

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 dated 3 August 2020 on the issue of Venezuela's legal representation

Members of the Committee

Judge Dominique Hascher, President of the *ad hoc* Committee
Professor Diego Fernández Arroyo, Member of the *ad hoc* Committee
Mr. Kap-You (Kevin) Kim, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Mr. Francisco Grob

2 November 2020

I. Procedural Background

1. On 27 November 2019, the Centre received an electronic copy of an “Application for Annulment” of the Award rendered on 8 March 2019, in the present proceedings, submitted by Mr. George Kahale from the law firm Curtis, Mallet-Prevost, Colt & Mosle LLP (“Curtis”) on behalf of the Bolivarian Republic of Venezuela. Along with the Application, the Centre received the lodging fee.
2. Upon delivery of the corresponding hard copies, supporting documentation and USB drives, the Centre transmitted the Application “to counsel of record in the arbitration proceedings” (i.e. Freshfields and Three Crowns on behalf of the Conoco Parties and Curtis, De Jesús & De Jesús and Dentons on the side of Venezuela).
3. On 5 December 2019, the Centre received an electronic copy (without exhibits) of an “Application for Annulment” submitted by Dr. Alfredo De Jesús O. from the law firm De Jesús & De Jesús (“De Jesús”). The Application was signed by Mr. Reinaldo Enrique Muñoz Pedroza, *Procurador General de la República Bolivariana de Venezuela* (E) (Acting Attorney General) “in representation of the Bolivarian Republic of Venezuela by the *Procuraduría General de la República de Venezuela*” and was substantively identical to the one filed by Curtis on 27 November 2019. The Centre also received the corresponding lodging fee. On 16 December 2019, electronic copies of this Application were transmitted “to counsel of record in the arbitration proceedings”.
4. On 16 December 2019, the Centre wrote to the Parties in reference to “the Application for Annulment submitted by Mr. George Kahale on November 27, 2019, and by Dr. Alfredo De Jesús O. on 5 December 5, 2019, on behalf of the Bolivarian Republic of Venezuela.” The Parties were informed that the Secretary-General “registered an Application for Annulment of the Award rendered on March 8, 2019”.
5. On 3 February 2020, the Committee was constituted, and the Parties were informed that the annulment proceedings were deemed to have begun.
6. Following several communications from the parties, on 15 March 2020, De Jesús sent a letter asking the Committee to “exclude the participation” of Curtis from this proceeding on the basis that it was acting on a power of attorney issued by “a person who does not exercise any authority or power within the Venezuelan legal system.”
7. On 19 March 2020, the Committee invited Curtis and the Claimants to comment on De Jesús’ 15 March letter regarding Venezuela’s representation in this proceeding. Curtis and the Claimants submitted their respective comments on 30 March 2020. De Jesús replied on 31 March 2020.
8. On 3 April 2020, the Committee issued an “Order on the Applicant’s Representation”. The Committee decided not to exclude Curtis from these proceedings and to reject De Jesús’ application of 15 March 2020.
9. On 9 April 2020, De Jesús requested that the Committee revisited its 3 April Order. De Jesús contended that the Committee ought to amend the Order on the Applicant’s

Representation “because it lacks a legal basis as it disregards Venezuelan law, the only applicable law to resolve the issue of representation of the Republic” and “ignores the relevant facts in its assessment for the resolution of the issue of representation of the Republic.”

