

EXHIBIT A

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and
Mobil Cerro Negro, Ltd.**

v.

Republic of Venezuela

(ICSID Case No. ARB/07/27) – Resubmission Proceeding

DECISION

On the Respondent's Representation in this Proceeding

Members of the Tribunal

Prof. Nicolas Angelet, President of the Tribunal
Mr. Stephen Drymer, Arbitrator
Prof. Andrea Giardina, Arbitrator

Secretary of the Tribunal

Ms. Alicia Martín Blanco

March 1, 2021

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding

Decision on the Respondent’s Representation in this Proceeding

CONTENTS

I.	PROCEDURAL BACKGROUND.....	3
II.	RELEVANT POSITIONS.....	10
III.	ANALYSIS OF THE TRIBUNAL.....	11
	A. Preliminary Observation.....	11
	B. Jurisdiction of the Tribunal	12
	(1) Whether the representation issue is properly before the Tribunal	12
	(2) Whether the representation issue is a political issue over which the Tribunal has no jurisdiction	13
	C. Representation of the Respondent.....	14
	(1) The level at which the representation issue must be decided	15
	(2) The <i>status quo</i> principle.....	15
	(3) Venezuelan Domestic Law and Effective Government.....	17
	(4) International Law and Recognition.....	18
	(5) General principles of procedural law and fairness.....	21
	(6) Conclusion	23
IV.	DECISION.....	24

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

I. PROCEDURAL BACKGROUND

1. On October 1, 2018, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. (together, the “**Claimants**”) filed with the International Centre for Settlement of Investment Disputes (the “**Centre**” or “**ICSID**”) a Request for Resubmission (the “**Request**”) against the Bolivarian Republic of Venezuela (the “**Respondent**” or “**Venezuela**”).
2. On October 24, 2018, pursuant to Article 52(6) of the ICSID Convention and Rule 55(2)(a) of the ICSID Arbitration Rules, the Acting Secretary-General of ICSID registered the Request, as supplemented by letter of October 22, 2018, and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute a new Tribunal as soon as possible in accordance with ICSID Arbitration Rule 55(2)(d). On the Respondent’s side, this notification was made to Mr. Reinaldo Enrique Muñoz Pedroza, *Procurador General de la República* (Attorney General of the Republic).
3. On November 5, 2018, the Centre informed the Parties, that pursuant to ICSID Arbitration Rule 55(2)(d), the Tribunal in this resubmission proceeding shall include the same number of arbitrators appointed by the same method as the original one. The original Tribunal in this case comprised three arbitrators appointed pursuant to Article 37(2)(a) of the ICSID Convention. In particular, it was agreed that each Party would appoint an arbitrator and that the president would be appointed by agreement of the Parties, with the assistance of the two co-arbitrators.
4. On November 12, 2018, the Centre informed the Parties that Mr. Stephen Drymer, a national of Canada, had accepted his appointment by the Claimants as an arbitrator in this case.

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

5. On December 3, 2018, the Respondent, represented by Mr. Pedroza, informed the Centre that it had instructed the law firm Curtis, Mallet-Prevost, Colt & Mosle LLP (“**Curtis**”), as well as Mr. George Kahale III, to represent it in this proceeding.
6. On January 30, 2019, the Centre informed the Parties that Prof. Andrea Giardina, a national of Italy, had accepted his appointment by the Respondent as an arbitrator in this case.
7. On March 21, 2019, the Respondent, represented by Mr. Pedroza¹, informed the Centre that it had instructed the law firm De Jesús & De Jesús, S.A. as well as Mr. Alfredo de Jesús Salvatori and Mr. Alfredo de Jesús O. (“**De Jesús**”), to represent it in this proceeding. The Respondent also notified the Centre that the power of attorney issued to Curtis had been revoked.
8. On March 28, 2019, the Centre transmitted to the Claimants as well as to the Respondent represented by Mr. Pedroza (i) a letter from Mr. José Ignacio Hernández G., *Procurador Especial de la República Bolivariana de Venezuela* (Special Attorney General of the Bolivarian Republic of Venezuela), to ICSID dated March 27, 2019, as well as (ii) a letter from ICSID to Mr. Hernández, acknowledging receipt of his communication. In his letter, Mr. Hernández requested as follows: “any notice or communication from ICSID to the Republic of Venezuela should be addressed to me in my capacity of Special Attorney General of the Republic of Venezuela, and not to any other person claiming to act on behalf of the Republic of Venezuela, especially based on alleged mandates given by the Office of the Attorney General of Venezuela” and further:

“ICSID should not consider valid any instruction or communication submitted as of February 5, 2019 by any other person -different than me- who pretends to act on behalf of the Republic of Venezuela.”

¹ The Tribunal confirms in this Decision (see Section IV below) that the Respondent was at all times properly represented in this proceeding by Mr. Pedroza and the persons or firm appointed by him to act as counsel for the Republic.

