

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf
of Paria B.V.**

Respondents on Annulment / Claimants

v.

Bolivarian Republic of Venezuela

Applicant / Respondent

(ICSID Case No. ARB/07/30)

Annulment Proceeding

**ORDER ON THE APPLICANT'S REQUEST FOR RECONSIDERATION OF THE
DECISION OF 29 SEPTEMBER 2021 DISCONTINUING THE STAY OF
ENFORCEMENT**

Members of the *ad hoc* Committee

Judge Dominique Hascher, President of the *ad hoc* Committee
Professor Diego Fernández Arroyo, Member of the *ad hoc* Committee
Prof. Lawrence Boo, Member of the *ad hoc* Committee

Secretary of the *ad hoc* Committee

Ms. Celeste Salinas Quero

15 February 2023

I. PROCEDURAL HISTORY

1. This is a summary of the procedural background leading to the issuance of this Order, and it does not purport to contain a full report of each procedural step undertaken by the Parties and the *ad hoc* Committee in this annulment proceeding.
2. On 2 November 2020, the Committee issued its “Decision on the Applicant’s request to continue the stay of enforcement of the award,” setting out certain assurances which, if provided by the Conoco Parties to the Committee’s satisfaction, would lift the stay of enforcement of the award.
3. On 29 September 2021, the Committee lifted the stay of enforcement, after finding it was satisfied that the Conoco Parties had provided the required assurances.
4. On 4 October 2021, Venezuela (as represented by De Jesús) requested the Committee to reconsider its 29 September Decision (the “**Request for reconsideration**”).
5. Upon an invitation from the Committee, on 13 October 2021 the Conoco Parties filed their observations on Venezuela’s Request for reconsideration.
6. From 14 October 2021 to 14 March 2022 the annulment proceeding was suspended for lack of payment of the required advance.
7. From 18 March 2022 to 1 June 2022 the proceeding was again suspended, while the vacancy left upon resignation of one of the Committee Members (Mr. Kim) was filled (by Mr. Boo) and the Committee was reconstituted with its current composition.
8. On 12 June 2022, Venezuela (as represented by De Jesús) filed a proposal to disqualify two of the Committee Members (Judge Hascher and Prof. Fernández Arroyo). The proceeding was suspended until 27 September 2022, when the Chairman of the Administrative Council dismissed the disqualification proposal, following a recommendation to that effect made by Judge Ian Binnie.
9. Upon an invitation from the Committee to update their respective submissions on the issue of the lift of the stay of enforcement, on 15 December 2022, Curtis replied on behalf of Venezuela that “we see no changes in the situation and have no further comment;” on 16 December 2022, the Conoco Parties replied that they “have no additional comments, other than to observe that there has been no change in circumstances that would come close to justifying any reconsideration. The Claimants continue to oppose the request and respectfully request that it be rejected, and reserve the right to respond to any new submissions that may be made by Venezuela;” and De Jesús on behalf of Venezuela replied that “the Republic fully reiterates the content of its previous submissions [...] and confirms it has no further comment. The Republic’s communication is made without prejudice to [...] its objection on the lifting of the stay of enforcement of the Award.”

II. ANALYSIS OF THE COMMITTEE

10. We write in reply to the letter of 4 October 2021 from Venezuela (as represented by De Jesús) following the Committee's Decision of 29 September 2021 on the fulfilment of the second condition for the discontinuation of the stay.
11. Venezuela (as represented by De Jesús) was offered on 6 December 2022 an opportunity to update its arguments for reconsideration and replied on 21 December 2022 only to reiterate the contents of its earlier submission and confirm it had no further comments.
12. Upon the Committee's invitation of 8 October 2021, the Conoco Parties' filed observations on 13 October 2021 and, in reply to the Committee's further invitation of 6 December 2022, indicated on 16 December 2022 to maintain their position to reject the reconsideration request, having nothing to add provided there was no relevant change of circumstances.
13. Venezuela (as represented by Curtis), which did not submit observations before on this issue, informed the Committee on 16 December 2022 that it had no further comment, seeing no changes of situation.
14. Venezuela (as represented by De Jesús) expresses in its letter of 4 October 2021 a general disagreement with the Committee's view about the implementation of the second condition for lifting the stay in the Decision of 2 November 2020.
15. The Committee's communication of 26 July 2021, cited by Venezuela (as represented by De Jesús) in its letter of 4 October (p. 4) reads: "*We turn now to the second condition of the Decision of 2 November 2020 regarding the opening of one or more segregated accounts for the funds collected outside of the US. The Conoco Parties have indicated in their letter of 17 June 2021 that the ConocoPhillips Company has applied to open six accounts with the London branch of Bank of America. Venezuela observes in its letters of 30 June and 23 July 2021 that no concrete details of the conditions for the opening of these accounts have been provided. We invite the Conoco Parties to inform the Committee accordingly*".
16. The Conoco Parties' letter of 17 June 2021 mentioned: "With respect to the status of the segregated account referred to in the second condition of the Decision on the Stay of Enforcement dated 2 November 2020, ConocoPhillips Company has applied to open six such accounts with the London branch of Bank of America (one US dollar denominated account and one Euro-denominated account for each of the three Claimants), for the deposit of any funds collected through enforcement of the Award rendered in this case, dated 8 March 2019 (as rectified 29 August 2019) (the Award). Those accounts will contain only the funds collected through enforcement of the Award and will not be dissipated during the pendency of the annulment proceedings, except with respect to account maintenance fees, which will be replenished in the event of annulment and repayment. The bank's standard compliance checks are ongoing (given that Venezuela would be the source of any funds deposited), and the Claimants will update the Committee as more details become available" (p. 3).
17. We cannot find in the language of our above cited communication of 26 July 2021 any hint that "the Second Condition could not be satisfied with the five elements informed by the Conoco Parties until the conditions for the segregated accounts would be

