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The Benefits of Arbitration with Entities in Financial and Political Distress: ConocoPhillips and Venezuela

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ConocoPhillips has recently seized assets in Curaçao to secure a settlement it reached with Venezuela after arbitration before the International Chamber of Commerce (ICC) concluded in April.^[2] The settlement has suspended a dispute that once blocked Venezuela's state-run oil company from exporting oil from key Caribbean facilities that account for nearly a quarter of Venezuela's oil-exporting capacity.^[3]



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The settlement relates back to the expropriation of Conoco's Venezuela assets in 2007.[4] Conoco left Venezuela after it could not come to a joint venture agreement with Petróleos de Venezuela, S.A. (PDVSA), Venezuela's state-owned oil company.[5] PDVSA has agreed to pay ConocoPhillips over \$2 billion.[6] Conoco has not yet received any amount of that balance.[7]

Venezuelan officials have characterized the settlement outcome as a victory, a "tough lesson" for Conoco, considering the final settlement amount is 10% of the \$22 billion initially sought by the oil firm.[8] That is one way of framing the situation. What is more likely is that Conoco is afraid of letting slip a fleeting chance to receive compensation for long-past 2007 expropriation.

Once Conoco successfully took back hard assets and began direct oversight of oil-producing operations, a precedent was created that might encourage other entities to hastily close in to secure their investments in Venezuela.[9] Requests for court attachments on Venezuelan-held assets are now arriving in the district courts of the United States, and some orders have been issued.[10] But what Conoco has demonstrated is that arbitration before international tribunals may be better suited for resolving disputes under these circumstances than looking to national courts. That is especially true when dealing with parties like Venezuela, who currently face a myriad of crushing financial obligations and rising political turbulence.

The situation is delicate. Venezuela's declining macroeconomic condition is further compounded by sanctions and influence from the United States, sanctions that make it more difficult for Venezuela to manage its debt and raise much needed capital.[11] Those sanctions were put in place out of humanitarian and economic concern.[12] The Venezuelan government currently struggles to provide basic food, services, and employment to the Venezuelan people.[13]

Most significantly, Venezuela is struggling to produce oil at even a quarter of its potential capacity.[14] Reasons for Venezuela's record low oil production include theft of equipment from its oil-fields due to growing poverty and crime,[15] the appointment of the politically connected within PDVSA to positions that require technical expertise,[16] and, according to some sources, the malnourishment of experienced Venezuelan oil workers and their subsequent abandonment of the oil fields, some fleeing the country entirely.[17] Unfortunately, Venezuela's continued ability to produce oil is its only true means of avoiding insolvency and collapse, and is one of the few remaining sources of leverage against eager debt-collectors and foreign influence.[18]

Venezuela and its creditors are in a predicament, the causes of which are far too numerous and interconnected to list here.[19] The reality is, Venezuela's

oil production has declined to such a critical low,^[20] in such large part because of mismanagement, that Conoco's relatively recent presence in the Caribbean could be a lifeline for the industry and to Venezuela.^[21]

For the time being, the settlement agreement between Conoco and Caracas has set the entities in tandem towards a single goal: the successful rehabilitation of Venezuela's oil-producing assets.^[22] The new production of oil provides longer-term security for Conoco's settlement award, and increases Venezuela's revenue from oil exports, allowing the country to pay back existing creditors and limit future dependence on outside financing. The entry of Conoco's technical resources and expertise back into the Caribbean, as well as its ready access to the United States market, should come as a breath of fresh air for a struggling PVDSA.^[23]

International arbitration has become the mainstay of dispute resolution between international commercial entities.^[24] Mutual consent to fora, choice of law, and the perceived impartiality of international tribunals have made arbitration the standard for international dispute resolution.^[25] But perhaps most importantly, arbitration carries a sense that the parties are meeting half way, that there is no significant bias or homefield advantage for the parties to account for.^[26] All these factors encourage voluntary adherence to the terms of an arbitral award. Such cooperation is especially important and delicate when a party to a dispute already perceives itself as embattled or controlled by adverse interests. Venezuela is precisely in that position. Conoco's use of arbitration with a country like Venezuela was advantageous for at least two reasons.