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

9. On April 5, 2019, the Centre transmitted to the Claimants as well as to the Respondent represented by Mr. Pedroza² (i) a letter from Mr. Pedroza, *Procurador General (E)* (Attorney General (A)), to ICSID dated April 4, 2019, as well as (ii) a letter from ICSID to Mr. Pedroza, acknowledging receipt of his communication. Mr. Pedroza referred to the letter from Mr. Hernández to ICSID of March 27, 2019, noted “serious concerns”, reserved all related rights, and informed the Centre that he would “issue instructions to the attorneys representing the Republic in the different proceedings so that they may request, to the different arbitral tribunals and annulment committees, the dismissal *in limine litis* of the incident raised by the letter from Mr. Hernández for lack of jurisdiction or competence.”
10. On May 2, 2019, the Centre transmitted to the Claimants as well as to the Respondent represented by Mr. Pedroza³ (i) a letter from Mr. Hernández to ICSID dated April 29, 2019 and (ii) an email from ICSID to Mr. Hernández, acknowledging receipt of his communication. In his letter, Mr. Hernández stated that only ICSID had the authority to resolve the matter at hand and that “[a]s a preventive measure aimed to preserve the integrity of the procedures, all pending cases against Venezuela should be suspended until ICSID resolves this matter.”
11. On June 13 and July 2, 2019, the Claimants notified the Centre that they were reflecting on the most appropriate manner in which to complete the constitution of the Tribunal following receipt of various “communications concerning this arbitration from competing purported representatives of the Republic of Venezuela, including external counsel appointed by the Maduro government and the Special Attorney General appointed by the Guaidó government.”
12. On November 11, 2019, the Claimants sent a letter to Mr. Alfredo de Jesús O. and Mr. José Ignacio Hernández, with a copy to the Centre, in which the Claimants proposed that, “to complete the constitution of the Tribunal, representatives of both Venezuelan regimes

² *Ibid.*

³ *Ibid.*

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

- confirm that they agree to: (i) empower the two co-arbitrators to select the presiding arbitrator by agreement without further input from the Parties; and (ii) recognize a Tribunal constituted in this manner as validly constituted.”
13. On November 26, 2019, Mr. Alfredo de Jesús O. sent a letter to the Claimants, with a copy to the Centre, in which he requested that the Claimants “refrain from including persons other than [sic] the members of the Arbitral Tribunal, ICSID representatives and the parties’ representatives in future exchanges. Specifically, we request that you refrain from including Mr. Hernández in the communications and exchanges relating to the instant proceedings since Mr. Hernández is not a representative of the Bolivarian Republic of Venezuela.”
 14. On February 13, 2020, the Claimants notified the Centre of the Parties’ failure to agree on the appointment of the President of the Tribunal, and requested that the Chairman of the Administrative Council of ICSID (the “**Chairman**”) complete the constitution of the Tribunal by appointing the President pursuant to Article 38 of the ICSID Convention and Rule 4(1) of the ICSID Arbitration Rules.
 15. On February 21, 2020, De Jesús objected to the Claimants’ request on the basis that it “contravenes the parties’ agreement”, and requested the Chairman to reject it and the Claimants “to proceed with the appointment of the President of the new arbitral tribunal as per the Agreed Method, that is to say to agree with the Republic on such appointment, with the assistance of Mr. Drymer and Prof. Giardina.”
 16. On February 26, 2020, the Claimants objected to De Jesús’ request and reiterated their request to the Chairman.
 17. On March 2, 2020, the Centre confirmed that since the request to the Chairman had been made more than 90 days after the dispatch of the notice of registration without the Tribunal having been constituted, the Chairman would proceed to appoint the President of the Tribunal from the ICSID Panel of Arbitrators, in accordance with ICSID Article 38.

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding

Decision on the Respondent’s Representation in this Proceeding

18. On August 12, 2020, the Centre informed the Claimants as well as the Respondent represented by Mr. Pedroza⁴ that it had proposed the appointment of Prof. Angelet and, on August 13, 2020, the Centre confirmed that the Chairman had appointed Prof. Angelet as the President of the Tribunal in this case.
19. On August 17, 2020, the Secretary-General, in accordance with Rule 6 of the ICSID Arbitration Rules, notified the Claimants as well as the Respondent represented by Mr. Pedroza⁵ that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Alicia Martín Blanco, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
20. On August 26, 2020, the Claimants requested “that the issue of which of Venezuela’s purported representatives are properly authorized to represent Venezuela in these proceedings be determined by the Tribunal as a threshold issue and in advance of the First Procedural Session” and, to that end, they proposed a briefing schedule. On August 27, 2020, De Jesús requested that the Claimants’ application be dismissed summarily as “there simply is no issue of representation to be determined by the Arbitral Tribunal” and reserved the right to comment on the timetable proposed by the Claimants should the Tribunal decide otherwise. The Claimants submitted further comments on August 28, 2020.
21. On September 1, 2020, the Tribunal decided as follows: “Upon careful consideration and on the face of the current record, the Tribunal is not persuaded that there is not a pending issue regarding the Respondent’s representation in this proceeding. Accordingly, the Tribunal cannot summarily dismiss the Claimants’ request and finds that a decision on the proper representation of the Respondent in this proceeding will be in the interest of the Parties and the integrity of the proceeding.” For this purpose, the Tribunal indicated its wish to contact the individuals or entities purporting to represent Venezuela in the present proceeding other than Mr. Pedroza and De Jesús and invited counsel to provide any

