

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

IN THE ARBITRATION BETWEEN

**CONOCOPHILLIPS PETROZUATA B.V.  
CONOCOPHILLIPS HAMACA B.V.  
CONOCOPHILLIPS GULF OF PARIA B.V.**

Respondent on Annulment

-and-

**BOLIVARIAN REPUBLIC OF VENEZUELA**  
Applicant

**RECOMMENDATION**

**INTRODUCTION**

1. On 8 March 2019 the Tribunal in this arbitration (“the Arbitration”) dispatched its award<sup>1</sup> to the parties. This recorded that those representing the Respondent (“Venezuela”) included Dr. Muñoz Pedroza, Viceprocurador General de la República, and a number of members of the firm Curtis, Mallet-Prevost, Colt & Mosle LLP (“Curtis”), including Mr. George Kahale III. The Award was in favour of the Claimants (“Conoco”).
2. On 29 August 2019 the Tribunal dispatched to the parties a Decision on Rectification<sup>2</sup>. This recorded that those representing Venezuela included Dr. Muñoz Pedroza, Viceprocurador General de la República, Mr. George Kahale, III of Curtis and Dr. Alfredo de Jesús O. of the firm De Jesús & De Jesús (“De Jesús”).
3. Applications for Annulment were then submitted to the Centre. On 3 February 2020 an *ad hoc* Annulment Committee was appointed consisting of Judge Dominique Hascher, President, Professor Diego P. Fernández Arroyo and Mr. Kap-You Kim (“the Committee”).
4. On 15 March 2020 the Committee received an Application (“the Exclusion Application”)<sup>3</sup> from De Jesús to exclude the participation of Curtis from the proceeding on the ground that Curtis was not authorized to act for Venezuela.
5. On 3 April 2020 the Committee made an Order<sup>4</sup> (“the Order on Representation”) rejecting this Application.

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<sup>1</sup> Tribunal’s Award of 8 March 2019.

<sup>2</sup> Tribunal’s Decision on Rectification of 29 August 2019.

<sup>3</sup> Application to Committee from De Jesús to exclude Curtis dated 15 March 2020, (“The Exclusion Application”).

<sup>4</sup> Order on Representation dated 3 April 2020.

6. On 16 April 2020 the Centre received a Proposal<sup>5</sup> from De Jesús “on behalf of the Bolivarian Republic of Venezuela” to disqualify all three members of the Committee pursuant to Articles 14 and 57 of the ICSID Convention and ICSID Arbitration Rule 9 (“the Disqualification Proposal”). Pursuant to Article 58 of the Convention and Arbitration Rule 9 it falls to the Chair of the ICSID Administrative Council to decide the Proposal.
7. The Proposal requested that the Secretary-General of ICSID seek a recommendation from a third-party neutral in connection with the Proposal. The Chair of the Administrative Council decided to accede to this request.
8. On 11 June 2020 I received a letter<sup>6</sup> from the Secretary-General inviting me to make a Recommendation on the Proposal, having previously ascertained that I would be prepared to accept this request. This is that Recommendation.
9. The gravamen of the Disqualification Proposal is that the terms of the Order on Representation demonstrate that each of the three members of the Committee cannot be relied upon to exercise independent judgment, as required by Article 14(1) of the Convention. Accordingly, in order to decide on my Recommendation I shall have to examine the Order on Representation in some detail.

## **BACKGROUND AND PROCEDURAL HISTORY**

10. The background to this matter is the political turmoil to which Venezuela has been subjected as a result of the rival claims of Mr. Maduro and Mr. Guaidó to be its legitimate President and Head of Government. In a letter of submissions to the Committee dated 30 March 2020<sup>7</sup> Curtis set out a lengthy list of countries and international institutions that it claimed had recognized the Guaidó Government. I have seen no evidence as to the accuracy of that list but will proceed on the basis that some countries have recognized Mr. Maduro as President whilst others have recognized Mr. Guaidó.
11. According to the Exclusion Application, on 9 April 2018 De Jesús began to act as co-counsel in the Arbitration<sup>8</sup>. It is not alleged, and I have seen no evidence to suggest, that De Jesús was entered on the record at this time as an addition to Venezuela’s legal representation.
12. On 5 February 2019 the National Assembly of Venezuela passed a Statute (“the Statute”) that gave Mr. Hernández power to act as “*Special Attorney*” of Venezuela. On 8 February 2019 the Constitutional Chamber of Venezuela’s Supreme Court declared this Statute to be “*null and without any legal effects*”<sup>9</sup>.
13. On 6 March 2019 Dr. Muñoz Pedroza granted a Power of Attorney giving authority to De Jesús to act in the Arbitration and revoked that which had been granted to Curtis<sup>10</sup>. The Tribunal was informed of this but Dr. Muñoz Pedroza, or those acting on his instructions, decided not to ask the Tribunal to make any finding in respect

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<sup>5</sup> The Disqualification Proposal dated 16 April 2020.

<sup>6</sup> Letter from Secretary-General dated 10 June 2020.

<sup>7</sup> Curtis’ letter to Committee dated 30 March 2020.

<sup>8</sup> The Exclusion Application, footnote 1.

<sup>9</sup> The Exclusion Application, p. 2.

<sup>10</sup> The Exclusion Application, Footnote 1.

of representation<sup>11</sup>. In consequence the Award, which was dispatched to the parties only two days later, made no mention of this.

14. On 27 March 2019 Mr. Hernández wrote to the Secretary-General of ICSID<sup>12</sup>, contending that by virtue of the Statute he was the only legitimate representative of Venezuela. ICSID declined to resolve the issue that this letter raised as to who was authorized to act in arbitration proceedings for the Republic of Venezuela, but referred this question to the individual Tribunals and Committees in ICSID arbitrations or arbitral proceedings to which Venezuela was party<sup>13</sup>.
15. On 5 April 2019 Mr. Hernández granted to Curtis a Power of Attorney to represent Venezuela in this arbitration<sup>14</sup>.
16. On 29 April 2019 Mr. Hernández wrote a further letter to the Secretary-General, expanding on his earlier letter.<sup>15</sup>
17. In a number of cases, where De Jesús was recorded as acting for Venezuela under authority conferred by Dr. Muñoz Pedroza, the relevant Tribunal or Committee decided that this should remain the position<sup>16</sup>.
18. In its Decision on Rectification the Tribunal referred to the dispute as to which lawyers were authorized to act for Venezuela, but decided that it did not need to resolve this.
19. In its Order on Representation the Committee concluded that

*“[...]maintaining Curtis and De Jesús as counsel of record accords, at this stage of the proceedings, with procedural fairness”* and, accordingly decided *“not to exclude Curtis, instructed by the Special Attorney General, from these proceedings”* and *“to reject the application of De Jesús of 15 March<sup>17</sup>.”*
20. On 9 April 2020 Dr. De Jesús wrote requesting the Committee to revisit the Order on Representation. On 15 April 2020 the Committee communicated to the parties its decision not to alter its Order<sup>18</sup>. It added:

*“The Committee wishes to draw the parties’ attention to the Order of April 3, 2020, which is limited to the present stage of the proceedings and is subject to review in light of future developments.”*

## **MR. HERNÁNDEZ LETTERS OF 27 MARCH 2019 AND 29 APRIL 2019**

21. In his letter of 27 March 2019 Mr. Hernández wrote in his *“capacity as Special Attorney General”* of Venezuela. He went on to state:

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<sup>11</sup> The Exclusion Application p. 3.

