

**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**

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**ORDER ON THE APPLICANT'S THIRD REQUEST FOR RECONSIDERATION OF  
21 SEPTEMBER 2021 ON THE ISSUE OF VENEZUELA'S LEGAL  
REPRESENTATION**

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**Members of the *ad hoc* Committee**

Judge Dominique Hascher, President of the *ad hoc* Committee  
Professor Diego Fernández Arroyo, Member of the *ad hoc* Committee  
Prof. Lawrence Boo, Member of the *ad hoc* Committee

**Secretary of the *ad hoc* Committee**

Ms. Celeste Salinas Quero

15 February 2023

## I. PROCEDURAL BACKGROUND

1. This is a summary of the procedural background leading to the issuance of this Order, and it does not purport to contain a full report of each procedural step undertaken by the Parties and the *ad hoc* Committee in this annulment proceeding.
2. On 3 April 2020, the Committee issued an “Order on the Applicant’s Representation,” rejecting the request presented on 15 March 2020 by the law firm De Jesús & De Jesús (“De Jesús”) on behalf of the Bolivarian Republic of Venezuela (“Venezuela” or the “Republic”) that the Committee exclude from this annulment proceeding the participation of the law firm Curtis, Mallet-Prevost, Colt & Mosle LLP (“Curtis”), who also appeared acting on behalf of Venezuela.
3. On 9 April 2020, Venezuela (as represented by De Jesús) requested that the Committee reconsider its 3 April Order (“**First request**”).
4. On 15 April 2020, the Committee denied Venezuela’s First request for reconsideration and reminded the parties that its 3 April Order was “limited to the present stage of the proceedings and is subject to review in light of future developments.”
5. On 16 April 2020, Venezuela (as represented by De Jesús) filed a proposal to disqualify the entire Committee. The proceeding was suspended until 10 August 2020, when 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.
6. On 3 August 2020, Venezuela (as represented by De Jesús) filed a second request that the Committee reconsider its 3 April Order (“**Second request**”).
7. On 2 November 2020, after hearing the parties and holding a hearing by videoconference on 30 September 2020, the Committee issued an “Order on the Applicant’s Request for Reconsideration dated 3 August 2020 on the issue of Venezuela’s legal representation.” The Committee rejected De Jesús’ Second request for reconsideration.
8. On 21 September 2021, Venezuela (as represented by De Jesús) filed a third request asking the Committee to reconsider its Order of 2 November 2020 (“**Third request**”).
9. Upon an invitation from the Committee, on 23 September 2021 Curtis submitted their comments on the Third request on behalf of Venezuela and the Conoco Parties submitted their comments on 27 September 2021.
10. From 14 October 2021 to 14 March 2022 the annulment proceeding was suspended for lack of payment of the required advance.
11. From 18 March 2022 to 1 June 2022 the proceeding was again suspended, while the vacancy left upon resignation of one of the Committee Members (Mr. Kim) was filled (by Mr. Boo) and the Committee was reconstituted with its current composition.

12. On 12 June 2022, Venezuela (as represented by De Jesús) filed a proposal to disqualify two of the Committee Members (Judge Hascher and Prof. Fernández Arroyo). The proceeding was suspended until 27 September 2022, when the Chairman of the Administrative Council dismissed the disqualification proposal, following a recommendation to that effect made by Judge Ian Binnie.
13. Upon an invitation from the Committee to update their respective submissions on the issue of the representation, on 15 December 2022 Curtis replied on behalf of Venezuela that “we see no changes in the situation and have no further comment;” on 16 December 2022, the Conoco Parties replied that they “have no further observations, as there has been no relevant change of circumstances. If the relevant circumstances do change, however, the Claimants will respond to any renewed application made;” and De Jesús on behalf of Venezuela replied that “the Republic fully reiterates the content of its previous submissions [...] and confirms it has no further comment. The Republic’s communication is made without prejudice to its objection on the continued participation of Curtis in these proceedings [...]”