⁴ *Ibid.*

⁵ *Ibid.*

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

- information they may have that would assist the Tribunal in this regard. Responses were submitted on September 2 and 3, 2020.
22. On September 11, 2020, the Tribunal stated as follows: “[f]rom the information now on record, the Tribunal assumes that any individuals who purport to represent the Respondent in this proceeding, other than Messrs. Pedroza and De Jesús, can be reached at 2409 California Street NW, Washington, DC 20008. The Tribunal will use this address, taking due care to preserve the confidentiality of the proceeding and without prejudging the capacity of said individuals.”
23. On September 16, 2020, the Secretary transmitted a communication from the Tribunal to the indicated postal address, to the personal attention of Mr. Hernández or his substitute, inviting them to provide: “(a) [t]he identity and electronic contact details of the person or persons, if any, currently in charge of briefing the Tribunal on the Preliminary Issue on behalf of “the Interim President of the Bolivarian Republic of Venezuela acting under the control of the Venezuelan National Assembly”; and (b) [t]he powers of the person or persons identified under (i).”
24. On September 30, 2020, the Centre circulated a communication received from Mr. Enrique Sánchez Falcón written “in [his] capacity as Special Attorney General of the Bolivarian Republic of Venezuela”, in response to the Tribunal’s letter of September 16, 2020, and dated September 27, 2020. In this letter, Mr. Falcón provided electronic contact details and a postal address in Bogotá, Bolivia. He also requested, *inter alia*, an “electronic copy of the full docket at stake as well as a sixty (60) day extension after the file is received for this Office to review it and proceed to take the necessary steps to exercise Venezuela’s defense, including through the appointment of counsel.”
25. In a communication of September 30, 2020, the Tribunal further informed the Claimants, Mr. Pedroza and Mr. Falcón (the “**Participants**”) that it intended to hold its first session during the first week of October 2020, separately from the preliminary procedural consultation with the Parties. By reference to Mr. Falcón’s letter, the Tribunal informed

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

- the Participants that it considered to have ascertained the identity, contact details and powers of the person currently in charge of briefing the Tribunal on the representation issue, including whether the Tribunal has jurisdiction to decide this issue (“**Preliminary Issue**”) on behalf of “*the Interim President of the Bolivarian Republic of Venezuela*”, and noted that this person was Mr. Falcón.
26. In the same communication, the Tribunal proposed a schedule of submissions for the Preliminary Issue, denied Mr. Falcón’s requests for a 60-day extension and for a copy of the full electronic record of the resubmission proceeding as premature considering the scope of the Preliminary Issue, and decided to transmit to Mr. Falcón the constitution documents and the correspondence following the constitution of the Tribunal.
 27. On October 1, 2020, the Secretary unsuccessfully sought to deliver to the email address provided by Mr. Falcón a notification that the constitution documents and the correspondence following the constitution of the Tribunal had been made available to him. On October 2, 2020, after repeated attempts to deliver communications to that email address, the Secretary transmitted a letter to the postal address provided by him with the Tribunal’s request to Mr. Falcón that he provides full contact details where he may be reached during this proceeding, including a functioning email address and a telephone number.
 28. On October 9, 2020, the Tribunal informed the Participants that it had held its first session on October 8, 2020 by videoconference and confirmed the schedule of submissions on the Preliminary Issue proposed in its communication of September 30, 2020.
 29. By letter dated November 5, 2020, Mr. Falcón notified the appointment of “Curtis, Mallet-Prevost, Colt & Mosle LLP as counsel for Venezuela in the above-referenced case, with George Kahale, III as lead counsel of the case” to the Secretary-General.
 30. On November 10, 2020, the Participants filed their first round of submissions on the Preliminary Issue.

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

31. On November 20, 2020, the Tribunal invited the Participants to comment, if they so wished, on the England and Wales Court of Appeal’s judgment of October 5, 2020 in *The “Maduro Board” of the Central Bank of Venezuela, The “Guaidó Board” of the Central Bank of Venezuela & Ors.*
32. On December 1, 2020, the Participants filed their second round of submissions on the Preliminary Issue.

II. RELEVANT POSITIONS

33. In substance, the Participants in the proceeding on the representation of Venezuela have submitted as follows.
34. According to De Jesús, the Preliminary Issue should be dismissed *in limine litis* because no “representation issue” has been submitted to the Arbitral Tribunal by any third party claiming to be the representatives of Venezuela in this particular case. In the alternative, the Tribunal has jurisdiction to decide the issue pursuant to Articles 42 and 44 of the ICSID Convention. As to the substance, the Venezuelan law at the basis of the appointment of Mr. Falcón’s predecessor has been annulled by the Constitutional Court. Mr. Falcón’s appointment is based on the same law and is therefore devoid of legal basis. General international law refers to the effective government. Referring to recognition within the World Bank Group, as advocated by Curtis, would be incompatible with the Tribunal’s independence.
35. According to Curtis, the representation issue is a political question of who legitimately represents Venezuela. The Tribunal has no jurisdiction to decide this issue, which would amount to deciding on recognition of the legitimate government of Venezuela. The matter is also beyond the Tribunal’s jurisdiction as provided by the bilateral investment treaty between the Netherlands and Venezuela. Therefore, the proceeding must be stayed. As to the substance, who is entitled to represent Venezuela in the proceedings depends on

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

international recognition by the international community, by the Contracting States to the bilateral investment treaty or within the World Bank Group. On these bases, Curtis is entitled to represent Venezuela in the proceedings. At the very least, Curtis must be allowed to represent Venezuela jointly with De Jesús.