<sup>12</sup> Mr. Hernández’ letter of 27 March 2019.

<sup>13</sup> The Exclusion Application, p. 2.

<sup>14</sup> Decision on Rectification, para. 9.

<sup>15</sup> Mr. Hernández’ letter of 29 April 2019.

<sup>16</sup> The Exclusion Application p. 2.

<sup>17</sup> Order on Representation, paras. 37 and 38.

<sup>18</sup> Email from Francisco Grob dated 15 April 2020.

*“As you are aware, since January 10, 2019 Nicolás Maduro ceased to hold office as President of Venezuela and therefore he does not have any authority to represent or to act on behalf of Venezuela. In addition, pursuant to article 15, literal “b” of the Statute that Governs the Transition to Democracy to Reestablish the Full Force and Effect of the Constitution of the Bolivarian Republic of Venezuela...the judicial representation of the Republic of Venezuela, including in arbitral proceedings, is vested exclusively on me, in my capacity as Special Attorney general of Venezuela, appointed by the Interim President of the Bolivarian Republic of Venezuela acting under the control of the Venezuelan National Assembly.”*

22. In his letter of 29 April 2019 Mr. Hernández contended that the international representation of the Venezuelan State was a matter for ICSID to decide as it was not a mere procedural issue that could be determined by arbitral tribunals and committees. He added<sup>19</sup>:

*“I am aware that some of those decisions of the National Assembly have been declared “null” by Maduro’s Constitutional Chamber of the Supreme Court. However this Court is not recognized as a legitimate body of the Venezuelan State...”*

## **DECISIONS IN OTHER ICSID PROCEEDINGS**

23. In its Order on Representation<sup>20</sup> the Committee states that it

*“accepts that the ‘status quo’ approach adopted in other ICSID proceedings should also apply in the present annulment proceedings.”*

24. De Jesús submits that the Committee has failed correctly to apply the *status quo*” approach. Accordingly I propose to consider at this point the approach taken in these other ICSID proceedings where the correct representation of Venezuela was in issue as a result of Mr. Hernández’ letter of 27 March 2019.

## **Air Canada v Bolivarian Republic of Venezuela<sup>21</sup>**

25. At the outset of this Arbitration on 14 March 2017 Dr. Muñoz Pedroza, described in Procedural Order No. 7 as Procurador General de la República instructed De Jesús to represent Venezuela and De Jesús was placed on the record as so doing.<sup>22</sup>
26. The letter from Mr. Hernández of 27 March 2019 led the Tribunal to review the representation of Venezuela in the Arbitration.
27. The Tribunal held that it had to resolve the following procedural issue:

*“whether it may continue the present proceedings with Respondent’s interests being represented by Respondent’s Counsel on record, who at*

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<sup>19</sup> Mr. Hernández’ letter of 29 April 2019, para. 6.

<sup>20</sup> Order on Representation, para. 31

<sup>21</sup> ICSID Case No. ARB(AF)/17/1, Procedural Order No. 7.

<sup>22</sup> *Id.*, para. 3, (referencing Procedural Order No. 1 Section 9.1).

*least until 4 February 2019, were indisputably the valid representatives of Venezuela.*<sup>23</sup>”

28. The Tribunal observed that the challenge to the representation on the record related to a political and constitutional question that was beyond the authority and jurisdiction of the Tribunal.

*“If, and until, there is a decision on this question by an appropriate decision-making body, this Tribunal shall refrain from taking a decision on who holds the proper representation of Respondent<sup>24</sup>.”*

29. This finding as to jurisdiction accorded with submissions made by Mr. Hernández and by De Jesús, described by the Tribunal as “the Respondent”. The Tribunal implicitly rejected the submission made by the Claimant that the issue should be determined according to French law as the *lex arbitri*, and that this would lead to the conclusion that Mr. Hernández was the proper representative of Venezuela, because France recognized the Presidency of Mr. Hernández<sup>25</sup>.
30. The Tribunal went on to hold that, as the only challenge to the representation on the record was based on political and constitutional grounds that the Tribunal had no authority to resolve, there was no obstacle to continuing with the representatives of Venezuela on record, namely Dr. Muñoz Pedroza and De Jesús<sup>26</sup>.

31. The Tribunal observed:

*“There is no reason or legal basis to continue, as Claimant suggests, with two different Counsel of Respondent. In fact, this avenue could create practical difficulties, particularly in the event of disagreements between the Counsel<sup>27</sup>.”*

### **Valores Mundiales, S.L. and Consorcio Andino, S.L. v Bolivarian Republic of Venezuela<sup>28</sup>**

32. The relevant decision is that of the Committee in Annulment Proceedings. The Award itself recorded Dr. Muñoz Pedroza, the Attorney General for Venezuela, and his counsel, Mr. Wray of Foley Hoag LLP, as representing Venezuela. The Committee adopted a somewhat different approach to that of the Tribunal in *Air Canada*.
33. The Committee held that it had no authority to decide, *erga omnes*, who was Venezuela’s legitimate representative. Its task was more limited, namely to determine who might express himself on behalf of Venezuela in the annulment proceedings<sup>29</sup>.

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<sup>23</sup> *Id.*, paras. 60 and 65.

<sup>24</sup> *Id.*, para. 64.

<sup>25</sup> *Id.*, paras. 40-44, 62.

<sup>26</sup> *Id.*, para. 66.

<sup>27</sup> *Id.*, para. 68.

<sup>28</sup> ICSID Case No. ARB/13/11.

<sup>29</sup> ICSID Case No. ARB/13/11, Procedural Order No. 2, para. 31.

34. The Committee held, nonetheless, that to resolve the procedural question it had to address the position under both Venezuelan domestic law and international law<sup>30</sup>. On both, the burden of proof was on Mr. Hernández<sup>31</sup>. The intervening persons (i.e., those other than Mr. Hernández) had concentrated their arguments on Venezuelan domestic law and said nothing about international law<sup>32</sup>.
35. The Committee held that Mr. Hernández failed to establish his case under Venezuelan domestic law because the Statute on which he relied had been declared null and void by the Supreme Court of Justice<sup>33</sup>.
36. This was not, however, the end of the matter. The Committee went on to hold that it could not deviate from what had been decided by Venezuela’s highest judicial body “*unless it is proved that there has been a change of government according to international law*”<sup>34</sup>. To prove this Mr. Hernández had to establish that “*in the reality of the facts, whoever controls the Venezuelan territory, as the current authority, is the government of the president of the National Assembly* (i.e. Mr. Guaidó)<sup>35</sup>.
37. Mr. Hernández had failed to prove this. The issue could not be determined simply by the number of States that had recognized Mr. Guaidó as President<sup>36</sup>. Accordingly the proceedings had to continue under the representation of Venezuela already established on the record<sup>37</sup>. The Committee added:

*“The Committee clarifies that, just as a change to the representation is not justified, neither can it grant the Respondents in the Annulment’s suggestion to continue the proceedings with two different representations on behalf of Venezuela. There is no legal or logical basis that would allow the Committee to, on the one hand, deny Mr. Hernández exclusive representation of Venezuela because he has not established to have such authority and, on the other, accept that he shares said representation with the Litigation Manager<sup>38</sup>.”*

**Kimberly-Clark Dutch Holdings, B.V. and Kimberly-Clark BVBA v Venezuela<sup>39</sup>**

38. As the Tribunal found in its Order on Venezuela’s Representation, when this arbitration was commenced in 2018 the Procuraduría General de la República, instructed De Jesús to represent Venezuela<sup>40</sup>. Mr. Hernández’ letter of 27 March 2019 caused the Tribunal to review Venezuela’s representation. The Tribunal framed the issue before it as follows:

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<sup>30</sup> *Id.*, para. 39.

