

CLIENT ALERT

ICSID Tribunal Makes Ruling on BIT Transfer Obligation: \$372 Million Award for Owens Illinois Against Venezuela

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On March 10, 2015, an ICSID arbitral tribunal issued a US\$ 372 million (plus interest) arbitral award in favor of Owens Illinois European Group B.V. (OIEG) against Venezuela for the expropriation of its investment. The most interesting element of the award is the first ever decision by a tribunal interpreting and applying a transfer obligation concerning the operation of Venezuela's currency exchange regime. Although OIEG did not succeed on the transfers claim, the ruling of the tribunal could well strengthen future claims by claimants seeking compensation for failures of this obligation after May 2010 (when the Central Bank of Venezuela was granted exclusive control over the currency trading market). Following is also a brief summary of the Award.

Venezuela's applicable exchange control regime did not breach the Netherlands-Venezuela BIT

OIEG claimed that Venezuela breached the free transfer obligation provided in Article 5 of the Netherlands-Venezuela bilateral investment treaty (BIT) through excessive delay and subsequently denying its request for repatriation of funds. Although the tribunal held that Venezuela's Exchange Control Agency (CADIVI) incurred "some delay," such measure did not amount to constitute a treaty breach because: (1) Venezuela had *at the time* (in 2009/2010) a dual exchange control regime that allowed the claimant to repatriate its dividends either through the "parallel" dollar market or the official system; and (2) unlike other BITs that provide stronger transfer protections, such as France-Venezuela and UK-Venezuela BITs, the Netherlands-Venezuela BIT did not expressly guarantee that transfers shall be made "*at the rate of exchange applicable on the date of transfer.*"

The Tribunal analysis may be distinguished to the period before May 2010: In May 2010, the Central Bank of Venezuela was granted exclusive control over the currency trading market, thus preventing private brokerages from participating in a "parallel" dollar market, an alternative for those that were unable to obtain dollars at the official rate. Since then, a complex series of exchange control platforms have been put in place, including SITME (2010), SICAD (2013), SICAD II (2014) and SIMADI (2015). However, none of these platforms allow for repatriation of monies without the supervision and/or approval of the Venezuelan Government. In the case of OIEG, it is worth noting that the company – in the absence of authorization from CADIVI – resorted to the parallel market and repatriated its dividends between December 2009 and April 2010, *i.e.*, one month before the Government took control of the parallel market. Under today's control exchange regime, OIEG would not have the alternative to resort to the "parallel" market and therefore a breach of Article 5 could arguably be sustained for post-May 2010 denials of repatriation.

Summary of Award – Venezuela unlawfully expropriated OIEG's investment

The tribunal found that Venezuela violated the Netherlands-Venezuela BIT by unlawfully expropriating (under Article 6 of the BIT) OIEG's glass production facilities. The tribunal concluded that while the expropriation was taken in the public interest and in a non-discriminatory manner, the Venezuelan Government failed to identify the assets subject to the expropriation and incurred

excessive and unjustified delay in the payment of just compensation. Moreover, the tribunal found that Venezuela failed to meet fair and equitable treatment standard under Article 3(1) of the BIT.

Collaboration with Crowell & Moring: Crowell & Moring has extensive experience helping companies resolve disputes with governments and representing them in investor-State arbitration under International Investment Agreements (IIAs). In addition, we have in-house expertise on Venezuelan law, as well as direct channels to several expert lawyers and other advisors on the ground in Caracas experienced in exchange control issues.

Please [see](#) Crowell's previous Client Alert for our summary of the announcement by the Government of Venezuela regarding the creation of a new foreign exchange platform called SIMADI.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Ian A. Laird

Partner – Washington, D.C.

Phone: +1 202.624.2879

Email: ilaird@crowell.com

Eduardo Mathison

International Associate – Washington, D.C.

Phone: +1 202.654.6717

Email: emathison@crowell.com