First, while the United States judicial and executive branches are separate in many respects, current sanctions against Venezuela by the Trump administration has likely fostered some degree of reluctance in Venezuela to accept influence from yet another branch of the United States government. PDVSA is unlikely to have much interest in being subject to the courts of the United States. Despite Venezuela's troubled economy, PDVSA has demonstrated a willingness to fight judgments from U.S. courts, adding to already mounting expenses for the parties involved.^[27]

International arbitration, on the other hand, is theoretically more impartial by design, and it is the voluntary participation and freedom from unwanted influence that is thought to produce fairer and more reliable results for both parties.^[28] Reluctant, combative, and uncooperative parties are deal killers, especially when the parties are separated by vast geographical barriers.^[29] Processes that promote voluntary cooperation produce better results on average.^[30] With president Maduro's publicly expressed commitment to pay Venezuela's debts, further influence by the United States, a country whose

government is politically averse to the current regime in Venezuela, is unlikely to foster further cooperation, compromise, and stability at the moment. Further instability and tension caused by more foreign influence will only compromise investments faster.

Second, the ICC and other international tribunals actually bear significant enforcement power.^[31] Judgments rendered by the courts of the United States are comparatively feeble in an international context without direct enforcement,^[32] such as involvement of the United States executive branch,^[33] the imposition of further sanctions, or one of the parties' own unilateral enforcement of a judgment. With innumerable parties interested in the continued stability of the region, those approaches may actually compromise investments further and destabilize Venezuela. Settling disputes through voluntary submission to arbitration would perhaps be more effective than the United States government's unwieldy attempts to enforce individual rulings beyond its borders.^[34]

There is likely little functional reason for an aggrieved party in Conoco's position to choose the United States as a governing body in a dispute over arbitration before an international tribunal.^[35] Financially and politically unstable parties like Venezuela are more likely to deliver on their obligations if they feel as though they have some remaining control over the outcome of their negotiations and that they will be rewarded for voluntary cooperation.^[36] Arbitration is successful and profitable precisely because it avoids the heavy-handed enforcement against a sovereign party that litigation might otherwise require.

It is also worth being mindful of the Venezuelan people, who rely on the continued health of the Venezuelan oil industry and economic stability in the region. Arbitration is most suited to that end. As is already evident in this case, arbitral awards like the Conoco-PDVSA settlement are effective when the interests of both parties are entwined by design of the agreement's terms toward a common goal. The parties who will reap the most profit will be the parties that recognize the financial and functional value of cooperative arbitration. The unfortunate alternative would be futile, undignified squabbling for scraps of a deteriorating and vulnerable nation, embarrassingly and unnecessarily sanctioned by United States courts.

Conoco is awaiting a final ruling on another case against Caracas filed with the International Centre for Settlement of Investment Disputes (ICSID), a World Bank tribunal.^[37] That case also relates back to the previous expropriation of two of Conoco's Caribbean oil projects by the Venezuelan government.^[38] A decision is likely to be rendered by the end of the year, according to a lawyer close to the case.^[39]

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[2] See Marianna Parraga and Nivedita Bhattacharjee, *ConocoPhillips and Venezuela's PDVSA Reach \$2 Billion Settlement*, REUTERS (Aug. 20, 2018), <https://www.reuters.com/article/us-conocophillips-pdvsa/conocophillips-and-venezuelas-pdvsa-reach-2-billion-settlement-idUSKCN1L517X>.

[3] See Marianna Parraga and Deisy Buitrago, *Exclusive: Conoco Moves to Take Over Venezuelan PDVSA's Caribbean Assets*, REUTERS (May 6, 2018), <https://www.reuters.com/article/us-conocophillips-pdvsa-assets/exclusive-conoco-moves-to-take-over-venezuelan-pdvsas-caribbean-assets-sources-idUSKBN1I70RA>.

[4] Parraga, *supra* note 3.

[5] Parraga, *supra* note 3.

[6] According to the settlement agreement, Venezuela will pay Conoco the first \$500 million of the settlement within 90 days of signing, the rest paid in installments over the next 4.5 years. Parraga, *supra* note 3.

[7] Parraga, *supra* note 3.

[8] See Andrew Cawthorne, *Venezuela Hails \$2B Award As 'Tough Lesson' For Conoco*, REUTERS (April 26, 2018), https://www.rigzone.com/news/wire/venezuela_hails_2b_award_as_tough_lesson_for_conoco-26-apr-2018-154409-article/.