<sup>31</sup> *Id.*, para. 40.

<sup>32</sup> *Id.*, para. 44.

<sup>33</sup> *Id.*, para. 45.

<sup>34</sup> *Id.*, para. 47.

<sup>35</sup> *Id.*, para. 48.

<sup>36</sup> *Id.*, para. 49.

<sup>37</sup> *Id.*, para. 51.

<sup>38</sup> *Id.*, para. 50.

<sup>39</sup> ICSID Case No. ARB(AF)/18/3.

<sup>40</sup> ICSID Case No. ARB(AF)/18/3, Order on Venezuela’s Representation, para. 4.

*“The Respondent in this arbitration is the State of Venezuela, not a particular government purporting to act on behalf of the State. Therefore the question before the Tribunal is not who the proper party to this arbitration is. It is merely which lawyers can represent Venezuela’s interests in this arbitration.[...] In other words it is a procedural issue. What is more, as a practical matter, it is a procedural matter that the Tribunal must resolve, because the arbitration cannot proceed with two representatives of one and the same party who are in conflict with each other.”*

39. The Tribunal discharged this duty with brief findings:

*“The Tribunal has carefully reviewed the submissions and accompanying documents on Venezuela’s representation. It has been unable to discern any argument or evidence that would lead it to change the representation of Venezuela in this arbitration as it has been in effect since April 2018.*

*[...]*

*On this basis the Tribunal comes to the conclusion that, at this stage, the arbitration must continue with counsel of record for Venezuela<sup>41</sup>.”*

#### **Agroinsumos Ibero-Americanos, S.L. and others v Venezuela<sup>42</sup>**

40. The short decision of this Tribunal reached a conclusion that was almost a carbon copy of the previous one:

*“After reviewing Mr. Hernández communications, the arguments of each of the parties and the evidence made available to it, the Tribunal does not find sufficient evidence to conclude that there has been, for the exclusive purposes of this arbitration, a change to the powers of representation of the Respondent in this arbitration.*

*[...]*

*In view of the above, the Tribunal decides to maintain the ‘status quo’ of the representation of the Bolivarian Republic of Venezuela in this arbitration<sup>43</sup>.”*

#### **Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A. v Venezuela<sup>44</sup>**

41. This was a very short decision of an Annulment Committee, of which Professor Fernández Arroyo was a member:

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<sup>41</sup> *Id.*, paras. 49 and 51.

<sup>42</sup> ICSID Case No. ARB/16/23.

<sup>43</sup> ICSID Case No. ARB/16/23, Procedural Order No. 13, paras. 17, 18.

<sup>44</sup> ICSID Case No. ARB/12/21.

*“Until now, Respondent has been represented by the persons appointed for such purpose by the Procurador General de la República as required by the domestic law of the Respondent.*

*After giving to all involved the opportunity to fully present their positions, the Committee finds that the evidence on record does not justify a change in the ‘status quo’. For this reason, and taking into account considerations of fairness to both Parties and efficiency of the proceedings, the Committee sees no basis to hold that, for purposes of this annulment proceeding, the representation of the Bolivarian Republic of Venezuela has changed.”*

## **THE RECTIFICATION PROCEEDINGS**

42. The Rectification Proceedings played a significant part in the reasoning of the Committee and I propose to examine them at this stage. I start with a summary of the proceedings taken from the Decision on Rectification itself.
43. On 16 April 2019 Curtis submitted to the Centre an Application for Rectification pursuant to Arbitration Rule 4, purporting to act for Venezuela. Curtis included the Power of Attorney issued by Mr. Hernández on 5 April 2019. On 18 April 2019 the Secretary-General registered the request.
44. On 19 April 2019 De Jesús wrote to the Secretary-General, attaching Curtis’ Application for Rectification and the Notice of Registration of this and requesting its registration. The letter referred to the Power of Attorney issued by Dr. Muñoz Pedroza on 6 March 2019, conferring authority on de Jesús and revoking that of Curtis.
45. On 20 April 2019 the Claimants wrote to the Secretary-General consenting to the Tribunal addressing the points raised in the Application for Rectification. The Claimants added that, in the light of their consent, the Tribunal could carry out its task of reviewing the Award without deciding the issue of representation of Venezuela.
46. On 9 May 2019 De Jesús wrote to the Secretary General a letter about representation that attached a power of representation in favour of De Jesús and of Dentons Europe SC LLP, signed by Dr. Muñoz Pedroza on 29 April 2019.
47. On 10 May 2019 the Claimants sent a letter in which, *inter alia*, they suggested that, as both declared representatives of the Republic had submitted the same Application, the Tribunal need not address any issues relating to the Respondent’s representation<sup>45</sup>.
48. This submission found favour with the Tribunal. In its Decision on Rectification it stated<sup>46</sup>:

*“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*

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<sup>45</sup> Paras 44 to 48 are taken from the Decision on Rectification.

<sup>46</sup> Decision on Rectification, para. 25.



*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."*

49. The Tribunal went on to state that the list of "Parties' representatives" in the Decision on Rectification did not imply a decision in relation to the legal questions submitted to the Tribunal in respect of representation<sup>47</sup>. The Tribunal went on to rule on the substantive issues raised by the Application for Rectification.

## **THE APPLICATION FOR ANNULMENT**

50. On 27 November 2019 the Centre received from Mr. Kahale of Curtis an Application for Annulment of the Award. On 5 December 2019 the Centre received a second Application for Annulment of the Award in essentially identical form. This was submitted by Dr. Alfredo Jesús O. and was signed by Dr. Muñoz Pedroza.
51. On 16 December 2019 the Centre wrote to all concerned stating that the Application for Annulment had been registered.
52. On 3 February 2020 the Committee was constituted. On the following day Conoco wrote opposing a request made by Venezuela for the continuance of a stay of enforcement of the Award and proposing a briefing schedule. On 5 February 2020 the Committee invited Venezuela to respond.
53. On 11 February 2020 Curtis rejected the Claimants' proposed schedule and proposed instead 16 March for Venezuela's response.
54. On 12 February 2020 De Jesús proposed the same day for Venezuela's response.
55. On 18 February 2020 the Committee fixed 16 March 2020 for Venezuela's response in relation to the stay of enforcement of the Award. On 20 February 2020 the Committee circulated a draft procedural order. The Claimants and De Jesús responded to this on 13 March and Curtis responded on 14 March. De Jesús made the Exclusion Application on the following day<sup>48</sup>.

