounding the business enterprise in a particular country. So, generally speaking, "a private corporation seeking to resolve an investment dispute against a foreign state has several options, including: domestic remedies, political risk insurance, arbitration under a bilateral investment treaty, and international arbitration as provided for in the contract"[37]. This is, as we will see, essentially a matter of arbitration and litigation strategy. Then, oil companies generally have the option to either decide to invoke investment arbitration treaties or look at contractual provisions either suing under local courts or invoking arbitration in foreign arbitral tribunals. Either way it will always be complex[38].

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[34] *See* Sira Santana, Gabriel, El imperio del Estado como excepción al arbitraje entre particulares, in: *Revista de Derecho Público,* 2016, Nr. 143-144.

[35] *See* Brewer-Carias, Allan, *Ley de Expropiación por Causa de Utilidad Pública o Social*, Caracas, Editorial Jurídica Venezolana, 2002.

[36] Under Venezuelan legislation expropriation is generally allowed as a way of protection of the State's interests. It is permitted for legitimate public interest purposes and, requires among others, a timely and fair compensation. The issue is that, expropriations have been used more as a political weapon to intimidate regime's adversaries, breaking the law. They do not always respond to the interest of the collectivity neither is paid a just compensation.

[37] Witten, Arbitration of Venezuelan Oil Contracts..., ob. cit., p. 60.

[38] Eljuri / Trevino, Energy Investment Disputes in Latin America..., ob. cit., pp. 335 and 337.

Under Venezuelan law, as a general rule, it is possible to arbitrate with the State in its private forms under the Commerce Code. This is, Public Corporations whose shareholders are the Republic, the States, or Municipalities. In general terms, the organization of Public Administration is truly messy, which always arises questions about the possibility of Arbitration with Public Entities[39]. So, this is a swampy area in which when we believe we have answers, we realize that there are more doubts[40]. In these private forms, Public Corporations[41] make business transactions as they were private individuals, therefore, they are able to contract either with arbitration clauses or with separated arbitration agreements.

In addition, under the Attorney General Act[42], it is required prior authorization in arbitration where be involved Republic's interests[43]. Even though the Act only applies to the Republic, it is debated whether or not this provision applies to Public entities where the Republic owns more than 50% of the shares or even if the procedural privileges of the Republic applies to these companies in Arbitration. To make more complex the practice, there is not uniform case law in this matter, although it is recognized the general idea of arbitration with public entities under the rules abovementioned under the Arbitration Act[44]. This is why domestic Venezuelan arbitration is not a friendly forum from an investor's perspective, although its awards may be enforceable under the Convention on the Recognition and Enforcement of

[39] In the Venezuelan vision of organization of Public Administration, there are three mainly public entities: The Republic, the States, and the Municipalities. In addition, there is a special regime for corporations owned by public entities besides the rules under the Arbitration Act. (Commercial Arbitration Law, Bolivarian Republic of Venezuela, *Official Gazette* Nr. 36.430, 7 April 1998).

[40] In this aspect, the general rules are contained in the Arbitration Act which states: "[w] hen one of the parties to an arbitration agreement is a corporation wherein the Republic, the states, the municipalities and the autonomous institutes hold an interest of fifty percent (50%) or more of the capital stock, or a corporation in which the entities mentioned above hold an interest of fifty percent (50% or more of stocks), said agreement shall require the approval of the body having authority under the bylaws and the authorization in writing of the Minister having jurisdiction in order to be valid. The agreement shall specify the type of arbitration and the number of arbitrators which shall under no circumstance be less than three (3)". Venezuelan Arbitration Act, Article 4.

[41] We refer as a Public Corporation those who are total or partially State-owned.

[42] Bolivarian Republic of Venezuela, Special *Official Gazette* Nr. 6.220, 15 March 2014.

[43] Attorney General Act, Article 12.

[44] *See* Supreme Court of Justice, Political Administrative Chamber, Decision Nr. 855 5 April 2006 *(Elettronica Industriale v. VTV)*.

Foreign Arbitral Awards or commonly known as the New York Convention[45] in which Venezuela is a member state.

In this respect, some authors have pointed out that

> ...although domestic law would seem to be irrelevant if the parties consented to international arbitration, Venezuela can assert several arguments to block enforcement of an award or even avoid arbitration altogether: (a) the state was acting in its public capacity and retains full sovereign immunity; (b) since arbitration for petroleum disputes was unconstitutional and against national law when the contracts were signed, consent was an ultra vires act, and therefore void; and (c) the dispute is not in regards to a commercial matter, so the tribunal has no jurisdiction[46].

These considerations apply essentially when there is a domestic arbitration governed by Venezuelan law, which arises the questions of what happens in cases of international business arbitration when the arbitration itself involves foreign parties and are argument usually held by the Venezuelan government. There is a possibility that as long as the arbitration is seated in Venezuela, the award may be vacated on grounds of Public Policy and Venezuelan Public law. Nonetheless, PDVSA international contracting with foreign parties has been usually under international grounds, putting aside all these domestic considerations. Indeed, PDVSA enjoys a double reality: under Venezuelan law, it has tremendous powers over dispute, but under foreign laws it is another simple foreign corporation.

In practice, another way of dispute resolution is through Bilateral Investment Treaties ("BITs") which main objective is to protect Investments. In an Investment Arbitration controversy, it is important to understand the concept of "investor" and "investment" because this distinction is crucial to understand this type of dispute resolution. Nevertheless, nor investor neither investment is completely doctrinally defining. In general, the "investor" is defined as the natural person that performs a investment in a particular jurisdiction. On the other hand, there is not a definition of investment. Indeed, even the ICSID convention does not define it at all[47]. One of the earliest awards to consider the meaning of "investment" in depth is *Fedax NV v Republic of*

[45] New York Convention on the Recognition ad Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 38; 21 UST 2517; 7 ILM 1046 (1968).
[46] Witten, Arbitration of Venezuelan Oil Contracts..., ob. cit., p. 75.
[47] Witten, Arbitration of Venezuelan Oil Contracts..., ob. cit.