## II. ANALYSIS OF THE AD-HOC COMMITTEE

14. The Committee deals with Venezuela’s (as represented by De Jesús) Third request of 21 September 2021, asking the Committee to reconsider the 2 November 2020 Reconsideration Order on Representation.
15. Venezuela (as represented by Curtis) and the Conoco Parties replied respectively on 23 and 27 September 2021 upon the Committee’s invitation of 22 September 2021. The Parties’ latest submissions of 16 and 21 December 2022 informed the Committee that they had no further comments to make since September 2021.
16. The Committee would like to clarify from the outset that the 2 November 2020 Order merely rejected Venezuela’s (as represented by De Jesús) request for reconsideration of the Order on Representation of 3 April 2020 which decided not to exclude Curtis, instructed by the Special Attorney General, from the annulment proceedings.
17. The Committee recalls that the annulment proceedings were launched by the Republic of Venezuela (as represented by Curtis) on 27 November 2019. Venezuela (as represented by De Jesús) wishes to exclude from these proceedings “*any third party claiming to represent the interests of the Republic by alleging to be the so-called special attorney and any other third party claiming to be instructed by the so-called special attorney, namely Curtis*”.<sup>1</sup> The annulment proceedings have only opposed the two Parties which were involved in the underlying arbitration that led to the Award of 8 March 2019: the Bolivarian Republic of Venezuela and the Conoco Parties. There are no other parties involved before us.
18. Two post-November 2020 events should, according to Venezuela (as represented by De Jesús), determine this Committee to exclude Curtis from representing Venezuela.
  - The first event is Decree No. 4.431 signed by President Maduro on 5 February 2021 which appoints Mr. Pedroza as Attorney General of the Republic following the authorization of the National Assembly on 4

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<sup>1</sup> Third request, p. 8.

February 2021 (Annex 2). It is not disputed that Mr. Pedroza instructs the firm of De Jesús for these proceedings.

- The second event is the Agreement of the National Assembly of 6 July 2021, published in the Official Gazette on 2 September 2021, that “*determines and warns the fraud against the Law, the Constitution and International public law as a consequence of the inexistence, ineffectiveness, and invalidity of the simulated Agreements dated 12 September 2018, 19 March 2019, 10 December 2019, and 28 April 2020 whereby it was pretended to disregard Mr. Attorney General of the Republic, as well as the system of norms on legal advice and legal defense of the Republic, both nationally and internationally*”.<sup>2</sup>

19. As a result of these two events, Venezuela (as represented by De Jesús) stresses that the Agreement of the National Assembly of 28 April 2020 on the Refusal of the Judgment of the Illegitimate Constitutional Chamber of 22 April 2020 is without foundation anymore for the Committee’s Decision of 2 November 2020.

20. The Agreement of the National Assembly of 28 April 2020, which was effectively mentioned at para. 30 of the Decision, has been declared null and void by article 3 of the Agreement of the National Assembly of 6 July 2021.<sup>3</sup> Article 4 of the same further establishes that the Judgments of the Constitutional Chamber of 22 April and 30 December 2020 ruled on the nullity of all acts of the 2016-2021 National Assembly, particularly those leading to the usurpation of the powers of representation of Mr. Pedroza.

21. The Committee indicated in the 2 November 2020 Decision:

*“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” (para. 39).*

22. The Committee sees no reason to depart from its earlier position regarding the chronology of events which was referred to in the Decision of 2 November 2020 as an illustration that the stacking of decisions enacted by the various branches of Government was not a solution to the issue of representation in these proceedings.

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<sup>2</sup> Third request, Annex I.

<sup>3</sup> Third request, Annex I.

23. Venezuela (as represented by De Jesús) nonetheless insists that, following the post-November 2020 events, the Committee is no more confronted to a situation where it would need to “*vindicate the actions of one branch of the Constitutional powers over the actions of another branch*” or to a “*swing-wing representation*” situation.<sup>4</sup> It incites us to declare Mr. Pedroza the sole legal representative of Venezuela. If we followed that route, we would be confronted to the recognition of Mr. Guaidó or of Mr. Maduro as head of State, which our decision would necessarily entail: if Mr. Guaidó is the President of Venezuela, the appointment of a Special Attorney is valid. To the contrary, if Mr. Maduro is the President of Venezuela, the Special Attorney’s appointment is invalid.
24. We do not dispute that De Jesús, as instructed by Mr. Pedroza, has a power of attorney to represent Venezuela in these proceedings. As we already pointed out in the 2 November 2020 Decision,<sup>5</sup> our refusal to recognize which individual is the constitutional president of Venezuela cannot be regarded as an attack on the sovereignty of Venezuela as a continuing State. We add that the sovereignty of a State would be at stake before an international adjudicative body, such as an *ad hoc* committee, under the sovereign immunity doctrine, which is not an issue presently.
25. The Committee’s Decision of 2 November 2020 rests on the following passage at para. 39: “*Failing any demonstration that Venezuela’s representation should be in the hands of De Jesús, to the exclusion of Curtis, for the preservation of Venezuela’s rights to accede to justice, the Request for reconsideration of 3 August 2020 is rejected,*” to which we now turn for considering Venezuela’s arguments in support of excluding Curtis based on procedural considerations.
26. It is contended that Venezuela’s procedural interests and rights militate to exclude any representation by Curtis and the latter’s silence on the Stay of Enforcement is cited as a supportive argument of the reasoning proposed<sup>6</sup>. We have difficulty in following the allegation that such absence of submissions on the conditions to lift the stay should be regarded as an approval of the Conoco Parties’ position. None of our decisions on the lift of the stay ever implied that kind of endorsement. We further note that Venezuela (as represented by De Jesús) applies to exclude Curtis from all these proceedings, including the stay issue. It cannot, without contradiction, at the same time complain that Curtis has not helped in opposing the Conoco Parties’ efforts to lift the stay. We do not know what were the reasons for Venezuela’s (as represented by Curtis) abstention, but it could not have hampered the defense of Venezuela’s (as represented by De Jesús) position, who was at liberty to argue in favor of the stay without the risk of being contradicted by Curtis. On that count, Venezuela (as represented by De Jesús) cannot raise a bicephalous position, an argument to which we now turn.
27. Venezuela (as represented by De Jesús) more generally alleges that Curtis’ participation “*has rendered these highly technical proceedings unnecessary difficult [...] by the proliferation of submissions that provides the Conoco Parties with space to benefit from the Republic’s allegedly contradictory bicephalous position*”.<sup>7</sup> Venezuela (as represented by De Jesús) inserts a footnote in that part of their Third request to the extent that the “*Conoco Parties have brought to the Republic’s attention that they had reached*