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<sup>47</sup> *Id.*, para. 26.

<sup>48</sup> Paras. 52 to 57 are taken from the Order on Representation.

## THE EXCLUSION APPLICATION

### The Application

56. The Exclusion Application was made by Dr. Alfredo de Jesús O. in a letter to the Committee dated 15 March 2020. This complained that the exercise of conferring on a proposed draft procedural order had been disturbed by “*the interference of a third party*”, namely Curtis. The basis of the Application was that under Article 50 of the *Ley Orgánica de la Procuraduría General de la República* Dr. Muñoz Pedroza, as acting Attorney General, was in charge of the representation of Venezuela before national and international courts and tribunals. Dr. Muñoz Pedroza had revoked Curtis’ authority on 6 March 2019. Curtis had invoked a power of attorney issued by Mr. Hernández, who asserted authority as *Special Attorney General* under a Statute issued by the National Assembly on 5 February 2019. That Statute had, however, been declared “*null and without any legal effect*” by the Venezuelan Supreme Court on 8 February 2019. All other ICSID Tribunals or Committees that had considered Mr. Hernández’ assertion of authority had resolved to “*maintain the status quo of the representation of the Bolivarian Republic of Venezuela under the authority of Acting Attorney General Munoz Pedroza*”.

### Curtis’ Response

57. Curtis responded in a lengthy letter dated 30 March 2020. This argued that it had been common ground on the part of De Jesús, Mr. Hernández and the various ICSID Tribunals and Committees that the latter had no jurisdiction to decide the political questions of recognition of the government of Venezuela and who had the right to represent Venezuela in legal proceedings<sup>49</sup>. That was a matter for the appropriate national or international authorities. The United States recognized the government of Mr. Guaidó, of which Mr. Hernández was a member. If Mr. Guaidó’s representative were excluded from the proceedings any award would be rendered illegitimate and unenforceable in a United States Court<sup>50</sup>. Mr. De Jesús was now seeking to depart from this common ground and to get the Committee involved in the political question of who had proper authority to make decisions for Venezuela in this case. The correct course was to follow the example of the Tribunals and Committees and preserve the *status quo*. This approach led to the recognition of the authority of Mr. Hernández, for Curtis had acted for Venezuela under this authority from the beginning of the post-Award proceedings<sup>51</sup>.

### Conoco’s Response

58. Conoco’s lawyers, Freshfields Bruckhaus Deringer US LLP (“Freshfields”) and Three Crowns, also responded on 30 March. Conoco took no position on the issue of principle of who was authorized to act for Venezuela in this arbitration and

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<sup>49</sup> Curtis’ Letter of 30 March 2020, para. 1.

<sup>50</sup> *Id.*, para. 2.

<sup>51</sup> *Id.*, para. 19.

submitted that there was no need for the Committee to do so either. The correct approach was to preserve the *status quo* by permitting the continued participation of both the Special Attorney General and the Acting Attorney General and their respective representatives. This approach was in line with the prior cases. In all those cases recognition of the authority of Mr. Hernández would have involved a change of the *status quo*, as he had no antecedent standing in any of them. In the present case the Special Attorney General and the Acting Attorney General had been working side by side for nearly a year, without complaint from anyone.

59. Conoco lawyers' letter then set out what were said to be the benefits of this course. Different Member States of the ICSID Convention recognized different governments of Venezuela. Having representation of both governments would avoid the risk of an enforcement court declining to recognize the outcome of this arbitration on the ground that Venezuela had not been validly represented. Such an approach would involve no prejudice to Venezuela.

### **De Jesús' Reply**

60. De Jesús replied vigorously to these responses in a letter of 31 March 2020. Two broad themes emerge from this. (i) Curtis and Conoco have advanced a political approach to the issue of representation rather than grapple with "*the merits of the legal issue raised by the Republic following a legal approach*<sup>52</sup>". (ii) While purporting to follow a principle of preserving the *status quo*, Curtis and Conoco have erred in the manner in which they apply this principle. They have focused on the position in the period after the making of the Award, when Mr. Hernández and his representative have been involved, rather than upholding the *status quo* that has persisted from the outset of the Arbitration under which Venezuela's representatives were Dr. Muñoz Pedroza and those he appointed to represent Venezuela, in accordance with the authority that he enjoyed under the domestic law of Venezuela<sup>53</sup>.
61. De Jesús also joins issue with Conoco's suggestion that dual representation would not prejudice Venezuela, arguing that this would involve "*a real risk of contradiction in the arguments and in the manner in which they will be presented*<sup>54</sup>".

### **THE ORDER ON REPRESENTATION**

62. The relevant parts of the Committee's decision on representation are sufficiently concise to be quoted verbatim:

*29...The Parties do not seriously dispute that the Committee, which is neither a political body nor the deliberative organ of an International*

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<sup>52</sup> De Jesús' letter of 31 March 2020, para. 2.

<sup>53</sup> *Id.*, paras. 6, 8, 9, 14.

<sup>54</sup> *Id.*, para. 15.

*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 Jesús 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 tribunals 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 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.*

[The Committee then traces the joint participation of Curtis and De Jesús from 6 March 2019 to 15 March 2010]

*35 [...] 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. The possibility of such divergences between Curtis and De Jesús does not mean that 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 argument that*

*will be raised by Curtis and De Jesús separately, agrees to respond to submissions from both sets of representatives.*

*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.*

## **THE REQUEST TO THE COMMITTEE TO REVISIT ITS DECISION**

63. On 9 April 2020 De Jesús wrote to the Committee inviting it to reconsider its decision on the ground that it lacked a legal basis as it disregarded Venezuelan law and ignored the relevant facts<sup>55</sup>. Under the Venezuelan National Constitution and the Organic Law of the Attorney General's Office the only organ empowered to represent the Republic in international proceedings was the *Procuraduría General*, currently under the authority of Dr. Muñoz Pedroza. The *Procurador Especial* had no standing under Venezuelan law because the Statute creating that office had been declared to be null and void by the Supreme Court<sup>56</sup>.
64. De Jesús submitted that the Committee's purported *status quo* analysis was flawed in that it failed to have regard to the only relevant *status quo*. This was the authority of the *Procuraduría General* to represent the Republic. The factual matters that the Committee had considered, such as the persons appearing as "counsel of record", were irrelevant<sup>57</sup>.
65. The Committee declined to alter its Order<sup>58</sup>. In doing so it conveyed the following comment:

*"The Committee wishes to draw the parties' attention to the Order of April 3, 2020, which 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."*

## **THE DISQUALIFICATION PROPOSAL**

66. It is De Jesús' case that the Order on Representation is so egregiously defective as to demonstrate that all three members of the Committee responsible for it lack the qualities required by Article 14(1) of the ICSID Convention. De Jesús further submit that there are matters individual to Judge Hascher and Professor Fernández Arroyo that demonstrate that each is incapable of exercising an independent judgment. In consequence De Jesús submit that all three must be disqualified.

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<sup>55</sup> De Jesús' Request to revisit Order on the Representation, page 1.

<sup>56</sup> *Id.*, pages 3,4.