Venezuela defining the investment phenomenon as so "have been described as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development"[48].

Generally speaking, such definition could be found in the particular treaty, but it has been well discussed by its scope meaning. So, at least theoretically, it is plausible that there is no such definition under the treaty at all and would be acceptable as investment controversy. Likewise, in most of the cases, the ICSID conventions work as default rules[49]; this means that, given the lack of rules contained in the treaty, the arbitrators can use them to manage the dispute. This entire international framework is essential in the corporate structure of Oil companies in the Americas. "Companies considering investing in South America in oil and gas projects must carefully analyze, among other things, the choice of entity, form of association, and choice of jurisdiction, in order to achieve an integrated legal, tax and accounting business structure"[50]. Therefore, corporate planning "it is an important tool for investors that must not be overlooked"[51] with important consequences in the dispute resolution. This is why "acquiring a good understanding of the regulatory framework is a key component of evaluating new prospects in new jurisdictions"[52].

Another theoretical precision is about the nature of investment arbitration and its internationality. On one hand, domestic arbitration can be assumed as "international" because of its seat, but not really because of the controversy

[48] ICSID, 37 LL.M. 1378, 1998 (*Fedax N.V. v. The Republic of Venezuela).*

[49] In this regard, McCarl (2015) points out that "where a treaty or contract-treaty and contract interpretation principles overlap to some degree-is silent on an issue that arises before a court or arbitral panel, the question arises of how to interpret that silence. [Hence] most silences in treaties as well as in contracts are filled with "default rules". [therefore] default rules "fill the gaps in incomplete contracts; they govern unless the parties contract around them" (McCarl, Ryan, ICSID Jurisdiction over International Mass Investment Arbitrations: Due Process and Default Rules, in: *Stanford Journal of International Law,* 2015, Vol. 51, Nr. 2*,* pp. 173 ff., citing Bederman, David J. Revivalist canons and treaty interpretation, in: *UCLA Law Review,* 1994, Vol. 41, pp. 953-955 and Ayres, Ian & Gertner, Robert*,* Filling gaps in incomplete contracts: an economic theory of default rules*,* in: *Yale Law Journal*, 1989, Vol. 99, p. 87).

[50] Eljuri, Elisabeth, Corporate Structuring of Oil and Gas Projects in Venezuela: Views form the North and South, in: *Journal of Energy & Natural Resources Law*, 2000, Vol. 18, Nr. 1, pp. 53 ff., at p. 53.

[51] Eljuri, Corporate Structuring of Oil and Gas Projects in Venezuela..., ob. cit., p. 53.

[52] Eljuri, Corporate Structuring of Oil and Gas Projects in Venezuela..., ob. cit., p. 53.

itself. Let's imagine an arbitration sit in France while the parties are Colombian companies and, by their request, the tribunal should apply Canadian law under the terms of the agreement. Here, actually the only thing that is "international" is the seat of the arbitration. In fact, it is not a matter of international law. In this scenario, it is more of a domestic matter under contractual terms. Thus, it is "international" because of its location and the application of a foreign law. On the other hand, investment arbitration is indeed international because it is mainly based on either international law upon treaties among countries, (which might be such much as Bilateral Investment Treaties as other species like free trade agreement with clauses in investment arbitration) or investment contracts with parties whose citizenship are from countries that enforce the ICSID convention.

Nowadays,

> [i]t is beyond doubt that today international investment law is not primarily or solely concerned with the private contractual relation between the foreign investor and the host state, but rather is principally founded on fundamental principles derived from international treaty law, and, to a lesser extent, on customary international law and general principles of law[53].

In the case of Venezuela, "undoubtedly, the Venezuelan government's view does not seem to agree with a broad approach on these issues, especially since the BITs practice contain explicit limitations on national sovereignty"[54].

However, as we can see, the internationality of the arbitration can be misinterpreted in many scenarios, giving chance to misleading speeches about sovereignty from undeveloped countries in the political arena. Some authors point out that this term must be used carefully because, unfortunately, "international arbitration" is a misleading term with many false friends[55]. Indeed, Investment Arbitration "is comparable to an onion – consisting of distinct layers of general international law, of general standards of international

[53] De Brabandere, Eric, Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications, in: *Cambridge Studies in International and Comparative Law,* 1996, p. 17.

[54] Cardenas Garcia, Julian, Rebalancing Oil Contracts in Venezuela, in: *Houston Journal of International Review Law,* 2011, Vol. 33, Nr. 2, pp. 235 ff., at p. 300.

[55] See generally Knahr, Christina, *Investment and commercial arbitration: similarities and divergences*, The Netherlands, Eleven International Publishing, 2010. See also Reisman, William Michael / William Laurence Craig / William W. Park / Jan Paulsson, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes*, Minnesota, Foundation Press, 2nd ed., 2016.

economic law, of distinct rules peculiar to its domain and of domestic law"[56]. Finally, International Arbitration brings stability to the dispute resolution giving a neutral ground where the parties may resolve their controversies. Thus, as some authors have pointed out "international arbitration introduced a certain degree of predictability to international transactions and a degree of consistency"[57].

All these considerations are important as a matter of commercial litigation strategy. As a counsel from an Oil company, we may face though question about the forum we are going to use to claim a commercial issuer or which treaty we may use to protect company investment in Venezuela. In our case as we will see, *Exxon Mobil v. Venezuela* is the perfect example that even if you win, you still can lose.

