

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

**ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf
of Paria B.V.**

Respondent on Annulment

v.

Bolivarian Republic of Venezuela

Applicant

**(ICSID Case No. ARB/07/30)
Annulment Proceeding**

ORDER ON THE APPLICANT'S REPRESENTATION

Members of the Committee

Judge Dominique Hascher, President of the *ad hoc* Committee
Professor Diego P. 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

3 April 2020

I. Procedural Background

1. On 27 November 2019, the Centre received an electronic copy (without exhibits) 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 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. Neither Curtis nor De Jesús addressed the issue of Venezuela’s representation at that stage or identified the authority upon which it purported to act for Venezuela.¹
6. On 3 February 2020, the Committee was constituted, and the parties were informed

¹ Earlier in the post-award proceedings, Mr. Kahale submitted a power of attorney granted to him by Mr. José Ignacio Hernández González, *Procurador Especial de la República Bolivariana de Venezuela* (Special Attorney General), when he filed the Application for Rectification of the Award that led to the “Decision on Rectification”. The Centre registered that request on 18 April 2019.

The power of attorney included the authority to file an annulment application on behalf of Venezuela. Up until 6 March 2019, Curtis had acted in the arbitration proceedings upon the authority of a power of attorney that was revoked on March 6, 2019 by the Acting Attorney General.

During the rectification proceeding, the Centre also received a power of attorney signed by the Acting Attorney General, Mr. Reinaldo Enrique Muñoz Pedroza, to the law Firms De Jesús & De Jesús and Dentons Europe SC LLP. The power of attorney included the authority to file an annulment application on behalf of Venezuela.

In its “Decision on Rectification” the Tribunal did not decide on the representation of Venezuela. It considered that this was unnecessary because there were no conflicting positions (a single Rectification Request was filed) and it was clear that Venezuela was the proper party to the proceeding. It listed on the back side of the cover of the Decision on Rectification all counsel mentioned above.

that the annulment proceedings were deemed to have begun.

7. On 4 February 2020, the Respondent on Annulment (hereinafter “Conoco” or the “Claimants”) opposed Venezuela’s request to continue the stay of enforcement. The Claimants also proposed a briefing schedule.
8. On 5 February 2020, the Committee invited the Applicant (hereinafter also referred to as “Venezuela” or the “Respondent”) to comment on Claimants’ procedural proposals.
9. On 11 February 2020, Curtis rejected Claimants’ proposed schedule and proposed instead 16 March 2020 for Venezuela’s response.
10. On 12 February 2020, De Jesús proposed the same deadline for Venezuela’s response (i.e. 16 March 2020).
11. On 13 February 2020, the Claimants objected to Venezuela’s proposed deadline and made an alternative proposal.
12. On 18 February 2020, the Committee fixed 16 March 2020 for Venezuela’s response on the stay of enforcement of the Award.
13. On 20 February 2020, the Committee circulated a draft procedural order concerning the organization of the proceedings. The parties were invited to confer on the draft and to submit a joint proposal including any agreed amendments.
14. On 25 February 2020, the Committee fixed a date for the first session and proposed additional dates for a hearing on the issue of the stay of enforcement of the Award.
15. On 2 March 2020, De Jesús, Curtis and the Claimants confirmed their availability on the proposed dates.
16. On 13 March 2020, De Jesús and Claimants submitted their comments and proposals on the draft procedural order circulated on 20 February 2020. So too did Curtis on 14 March 2020.
17. 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 is acting on a power of attorney issued by “a person who does not exercise any authority or power within the Venezuelan legal system.”
18. On 16 March 2020, De Jesús and Curtis submitted each a response on Claimants’ Opposition to Venezuela's Request to Continue the Stay of Enforcement of the Award.
19. 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.
20. Curtis and the Claimants submitted their respective comments on 30 March 2020. De Jesús replied on 31 March 2020.