10. On 13 April 2020, the Conoco Parties and Curtis submitted their respective comments on De Jesús’s request for the Committee to revisit its Order on the Applicant’s Representation, and on 14 April 2020, De Jesús replied.
11. On 15 April 2020, the Committee ruled on De Jesús’ 9 April application. The Committee observed that the application was based on arguments which were already made by Dr. De Jesús in his previous letters and had been considered by the Committee when it decided to reject De Jesús’s first application. The Committee therefore denied De Jesús’ 9 April application, although it reminded the parties that its Order was “limited to the present stage of the proceedings and is subject to review in light of future developments.”
12. The next day, 16 April 2020, De Jesús filed a proposal to disqualify the three Members of the Committee on behalf of Venezuela. The Disqualification Proposal stated *inter alia* that the terms of the Order on the Applicant’s Representation demonstrated that each of the three members of the Committee can no longer be relied upon to exercise independent judgment, as required by Article 14(1) of the Convention.
13. On 10 August 2020, the Chairman of the Administrative Council dismissed the disqualification proposal, following a recommendation to that effect made by The Rt. Hon. Lord Phillips of Worth Matravers, K.G. The proceedings resumed that day.
14. On 3 August 2020, De Jesús requested that the Committee reconsider its Order on Representation of 3 April 2020. On 12 August 2020, Curtis and the Conoco Parties commented on this request.
15. On 28 August 2020, the Committee communicated that it would hear the Parties on this matter and the stay of enforcement of the Award during the hearing that was then reconvened.
16. On 30 September 2020, the Committee held a hearing by videoconference. The Parties were given the opportunity to address De Jesús 3 August application and to expand upon it if they wished (which De Jesús did).

II. The Parties’ Positions

A. *De Jesús*

17. De Jesús states that the Committee should reconsider its Order of 3 April 2020 on the Applicant’s Representation “in light of the new and decisive elements that have become available since”. The new element consists of a judgment rendered on 22 April 2020, by the Constitutional Chamber of the Supreme Court of Venezuela in which the Court ruled “that the Acting Attorney General of the Republic, Mr.

Reinaldo Enrique Muñoz Pedroza, has the sole and exclusive authority to appoint representatives in international legal proceedings where the Republic is a party”.¹

18. De Jesús asserts that this judgment “may not be disregarded by the committee”.² According to De Jesús, the Court reached this determination interpreting Articles 247, 248, and 249 of the Venezuelan National Constitution and Article 49 of the Organic Law of the Attorney General’s Office, the controlling law that should govern Venezuela’s representation. Furthermore, the Court upheld the legality of Mr. Reinaldo Enrique Muñoz Pedroza’s appointment as Acting Attorney General and recalled, by reference to its previous judgments of 8 February 2019 and 11 April 2019, that the actions of any person purporting to hold and exercise the functions currently held by Acting Attorney General are to be considered null and void.
19. De Jesús underscores that “holdings of the constitutional chamber of the Venezuelan Supreme Court are final”.³ Therefore, if there were ever any doubts about the legal representation of Venezuela, this judgment dissipates them all by clarifying the authority of the Acting Attorney General to act on behalf of Venezuela. It also makes it clear that “the validity of the Acting Attorney General’s actions is governed solely by the nullity regime established by the Venezuelan National Constitution and the laws of the Republic and therefore may not be reviewed by the National Assembly which lacks the power to annul or void administrative acts or actions.”⁴ Therefore, the Committee must give no weight to the “Agreement” issued by the National Assembly on 28 April 2020, that sought to dismiss the authority of the 22 April 2020 judgment by the Constitutional Chamber of the Venezuelan Supreme Court and upon which Curtis has relied in submissions on this matter.
20. To conclude, De Jesús remarks that “it is a basic principle of international law that a State, as subject international law, is represented by its government, which exerts effective control over the State’s territory and apparatus.” The statements of the US Government are therefore irrelevant for present purposes. No “*practical*” analysis, no “*convenient*” or “*political*” consideration may be used to overshadow this basic principle.⁵

B. *Curtis*

21. Curtis states that the judgment issued on 22 April 2020 by the Constitutional Chamber of the Venezuelan Supreme Court “adds nothing to the analysis”.⁶ In their views, Dr. De Jesús is “simply trying to reargue the same points raised in his letters of March 15, March 31, April 9 and April 14, 2020, in which he cited the same legal provisions and a similar court decision.”
22. Most importantly, Curtis submits that “De Jesús’ application reflects a fundamental misunderstanding of this Committee’s decision on the representation issue.” Curtis states that the Committee did not base its decision on any uncertainty regarding the

¹ De Jesús’ application of 3 August 2020, p. 1.

² De Jesús’ application of 3 August 2020, p. 2.

³ De Jesús’ application of 3 August 2020, p. 5.

⁴ De Jesús’ application of 3 August 2020, p. 5.

⁵ De Jesús’ application of 3 August 2020, p. 7.