III. Exxon Mobil Controversy

Exxon Mobil v. Venezuela is a conglomerate of different parties in the same dispute[58] plus several legal opinions interconnected from different tribunals and courts.[59] For such reason the controversy in *Exxon Mobil* is long, complex, and unpredictable until today. To facilitate the understanding of the case, we are going to separate each step of the litigation while we are analyzing the dispute in its different grounds.

A. The Investment and Commercial controversy

Originally, this was an investment dispute governed by two important sources of international law. On one hand, the controlling Bilateral Investment Treaty

[56] Diehl, Alexandra, *The core standard of international investment protection: fair and equitable treatment*, Kluwer Law International, 2012, p. 253.

[57] Diehl, *The core standard of international investment protection...*, ob. cit., p. 624.

[58] These parties are part of Exxon Mobil economic group and they conformed the investor entities in Venezuela. Such claimants are Venezuela Holdings, B.V. (a Dutch Company incorporated under the laws of the Kingdom of the Netherlands), Mobil Cerro Negro Holding, LTD., (an American company incorporated under Delaware Law) Mobil Venezolana de Petróleos Holdings, Inc., (an American company incorporated under Delaware Law), Mobil Cerro Negro, LTD. (a corporation incorporated under the laws of the Commonwealth of the Bahamas) and Mobil Venezolana de Petróleos, Inc., (a corporation incorporated under the laws of the Commonwealth of the Bahamas) all of these against the Bolivarian Republic of Venezuela.

[59] For the purpose of this article, we're commenting the ICSID cases as whole, with separated considerations to the U.S. cases related to the enforcement. At the end, all cases are about the same controversy but from a different strategic perspective.

which was the Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela of 22 October 1991[60] ("BIT") as a substantive body of international law. On the other hand, as an express provision in the BIT[61], the ICSID Convention in which Netherlands and United States are member states[62] as well as Venezuela until its denouncement in January 2012 as a way of exercise of its sovereign powers[63]. ICSID resulted the applicable procedural law as the controversy was invoked before its denouncement and therefore, the ICSID framework is still controlling the controversy until its end. For this reason, the companies involved in the *ExxonMobil* group were considered as foreign corporations under the text of the treaty, although the test for nationality of foreign corporation is still debated in the international forum.[64]

In fact, this is a long controversy whose origins are from the 80's. In 1975,

> ...the oil industry was nationalized through the Organic Law that Reserves to the State the Industry and Trade of Hydrocarbons [which] terminated the oil concessions held by private companies, expropriated their operating assets and generally reserved oil industry activities to the State[65].

[60] This treaty was signed on 22 October 1991 and entered into force on 1 November 1993.
[61] Article 9, § 2 of the agreement. The triggered the ICSID facilities rules.
[62] The United States ratified the ICSID Convention in 1966. To carry out these purposes, the U.S. Congress passed implementing legislation, 22 U.S.C. § 1650a, which provides that ICSID awards "shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States".
[63] This was, indeed, very controversial at the time. In a globalize world, reactions against international organizations for mere political reasons are considered unreasonable and not engage in global common interest. In theory, if it is true that "the foundational principle [is that the] State consent governs the design and operation of all treaty exit clauses," (Laurence R., Helfer, Terminating Treaties, in: D. Holllis (ed.), *The Oxford Guide to Treaties*, Oxford, Oxford University Press, 2012, pp. 634-649) this is a formalistic excuse in practice for States to avoid its international obligations. This was clearly the case of Venezuela before hundreds of cases lost under ICSID grounds.
[64] Since *Barcelona Traction*, it has been understood that the preponderance of the nominal company and its citizenship rather than citizenship of the shareholders of such company. So, in an investment arbitration we have the following opposite arguments, on one hand, it is well-settled that Legal personality, and as a principle of international law, is up to the States to regulate the legal framework of corporations and how they can be incorporated in a particular jurisdiction. On the other hand, it is common that States argue the necessity to impose limits to these circumstances, which increases the investment disputes on the grounds of abuse of forms.
[65] ICSID, Case Nr. ARB/07/27, (*Venezuela Holdings, B.V. et al v. Bolivarian Republic of Venezuela)*, (award of the tribunal) at ¶ 36.

This scheme was inspired, among others, by some international resolutions from the Organization of the United Nations[66] and the constitutional article that permits the State to reserve itself certain industries. With this new scheme, concessions were extinguished earlier in change of an indemnity. Further, PDVSA was created and, until today, it carries out the oil industry by as it is reserved such activities[67]. This law was the opportunity to the state to get involved in the oil industry for the first time, at least, at that scale.

By the 1980s,

> [*ExxonMobil*] wished to explore new fields or to look to the country's vast reserves of extra-heavy oil. These reserves were primarily located in reservoirs in the Orinoco River Basin, in the Orinoco Oil Belt (*la Faja Petrolífera del Orinoco)*, which is a vast area covering approximately 55,000 square kilometers. The Orinoco Oil Belt was divided into four areas, from east to west: *Cerro Negro* (renamed Carabobo), *Hamaca* (later renamed Ayacucho), *Zuata* (later renamed Junín) and *Machete* (later renamed Boyacá)[68].

This extra-extra-heavy oil required an adaptation of the industry, which meant an important investment. For the government, it was a better alternative to bring investors back and give them a concession, so they did not have to spend a cent. It was clearly a business strategy.

To meet these goals,

> [Venezuela] adopted a series of measures, collectively known as the *Apertura Petrolera* ('Oil Opening'), which allowed foreign investors to participate in the Venezuelan oil industry. One of the objectives of the Oil Opening was the development of the extra-heavy oil reservoirs in the Orinoco Oil Belt[69].