36. The Claimants argue that they have in no way created this issue and that they have an interest in obtaining a decision on this issue. The Claimants do not take a position as to whom should represent Venezuela, but they submit that the proceeding cannot be made dependent on a decision by the World Bank Group which does not appear to be forthcoming.

III. ANALYSIS OF THE TRIBUNAL

A. PRELIMINARY OBSERVATION

37. This Decision is concerned with which, of two competing bodies or persons, is entitled to represent Venezuela as the Respondent in the Resubmission Proceedings. This issue arises against the background of a political conflict with domestic (Venezuelan) and international aspects. This causes the competing bodies or persons asserting to represent Venezuela, to also dispute the validity of functions, titles or denominations used on one side or the other.
38. The terminology used by the Tribunal in this Decision serves the sole purpose of clearly identifying each of the competing bodies or persons, without prejudice to the validity of the relevant functions, titles or denominations and without in any way purporting to attribute qualities to any of them which they do not otherwise possess. With that in mind, the participants in this proceeding, other than the Claimants, will be identified as follows:
- Mr. Reinaldo Enrique Muñoz Pedroza, appointed by “the government of Mr. Nicolás Maduro” (also the “**Maduro government**”) and represented in this proceeding by the law firm De Jesús since March 2019;
 - Mr. José Ignacio Hernández G. and subsequently Mr. Enrique Sánchez Falcón, appointed by “the government of Mr. Juan Guaidó” (also the “**Guaidó**”

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

government”) and represented in this proceeding by the law firm Curtis since November 2020.

39. Together with the Claimants, these persons and bodies are also identified hereafter as “the Participants” in the proceeding on the representation of Venezuela. For reasons of convenience, the Tribunal will hereinafter identify the Participants purporting to represent Venezuela interchangeably, by referring to the respective “governments”, to Messrs. Pedroza and Falcón, and to the law firms appearing in this proceeding.

B. JURISDICTION OF THE TRIBUNAL

40. Two jurisdictional issues have been raised. The first one, raised by De Jesús, is that no representation issue has been properly submitted to the Tribunal. The second one, raised by Curtis, is that the representation issue is a political issue with respect to which the Tribunal lacks jurisdiction.

(1) Whether the representation issue is properly before the Tribunal

41. De Jesús observes that the Guaidó government’s letter to ICSID of 27 March 2019 was concerned only with ICSID as an international organization and not with ICSID Tribunals, and that “the sole communication sent to date by Mr. Sánchez Falcón in these proceedings was issued only after the Arbitral Tribunal decided to contact ‘the individuals or entities purporting to represent Venezuela in the present proceeding other than ...’”⁶
42. The Tribunal finds that this argument is contradicted by Mr. Hernández’s letter to ICSID of 27 March 2019, which stated that “any notice or communication from ICSID to the Republic of Venezuela should be addressed to me in my capacity of Special Attorney General of the Republic of Venezuela” and that “the person who currently serves as Attorney General of Venezuela does not have the authority to exercise the judicial representation of Venezuela in arbitral proceedings.” This wording was concerned with the

⁶ De Jesús, First Submission, pp. 1-2.

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

representation of Venezuela before ICSID tribunals. This interpretation of the letter finds confirmation in Curtis’s subsequent position before this Tribunal, which aims at obtaining a decision on the representation of Venezuela before the Tribunal. A similar request has been made by the Claimants, who have an interest indeed in having this issue decided *in limine*. On these bases, the Tribunal finds that the issue of the representation of Venezuela has properly been raised before it.

(2) Whether the representation issue is a political issue over which the Tribunal has no jurisdiction

43. As concerns Curtis’s position that the representation of Venezuela is a political issue, it is first of note that arbitral tribunals and *ad hoc* committees which have been caused to decide on the representation of Venezuela hitherto and which decisions have been submitted by the Participants in this proceeding, have qualified the issue before them as a procedural issue to be decided pursuant to Article 44 of the ICSID Convention. This includes the *Conoco* annulment decision relied upon by Curtis.⁷ The Tribunal finds that the representation of Venezuela is indeed a procedural issue pursuant to Article 44 of the Convention. As stated by the *Kimberly-Clark* tribunal, “it is an issue dealing with the proper conduct of this arbitration. In other words, it is a procedural issue.”⁸
44. This is unaffected by Curtis’s argument that the issue of the representation of Venezuela in the present proceedings falls outside arbitral jurisdiction pursuant to the bilateral investment treaty between the Netherlands and Venezuela. The jurisdictional provisions in this treaty must be read in combination with the ICSID Convention. The Tribunal’s jurisdiction over the dispute as defined in Article 9(3) of the bilateral investment treaty is without prejudice to the Tribunal’s power to address procedural issues that may arise in the

⁷ Curtis, Second Submission, §7.

⁸ *Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U., and Kimberly-Clark BVBA v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB(AF)/18/3), 15 October 2019, Order on Venezuela’s Representation (“*Kimberly-Clark*”), §41.

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

course of the arbitration, which is governed by Article 44 of the ICSID Convention to which Article 9(1) of the bilateral investment treaty refers.