- disclosed” as Venezuela (as represented by De Jesús) advances in its letter of 4 October (p. 5), namely the beneficiaries, numbers, currency denomination of the accounts, designation of the financial institution, advised by the Conoco Parties in their letter of 17 June 2021.
18. Venezuela (as represented by De Jesús) requires documentary support regarding the terms and conditions for the opening of the segregated accounts and indicates that such terms and conditions agreed by the Conoco Parties “*unilaterally and behind closed doors with the London branch of bank of America*” will not allow Venezuela to recoup any funds (letter of 4 October, p. 7).
 19. It bears recalling that the Decision of 2 November 2020 requested from the Conoco Parties “*the conditions for opening one or more segregated accounts for the funds collected outside of the United States*” (para. 67.2)). This language must be read against the backdrop of the US sanctions regime for Venezuela (see paras. 65-67 of the Decision of 2 November 2020). Without a possibility for the Conoco Parties to open segregated accounts for the award monies outside the United States, lifting the stay would be an ineffective measure.
 20. Following the Committee’s invitation on 26 May 2021 to “*provide concrete details of the segregated account(s)*” which the Conoco Parties announced their intention to open in their letter of 22 January 2021 (p. 2), the disclosure by the Conoco Parties in their letter of 17 May 2021 that they had applied to open six segregated accounts with the London branch of the Bank of America, that the Bank’s compliance checks were ongoing and that they would update as more details become available (p. 3) prompted the Committee’s reaction on 26 July 2021 for more information.
 21. The Conoco Parties indicated in their letter of 17 June 2021 that the “*bank’s standard compliance check is ongoing (given that Venezuela would be the source of any funds deposited*” (p. 3) and informed on 8 September 2021 that the compliance process had been completed. Venezuela (as represented by De Jesús) speaks of “*unsupported declarations*” regarding the compliance process followed with the Bank (letter of 4 October, p. 5).
 22. It is undisputed that six segregated accounts were opened by the Conoco Parties with the London branch of Bank of America. This event necessarily entailed that the compliance process announced in the same letter of 17 June 2021 had been successfully brought to completion. It is reasonable to infer that, otherwise, the operation of the said accounts would not have been possible as signaled by the Conoco Parties in their letter of 30 July 2021 (“*These accounts are reserved for the Claimants’ use in satisfaction of the Committee’s second condition, but they are not yet active, which means they cannot receive the funds*”, p. 2).
 23. Venezuela (as represented by De Jesús) does not mention the possibility that the compliance check may have been in breach of the sanctions regime applying to Venezuela in the United States or the United Kingdom. In the circumstances, we would not learn anything from an alleged supporting documentation regarding the compliance process. We are satisfied, that with the successful opening and activation of the segregated accounts, the lift of the stay became a concrete and effective measure.