This "opening" operated under three modalities: (i) by the participation of international investors in abandoned fields for their exploitation, (ii) by the association of PDVSA with international investors to exploit the Orinoco Oil Belt which required the previous approval of the Supreme Court of Justice; and, (iii) by the implementation of an special association scheme were investors explored (under their own risk) new fields and, in the case there was crude, they had to share their profit with PDVSA. Either way, thanks to the

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[66] Res. N° 1.803 General Assembly of the UN (1962); Res. Nr. 2.158 of the UN (1966); Res. Nr. 3.016 of the UN (1972); Res. Nr. 1.717 of the Economic and Social Counsel; Res. Nr. 3.201 of the UN (1974) and the Charter of Economic Rights and Duties of states.

[67] We already explained this in the introductory background of the Venezuelan Oil industry. See *supra* at the background section of this paper.

[68] *Venezuela Holdings,* at note 38.

[69] *Venezuela Holdings* at ¶ 39.

Oil Opening and the Venezuelan Law, it was provided tax incentives and different mechanisms to carry out the investment. In particular, PDVSA was allowed to enter into operating services agreements (which were essentially service contracts) and association agreements (which were very similar to a contractual joint venture but with the requirement of agreements required specific authorization by the Venezuelan Congress, as we have mentioned).

In addition, to encourage the oil industry and foreign investment, there were provisions to reduce Income Tax rate[70], creating an attractive place for investment in the nineties. In September 1990, "PDVSA approached Mobil Corporation to 'hear out and react to' PDVSA's 'new policy of international cooperation being considered to foster expansion'"[71]. Eventually, after studies, discussions and negotiations, Mobil participated in two projects that the Respondent offered during the Oil Opening: (i) the Cerro Negro Project – a joint venture to exploit extra-heavy crude in the Orinoco Oil Belt; and (ii) the La Ceiba Project – a joint venture to explore and exploit, on a shared-risk-and-profit basis, an area with light and medium crude potential adjacent to Lake Maracaibo[72]. These conditions changed radically when Chávez came into power in 1998 and its progressive radicalization in the power[73]. Originally, the oil projects were achieved in the early 2000's. Cerro Negro project was achieved in August 2001 while the other projects where achieved in 2005, respectively while more than ten years of investment in the Venezuelan oil sector.

But the controversy arose thanks to several factors. *ExxonMobil* carried the burdensome of an indiscriminate increase in the Royalty Rate between 2004 and 2005, an increase in the Income Tax Rate applicable to participants in the Orinoco Oil Belt Ventures, and a final expropriation of the Exon Mobil Investments in the Cerro Negro and La Ceiba Projects. In parallel, thanks to the new legislation Hydrocarbons Law of 2001 promoted by President Chávez, all "operating service agreements were to be reformed as mixed

[70] *Venezuela Holdings* at ¶¶ 41-42.
[71] *Venezuela Holdings*.
[72] *Venezuela Holdings* at ¶ 45.
[73] Indeed, the Claimants specifically alleged that "the alleged wrongful measures at issue in the present case were all taken after Mr. Hugo Chávez Frías was elected President of Venezuela in December 1998" (*Venezuela Holdings* at note 86).

enterprises"[74]. The Venezuelan government announced that "all of the projects that had been operating outside of the framework of the 2001 Hydrocarbons Law, including the Cerro Negro Project, would be nationalized"[75]. In Ernesto Fronjosa's opinion, this law was a step back in the oil industry.

Because all of these circumstances, *ExxonMobil* claimed compensation over

> [i] the unilateral termination of the Cerro Negro Royalty Reduction Agreement and the Cerro Negro Royalty Procedures Agreement; [ii] the further increase in the royalty rate through the imposition of the extraction tax; [iii] the increase in the income tax rate applicable to participants in Orinoco Oil Belt ventures; [iv] the production and export curtailments imposed on the Cerro Negro Project; and [v] the direct expropriation of Mobil Cerro Negro's and Mobil Venezolana's entire interests in the activities of the Cerro Negro Joint Venture and the La Ceiba Joint Venture, as well as the related assets[76],

with an overall quantum of damages in the approximate amount of 15 billion US dollars.[77] To achieve this goal, *Exxon Mobil* approached to the case was in two ways: first, filed a commercial arbitration claim in the International Chamber of Commerce ("ICC"), while in parallel, invoked the BIT under international investment law. In the latter, the claimants argued the violation of the article 6 of the treaty, which states:

> Neither Contracting Party shall take any measures to expropriate or nationalize investments of nationals of the other Contracting Party or take measures having an effect equivalent to nationalization or expropriation with regard to such investments, unless the following conditions are complied with:
>
> (a) the measures are taken in the public interest and under due process of law;
>
> (b) the measures are not discriminatory or contrary to any undertaking which the Contracting Party taking such measures may have given;
>
> (c) the measures are taken against just compensation. Such compensation shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier, it shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the

[74] *Venezuela Holdings* at ¶ 105.
[75] *Venezuela Holdings*.
[76] *Venezuela Holdings* at ¶ 86.
[77] *See Venezuela Holdings* at ¶¶ 133-135.

> country of which the claimants are nationals or in any freely convertible currency accepted by the claimants[78].

In parallel, the commercial dispute was decided before the ICSID tribunal rendered its decision and it was a point discussed before the merits of the investment dispute. The commercial arbitration proceedings initiated at ICC on 2008 pursuant to an arbitration clause under the Association Agreement between Mobil Cerro Negro and PDVSA.[79] On 23 December 2011, "the award was issued in the ICC proceeding, finding PDVSA and PDVSA-CN jointly and severally liable for the economic consequences of the "Discriminatory Measures" under the agreement"[80]. The ICC Tribunal ordered to PDVSA "to pay to Mobil Cerro Negro a sum of US$ 746,937,958, together with interest thereon"[81]. Because we are talking about a commercial arbitration award, the enforcement of such decision is governed by the New York Convention. As a matter of fact, *ExxonMobil* was able to collect damages in the amount of US$ 746,937,958 thanks to the commercial arbitration,[82] enforcing such award before courts in the New York and London where Venezuela has either several assets or access to the international financial system.