<sup>57</sup> *Id.*, page 7.

<sup>58</sup> Email from Francisco Grob dated 15 April 2020.

## Relevant law

67. Article 57 of the ICSID Convention provides:

*“[a] party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14.”*

68. Article 14(1) of the Convention provides:

*“Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.”*

69. De Jesús submit that in the ICSID context “*independence*” of arbitrators – and by extension of Annulment Committee Members- is to be understood as “*the absence of the influence of external factors in their consideration of the case, different from the facts, arguments and evidence presented by the Parties and their merit*<sup>59</sup>.”

70. This submission appears to be founded on two sentences, repeated in a number of the decisions cited by De Jesús, including earlier Proposals to Disqualify Arbitrators in this Arbitration:

*“Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both ‘protect parties against arbitrators being influenced by factors other than those related to the merits of the case’<sup>60</sup>.”*

71. De Jesús have incorrectly conflated these two sentences to produce the proposition that an arbitrator who takes into account a factor that is not material to the merits of the case lacks independence. This is fallacious.

72. That said, I have no difficulty with the remainder of De Jesús’ submissions of law. These are that the *independence* standard of Article 14 has been interpreted to encompass both independence *and* impartiality, and the Spanish version of the Convention expressly refers to impartial judgment in place of independent judgment. It follows that the requirement is that Annulment Committee members are required to be both impartial and independent<sup>61</sup>. A successful challenge to the independence and impartiality of a member of a Tribunal or Committee does not require the establishment of actual dependence or bias. An *appearance* of dependence or bias will suffice<sup>62</sup>.

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<sup>59</sup> Proposal for Disqualification, para. 17.

<sup>60</sup> Decision on the Proposal to Disqualify a Majority in this Arbitration, dated 5 May 2014, at para. 51; see also Decision on Proposal to Disqualify L Yves Fortier Q.C. in this Arbitration, dated 27 February 2012, paras. 54, 55; Decision on the Proposal to Disqualify a Majority of the Tribunal in this Arbitration dated 1 July 2015 at para. 81; Decision on the Proposal to Disqualify all Members of the Arbitral Tribunal in *Mobil v Argentine* ICSID Case No. ARB/04/16 at para. 35.

<sup>61</sup> Proposal for Disqualification, paras. 17 and 18.

<sup>62</sup> *Id.*, para 19.

73. De Jesús cite the majority of the Tribunal ruling on an Application for the Disqualification of the third member of the Tribunal in *Suez Sociedad General de Aguas de Barcelona S.A. v Argentina*<sup>63</sup>. This correctly defined independence and impartiality<sup>64</sup>:

*“The concepts of independence and impartiality, though related, are often seen as distinct, although the precise nature of the distinction is not always easy to grasp. Generally speaking independence relates to the lack of relations with a party that might influence an arbitrator’s decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties.”*

### **De Jesús’ case**

74. De Jesús submit that the Committee’s approach to the issue of representation constituted such a *“blatant deviation from their mission*<sup>65</sup> as to demonstrate, or at least give the appearance of, a manifest lack of independence and impartiality on the part of all three members.

75. The gravamen of the criticism advanced by De Jesús is as follows. The issue of representation fell to be determined according to the domestic law of Venezuela. The Committee made no attempt to apply legal reasoning. Instead it abandoned *“all legal reasoning in favor of a political solution”* that appeared to the Committee to be *“practical”* or *“convenient”*<sup>66</sup>. The position is summarised as follows<sup>67</sup>:

*“In sum in its Order on Representation, the Committee invoked one procedural rule in order to establish its inherent powers to resolve the matter at hand (Article 44 of the ICSID Convention). The Committee failed to analyze or invoke a single provision of Venezuelan law, the only applicable law to the issue of representation of the Republic and contented itself to mention a set of irrelevant facts to the issue.”*

76. De Jesús submit that by failing to apply Venezuelan law

*“the Committee transformed its decision into an instance of recognition and legitimacy for Mr. Hernández and his pretended capacity to act in representation of the Republic”*<sup>68</sup>.

77. De Jesús expresses concern at the Committee’s remark, when confirming its Order on Representation, that its decision was *“subject to review in light of future developments”*. This could only apply to future *political* developments , confirming

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<sup>63</sup> De Jesús’ Additional Observations, pp. 3-4.

<sup>64</sup> ICSID Cases ARB/03/17 and ARB/03/19, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal, para 29.

<sup>65</sup> Proposal for Disqualification, para 8.

<sup>66</sup> *Id.*, paras. 19, 20, 23, 24, 26, 29, 32, 34.

<sup>67</sup> *Id.*, para. 29.

<sup>68</sup> *Id.*, para. 32.

the fact that the Committee had impermissibly had regard to these, rather than to the law.

78. So far as Judge Hascher is concerned, De Jesús submit that the adverse inference that a reasonable and objective observer would draw from the terms of the Order on Representation would be reinforced by Judge Hascher's position as a Judge of the French *Cour de Cassation*<sup>69</sup>. As such, Judge Hascher was subject to the guidelines issued by the *Conseil Superior de la Magistrature*. These prohibited judges from

*“showing any hostility towards the principle and form of the Government of the Republic, as well as any political demonstration that is incompatible with the restraint that their role requires”*. [This required Judge Hascher to] *“show deference to the French Government of the Republic and refrain from expressing political opinions that would be incompatible with his position”*<sup>70</sup>.

79. On 31 March 2020 the United States published *A Democratic Transition Framework for Venezuela*. On 3 April 2020 a press briefing by the French Ministry for Europe and Foreign Affairs made it public that the French Government adhered to this. De Jesús submit that, by reason of Judge Hascher's position as a French Judge, this would be perceived by the reasonable onlooker as having influenced him to disregard Venezuelan law and to reach a decision on representation that was compatible with the political position of the French Government<sup>71</sup>.

80. So far as Professor Fernández Arroyo is concerned, as a member of the Annulment Committee in the *Fábrica de Vidrios* case, Professor Fernández Arroyo had been party to the decision that held that there was no justification for departing from the position under which the *“Respondent has been represented by the persons appointed for such purpose by the Procurador General de la República, as required by the domestic law of Respondent”*. The *“only reasonable explanation”* for the Professor's adoption of *“a diametrically different solution”* in the present case was that he had *“allowed himself to be influenced by factors external to the case, of a political nature, thus compromising his ability to exercise independent judgment”*<sup>72</sup>.

## **RESPONSES TO THE DISQUALIFICATION PROPOSAL**

81. Apart from disassociating themselves from De Jesús' application, Curtis made no substantive submissions in relation to this<sup>73</sup>.
82. On behalf of Conoco, Freshfields, Three Crowns and Mr. D. Brian King submitted that the application was frivolous and should be rejected<sup>74</sup>. The Committee had reasonably decided to maintain the *status quo* – specifically the continued

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<sup>69</sup> *Id.*, para. 36.

<sup>70</sup> *Id.*, para. 39.

<sup>71</sup> *Id.*, paras. 37-39.

<sup>72</sup> *Id.*, paras. 46-55.

<sup>73</sup> Letter from Curtis to ICSID dated 24 April 2020.

