



SMALL STATES AFFECTED BY ENFORCEMENT OF ARBITRAL AWARDS– HOW TO LEVEL THE PLAYING FIELD?

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1. INTRODUCTION – SMALL STATES AND ARBITRATION

- Parties to an arbitration vs affected third parties
- Vulnerability
 - Low population, small domestic market, restricted economic activities; dependence on nearby large states for markets and import of essential goods and services
- Volatility
 - Small changes may send 'shockwaves' across the country's economy, the environment and the population (health, safety, employment)
- Value
 - Natural resources, refineries, low-cost labour
- Global challenges
 - Affected by global challenges like all other states, but the impact is likely to be more severe

2. THE CONOCOPHILLIPS v VENEZUELA ARBITRATION

- Phillips Petroleum Company Venezuela Limited, Conocophillips Petrozuata B.V. v. Petroleos De Venezuela, S.A., Corpoguanipa, S.A., PDVSA Petroleo, S.A., ICC Case No. 20549/ASM/JPA (C-20550/ASM)
 - Dispute concerns extra-heavy crude oil projects in Venezuela
 - PDVSA held liable for breach of oil contracts
 - Award in favour of Conoco dated 24 April 2018
 - Amount of the award: US\$ 2 billion
 - Parallel ICSID arbitration based on Dutch-Venezuelan BIT



3. GLOBAL CONTEXT – CRISIS OF INVESTMENT ARBITRATION

- Small States' vulnerability in the context of global challenges:
- Legitimacy crisis of investment arbitration
 - Transparency, accountability, independence, public budget
- Huge amount of damages – no sign of reversal of the trend
 - Occidental Petroleum Corporation v. The Republic of Ecuador, **ICSID** Case No. ARB/06/11– US\$ 1 billion (reduced through annulment from US\$ 2 billion) (2012)
 - Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, **PCA** Case No. AA 227 – US\$ 50 billion (currently challenged at The Hague) (2014)
 - Conoco v Venezuela – US\$ 2 billion awarded by an **ICC** tribunal (2018)

4. WHY DOES IT MATTER FOR SMALL STATES? ENFORCEMENT OF THE AWARD I



- Conoco started enforcement proceedings on 26 April 2018
- Petition to the New York District Court (Southern District) a mere two days after the ICC award was rendered
- Filed in Hong Kong, Paris, London, other Caribbean countries
- Filed in the ABC Islands: Aruba, Bonaire, Curacao; and on the island of St Eustatius (Kingdom of Netherlands)

5. IMPLICATIONS - ENFORCEMENT OF THE AWARD II

- 4 May 2018 - Conoco obtained a court order in Curacao which permitted the attachment of 'oil or oil products on ships and bank deposits'
 - Installation products from the Isla refinery were seized
 - Court order stating that Venezuelan oil not to leave local export terminals until further legal review
 - Estimated total of seizure is US\$ 600 million
- Conoco chose to 'pursue enforcement and financial recovery of its award to the full extent of the law'.
- Former PM of Curacao: Conoco 'has no regard whatsoever for the consequences these actions may have on the already fragile economies' of the islands. When they 'choke some of the largest flows of cash in a small economy [they] inadvertently choke that economy.' Conoco 'sees fit to put thousands of jobs in the small fragile economy and labour market' at risk. 'Thousands of Dutch Caribbean nationals will have to move or even migrate to find a new job.' 'Shame on you [Conoco] for the anguish you have poured in the hearts and homes of Dutch Caribbean families. ... You are acting like a bull that is out to destroy our economies without regard. ... Leave us in the Dutch Caribbean alone! (Open Letter to Conoco, Maria Liberia-Peters, 15 May 2018)

6. WHY DOES IT MATTER GLOBALLY? THE DOMINO EFFECT OF ENFORCEMENT



- ABC islands – shortage of fuel and electricity; basic public utilities at risk
- Globally – export from oil storage terminals on the islands to other parts of the world is threatened
- Could cause a rise in oil prices globally, given especially some further factors:
 - US sanctions on Iran leading to a drop in Iran's oil production
 - PDVSA oil production is likely to plummet even further as a result of enforcement
- Globally – potential rise in oil prices
- Small States – potentially devastating their economy
- Did the tribunal consider this when awarding US\$ 2 Bn?

7. HOW TO LEVEL THE PLAYING FIELD?

Pursuing enforcement to the 'full extent of the law' or applying economic and political pressure?

Using small states' vulnerabilities to pressure a deal out of Venezuela?

Subsequently, the attachments were partially lifted by local courts and the parties concluded a settlement agreement according to a statement dated 20 August 2018

What can small states do to protect their interests?

- awareness of the issue
- possibility to participate as amicus curiae during the arbitration if the rules permit
- refusing to enforce the award ex officio on 'public policy' grounds (New York Convention, Article V.2.(b))
- Increasing capabilities of local lawyers and judges