II. The Parties' Positions

A. *De Jesús*

21. In the letter to the Committee of 15 March 2020, De Jesús contends that the Parties' efforts to confer on the draft procedural order circulated by the Committee in preparation for the First Session and Preliminary Procedural Consultation were thwarted by the presence of the law firm of Curtis, which is a third party in the annulment proceedings.
22. De Jesús submits that Curtis wrongfully presents itself as a representative of the Bolivarian Republic of Venezuela although its power of representation was revoked during the arbitration on 6 March 2019 by Venezuela's Acting Attorney General, Mr. Muñoz Pedroza, as notified to ICSID on 9 May 2020. Curtis's current power of attorney has been issued by Mr. Hernández, a Venezuelan attorney, who presents himself as a Special Attorney under a statute passed by the Venezuelan National Assembly on 5 February 2019. The statute was however annulled by the Venezuelan Supreme Court of Justice on 8 February 2019.
23. Curtis nonetheless presented on 16 April 2019 an Application for Rectification of the Award on behalf of Venezuela. De Jesús resubmitted the Application on 19 April 2019.
24. Curtis next presented an Application for Annulment on 27 November 2019, followed on 5 December 2019 by an Application filed by De Jesús.
25. De Jesús asks the Committee to rule, even before the issuance of the Procedural Order pertaining to the First Session and Preliminary Procedural Consultation, on the issue of representation and to exclude from the annulment proceedings any third party and in particular Curtis.
26. In its letter to the Committee of 31 March 2020, De Jesús declares that the issue of representation of Venezuela is not a political question but one of procedure that the Committee is empowered to resolve. De Jesús says that the *status quo* which must be maintained is that of the representation of Venezuela by the Acting Attorney General.² A dual representation of Venezuela, adds De Jesús, would give an undue and unfair advantage to Conoco and affect Venezuela's right to a fair trial because of the risk of contradiction in the arguments and manner in which they will be presented.

B. *Curtis*

27. In its letter to the Committee of 30 March 2020, Curtis replies that the Guaidó Government has been recognized by numerous States and International Organizations, but stresses that a decision on the political question of which

² According to Article 50 of the Venezuelan *Ley Orgánica de la Procuraduría General de la República* of 15 March 2019, the Acting Attorney General is the competent Venezuelan authority in charge of the patrimonial interests of Venezuela before national and international courts and tribunals (Annex 2) and the only authority recognized to act by the Constitution of Venezuela (Annex 3).

government has the standing to represent Venezuela in ICSID proceedings cannot be left to the Committee. Curtis invites the Committee to reject the application to change the *status quo* of Venezuela's representation in the annulment proceedings.

C. *The Respondent on Annulment*

28. In its letter to the Committee of 30 March 2020, Conoco raises the concern of the future difficulties it may face in enforcing the Award, should Venezuela argue that it was not heard properly in the annulment proceedings because of the exclusion of its representative. Conoco invites the Committee not to take a decision that could result in any unnecessary risk, as already different State Parties to the ICSID Convention have recognized different governments of Venezuela. Conoco concludes that the *status quo* should be maintained with the participation of both the Special Attorney General and the Acting Attorney General and their respective representatives, Curtis and De Jesús.

III. The Committee's Analysis

29. As Conoco recalls³, 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.

30. The issue raised before the Committee by De Jesús pertains to Venezuela's representation in the annulment proceedings. The Committee agrees with De Jesús⁴ that the Committee must resolve the matter in accordance with the power it has under Article 44 of the ICSID Convention (applicable *mutatis mutandis* to this annulment procedure before the Committee pursuant to Article 52(4)) 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.”

31. In support of its application, De Jesús refers to decisions of *ad hoc* committees and arbitral tribunals⁵ which have decided to maintain the *status quo* of Venezuela's representation by continuing with the counsel on record. The Committee accepts that the *status quo* approach adopted in other ICSID proceedings should also apply in the present annulment proceedings.