[9] See, e.g., Antonio Maria Delgado, *'No one wants to be last in line.' Seizure of Venezuela Oil Assets May Start Wave.*, MIAMI HERALD (May 10, 2018), <https://www.miamiherald.com/latest-news/article210820589.html> (“a former PDVSA supplier . . . filed a lawsuit Monday in the U.S. District Court for the Southern District of New York against PDVSA for the company’s failure to meet payment obligations on a PDVSA \$25 million bond issue.”); Andrew Scurri and Julia Wernau, *U.S. Judge Authorizes Seizure of Venezuela's Citgo*, WALL ST. J. (Aug. 9, 2018).

[10] See Delgado, *supra* note 9.

[11] E.g., Exec. Order No. 13,835, 83 Fed. Reg. 24001 (May 21, 2018).

[12] For example, one of the purported reasons for the sanctions was to prevent the liquidation of Venezuela’s assets “at fire-sale prices” at the

expense of the Venezuelan people. See Christopher Woody, *The US is Hitting Venezuela with More Sanctions to Stop 'Smash-and-Grab' Behavior*, BUS. INSIDER (May 21, 2018), <https://www.businessinsider.com/new-us-sanctions-on-venezuela-prevent-sale-of-debt-2018-5>.

[13] See Vivian Sequera, *Venezuelans Report Big Weight Losses in 2017 as Hunger Hits*, REUTERS (Feb. 21, 2018), <https://www.reuters.com/article/us-venezuela-food/venezuelans-report-big-weight-losses-in-2017-as-hunger-hits-idUSKCN1G52HA> (reporting that Venezuelans lost on average 24 pounds in body weight in 2017 and almost 90 percent now live in poverty, according to a new university study on the impact of a devastating economic crisis).

[14] See generally, *Venezuela crude output hits 28-year low: OPEC*, REUTERS (Nov. 13, 2017), <https://www.reuters.com/article/us-venezuela-oil/venezuela-crude-output-hits-28-year-low-opec-idUSKBN1DD1QD>.

[15] See Alexandra Ulmer, *Pirates and hold-ups: crime strikes Venezuela's oil industry*, REUTERS (June 20, 2015) <https://www.reuters.com/article/us-venezuela-oil-crime-insight-idUSKBN0P51G020150630> ("When night falls over western Venezuela, armed gangs known as 'pirates' sometimes ride boats into muggy Lake Maracaibo to steal equipment from oil wells.").

[16] See Alexandra Ulmer and Deisy Buitrago, *Maduro taps major general to lead Venezuela's deteriorating oil industry*, REUTERS (Nov. 26, 2017), <https://www.reuters.com/article/us-venezuela-politics-pdvsa/maduro-taps-major-general-to-lead-venezuelas-deteriorating-oil-industry-idUSKBN1DQ0R9> ("Industry analysts and sources said the surprise appointment of Manuel Quevedo, a former housing minister with no known energy experience, was a bad omen for the country's already deteriorated oil industry.").

[17] See generally William Neuman and Clifford Krauss, *Workers Flee and Thieves Loot Venezuela's Reeling Oil Giant*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/world/americas/venezuela-oil-economy.html> ("Desperate oil workers and criminals are also stripping the oil company of vital equipment, vehicles, pumps and copper wiring, carrying off whatever they can to make money."); Daniel Pipes, *Venezuela's Tyranny of Bad Ideas*, WALL ST. J. (Aug 26, 2018), <https://www.wsj.com/articles/venezuelas-tyranny-of-bad-ideas-1535311573?mod=searchresults&page=1&pos=4> (for one perspective).

[18] See *supra* note 14 ("Venezuela depends on oil for more than 95 percent of hard currency export revenues, fuelling both social welfare programs and payment on some \$60 billion of outstanding bonds.").

[19] See generally, The World Bank in Venezuela, WORLD BANK, <http://www.worldbank.org/en/country/venezuela/overview> (last visited Sept. 13, 2018).

[20] See Robert Rapier, *Venezuela's Oil Exports Are Headed Toward Zero*, FORBES (June 8, 2018), <https://www.forbes.com/sites/rrapier/2018/06/08/venezuelas-oil-exports-are-headed-toward-zero/#3d1f00646876> ("Venezuelan crude oil production would [is forecast to] fall to around one million barrels per day by the end of 2018 . . . a steep decline from the three million barrels per day that Venezuela produced in 2011.").