45. In deciding on the representation issue, the Tribunal would not be deciding on “the recognition of a Venezuelan government” or on the recognition of Venezuela’s “legitimate Government.” Unlike sovereign States, arbitral tribunals have a limited and functional capacity consisting in deciding the issues submitted to them by the disputing parties. As Curtis rightly observes, they do not have the capacity to recognize a government as sovereign States would do. But, consequently, they do have the power, in accordance with their specific functions, to render procedural decisions on the representation of parties before them. They do so for the only purpose of assuring the proper conduct of the proceedings and protecting the rights of defence of the parties, which may also depend on criteria such as procedural fairness and efficiency different from those relevant to the recognition of States and governments. It is solely in this context and for this limited purpose that the Tribunal is asked, and accepts, to determine what it refers to as the “representation issue.” As the tribunal in *Valores Mundiales* observed, the procedural issue of representation of the Respondent “is limited in scope to these proceedings.”⁹
46. On these bases, the Tribunal rejects Curtis’s objection to jurisdiction as unfounded.

C. REPRESENTATION OF THE RESPONDENT

47. The qualification of the representation issue as “procedural” within the meaning of Article 44 of the ICSID Convention founds the Tribunal’s power to determine the issue, without prejudice to the substantive legal rules and principles that may be applicable or relevant in that regard. Both De Jesús and Curtis have, to some extent but with different emphases, referred to Venezuelan domestic law, international law and principles of procedural law and fairness. The Tribunal will address these various elements in turn. Before doing so, it

⁹ *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/13/11) – Annulment Proceedings, Procedural Order No. 2, 29 August 2019 (“Valores Mundiales”), §32.*

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding

Decision on the Respondent’s Representation in this Proceeding

is necessary to determine at what *level* – of the two “governments”, of the two “*Procuradores*” or of the two law firms – the representation issue must be decided.

(1) The level at which the representation issue must be decided

48. A first issue is whether the representation issue should be decided at the level of the “governments” (the “Maduro government” and the “Guaidó government”), at the level of the “*Procuradores*” (Messrs. Pedroza and Falcón), or that of the law firms De Jesús and Curtis.
49. In line with the letters sent to ICSID on 27 March and 29 April 2019 by Mr. Hernández, and the response from Mr. Pedroza of 4 April 2019, the Tribunal finds that the representation issue must, in the present instance, be decided at the level of Messrs. Reinaldo Enrique Muñoz Pedroza, and Mr. Enrique Sánchez Falcón. That is, the representation issue must be decided at the intermediate stage between the “Maduro government” and “Guaidó government” on the one hand, and the law firms of Curtis and De Jesús, on the other hand. It must not be decided at a higher level than that of the “*Procuradores*” because this decision is concerned with the specific procedural issue of the Respondent’s representation before the Tribunal. It must not be decided at the level of law firms because it is for “*Procuradores*” to appoint counsel and not the reverse.

(2) The *status quo* principle

50. This Tribunal is not the first to be confronted with the issue of the representation of Venezuela in ICSID arbitration and annulment proceedings. Most if not all earlier decisions have accorded a central role to the maintenance of the *status quo*, laying the burden of proof with the person or body seeking to change the existing representation.¹⁰ This line of

¹⁰ Notably *Valores Mundiales, op. cit.*, §40; *Agroinsumos Ibero-Americanos, S.L., Inica Latinoamericana, S.L., Proyefa Internacional, S.L. and Verica Atlántica, S.L. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/16/23)*, Procedural Order No. 13, 13 January 2020, §§17-18; *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/17/4)*, Procedural Order No. 2, 13 November 2020, §§46-47; *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/30)*, Annulment Proceeding, Order on the Applicant’s representation, 3 April 2020, §§29-35; and less explicitly: *Kimberly-Clark, op. cit.*, §§48-49; *ConocoPhillips*

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

reasoning has been accorded limited attention by the Participants, though it is inherent in De Jesús’s position that the representation of Venezuela must remain unchanged. For the reasons set out hereinafter, it does provide a basis for the Tribunal’s decision in the present instance.

51. As already noted (§§48-49), the decision on the representation of the Respondent in this case must be taken at the “intermediate” level between governments and legal counsel, that is, at the level of *Procuradores*, Messrs. Pedroza and Falcón. More specifically, as indicated above, it must be decided at the level of State agents and not of counsel, since the State agents appoint counsel and not the reverse. This being established, in the circumstances here the *status quo* principle operates in favour of representation by Mr. Pedroza. This is because of the factors combined that (i) Mr. Pedroza was Respondent’s representative of record at the time of the initiation of the present resubmission proceeding, and (ii) Mr. Pedroza (or his predecessor at the *Procuradoría General de la República*) represented Venezuela in the first arbitration, the annulment proceeding and the initial steps of the resubmission proceeding.
52. Accordingly, not only does Mr. Pedroza have the formal quality of “representative of record”, which lays the burden of proof on Mr. Falcón. Representation of the Respondent by Mr. Pedroza also provides continuity in the interest of orderly proceedings and the right of defence of the Respondent.
53. On these bases, the Tribunal finds that the *status quo* principle operates in favour of representation of the Respondent in this proceeding by Mr. Pedroza, and that this is in itself a sufficient basis for the Tribunal to decide, as it does, in favour of Mr. Pedroza on the representation issue.