⁶ Curtis’ comments of 12 August 2020, p. 1.

position of Dr. De Jesús. It refers on this point to a passage of the Order on the Applicant's Representation where the Committee stated that it "is neither a political body nor the deliberative organ of an International Organization, [and] cannot hear - and decide - a political question, such as the legitimate government of Venezuela...".

23. Finally, Curtis contends that "[a]ccepting Mr. De Jesús' argument would not only be prejudicial to Venezuela, but it would be embroiling this Committee in the political question it properly recognized was beyond its jurisdiction and upsetting the status quo in this annulment proceeding, which began when we filed the application for annulment on November 27, 2019, which application was then retyped word-for-word and resubmitted by Mr. De Jesús on December 5, 2019."⁷

C. *Conoco Parties*

24. In response to the Committee's invitation to comment on De Jesús' application, the Conoco Parties refer to their prior submissions regarding Venezuela's representation, and the Committee's rulings on this matter. Accordingly, they "see no need or reason to comment further on Venezuela's latest request",⁸ although they express their concerns about what they see as "the continuation of Venezuela's delay tactics, imported over from the underlying arbitration, which serve Venezuela's purposes as long as a stay of enforcement remains in effect."⁹

III. The Committee's Analysis

25. As noted above, the present annulment proceedings against the Award of 8 March 2019 have been launched on 27 November 2019 with an Application submitted by Mr. George Kahale from the law firm of Curtis on behalf of Venezuela and with an Application submitted by Dr. Alfredo De Jesús O. from the law firm De Jesús, on 5 December 2019, also on behalf of Venezuela. This latter Application was signed by Mr. Reinaldo Enrique Muñoz Pedroza, *Procurador General de la República Bolivariana de Venezuela* (E) (Acting Attorney General) "in representation of the Bolivarian Republic of Venezuela by the *Procuraduría General de la República de Venezuela*" and was substantively identical to the one filed by Curtis on 27 November 2019.
26. It is noteworthy that Venezuela was thus represented by Curtis and De Jesús when the Committee became constituted on 3 February 2020. We also recall that Curtis represented Venezuela in the underlying arbitration which started on 2 November 2007 until 6 March 2019, when its power of attorney was revoked by Venezuela's Acting Attorney General, Mr. Reinaldo Muñoz Pedroza. Since 5 April 2019, Curtis is instructed by Venezuela's Special Attorney General, Mr. José Ignacio Hernández. De Jesús is instructed by the Acting Attorney General under a power of attorney of 6 March 2019 notified to the Arbitral Tribunal on 7 March 2019, one day before the Award was rendered. Venezuela was represented by Curtis and De Jesús in the rectification proceedings which began on 16 April 2019 with an Application submitted by Curtis and a letter of 19 April 2019 of De Jesús making reference to

⁷ Curtis' comments of 12 August 2020, p. 2.

⁸ The Conoco Parties' comments of 12 August 2020, p. 2

⁹ The Conoco Parties' comments of 12 August 2020, p. 2

Curtis' Application for Rectification.