In this respect, the ICSID tribunal held that the ICC arbitration did not affect the investment dispute; being both controversies autonomous to each other, essentially, because in the commercial arbitration the Bolivarian Republic of Venezuela was not a party in the controversy while so was in the investment dispute. Nonetheless, this issue was considered with particular relevance in the damage's calculation because the risk of double recovery[83], finally deciding the tribunal that

> ...although the dispute before the ICC Tribunal and the dispute before this Tribunal are different, the measure that gave rise to the dispute before the ICC Tribunal is also a measure at issue in this proceeding, and one of the [*Exxon Mobil* claims] in the present case has already been compensated for the loss incurred as consequence of that measure[84].

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[78] Article 6, Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Republic of Venezuela of 22 October 1991.
[79] *Venezuela Holdings* at ¶ 118.
[80] *Venezuela Holdings* at ¶ 120.
[81] *Venezuela Holdings* at ¶ 120.
[82] *Venezuela Holdings* at ¶ 120.
[83] *Venezuela Holdings* at ¶ 379.
[84] *Venezuela Holdings* at ¶ 379.

Therefore, under the terms of the agreement, it was avoidable the double recovery following the contractual terms established by the parties[85].

The arbitral tribunal decided about its jurisdiction in June 2010. In this decision, the tribunal unanimously decided that it had jurisdiction over the claims as far as

> [the claims were] based on alleged breaches of the [BIT between the Republic of Venezuela and the Kingdom of the Netherlands] and they were related to disputes born after 21 February 2006 for the Cerro Negro Project and after 23 November 2006 for the La Ceiba Project and in particular as far as they relate to the dispute concerning the nationalization measures taken by the Republic of Venezuela[86].

In the decision of the merits, the arbitral tribunal agreed with the claimants. In summary, *Exxon Mobil* claim was sustained under the following premise: the business must be profitable under fix parameters. If such parameters discretionally change, you are causing an economic injury in a long-term investment, which are essentially the case of Oil & Gas activities. This rationale was accepted by the tribunal as evidence of violation of international standards under international law. Finally, the tribunal decided that it has no jurisdiction over the income tax claims, but it has over the remaining claims of the: (i) claim arising out of the production and export curtailments imposed on the Cerro Negro Project in 2006 and 2007; and, (ii) the claim arising out of the expropriation of the Claimants' investments in the Cerro Negro and La Ceiba Projects, awarding $1.6 billion in damages.

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[85] In this particular, the rational of the ICSID tribunal was that the "Clause 15(1) of the Association Agreement requires the "Foreign Party" to pursue legal action which is available to it in order to mitigate any damages it may have suffered as a result of the alleged discriminatory measures. In addition, Clause 15(1) establishes that any net benefits received by the "Foreign Party" because of such legal action, (and after deduction of the legal costs incurred by the "Foreign Party" in this connection) shall be reimbursed to Lagoven CN if Lagoven CN had previously made payment to the "Foreign Party" with respect to the discriminatory measures in question. The Claimants have expressly stated that "in the event of an award in this case in favor of the Claimants, the Claimants are willing to make the required reimbursement to PDVSA". [This is why] the Tribunal [did not have] reason to doubt the Claimants' representation" (*Venezuela Holdings*).

[86] ICSID, Case Nr. ARB/07/27, (*Venezuela Holdings, B.V. et al v. Bolivarian Republic of Venezuela)*, (Jurisdiction) p. 57, ¶ 209.

The Venezuelan measures were considered compensable under international law[87], but were not considered an unlawful expropriation. The problem was about the compensation that was given at the time of the proceeding. Because the fact that Venezuela did not compensate under the proceedings, it does not jeopardize the legality of the expropriation. As the tribunal held

> it [was] not disputed that the Claimants did not receive compensation and that Venezuela did not fulfill its obligation to pay compensation in accordance with Article 6(c) of the BIT. However, the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful. An offer of compensation may have been made to the investor and, in such a case, the legality of the expropriation will depend on the terms of that offer[88].

In fact, it was an undisputed fact the several conversations held between the parties to reach compensation[89]. Ultimately, the tribunal held that "the Claimants have not established the unlawfulness of the expropriation on that ground"[90].

Once the investment arbitration award was rendered the conflict escalated to the challenging of the award under U.S law; and this is not a new issue. In fact, this is the main problem of arbitration: enforcement. It does not matter if you have the best decision award if you are not able to enforce it and have the money in your hands. Indeed, still today this is the challenge of *ExxonMobil* who is still litigating the case. Since the award was rendered, Venezuela has requested the revision of the award[91] and the annulment of the decision[92] under the ICSID rules and litigated against the award recognition in the Federal District Court of the Southern District of New York, being Venezuela successful in the reduction of the damages originally granted.

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[87] Internationally speaking, expropriation is a broad concept. The idea behind this is to catch whatever unjust appropriation made by governments to foreign investors. Therefore, in this scenario we have fair compensation under the rule of the treaty, avoiding completely any consideration under municipal law. Likewise, this idea is complemented by the general principle of international law that cannot be invoked domestic exceptions in the application of international law.

[88] *Venezuela Holdings*, at ¶ 301.

[89] *See Venezuela Holdings* at ¶ 305.

[90] *Venezuela Holdings* at ¶ 305.

[91] ICSID, Case Nr. ARB/07/27, June 2015 (*Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela)*, (Revision).

[92] ICSID, Case Nr. ARB/07/27, September 2015 (*Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela)*, (Decision on Annulment) (Annulment proceedings) and ICSID, Case Nr. ARB/07/27, March 2017, (*Venezuela Holdings, B.V*).