32. The Parties agree to an approach based on the *status quo*, but differ as its proper application in the present case. Contrary to the view advocated by De Jesús that the representation of Venezuela must continue without change under the authority of the *Procuraduría General de la República*, Curtis and Conoco maintain that the

³ Letter of 30 March 2020 ¶ 11.

⁴ Letter of 31 March 2020 ¶ 4.

⁵ ICSID cases n° ARB/12/21, ARB(AF)/17/1, ARB/13/11, ARB(AF)/18:3, ARB/16/23.

status quo includes the participation of the respective representatives of Curtis for the Special Attorney General and of De Jesús for the Acting Attorney General.

33. It is uncontested that Curtis and De Jesús have acted as representatives of Venezuela in the underlying arbitration proceedings. 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. Curtis is, since the revocation of its power of attorney on 6 March 2019 by the Acting Attorney General, instructed by the Special Attorney General from the beginning of the post-Award proceedings with a power of attorney of 5 April 2019.
34. Curtis has submitted on 16 April 2019 an Application for Rectification of the Award rendered on 8 March 2019. De Jesús has filed the same Application on 19 April 2019. The Arbitral Tribunal held in its Decision on Rectification of 24 August 2019:

“The submission of different documents as powers of attorneys may raise an issue of representation, opposing on two sides law firms both claiming to be the Respondent’s representative. However, the true issue before the Tribunal is to identify the Parties, and in particular the Respondent, and to identify its position that must be addressed through the Tribunal’s findings. In this respect, the Tribunal is not faced with any conflicting position or submission. Firstly, as both representatives state that they act on behalf of the Respondent, there is no dispute that they represent the same Party, the Bolivarian Republic of Venezuela. There is no other individual or firm claiming any similar power on behalf of Venezuela. Secondly, there is no conflict about the substance of the issues on rectification before the Tribunal. Indeed, on both sides of the representatives declaring to act on behalf of the Respondent, the Application for Rectification is identical to the Request dated 16 April 2019. Therefore, the issue related to the correct designation of the Respondent’s representatives is moot and does not require any decision from the Tribunal.”⁶
35. Curtis has filed an Application for Annulment on 27 November 2019. De Jesús has filed a substantively identical Application on 5 December 2019. Both Applications have been registered by ICSID and transmitted to the Committee. Curtis and De Jesús have participated at all stages of these annulment proceedings since. The Committee therefore finds that the *status quo* means that Curtis and De Jesús, who have both been counsel of record in the arbitration phase and in the annulment proceedings, will remain as representatives of Venezuela.
36. De Jesús has however objected to such a situation which, it alleges, would violate Venezuela’s right to a fair trial. The Committee considers that it has the power and duty to conduct the process before it in such a way that the parties are treated fairly and with equality and that at any stage of the proceedings each party is given the opportunity to present its case. Both De Jesús and Curtis aim at the annulment of the Award. As pointed out by De Jesús, there is a real likelihood that Curtis and De Jesús make different arguments and present these arguments in a different manner.⁷ The possibility of such divergences between Curtis and De Jesús does not mean that

⁶ ¶ 25.

⁷ Letter of 31 March 2020 ¶ 15.

their arguments and theses would not be heard and answered, separately as may be, by the Committee. The Committee notes that Conoco, which bears a heavier burden to defend against the lines of arguments that will be raised by Curtis and De Jesús separately, agrees to respond to submissions from both sets of representatives.⁸

37. The Committee therefore concludes that maintaining Curtis and De Jesús as counsel of record accords, at this stage of the proceedings, with procedural fairness.

IV. Decision

38. The Committee decides:

- not to exclude Curtis, instructed by the Special Attorney General, from these proceedings,
- to reject the application of De Jesús of 15 March 2020.

39. 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 Committee,

[signed]

Judge Dominique Hascher
President of the Committee

⁸ Letter of 30 March 2020 ¶ 12.