<sup>74</sup> Conoco lawyers' letter to ICSID dated 24 April 2020, para. 1.



participation of both the Special Attorney General and the Acting Attorney general and their respective representatives<sup>75</sup>. The requirement to demonstrate a “*manifest*” lack of the requisite qualities imposed a heavy burden on De Jesús to identify objective facts that made bias highly probable<sup>76</sup>.

83. Conoco’s lawyers submitted that dissatisfaction with the outcome of the Exclusion Application, even if justified, provided no grounds for discrimination. In the event the Committee’s decision was correct. It followed the approach to representation of the other Tribunals and Committees, namely the preservation of the *status quo* – in this case the participation of both the Special Attorney General and the Acting Attorney General<sup>77</sup>. So far as the specific challenge in respect of Judge Hascher was concerned, there was no merit in this and it should, in any event, be dismissed because it was not made promptly<sup>78</sup>. So far as the specific challenge in respect of Professor Fernández Arroyo was concerned, inconsistency between decisions in two different cases was no ground for disqualification, but no such inconsistency existed. In each case the decision had been to preserve the *status quo* in respect of representation<sup>79</sup>. Conoco’s lawyers annexed a substantial body of authorities in support of its submissions.
84. Each of the three Members of the Committee sent to ICSID a short re-assertion of his independence and impartiality without condescending to address the detailed submissions made by De Jesús.

## DE JESÚS’ OBSERVATIONS ON THE RESPONSES

85. On 8 May 2020 De Jesús sent to ICSID its observations on the responses of the Members of the Committee and Conoco. This asserted that adverse inference should be drawn in the case of each Member of the Committee from his failure to address the detail of De Jesús’ Disqualification Proposal. De Jesús accepted the submissions of Conoco’s lawyers as to the test to be applied to disqualification of the Members of the Committee but differed as to the consequence of the application of that test.

## ANALYSIS

### The Disqualification Proposal

86. Article 57 permits a proposal for disqualification “*on account of any fact*” that indicates a manifest lack of the qualities required by Article 14(1). While certain specific facts are relied upon in the challenges made in respect of Judge Hascher and Professor Fernández Arroyo, the essence of the case made against all three members of the Committee is based on inferences to be drawn from alleged

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<sup>75</sup> *Id.*, para. 7.

<sup>76</sup> *Id.*, paras. 9 and 10.

<sup>77</sup> *Id.*, paras. 13, 14

<sup>78</sup> *Id.*, para. 16.

<sup>79</sup> *Id.*, para. 17.

deficiencies in their Order on Representation. An applicant that seeks to prove from the terms of a decision alone that those who made it were not merely wrong but were, or appear to have been, manifestly lacking in the requisite independence or impartiality has a heavy burden to discharge.

87. Where lack of impartiality is alleged against a member of a Tribunal this is usually on the basis that he is, or appears to be, biased in favour of, or against, one of the parties to the Arbitration. In this case the allegation arises in the context of a dispute as to who should be permitted to represent Venezuela in the Application for the Annulment of the Arbitration. The alleged lack of independence and impartiality in this instance arises in relation to a contest between two rival contenders in that dispute – Dr. Muñoz Pedroza and Mr. Hernández. The lack of independence, or the appearance of this, is alleged to be manifested by the decision in relation to that dispute.

### **The nature of the decisions on representation**

88. In this, and in other arbitrations where the issue has arisen as to Venezuela's representation, the Tribunal or Committee has given consideration to the basis on which it has power to resolve that issue. The issue arises in circumstances where there are two rival contenders to the Presidency of Venezuela, Mr. Maduro and Mr. Guaidó. It is, or may be arguable, that if Mr. Maduro is the rightful President Dr. Muñoz Pedroza, as his Attorney General has authority to conduct legal proceedings on behalf of Venezuela but if Mr. Guaidó is the rightful President, that authority vests in Mr. Hernández as his Special Attorney General<sup>80</sup>.

89. The Tribunals and Committees have agreed that they have no jurisdiction to make a decision that binds anyone as to which is the legitimate government of Venezuela, or lawful representative of that government in this arbitration. They have equally agreed that Article 44 of the ICSID Convention, as applicable to Committees pursuant to Article 52(4), gives them the power, and indeed the duty, to decide whom *they shall treat* as the representatives of Venezuela in the proceedings. This is because that question is one of procedure and Article 44 provides:

*“...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.”*

90. Thus, in all these cases, the decision on representation has been treated as resolving a procedural, not substantive issue. The Tribunals and Committees have not purported to determine who, as a matter of law, is entitled to represent Venezuela. They have been concerned with the procedural question of whom they will permit to make representations on behalf of Venezuela. The question that has plainly, and understandably, caused difficulty for the Tribunals and Committees in respect of this question, when faced with competing claims, has been how to resolve it. On analysis it is apparent that they have not all adopted the same approach.

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<sup>80</sup> See paras. 21 and 22 above.

91. There has been agreement as to the burden of proof on this issue. Tribunals and Committees have agreed that, where a representative of Venezuela has already been recognized and placed on the record, the onus is on any subsequent rival to demonstrate that the representation should be altered in his favour.
92. In the *Air Canada* case the Tribunal held that the only “an appropriate decision-making body” could decide who held the proper representation of Venezuela. That was a political issue that the Tribunal had no authority to resolve. As this political issue was the only objection raised to the existing representation and this was not an issue within the competence of the Tribunal, there was no impediment to proceeding with the existing representation.
93. In the *Valores Mundiales* case the Committee held that it had no authority to reach a decision binding others (*erga omnes*) as to who was Venezuela’s legitimate representative but that this was a matter on which it would have to reach its own decision in order to resolve the procedural issue as to who should express himself on behalf of Venezuela within the framework of the annulment proceedings .
94. To do this the Committee had to take into account the interaction between international law and Venezuelan domestic law, as well as the role performed by the burden of proof<sup>81</sup>. The burden of proof lay on Mr. Hernández, as he was seeking to change the *status quo*<sup>82</sup>.
95. As a matter of Venezuelan domestic law Mr. Hernández failed to make good his case as the Statute on which he relied had been declared null and void by the Supreme Court<sup>83</sup>. This was conclusive unless it was proved that there had been a change of government under international law<sup>84</sup>. Mr. Hernández had asserted, but failed to prove, such a change. He had demonstrated recognition of Mr. Guaidó by a number of States, but this did not suffice under international law in the absence of proof of material acts of exercise of power by Mr. Guaidó<sup>85</sup>.
96. In these circumstances Mr. Hernández had failed to prove his standing to represent Venezuela and the proceedings had to continue under the existing representation<sup>86</sup>.
97. In the *Kimberly-Clark* case, the Tribunal recited the submission of the parties, including Mr. Hernández, and concluded simply, without detailed reasoning, that it had discerned no argument or evidence that would lead it to change the existing representation.
98. The decisions in the *Agroinsumos* and the *Fábrica de Vidrios* cases were to like effect.
99. The position in the Rectification Proceedings differed from all these cases. Curtis had been on the record as the law firm that represented Venezuela up to the time of the award and initiated the Rectification Proceedings. Thereafter both he and De

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<sup>81</sup> ICSID Case No. ARB/13/11, Procedural Order No. 2, para. 39.