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<sup>4</sup> Order of 2 November 2020, paras. 37-38.

<sup>5</sup> Order of 2 November 2020, para. 40.

<sup>6</sup> Third request, p. 2.

<sup>7</sup> Third request, p. 2.

*an agreement with Curtis, as instructed by the so-called 'special attorney', in procedural matters related to the Hearing on Annulment".<sup>8</sup>*

28. The footnote does not identify the alleged incident. The Committee is left to guess that the footnote may probably allude to the preparation of the hearing in September 2021. The Conoco Parties wrote on 13 September 2021 about the draft procedural order of the Hearing: "*The Claimants respectfully submit the attached Word document reflecting the Claimants' proposed revisions to the draft Procedural Order no. 2. Counsel for Venezuela at Curtis has stated its agreement with this proposal.*" This reply fulfilled the Committee's invitation of 27 August 2021 inviting the Parties to confer and transmit their joint comments on the draft procedural order (or their respective positions in case of disagreement). We have no indication regarding how the above comments made on a draft procedural order could have advantaged the Conoco Parties to the detriment of the Applicant. Venezuela (as represented by De Jesús) filed its own comments on the draft procedural order and all observations made were taken into consideration by the Committee before Procedural Order No. 2 on the organization of the hearing was issued on 29 September 2021. We add here that, because the proceedings were suspended on 14 October 2021 for lack of payment of the advance required under ICSID Administrative and Financial Regulation 14(3)(d) and (e), the Hearing scheduled during the week of 25 October 2021, consequently, did not take place. Venezuela (as represented by De Jesús) does not demonstrate in which manner the above narrated events concerning Procedural Order No. 2 of 29 September 2021 that has now become obsolete, have hampered its position, or disorganized its defense in these proceedings.
29. Both representations of Venezuela by Curtis and De Jesús seek the annulment of the Award. We relate to the bicephalous defense argument, Curtis' reply of 23 September 2021 that "[o]ur only observation is that Mr. De Jesus should be grateful that we are here to present the case for annulment."<sup>9</sup> While we will not engage here in a debate on the respective quality of the submissions filed, we may only take note, that aside from the above footnote, we have no indication from Venezuela (as represented by De Jesús) as to how Curtis' submissions in support of the Application for Annulment, filed by Curtis before its duplication by De Jesús, might have concretely prejudiced in any way Venezuela's defense. Venezuela (as represented by De Jesús) avers that with Curtis' representation "*the Republic will continue to suffer the detrimental consequences of the unlawful and wrongful actions purportedly made on its behalf.*"<sup>10</sup> Such general declaration does not establish how, in the present annulment proceedings, its right of defense has been breached or which rule of natural justice has been infringed to the detriment of Venezuela (as represented by De Jesús), let alone the "*great harm to the Republic's procedural interests and rights of defense*"<sup>11</sup> purportedly suffered by it.

### III. DECISION

30. In light of the above considerations, we conclude that the 21 September 2021 Request to reconsider the Reconsideration Order on Representation of 2 November 2020 has not demonstrated that the preservation of Venezuela's effective exercise of the right to

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<sup>8</sup> Third request, footnote 3.

<sup>9</sup> Curtis' email (on behalf of Venezuela) of 23 September 2021.

<sup>10</sup> Third request, p. 8.

<sup>11</sup> Third request, p. 2.

present its case has been prejudiced by Curtis' involvement (see Order of 2 November 2020, para. 39).

31. We, therefore, maintain today our Decision of 3 April 2020.
32. All questions concerning the costs and expenses of the Committee and of the Parties in connection with this application are reserved for subsequent determination, together with the Application for Annulment.

On behalf of the *ad-hoc* Committee

[signed]

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Judge Dominique Hascher  
President of the *ad hoc* Committee