[21] See Parraga, *supra* note 2 ("In Curaçao, where efforts are underway to replace PDVSA as operator of the island's 335,000-barrel-per-day Isla refinery, the agreement was welcomed by the government, which would now have more options to keep the facility working."); *Venezuela Crude Output Slips Below 1.3mn b/d*, ARGUS MEDIA (July 11, 2018), <https://www.argusmedia.com/en/news/1714762-venezuela-crude-output-slips-below-13mn-bd?backToResults=true> (quoting a PDVSA executive) ("PdV 'is dying operationally,' the eastern division executive said. But Venezuela's government is deliberately conflating upstream output numbers to 'disguise the company's true situation.'").

[22] See Parraga, *supra* note 3.

[23] See Parraga, *supra* note 2.

[24] See W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 50 TEX. INT'L L.J. 699, 700 (1995) ("By the mid-1980s, at least, it had become recognized that arbitration was the normal way of settlement of international commercial disputes.").

[25] See Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1049 (1961) ("... businessmen have preferred arbitration, a process which they think combines finality of decision with speed, low expense, and flexibility in the selection of principles and mercantile customs to be used in solving a problem, over litigation.").

[26] See *id.* ("In short, while speed, informality, and economy have had some influence on the growth of international commercial arbitration, the essential driving force has been the desire of each party to avoid having its case determined in a foreign judicial forum. Parties seek to avoid these forums for fear that they will be at a disadvantage due to unfamiliarity with the jurisdictions language and procedures, preferences of the judge, and

possibly even national bias.”); 81 AM. JUR. 2D TRIALS 1 § 6 (2001) (“Parties to international agreements may be concerned that the national courts in the country of a party with whom they are contracting may have an instinctive, or even a manifest, bias.”).

[27] See, e.g., Angus Berwick, *Venezuela’s PDVSA Files Appeal Against Crystallex Court Ruling*, REUTERS (Aug 26, 2018), <https://www.reuters.com/article/us-venezuela-pdvsa-crystallex/venezuelas-pdvsa-files-appeal-against-crystallex-court-ruling-idUSKCN1LB033>. See Craig, *supra* note 24, at 701 (“There is the additional risk that a national court judgment will be subject to one or more layers of appellate review, causing further delay and uncertainty in the ultimate disposition of the matter.”).

[28] See Paul Friedland and Michael Ottolenghi, *Comments on the 2008 Survey on International Arbitration: Corporate Attitudes and Practices on Recognition and Enforcement of Awards*, 19 AM. REV. INT’L ARB. 447, 451 (2008) (citing empirical evidence showing the continued success of the New York Convention) (“... the vast majority of arbitral awards are carried out voluntarily by the losing party.”).

[29] See *Id.*

[30] See Kevin Jeffrey Brody, *An Argument for Pre-Award Attachment in International Arbitration under the New York Convention*, 18 CORNELL INT’L L.J. 99, 100 (1985) (“... arbitration is less likely to destroy ongoing commercial relations than litigation. . .”).

[31] This is true, not in the sense that the ICC is able to act as a collections agency, but because the international tribunal’s arbitral rulings are respected and complied with regularly, even though the individual parties drive fulfilment of the ruling’s terms. *Id.* (“Arbitration is effective only if the parties abide by their agreement to arbitrate and honor the arbitral decision.”).

[32] Otto Sandrock, *The Case for More Arbitration When Sovereign Debt is to be Restructured: Greece as an Example*, 23 AM. REV. INT’L ARB. 507, 510 (2012) (“An arbitral award, in stark contrast to a court judgment, has a much better chance of being recognized and enforced abroad.”).

[33] While the United States is not far from Venezuela geographically and certainly has a military presence in the Caribbean, the use of that presence towards the enforcement by the United States government is arguably imprudent to say the least, though, the Trump administration has alluded to the fact that a military option against Venezuela is not “ruled out.” See Jenna Johnson and John Wagner, *Trump Won’t ‘Rule Out a Military Option’ in Venezuela*, WASH. POST (Aug. 11, 2017),

https://www.washingtonpost.com/news/post-politics/wp/2017/08/11/trump-wont-rule-out-a-military-option-in-venezuela/?utm_term=.1509f523d76f

[34] *See id.*

[35] There may, however, be situations where it is preferable. Consider situations where foreign owned property is already situated, maybe fixed, within the borders of the United States. At that point, jurisdiction might be exercised *in rem* over domestically located assets. *See, e.g., supra* note 12.

[36] *See* Friedland, *supra* note 28.

[37] Parraga, *supra* note 3.

[38] Parraga, *supra* note 3.

[39] Parraga, *supra* note 3.

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