<sup>82</sup> *Id.*, para. 40.

<sup>83</sup> *Id.*, para. 45.

<sup>84</sup> *Id.*, para. 47.

<sup>85</sup> *Id.*, paras. 48, 49.

<sup>86</sup> *Id.*, para. 51.

Jesús acted in tandem in those proceedings, without resolution as to who should be treated as entitled to represent Venezuela. In the end the Tribunal found it unnecessary to take a decision on the matter. Both firms were recorded as representing Venezuela, as was Dr. Muñoz Pedroza, who had been on the record throughout the proceedings, but the Tribunal made it plain that this should not imply that the it had determined who was entitled to represent Venezuela.

### **The approach of the Committee**

100. In the Order on Representation the Committee states that it “*accepts that the status quo approach adopted in the other ICSID proceedings should also apply in the present annulment proceedings*”. In applying that approach the Committee has held that it is appropriate to consider the *status quo* that has persisted in relation to the parties legal representatives since the start of the post Award proceedings, Curtis appearing pursuant to a power of attorney granted by Mr. Hernández and De Jesús pursuant to a power of attorney granted by Dr. Muñoz Pedroza.

### **The case for disqualification**

101. I propose to consider first the case for disqualification advanced by De Jesús against all three members of the Committee, namely deficiencies in the Order on Representation, before turning to the individual matters relied upon in relation to Judge Hascher and Professor Fernández Arroyo.
102. De Jesús’ primary complaint is that the Committee has not reached its decision on representation as a matter of law, but has reached a decision based on ‘political’ or pragmatic considerations. This

*“transformed its decision into an instance of recognition and legitimacy for Mr. Hernández and his pretended capacity to act in representation of the Republic.”<sup>87</sup>*

I do not consider that this assertion is correct. Just as in the case of the other Tribunals and Committees, the Committee has not purported to recognize the legitimacy of Mr. Hernández claim to represent Venezuela. Had it reached its decision as a matter of law it might have done so, but as De Jesús complain, the Committee’s decision is not advanced as representing a legal decision.

103. It is manifest that Dr. Muñoz Pedroza and Mr. Hernández cannot both have authority to appoint lawyers to appear on behalf of Venezuela in these proceedings. Which of them has that right depends, or at least may depend, on whether Mr. Maduro or Mr. Guaidó presides over the legitimate government of Venezuela. The Committee’s decision leaves this political issue wholly at large. The basic issue is whether this was a proper course for the Committee to take.

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<sup>87</sup> Proposal for disqualification, para. 32.

104. De Jesús submit that the Committee should have founded its decision on the domestic law of Venezuela alone, as the only applicable law. No Tribunal or Committee has done this. It is not axiomatic that, if the Committee’s approach had been to base its decision on law, it should have confined its consideration to Venezuelan domestic law. The *Valores Mundiales* Committee based its decision on its view of the law, but the law to which it had regard was not merely Venezuelan domestic law but international law.
105. The nature of the legal analysis that might have been appropriate is not, however, the critical question. The critical question is whether the Committee’s decision, as a matter of procedure, to permit, “*at this stage of the proceedings*”, both Curtis and De Jesús to remain as counsel of record for Venezuela was so egregiously improper as to raise a presumption of manifest lack of independence or impartiality on the part of the three members of the Committee.

### **My conclusions**

106. Three questions fall for consideration:
- (i) Was the decision reached by the Committee practicable without injustice to either party?
  - (ii) Was the decision reached by the Committee one that it was proper to make?
  - (iii) If not, does the decision demonstrate that the members of the Committee have, or appear to have, a manifest lack of independence or impartiality?

The three questions are interrelated and it is logical to take them in the order set out.

### **Was the decision practicable without injustice?**

107. The approach to procedure taken by the Committee mirrors that taken by the Tribunal in the Rectification Proceedings. The Tribunal found that there was no conflict about the substance of the issues on rectification. In those circumstances it was practicable for the Tribunal to treat both representatives as acting for Venezuela without any risk of injustice. No objection was taken to this course.
108. In the *Air Canada* case the Tribunal observed in respect of the suggestion that the proceedings should continue with two different Counsel of Respondent that
- “this avenue could create practical difficulties, particularly in the event of disagreements between the Counsel<sup>88</sup>.”*
109. De Jesús cited this passage in its letter of 31 March 2020 in support of the proposition that in the annulment proceedings dual representation involved

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<sup>88</sup> See para. 31 above.

*“a real risk of contradiction in the arguments and in the manner in which they will be presented”<sup>89</sup>.”*

110. In its Order on Representation the Committee accepted that this was the case, but commented :

*“The possibility of such divergences between Curtis and De Jesús does not mean that their arguments and theses would not be heard and answered, separately as may be, by the Committee”<sup>90</sup>.”*

111. It was possible that the submissions of De Jesús and Curtis in the annulment proceedings would complement each other, rather than conflict with each other, to the benefit of Venezuela. Each would be striving towards the same end. Curtis had been on the record and, presumably, closely involved in the conduct of Venezuela’s case from the outset of the Arbitration. It was at least possible that the arguments that it advanced in favour of nullification of the award would commend themselves to De Jesús. If the two law firms put aside their differences as to which represented the lawful government of Venezuela and cooperated in their efforts to procure the annulment of the Award, it was possible that no conflict would result. But it was also possible that there might be conflict between the cases that the two sought to advance, so that it would cease to be procedurally viable for them both to represent Venezuela. More generally a refusal on the part of the two to cooperate generally might lead to a procedural impasse. As the Tribunal remarked in the *Kimberly-Clark* case<sup>91</sup>

*“...the arbitration cannot proceed with two representatives of one and the same party who are in conflict with each other.”*

112. I read the Committee’s reference to “*at this stage of the proceedings*” in its Order on Representation<sup>92</sup> and its comment when confirming that Order that it was “*subject to review in light of future developments*” as indicating that the Committee had in mind the possibility that its procedural order would cease to be viable for such reasons.
113. My conclusion is that, at the time that the Order on Representation was made, there was a possibility that compliance with it would prove practicable without injustice, but that this was by no means certain.

### **Was the decision reached by the Committee one that it was proper to make?**

114. De Jesús submit that the Committee’s decision was reached by

*“deciding on the most practical, convenient and political solution by simply allowing everyone’s continued participation in the proceedings...and only*

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<sup>89</sup> De Jesús’ letter of 31 March 2020, para. 15.

<sup>90</sup> Order on Representation, para. 36.

<sup>91</sup> ICSID Case No. ARB(AF)/18/3, Order on Venezuela’s Representation, para. 41.

<sup>92</sup> Order on Representation, para. 37.

*then scrambling to line up some considerations, of fact and not of law to justify its choice*<sup>93</sup>.”