27. In rejecting, on 15 April 2020, De Jesús' request to revisit the Order on the Applicant's Representation of 3 April 2020, the Committee indicated that the Order is "limited to the present stage of the proceedings and is subject to review in light of future developments. Should this be the case in the future, there would be further opportunity to renew the contents of the April 9 letter with other arguments as they may be".¹⁰
28. On this basis, De Jesús submits in its request of 3 August 2020 that the Order on the Applicant's Representation of 3 April 2020 cannot be maintained in light of the Judgment made on 22 April 2020 by the Constitutional Chamber of the Supreme Court of Venezuela, which ruled that the Acting Attorney General of the Republic, Mr. Reinaldo Muñoz Pedroza, has the sole and exclusive authority to appoint representatives in international legal proceedings where the Republic is a party.
29. De Jesús explains that the holdings of the Constitutional Chamber clarify in the 22 April 2020 Judgment "the legal uncertainty regarding the international legal representation of the Bolivarian Republic of Venezuela" which have led the Committee to erroneously allow Mr. Hernández to act on behalf of the Republic in the annulment proceedings. The same Judgment states besides that the validity of the Acting Attorney General's actions are solely governed by the nullity regime of the Constitution and the laws of Venezuela and cannot be reviewed by the National Assembly. According to the said Judgment, four elements must be taken into consideration for reconsideration of the issue of representation: (i) the National Assembly is not the body in charge of the appointment of the Attorney General (ii) the office of *Procurador Especial* does not exist according to the Constitution and laws of Venezuela (iii) no valid act or judgment has been issued in the national legal order that revokes, annul or calls into question the appointment or authority of Mr. Reinaldo Muñoz Pedroza (iv) there is no valid act in the national legal order that appointed another person to the position.¹¹
30. The decisions taken by the legislative and judicial branches of Venezuela on the appointment of Mr. José Ignacio Hernández which have been discussed by the Parties include in chronological order:
 - Decision of 5 February 2019 of the Interim President of Venezuela, Mr. Guaidó, to appoint Mr. José Ignacio Hernández;
 - Judgment of the Constitutional Chamber of the Supreme Court of 8 February 2019 annulling the Statute Governing the Transition to Democracy to Restore the Full Force and effect of the Constitution of Venezuela enacted on 5 February 2019;¹²
 - Approval by the National Assembly on 27 February 2019 of the appointment by Mr. Guaidó of Mr. José Ignacio Hernández to the office of Special Attorney General provided by Article 15 of the Statute Governing the Transition to Democracy to Restore the Full Force and Effect of the Constitution of Venezuela;

¹⁰ De Jesus' request of 9 April 2020 to revisit the Order on the Applicant's Representation of 3 April 2020.

¹¹ Judgment of 22 April 2020, Annex 14.

¹² Annex 4 to De Jesus letter of 15 Mars 2020

- Resolution of the National Assembly of 19 March 2019 reaffirming that Mr. Reinaldo Muñoz Pedroza cannot represent Venezuela;
 - Judgment of the Supreme Court of 11 April 2019 annulling the appointment of Mr. José Ignacio Hernández as a consequence of the nullity of the Statute Governing the Transition to Democracy to Restore the Full Force and Effect of the Constitution of Venezuela;
 - Judgment of the Supreme Court of 22 April 2020; and
 - Resolution of the National Assembly of 28 April 2020 on the Refusal of the Judgment of the Illegitimate Constitutional Chamber of 22 April 2020.¹³
31. De Jesús avers that little weight should be given to the National Assembly Resolution of 28 April 2020 because, according to Article 335 of the Constitution of Venezuela, the finality of the judgments of the Constitutional Chamber are binding precedents which must be followed by all Venezuelan courts. De Jesús explains in this regard that the constitutional interpretations of the Supreme Court participate of a mixed system between civil law and common law.¹⁴ De Jesús likewise encourages the Committee to disregard the National Assembly Resolution of 19 March 2019 since the decisions of the Constitutional Chamber cannot be overturned by the National Assembly. De Jesús further reminds that there has been no governmental change or any change in the exercise of effective control over the Venezuelan State's territory and apparatus.¹⁵
32. On the one hand, it is a fact that the Judgment of 18 February 2019 of the Constitutional Chamber of the Supreme Court declared that the Statute Governing the Transition to Democracy to Restore the Full Force and Effect of the Constitution of Venezuela is an act of force. The same Judgment clarifies that any citizen who intends to usurp the powers held by Mr. Reinaldo Muñoz Pedroza commits a criminal offense.
33. On the other hand, it is also a fact that the Interim President of Venezuela relied on the above mentioned Statute to appoint Mr. José Ignacio Hernández to the office of Special Attorney General on 5 February 2019 and that such appointment was approved by the National Assembly on 27 February 2019 and that on 28 April 2020 the National Assembly decided that, because of the illegitimate composition of the Supreme Court, none of the judgments of the Constitutional Chamber of the Supreme Court since 23 December 2015 may be considered as valid and much less binding within the terms of Article 335 of the Constitution.¹⁶
34. De Jesús proposes to resolve this conflict of authorities by disregarding the acts of the legislative branch on the assumption that there is no doubt that, from the perspective of international law, President Maduro exerts effective control over the territory of Venezuela and over the State apparatus. The arguments of De Jesús calling the Committee to end the double representation of Venezuela as contrary to Venezuelan and international law suppose that the Committee applies the criterion of effective control, which implies that the Committee recognizes President Maduro

¹³ Annex 15.