Petrozuata B.V. a.o. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/30), Order on the Applicant’s Request for Reconsideration dated 3 August 2020 on the issue of Venezuela’s legal representation, 2 November 2020 (“**ConocoPhillips Reconsideration Decision**”).

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding

Decision on the Respondent’s Representation in this Proceeding

54. In addition, as shown hereinafter, no other consideration raised by Mr. Falcón either rebuts the presumption in favour of the formal “representative of record” in the present instance or has been shown to provide a basis on which to grant his request.

(3) Venezuelan Domestic Law and Effective Government

55. As concerns Venezuelan domestic law in isolation from the recognition issue, it is undisputed between the Participants that the Venezuelan law at the basis of the appointment of Mr. Falcón’s predecessor has been annulled by the Constitutional Court.¹¹ This judgment deprived Mr. Falcón’s appointment, which was based on the same law,¹² of its legal basis under Venezuelan law. Subsequently, the Venezuelan Constitutional Court specified that Mr. Pedroza had the exclusive right to represent Venezuela in international proceedings.¹³ It further appears from the *ConocoPhillips* reconsideration decision, which was submitted by Curtis¹⁴ but not discussed or relied upon by the Participants, that the National Assembly subsequently adopted a “Resolution of the National Assembly of 28 April 2020 on the Refusal of the Judgment of the Illegitimate Constitutional Chamber of 22 April 2020.”¹⁵ It has not been argued by Curtis that the National Assembly annulled the Constitutional Court judgments. Accordingly, on the basis of the evidence and submissions before it, the Tribunal has not been convinced that Mr. Falcón’s appointment is formally valid under domestic Venezuelan law. Whether it benefits from democratic legitimacy is a different matter, which the Tribunal does not purport to address.

56. In addition, the Tribunal observes that ever since the representation issue was raised in the present proceeding and at the time this decision is rendered, Mr. Falcón has not been shown

¹¹ De Jesús, First Submission, p. 3; Judgment of the Constitutional Chamber of the Republic’s Supreme Court of Justice of 8 February 2019, Annex 9 to De Jesús’s First Submission; See also *Valores Mundiales*, *op. cit.*, §§45-47.

¹² *Decreto No. 21 de la Presidencia (E) de la República Bolivariana de Venezuela sobre la designación como Procurador Especial al ciudadano Enrique José Sánchez Falcón*, annexed to Mr. Falcón’s letter to the Secretary of the Tribunal of 27 September 2020, p. 9, Annex 4, p. 10 to Curtis’s First Submission.

¹³ Judgment of the Constitutional Chamber of the Republic’s Supreme Court of Justice of 22 April 2020, Annex 14 to De Jesús’s First Submission.

¹⁴ Annex 27 to Curtis’s Second Submission.

¹⁵ *ConocoPhillips Reconsideration Decision*, *op. cit.*, §30.

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

to be the representative of an *effective* government – meaning the government that is in control of the national territory and most, if not all, of the State apparatus. This is evidenced *inter alia* by the fact that Mr. Falcón is handling this proceeding from Bogotá, Bolivia (*supra*, §24). Accordingly, while emphasising that identifying a State’s effective government is entirely different from its legitimacy, the Tribunal considers that the *status quo* regarding Venezuela’s representation in this proceeding is unaffected by reasons concerning effectiveness of government.

57. The Tribunal therefore finds that, without prejudice to the issue of legitimacy, which is not within the Tribunal’s jurisdiction and which the Tribunal in no way addresses, Mr. Falcón’s appointment does not find a proven basis in Venezuelan domestic law and is, further, not proven to be backed by Venezuela’s effective government. The Tribunal’s findings based on the *status quo* principle therefore remain unaltered.

(4) International Law and Recognition

58. The argument of Curtis regarding international law and recognition is capable of encompassing two distinct arguments. The first argument is concerned with general international law and the recognition by third *States* (in particular the Netherlands and the United States). The second argument is concerned with the existence of a *lex specialis*, namely the international law rules governing the relationship between ICSID tribunals and the World Bank Group.
59. The relevance of domestic law to such an analysis depends on international law and recognition when a violation of *jus cogens* triggers an *international obligation* of non-recognition. Article 41, §2, of the Articles on the Responsibility of States for Internationally Wrongful Acts (“**ARSIWA**”)¹⁶ provides as follows:

“No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40 [a “serious breach by a State of an

¹⁶ Text adopted by the UN International Law Commission at its fifty-third session in 2001 and annexed to UN General Assembly resolution 56/83 of 12 December 2001.

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

obligation arising under a peremptory norm of general international law”], nor render aid or assistance in maintaining that situation.”

This obligation is quite limited in scope. A peremptory norm of general international law (*jus cogens*) is defined in Article 53 of the Vienna Convention on the Law of Treaties, for the purposes of the Convention, as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹⁷ ARSIWA Article 40, §2, further provides that a breach of such an obligation is serious “if it involves a gross or systematic failure by the responsible State to fulfil the obligation.” For the provision to apply to the effect that the Tribunal shall not recognize acts performed by a given individual or body with respect to the representation of Venezuela, it would be irrelevant to assert that the authorities adopting these acts have ceased to hold office, lack democratic legitimacy or violate international law. For the provision to apply, the very existence of the authorities adopting these acts, or the acts themselves, should constitute a serious breach of *jus cogens*, as would be the case of a government of foreign occupation resulting from aggression or an Apartheid regime. That has not been shown to be the case. Neither have the acts of the Maduro government appointing the representatives of Venezuela in the present proceedings been shown to be in violation of *jus cogens*. Absent such a violation, there is no *obligation* in international law to set aside the relevant domestic Venezuelan law and the ensuing appointment of De Jesús.