24. The Committee was also wary in its Decision of 2 November 2020 of the return of the funds to Venezuela in case the award would be annulled. As an example of “*documentary support*” and “*terms and conditions*”, Venezuela (as represented by De Jesús) cited “*for instance*” information regarding the level of segregation, or the accounts financial and regulatory conditions or the reasons for which two set of accounts in Euro and US dollar were opened for each of the Conoco Parties (letter of 17 September 2021, pp. 3-4).
25. The Conoco Parties have provided the banking details of the six segregated accounts which enable the Committee and the Parties to locate the placement of the award monies. The Conoco Parties declared that “*Those accounts will contain only the funds collected through enforcement of the Award and will not be dissipated during the pendency of the annulment proceedings, except with respect to the maintenance fees, which will be replenished in the event of annulment and repayment*” (letter of 17 June 2021, p. 3). We first note that there is no evidence that the openings of these accounts would be a sham to defraud Venezuela from recovering the monies deposited in the London branch of the Bank of America. Second, the identification of the accounts, as we already remarked in our Decision of 29 September 2021, provides all the necessary “*transparency*” claimed by Venezuela (as represented by De Jesús) in its communication of 17 September 2021 and in its letter of 4 October (pp. 5, 7) to protect against dissipation and, thereby, allow recoupment in the case the Conoco Parties would not return the funds voluntarily (notwithstanding the guarantee provided in accordance with the third condition of the 2 November 2020 Decision).
26. We fail to see how the preservation of these objectives, and above all, the recoupment stressed by Venezuela (as represented by De Jesús) in its letter of 30 June 2021 (p. 14) would be better achieved with the reasons for opening Euro and US Dollar accounts, or information on the level of segregation or else by the financial conditions contracted between the Conoco Parties and the Bank. A concrete demonstration of the link between the necessity of such information and the above stated goals has not been made nor proposed.
27. Venezuela (as represented by De Jesús) further develops that the placement of funds in a financial institution connected with the United States and the United Kingdom is inappropriate. When we wrote in our message of 29 September 2021 that “*if we are correct, we received no indication from Venezuela about the type of financial institution they would regard as acceptable*” after reminding in the same message that “*we called on the parties’ cooperation in implementing our Decision of 20 November 2020*”, the Committee pointed out that it received from Venezuela (as represented by De Jesús) no concrete proposal that would be of assistance in identifying a banking institution or a country considered in Venezuela’s (as represented by De Jesús) eyes as not having “*led policies against the Government of the Bolivarian Republic of Venezuela*”, according to Venezuela’s (as represented by De Jesús) words in its submission of 17 September 2021.
28. The Committee is always willing to explain its approach to the Parties. The above cited passage in our message of 29 September 2021 could not have meant to be an accusation of “*disloyal behavior*” as Venezuela (as represented by De Jesús) writes in the letter of 4 October (p. 4), but an expression of regret, as we continued in our message of 29 September: “*We are sorry for this absence of suggestion*”. Absent any constructive proposal on the part of Venezuela (as represented by De Jesús) as to which country and

bank would be palatable with its policy, we could not move at random from country to country in the hope that Venezuela (as represented by De Jesús) would find the politics acceptable. If we acted as such, this would have seriously undermined in our view the efficiency of these proceedings.

29. We would now like to remind that, considering the concerns expressed by Venezuela (as represented by De Jesús) in its letter of 30 June 2021, we held on 26 July 2021 that the Committee was available for resolving any difficulties, if and when they arise. In its letter of 4 October, Venezuela (as represented by De Jesús) urges us to undertake this commitment.
30. Venezuela (as represented by De Jesús) expresses in the strongest terms its reservations about the United States and United Kingdom Governments and their judiciaries for their hostile posture against Venezuela and puts emphasis in its letter of 4 October on the impossibility to recoup assets in the United Kingdom. In its letter of 30 June 2021, the concerns voiced by Venezuela (as represented by De Jesús) in this regard were expressed in the discussion on the fulfilment of the first condition of the 2 November 2020 Decision (pp. 11-13).
31. The second condition is one of the three conditions of the Decision of 2 November 2020 which interact together to preserve the recoupment of the Award monies by Venezuela in case of annulment. The necessity of additional litigation in the courts of the country where the accounts are located is not implied nor expressed by our Decision. The efficiency of the November 2020 measure is backed by the ICISD Convention which gives this Committee the authority to make the necessary orders regarding the implementation of its decisions.
32. We observe from the Parties' latest communications of 16 and 21 December 2022 that the situation has not evolved since the discussions that took place in September-October 2021 regarding the reconsideration request. We are led to conclude that no deposit in the London accounts of funds collected outside the US has been effectuated for the moment and that no difficulty encountered on the part of the Bank of America (London Branch) under the compliance process regarding the operation of the accounts upon reception of such funds has been consequently reported.
33. In the absence of measures of enforcement of the Award pursuant to the Decision of 2 November 2020, we are left, for the time being, with speculations regarding the likelihood of a breach of Venezuela's (as represented by De Jesús) right to recoup the Award monies in the London accounts, let alone any materialization of a possible denial of justice as Venezuela (as represented by De Jesús) reminds us we mentioned in our Decision of 26 July 2021 on the fulfillment of the third condition.
34. In conclusion, we cannot share Venezuela's (as represented by De Jesús) views on the non-fulfillment of the second condition.

III. DECISION

35. In light of the above, the Committee maintains its decision of 29 September 2021 and, thereby, maintains the lift of the stay of enforcement of the Award.
36. All questions concerning the costs and expenses of the Committee and of the Parties in connection with this application are reserved for subsequent determination, together with the Application for Annulment.

On behalf of the *ad-hoc* Committee

[signed]

Judge Dominique Hascher
President of the *ad hoc* Committee