¹⁴ English Transcripts, pp. 8: 16-25, 9: 1-24.

¹⁵ Letter of 3 August 2020, pp. 6-7.

¹⁶ Annex 15, p. 2.

as head of State and head of Government in Venezuela.¹⁷ This could not be done without contradicting the Parties' admission that the Committee cannot engage with deciding the legitimacy of powers in Venezuela.

35. When the matter of Venezuela's representation by Curtis in these proceedings was decided on 3 April 2020, the Committee assumed in light of the Parties' submissions that "there is no question that Venezuela is the proper identity of the State applying for annulment in these proceedings. The Parties do not seriously dispute that the Committee, which is neither a political body nor the deliberative organ of an International Organization, cannot hear - and decide - a political question, such as the legitimate government of Venezuela".¹⁸ The Committee relies on this position as still valid for deciding De Jesús' Request for Reconsideration of 3 August 2020.
36. The Committee has been constituted to decide the validity of the Award of 8 March 2019 between the Conoco Parties and Venezuela under Article 52 of the ICSID Convention and not to rule on where and with whom lies the legitimate government of Venezuela. It is worth reminding that the only basis for the Committee to decide Venezuela's representation in these annulment proceedings by Curtis lies in Article 44 of the ICSID Convention which provides, in relevant part:

"If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."
37. Under this humble remit, the Committee cannot vindicate the actions of one branch of the Constitutional powers over the actions of another branch without engaging with the prevailing legality in the country and turning itself into a final arbiter of the Constitutional powers of Venezuela. Under article 44 of the ICSID Convention, the Committee's more modest concern is to ensure that Venezuela enjoys its rights of defense in the annulment proceedings in being also represented by Curtis.
38. The chronology of actions taken by the judicial and legislative branches of Venezuela indicates that each of these Constitutional powers has systematically thwarted the other's decision regarding the office of Mr. José Ignacio Hernández. If the Committee were to exclude Curtis each time the Constitutional Chamber of the Supreme Court makes an adverse pronouncement to Mr. José Ignacio Hernández, there would be some logic in readmitting Curtis each time the National Assembly passes a resolution affirming Mr. José Ignacio Hernández's powers. As of today, the Committee notes that the National Assembly has had the last word by declaring on 28 April 2020 the Constitutional Chamber of the Supreme Court an illegitimate body whose judgments since 23 December 2015 are without effect or force, including the Judgment of 22 April 2020. The Committee cannot see how the procedural interests of Venezuela would be served by having a swing-wing representation dependent upon the vagaries of the quest of power in Venezuela.
39. The Committee therefore cannot exclude on the basis of the Judgment of 22 April 2020 the representation of Venezuela by Curtis. Failing any demonstration that Venezuela's representation should be in the hands of De Jesús, to the exclusion of

¹⁷ English Transcripts, pp. 13: 20-25, 14: 1-9.

¹⁸ Order on the Applicant's Representation of 3 April 2020, ¶ 29.

Curtis, for the preservation of Venezuela's rights to accede to justice, the Request for reconsideration of 3 August 2020 is rejected.

40. In reaching this decision, the Committee is mindful of Mr. Reinaldo Muñoz Pedroza's admonition at the hearing of 30 September 2020 that the participation of people who do not have the competence of representing Venezuela violates its sovereignty.¹⁹ In rejecting the request for reconsideration for other purposes than resolving whether Curtis is acting on a power of attorney issued by Mr. José Ignacio Hernández who does not exercise any authority or power within the Venezuelan legal system, the Committee has not identified the legitimate government of Venezuela at the detriment of Mr. Maduro. By refusing to engage in the rivalry between the two contenders for power in Venezuela, the Committee cannot have negated in any manner the sovereignty of Venezuela.

IV. Decision

41. The Committee decides:

- to reject the request for reconsideration of the Order on Representation of 3 April 2020; and that
- all questions concerning the costs and expenses of the Committee and of the Parties in connection with this request are reserved for subsequent determination, together with the Application for Annulment.

On behalf of the Committee,

[signed]

Judge Dominique Hascher
President of the Committee

¹⁹ English Transcripts, p. 2: 17-24.