¹⁷ The limited nature and number of such norms is made clear by the draft conclusions on peremptory norms of general international law (*jus cogens*), adopted by the Commission on first reading in 2019 (A/74/10). Conclusion 3 states: “Peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community, are hierarchically superior to other rules of international law and are universally applicable.” Conclusion 23 contains the following non-exhaustive list: “(a) The prohibition of aggression; (b) The prohibition of genocide; (c) The prohibition of crimes against humanity; (d) The basic rules of international humanitarian law; (e) The prohibition of racial discrimination and apartheid; (f) The prohibition of slavery; (g) The prohibition of torture; (h) The right of self-determination.”

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

60. Further, Curtis’s arguments based on the recognition of the Guaidó government by other States cannot affect the *status quo* regarding Venezuela’s representation in the present proceedings. First, the Tribunal observes that such recognition is not uniform within the international community of States. Second, States which recognize the Guaidó government may do so as an expression of political support, without prejudice to the powers of the Maduro government as the effective government of Venezuela. In United Kingdom practice, for instance, ‘legitimate’ governments may be recognized alongside ‘effective’ governments, in which case the laws and acts of the effective governments stand and those of the ‘legitimate’ government are null and void.¹⁸ The recognition of the Guaidó government by other States cannot therefore found a claim by that government to alter the *status quo* regarding Venezuela’s representation in the present proceedings.
61. Curtis has further argued that the Tribunal must base its decision on the recognition of the Guaidó government by the Netherlands, as the Contracting State to the applicable bilateral investment treaty that is also the home State of the Claimants, and further on the recognition of that government by the United States which is the State of incorporation of the Claimants’ ultimate mother company.¹⁹ In this respect, the Tribunal finds that it cannot be for the country of nationality of a claimant in effect to decide on the respondent’s representation in investment arbitration proceedings. Home States have a legal interest in investment treaty claims brought by their nationals. They cannot be allowed to influence the defence against such claims.
62. Curtis also argues that the relevant decision must be made on an institutional level for purposes of matters coming before ICSID, not by individual ICSID tribunals or *ad hoc* committees, and that the issue should be decided at the institutional level by the World Bank.²⁰ According to this line of reasoning, however, the Tribunal considers that

¹⁸ Court of Appeal for England and Wales, *The “Maduro Board” of the Central Bank of Venezuela, The “Guaidó Board” of the Central Bank of Venezuela & Ors.*, Judgment of 5 October 2020, §§85 ff.

¹⁹ Curtis, First Submission, §11; Curtis, Second Submission, §3.

²⁰ Curtis, First Submission, §15.

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent's Representation in this Proceeding

representation of States before ICSID tribunals and committees would depend most critically on their representation in (the Administrative Council of) ICSID as the relevant international organisation, rather than more generally in the World Bank Group. Venezuela denounced the ICSID Convention in January 2012, with effect in June 2012. Venezuela thus ceased to be a Contracting State and therefore a member of the Administrative Council in 2012. Accordingly, leaving all other issues aside, there is no representation of Venezuela on the relevant institutional level, which is the level of ICSID, to which the Tribunal could have regard, even were it minded to.

63. In conclusion, relevant rules of international law do not alter the conclusion previously reached on the basis of the *status quo* principle, Venezuelan domestic law and the exercise of effective governmental control that Mr. Pedroza of the *Procuraduría General de la República* is entitled to represent the Respondent in this proceeding and to appoint counsel of his choosing.

(5) General principles of procedural law and fairness

64. The Participants, and other tribunals and *ad hoc* committees deciding on the representation of Venezuela have also had regard to principles of procedural law and fairness, in particular the efficiency of the proceedings and the rights of defence, and the possible influence on the enforcement of an award on damages.
65. The requirement of efficient and orderly proceedings and the rights of defence have been addressed already as one of the possible objectives pursued by the *status quo* principle and as providing a sufficient basis for representation of the Respondent by Mr. Pedroza. In broader terms, the Tribunal observes as follows:

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

- The *Kimberly-Clark* tribunal reasoned that “the arbitration cannot proceed with two representatives of one and the same party who are in conflict with each other.”²¹ The Tribunal agrees with this principle. The Tribunal would welcome the constitution of a coordinated or joint defence team by De Jesús and Curtis. It notes that Curtis is in favour of “participation” in the representation of Venezuela if the Tribunal does not stay the proceeding.²² However, this has until now been objected to by De Jesús.²³ As long as this objection remains, the *Kimberly-Clark* tribunal’s reasoning also applies in the present instance.
- As concerns the right of defence, Curtis has not argued, and there is no reason to consider, that Mr. Pedroza will not adequately defend Venezuela’s rights and interests in the present proceedings. Venezuela’s representation by the representative of the Maduro government alone does not raise any specific issue of procedural fairness.