B. The US litigation to enforce the awards

1. The District Court for the Southern District of New York decision

Immediately thereafter the award was rendered, *ExxonMobil* moved to originally enforce it in the District Court for the Southern District of New York. This was not a mere coincidence. New York Law has been generally friendly to the enforcement of either foreign or domestic arbitral awards. This is why it is generally said that "if you take them there, you can collect from anywhere"[93]. Being New York a global financial center

> ...and the attendant likelihood that parties to international arbitrations will have assets either within the jurisdiction of New York or in the custody of institutions subject to New York jurisdiction, these developments have the potential to play a significant role in international arbitration disputes[94].

So, *ExxonMobil* brought an *ex parte* petition to the District court to recognize the award. Thereafter, Venezuela moved to vacate part of the judgment and ultimately, the court denied the Venezuelan petition under the grounds of New York Law but staying the "enforcement of the judgment, pending the outcome of Venezuela's application to ICSID to revise the arbitral award"[95]. The court withheld the decision until the ICSID revision of the controversy while an appeal was file by Venezuela.

2. The Second Circuit decision

At this point, the controversy is still alive with the decision in *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*[96] under the grounds of US law. In appeal, the United States Court of Appeals for the Second Circuit

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[93] Friedman, Elliot, Enforcement of International Arbitration Awards in New York: If You Take Them There, You Can Collect from Anywhere, in: *Arbitration International*, 2011, Vol. 27, Nr. 4, pp. 575 ff., at p. 575.

[94] New York law has powerful tools for the enforcement of int'l arbitral awards. In fact, New York law provisions were applied against PDVSA Cerro Negro S.A in the commercial arbitration dispute. As Friedman points out as an example, "section 7502(c) can be a very powerful tool for those engaged in arbitration, irrespective of whether the parties to the dispute or the dispute itself has any connection to New York. Indeed, the provision has yielded substantial pre-award attachments, including an over USD 300 million attachment ordered in favor of Mobil Cerro Negro, Ltd. in support of its arbitration against PDVSA Cerro Negro S.A". (Friedman, Enforcement of International Arbitration Awards in New York..., ob. cit., p. 577).

[95] *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.,* 87 F. Supp. 3d 573 (S.D.N.Y. 2015) p. 603.

[96] *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 863 F.3d 96 (2d Cir. 2017).

held that the Foreign Sovereign Immunities Act of 1976[97] ("FSIA") is controlling with respect to the jurisdiction of United States courts over actions against foreign sovereigns. Being Venezuela a party in the litigation, the FSIA resulted applicable in accordance with International Law. To reach this decision, the court invited the United States to submit a memorandum brief as *amicus curiae* in the case having the government a "strong interests in ensuring the proper interpretation and implementation"[98] of the ICSID convention. Surprisingly, the United States agreed with the Venezuelan core argument that "the district court was not permitted to 'borrow' state-law procedures that permit *ex parte* proceedings to recognize an arbitral award against a foreign state and enter a U.S. judgment against that foreign state"[99], but the enforcement of the award must be done in compliance of the ICSID convention.

In fact, as we already saw, the controversy arose because of the necessity to enforce the award and collect the damages. Indeed, *ExxonMobil* as a victorious party has tried in several grounds to collect the money at this point of the litigation. But as surprise, this was the case that changed the current practice of ISCID award enforcement thanks to appellate criteria. In practice, there were two predominant positions about enforcement. On one hand, the first approach adopted by the district courts in New York which permitted "entry of judgment on an ICSID award through *ex parte* proceedings like those at issue here"[100], and followed by such courts since *Liberian E. Timber Corp. v. Gov't of Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986), applying proceedings under New York state law. On the other hand, a second approach which "requires award-creditors to pursue a plenary action in compliance with the [FSIA] personal jurisdiction, service, and venue requirements to enforce an ICSID award"[101] and in which "courts adopting this approach do not read 22 U.S.C.S. § 1650a to require summary enforcement and turn to the

[97] Foreign Sovereign Immunities Act (FSIA), 1976, 94 P.L. 583, 90 Stat. 2891, 94 P.L. 583, 90 Stat. 2891

[98] U.S. Dept. of Jus, U.S Att'y S. Dist. of N.Y, 1 (Mar, 2016).

[99] U.S. Dept. of Jus, U.S Att'y S. Dist. of N.Y, 1 (Mar, 2016) p. 15,

[100] *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, p. 105.

[101] *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, p. 107.

FSIA for guidance regarding how to bring an enforcement action against a foreign sovereign"[102].

For the foregoing, the court held that FSIA

> ...provides that, subject to existing international agreements to which the United States is a party, foreign sovereigns shall be immune from the jurisdiction of the courts of the United States and of the States except as provided by one of the FSIA's exceptions to jurisdictional immunity[103].

So concluding the court that

> ...under the FSIA, federal courts are empowered to exercise personal jurisdiction over a foreign sovereign when two conditions obtain: (1) an exception from jurisdictional immunity established by the FSIA applies, and (2) the sovereign has been served with process in accordance with the FSIA's provisions[104].

As the current case was between a national and a foreign party, special procedural requirements were required to be a civil action against a foreign state[105]

As a controlling statute, the FSIA

> ...controls actions to enforce [ICSID] awards. The FSIA provides the sole source of jurisdiction, subject matter and personal, for federal courts over actions brought to enforce ICSID awards against foreign sovereigns; that the FSIA's service and venue requirements must be satisfied before federal district courts may enter judgment on such awards; and that [ICSID convention] does not contemplate recognition of an ICSID award as a proceeding separate from enforcement[106].

This is a huge change of the past practice because award creditors need to comply with the FSIA provisions and service requirements.