In these circumstances, the Tribunal finds that its previous conclusion that the Respondent shall be represented by Mr. Pedroza remains unaffected by considerations of procedural efficiency and the rights of defence. At the same time, the Tribunal reiterates that it would welcome the constitution of a coordinated or joint defence team by Messrs. Pedroza and Falcón should those gentlemen agree to such.

66. Finally, Curtis argues in line with earlier statements by Mr. Hernández that “Venezuela can never accept” the validity of an award or decision in this proceeding could have any legitimacy or validity if the duly authorized representatives of the Guaidó Government were to be excluded from the case,²⁴ and that this would render any award in this case “void for lack of jurisdiction.”²⁵ The Tribunal interprets these statements as meaning nothing

²¹ *Kimberly-Clark, op. cit.*, §41. See also *Air Canada v. Bolivarian Republic of Venezuela (ICSID Case No. ARB(AF)/17/1) Procedural Order No. 7, Decision on the Question of Respondent’s Representation*, 28 May 2019, §68.

²² Curtis, First Submission, §19 and Second Submission, §12 (“participate”).

²³ Notably De Jesús, Second Submission, §§2-3, §16 footnote 27 and §23.

²⁴ Curtis, First Submission, §16.

²⁵ Curtis, First Submission, §19 and Second Submission, §4.

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent’s Representation in this Proceeding

more than that Curtis reserves the Respondent’s right to challenge the Tribunal’s award on this basis for lack of jurisdiction. For the sake of completeness, the Tribunal observes that pursuant to Article 54.1 of the ICSID Convention, each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. Therefore, unless the award in these proceedings be annulled by an ICSID *ad hoc* Committee, no Contracting State has the right to negate its legitimacy or validity. By virtue of ICSID Convention Article 72, that remains applicable to the recognition and enforcement of the award to be rendered by this Tribunal, Venezuela’s denunciation of the Convention notwithstanding.

(6) Conclusion

67. It follows from the above that Venezuela shall be represented in these proceedings by Mr. Pedroza (or his successor or substitutes) and not by Mr. Falcón (or his successor or substitutes).
68. This decision is, by its nature, dependent on the relevant facts as they exist at the time this decision is rendered. Accordingly, this decision is without prejudice to the power of the Tribunal to revise its decision on the representation of Venezuela in the light of new facts that might arise at a later date.
69. In particular, this decision is adopted without prejudice to a possible agreement of the two “governments” to organize a coordinated or joint defence team in this case. Should the “governments” reach an agreement to that effect, which the Tribunal would welcome; such agreement should be promptly notified to the opposing Party, the ICSID Secretariat and the Arbitral Tribunal.
70. The Tribunal reiterates that this decision is merely procedural in nature and limited to the present proceeding. Its only function is to determine who shall have the task of presenting

Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding
Decision on the Respondent's Representation in this Proceeding

Venezuela's defence before the Tribunal in these proceedings. The decision, and consequently the representation of Venezuela in the present proceedings has no other legitimizing function or effect.

IV. DECISION

71. For the reasons stated above, and without prejudice to a possible agreement of Messrs. Pedroza and Falcón (or their successors or substitutes) for the constitution of a coordinated or joint defence team in the case to be notified promptly to the Claimants, ICSID and the Tribunal,
72. the Tribunal decides and orders as follows:
- (i) The Preliminary Issue is properly before this Tribunal.
 - (ii) The Tribunal has jurisdiction to decide the Preliminary Issue.
 - (iii) Mr. Enrique Sánchez Falcón's request to represent the Bolivarian Republic of Venezuela in this proceeding is denied, as well as the request to suspend the proceeding. For the avoidance of doubt, Mr. José Ignacio Hernández's requests contained in his letters of March and April 2019 in so far as they pertain to this resubmission proceeding are also denied.
 - (iv) The Resubmission Proceeding shall continue with the Bolivarian Republic of Venezuela represented by Mr. Reinaldo Enrique Muñoz Pedroza or his successors or substitutes.
 - (v) Messrs. José Ignacio Hernández and Enrique Sánchez Falcón shall bear their own costs and expenses.

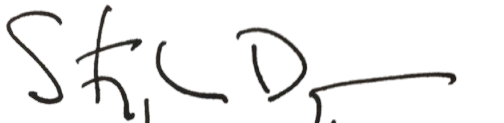
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Decision on the Respondent's Representation in this Proceeding

- (vi) All other questions concerning the costs and expenses of the Tribunal and of the Parties in connection with this proceeding on the representation of the Bolivarian Republic of Venezuela are reserved for subsequent determination.

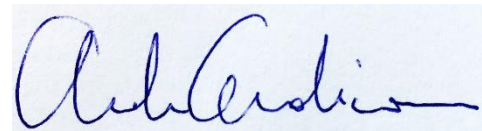
Venezuela Holdings, B.V., Mobil Cerro Negro Holding, LLC, and Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela (ICSID Case no. ARB/07/27) – Resubmission Proceeding

Decision on the Respondent's Representation in this Proceeding



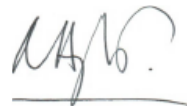
Stephen Drymer
Arbitrator

Date: February 26, 2021



Andrea Giardina
Arbitrator

Date: February 26, 2021



Nicolas Angelet
President of the Tribunal

Date: February 26, 2021