The court concluded that they did not have personal jurisdiction over Venezuela, reversed the District Court's order denying Venezuela's motion to vacate, and remanded the case with instructions to dismiss the petition to renewal the action commenced in compliance with the FSIA[107]. So, a prima facie case that was originally lost by Venezuela, was won by the loser party

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[102] *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, p. 107.
[103] *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, p. 104.
[104] *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*
[105] As the court stated: "under the FSIA personal jurisdiction over a foreign sovereign equals subject matter jurisdiction plus valid service of process" (*Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*).
[106] *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, p. 112.
[107] *See Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, p. 125.

under procedural grounds. At the moment of writing this note, *ExxonMobil* is commencing the new action under the new standard and this decision is key to understand how complex it can be to enforce an arbitral award. Still, *ExxonMobil* is a living case where, until today, not collection of damages has been done in the investment arbitration case.

IV. Some lessons from *ExxonMobil*

The core facts of this case are quite common in the Investor-State practice. On one hand, we have a State that either expropriate unlawfully or breach a contract with huge investment consequences to the investor. In these two hypotheses, a lot of things may happen. Then, for instance, the mere dispute is a contractual one and there is an umbrella clause in the BIT in question that allows international protection. Perhaps there was an expropriation lawfully under domestic standard but unlawfully under the BIT umbrella. In both cases, the rationale is the same, obligations are not fulfilled under an international law analysis. But international law is a swampy area where the mere access to this kind of protection is difficult and way far planned if counsels from corporation are diligent.

If *ExxonMobil* would have not planned in advanced that one of those corporations were a Dutch company in the chain of ownership, the entire access to the protection would not have been possible. And even with a "national" corporation under the treaty, there is not a guarantee access. From a policy perspective, treaty shopping is a phenomenon in the international forum. Truly, *ExxonMobil* does not have any real connection with Netherlands but still it used the BIT to protect its investment in Venezuela, bringing with them a couple other companies not protected by the treaty. Neither ExxonMobil Bahamas nor ExxonMobil Delaware were protected by the treaty but by ExxonMobil Netherlands. Is this okay? Is it acceptable to shop treaties?

In the modern corporate world, it is completely normal to structure transactions with multiple jurisdictions as a way of assessment of risk. It is arguable that corporations take advantages of these resources but who does not? Policy considerations about treaty shopping are war far from the purpose of this note[108], but we truly believe these treaties are made with the purpose of protect

[108] One of the problems regarding of jurisdiction in investment arbitration is when one of the parties use certain jurisdiction to get a better forum to seek controversy resolution. This is

investment in any circumstance, and the nationality of corporations are never comparable of the nationality of natural persons. to facilitate this broad approach, several arbitral tribunals have held the importance of allowing access to this international mechanism and obtain compensation for unlawfully acts from States that otherwise would not compensate under domestic law. As we see, to obtain compensation corporation must pass through a long proceeding. A process that is neither fast or cheaper, and with the result of more questions in practice: enforcement of the judgment which may imply more time and resources consumed. Oil companies may carry out these proceedings because they have a financial muscle to do so but this is not the case of all sectors.

But why *ExxonMobil* litigated instead of starting negotiations? As Marsh points out, it seems that

> ...considering the various legal difficulties and adverse practical consequences of pursuing international arbitration [...] Exxon Mobil's contract culture may have been the most significant factors influencing their decision to litigate. Perhaps [*ExxonMobil*] also wanted to send an international signal that they would not acquiesce to compensation of less than half the market value of their projects, and perhaps one or both of them also believed that under the current government they would not be likely recipients of lucrative new deals[109].

Analyzing *ExxonMobil*, we may understand that much more than a case, the mere fact of invoking international arbitration also means an exercise of

called "forum shopping", and, in our case in particular, one of its international variants, "treaty shopping" (Lee, John, Resolving Concerns of Treaty Shopping in International Investment Arbitration, in: *Journal of International Dispute Settlement*, 2015, Vol. 6, p. 358). Treaty shopping is usually an argument in which the state claims that the investor abuses the forms established under certain foreign law to escape or avoid the legal consequences of disputes that would have been heard by domestic courts. (Lee points out that arguments against treaty shopping "can broadly be divided into three categories: lack of reciprocity, lack of informed consent and policy reasons." (*Id.* p. 358). Likewise, it is important to say that there is not one concept of treaty shopping. Some authors affirm that it should be used when there is a gross manipulation of treaties. Other scholars, in contrast, state that it can be invoked only when the investors do not seek remedy in domestic courts intentionally and go forward directly with international mechanisms. Either way, treaty shopping is often an argument invoked by States to deny BITs application.

[109] Marsh, Brandon, Preventing the Inevitable: The Benefits of Contractual Risk Engineering in Light of Venezuela's Recent Oil Field Nationalization, in: *Stanford Journal of Law, Business & Finance,* 2008, Vol. 13, Nr. 2, pp. 453 ff., at p. 481.

economic power. As *ExxonMobil* did, invoking arbitration may be a way to show how strong companies are in the oil industry.

But we must not forget Oil companies are competing with titans: sovereign states. "In the end, governments are always the boss"[110]. It is true that an aggressive litigation strategy might be ineffective in practice. As some pointed out that "using lawsuits to fight the loss of control and profit share that comes when countries such as Venezuela change contract terms was counterproductive ... good luck!"[111]. In a similar case arising with the same trier of facts, Conoco-Phillips decided to start negotiations with the government instead of invoking arbitration although at the end, they invoked the BIT with Netherlands as well as *ExxonMobil* did but with a really different outcome[112]. Indeed, Investment arbitration is not a panacea and neither States nor companies are willing to litigate every case. Here, it comes to plan a negotiation scheme that allows a friendly dispute resolution. But undeniably, the litigation strategy is key in any potential conflict. This is why corporate planning in so important in the Oil industry, it allows several litigation options in a cross-border level.

ExxonMobil also showed us, that if you win, you can still lose. The enforcement of this kind of arbitration decisions are way expensive and take more than the expected time. At the end, companies are enforcing awards against States, and not simple private companies. This supposes special proceeding and special jurisdictions to do so. In addition, the political impact of enforcement of arbitration is another factor to consider, because putting aside all the legal discussion, an even worse retaliation may happen to the Oil business. In the case of Venezuela, even though as we have seen, the government is doing

[110] Thomas Catan et al., Energy Landscape Redesigned, in: *Companies International,* 2006, Vol. 26, p. 84, cited in Witten, Arbitration of Venezuelan Oil Contracts..., ob. cit.

[111] Witten, Arbitration of Venezuelan Oil Contracts..., ob. cit.

[112] *See* ICSID Case Nr. ARB/07/30 (*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*). In this case, the arbitral tribunal held that "the [Venezuela] breached its obligation to negotiate in good faith for compensation for its taking of the ConocoPhillips assets in the three projects on the basis of market value as required by Article 6(c) of the BIT" (*Id.* 131). As Anibal Sabater comments "arbitration users keep repeating, time and cost efficiency is a must in international arbitration. Conoco v. Venezuela is a sad reminder that this goal is not always achieved." (Simpson, Caroline, *Conoco ICSID Case Highlights the Expense of Fairness*, (April 2016), available at: https://www.law360.com/articles/779336/conoco-icsid-case-highlights-the-expense-of-fairness). In this case, *Conoco* won partially the merits of the case but it didn't obtain compensation for their claims.

business as usual, everything may happen in these kinds of scenarios and retaliation is always a possibility. Therefore, compensation may be way far from the original treaty expectations.

Conclusions

Political risk assessment is an important part of any international litigation strategy for transnational oil companies. Venezuela has an important network of BITs that provides a legal framework suitable to structure different investment strategies. In this sense, Venezuela's current political situation and the lack of confidence in its justice administration makes BIT a good option to protect investments in that country. From Oil and Gas dispute resolution perspective, this is key to establish a BIT protection plan in potential investment disputes. Hardly, someone could have imagined Venezuela as the risky scenario as it is today.

Corporate structure is crucial for a potential litigation strategy in the Oil business. One of the lessons of *ExxonMobil* is that everything in the corporate structure has a purpose and should be well analyzed and thought by the legal team behind all the commercial transactions. A strategic arbitration clause in a commercial contract, the corporate form used, and even the BITs in force in a country, may impact in any strategy of investment protection. In practice, it seems the tendency to give broad interpretation of BITs to pick up contractual matters, which would be protected by the original agreements. Then, in the today's world, it is easy to invoke this kind of protections, but it isn't an easy practice. As we see in *ExxonMobil*, even if you win, you can still lose. Enforcement of arbitral awards are still problematic and takes longer than companies would usually expect. At the end, we are not litigating against simple private companies: we are litigating against huge States with all the powers and immunities that sovereignty may give them.

In Investment Arbitration, the arbitrator must be open-minded, legally speaking, to new legal institutions, scenarios, and ways to think about the law. Even though, domestic law in investment arbitration is a consideration of second instance, non-relevant insofar the treaty says the opposite, its consideration should be a necessary tool to interpret the context of the investment controversy. As a Venezuelan law practitioner, it is terrible to admit the imperious necessity to invoke treaties instead of national courts because of the lack of

impartiality, political decisions, among other problems. Alternatively, investment arbitration is not a panacea.

Truly it has said that arbitration is not cheap, quick, and informal. An example of this is precisely investment arbitration, which could be formalistic, expensive, and litigated for many years as *ExxonMobil*. And still, the damages that might be awarded may still be disputed. In this respect, there are some criticisms for the huge discretion of the arbitrators in this kind of proceedings. There is a lack of unified methods to calculate the compensation and adding the fact that arbitrators only have the power to award damages, compensation turns to be a swampy area where there are more questions than answers. The original 1.6-billion dollars awarded to *ExxonMobil* are still in dispute in this speculation while the proceeding of enforcement is ongoing. But, in our opinion, this is not a matter of money but of the establishment of a precedent regarding international dispute resolution.

But setting aside all of this, this sort of arbitration protects the possibility of corporations and individuals of litigating either in scenarios of extreme unfairness or domestic courts biased in favor of the government. On one hand, from the Venezuelan perspective, investment arbitration is changing the way that Venezuelan law is understood and how international business transactions are handled. The importance of International Law has unequivocally changed the resolution of disputes in many ways. On the other hand, oil production helps to move the world, more globalize than ever. In order to keep the business going, Oil companies may carry out its investments in very risky countries. It is very difficult to change an entire economic sector to facilitate the oil industry. Rather, the dilemma for oil companies is to adapt to new foreign regulations and make a profitable business. We believe that it is completely possible.

Even today, indeed, Oil corporations are still doing businesses in Venezuela notwithstanding the crisis and poor economic indicators. But politics must be always considered in Latin America. Political risk is a reality very difficult to avoid with and the best strategy will depend on several factors. Especially when it comes up with big oil projects, usually projected in forty years or more in exploration and further extraction of resources[113], political risk is key to

[113] Under the Venezuelan hydrocarbons Law.

plan litigation strategy in a political hostile environment. Because the long term of projects related to natural resources, these investments should be carefully planned from the litigation perspective. Aught, if *ExxonMobil* taught us something, it is that an adequate litigation strategy against the government is essential in heavy-regulated industries such as Oil & Gas. But even then, when conflicts arise, there are unpredictable outcomes. Here, it comes to play the best legal minds to handle complex litigation scenarios.