115. I consider that an objective onlooker might well conclude that the Committee was influenced in its approach by consideration of what would be practical, convenient and politic (rather than ‘political’). The Committee accepted the submission of Curtis and Conoco as to how to proceed<sup>94</sup>. Curtis had warned that United States Courts would not recognize an award in proceedings where Venezuela was not represented by a representative of the Guaidó government. Conoco had requested that representatives of both Mr. Hernández and Dr. Muñoz Pedroza should remain on the record to obviate the risk that the proceedings would not be recognized by the courts of some countries. It would not have been unreasonable for the members of Committee to consider this a desirable aim.
116. I consider that an objective onlooker might also conclude that the Committee had been attracted by what appeared to be a conveniently simple solution to a problem that other Tribunals and Committees had found thorny.
117. As to the basis upon which the Committee founded its decision, it held<sup>95</sup>
- “The Committee accepts that the ‘status quo’ approach adopted in other ICSID proceedings should also apply in the present annulment proceedings.”*
118. The Committee did not, however, adopt that approach. The approach adopted in those other proceedings was to proceed on the basis of a presumption that the single representative on the record was the proper representative unless the challenger proved to the contrary. The Tribunals and Committees did not proceed on the simple basis that the *status quo* should be preserved. They considered whether a case had been made out for departing from the *status quo*, and decided that it had not.
119. The Tribunal in the Rectification Proceedings in this Arbitration took a different approach. It permitted the two rival contenders to the representation of Venezuela to take part in the process and to be placed on the record, while making plain that it did so without making any decision as to the entitlement of either to represent the Republic.
120. The Committee took the latter approach, continuing that *status quo*. Applications for the Annulment of the Award had been made by both Curtis and De Jesús. The Centre had registered an Application for the Annulment of the Award. After the Committee was appointed on 3 February 2020, it treated both Curtis and De Jesús as representing Venezuela in the steps that were taken towards agreeing a procedural order<sup>96</sup>. When De Jesús challenged Curtis’ continued participation in the proceedings, the Committee rejected the challenge and ruled that both should remain on the record, thus affirming the approach that it, and before it the Tribunal, had adopted.

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<sup>93</sup> Proposal for Disqualification, para. 20.

<sup>94</sup> Order on Representation, para. 32.

<sup>95</sup> Order on Representation, para. 31.

<sup>96</sup> Order on Representation, paras. 1 to 16.

121. No challenge has been made of the propriety of the conduct of the Tribunal in proceeding as it did, but at that stage of the proceedings neither of the rivals challenged the participation of the other. Was it procedurally proper for the Committee to take the same course, notwithstanding that De Jesús was challenging the continued participation of Curtis?
122. I am not aware of any precedent that provides guidance on this question, indeed it is possible that the conflict that has arisen in this case is without precedent.
123. In the *Air Canada* case, the *Valores Mundiales* case and the *Kimberly-Clark* case the Tribunal or Committee held, in the circumstances prevailing in those cases, that the proceedings could not continue with rival representation of Venezuela. It is at least possible in the present case that the appropriate course that the Committee should have taken was to resolve, as best it could, the question of which of the two rival contenders had the better case to represent Venezuela.
124. I do not need to express an opinion on that issue. I propose to proceed on the premise, without deciding the point, that the appropriate course that the Tribunal should have taken, when faced with the De Jesús' challenge to Curtis' participation in the proceedings, was to resolve which of the two should be permitted to represent Venezuela.

**Does the decision on representation taken by the Committee demonstrate that its members have, or appear to have, a manifest lack of independence or impartiality?**

**The Committee as a whole.**

125. I shall first address this question having regard to the position of all three members of the Committee, before turning to the particular matters raised in relation to Judge Hascher and Professor Fernández Arroyo.
126. I have reached a firm conclusion on this critical issue. I do not consider that the objective bystander would conclude, from the fact of the decision reached by the Committee, that its members had demonstrated a manifest lack of independence or impartiality. Indeed I do not consider that the objective bystander would conclude that the decision reached by the Committee raised even a suspicion of lack of independence or impartiality on their part. I find that the fact that the Committee appears to have been motivated by considerations of what was practical, convenient and politic raises no inference that its members were not independent or impartial.
127. De Jesús have referred to the dual representation of Venezuela as a “Solomonic solution<sup>97</sup>”. That is a fair description, referring to a famous decision that was based on pragmatism rather than the law. That decision did not, however, raise any inference that King Solomon lacked independence or impartiality. The Committee may have erred in concluding that it was proper, as a matter of procedure, to have regard to the practical consequences of its decision and to convenience, rather than

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<sup>97</sup> De Jesús' letter of 31 March 2020, para. 12.



resolve the issue of which of the two contenders should represent Venezuela. If that was the position, it did not suggest a lack of independence or impartiality.

128. I should add that I do not consider that any adverse inference falls to be drawn from the fact that, in response to the Disqualification Proposal, the members of the Committee merely re-submitted their declarations of independence and impartiality. This was an appropriate response in the circumstances.

### **Judge Hascher**

129. De Jesús submit that the Committee's conduct in issuing the Order on Rectification should be placed in the wider context of Judge Hascher's role as a member of the French *Cour de Cassation*<sup>98</sup>. The alleged effect of this is summarised above<sup>99</sup>. I am not able to accept this part of De Jesús' case for a number of reasons. So far as the *Democratic Transition Framework* is concerned, this was published by the U.S. Government on 31 March 2020 and the press release indicating the support of the French Government for this in relation took place on 3 April 2020, the day of the publication of the Committee's Decision on Representation. It seems manifest that the latter cannot have been influenced by the former.
130. Support for the *Democratic Transition Framework* is said to be indicative of the French Government's "*attempting to interfere with the domestic affairs of the Venezuelan Government*". The De Jesús' submission is that the Committee's decision was compatible with this political position because it avoided applying Venezuelan domestic law under which the Statute purporting to give Mr. Hernández authority to represent the Republic had been declared null and void<sup>100</sup>. Thus, it is submitted, the Committee's decision would appear to have been motivated, so far as Judge Hascher was concerned, by his duty as a French Judge to show deference to the political position of the French Government.
131. I find this submission unrealistic. Judge Hascher's prohibition as a French judge "*from showing any hostility towards the principle and form of the Government of the Republic, as well as any political demonstration that is incompatible with the restraint that their role requires*" did not require Judge Hascher, when sitting as an arbitrator, or member of an arbitral committee, to tailor his decisions to accord with the political position of the French Government. To do so would be manifestly improper and I do not consider that a reasonable onlooker would conclude that Judge Hascher might have acted in this way, let alone that he had manifestly done so.
132. For this reason I do not accept the specific challenge made to Judge Hascher's appearance of independence and impartiality. I accept that the challenge was timely.

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<sup>98</sup> Proposal for Disqualification, para. 36.

<sup>99</sup> At paragraphs 79, 80.

<sup>100</sup> Proposal for Disqualification, para. 40.

## Professor Fernández Arroyo

133. De Jesús submit that the decision of the Committee was “*a diametrically different solution*” to the representation issue from that reached by the Committee in the *Fábrica de Vidrios* case, of which Professor Fernández Arroyo was a member. An objective observer would conclude that the only reasonable explanation for this was that he had “*allowed himself to be influenced by factors external to the case of a political nature, thus compromising his ability to exercise independent judgment*”<sup>101</sup>.”
134. As I have observed above<sup>102</sup> the approach of the Committee differed from that of previous Tribunals or Committees, including that in the *Fábrica de Vidrios* case. This reflects the fact that the Committee was faced with a different procedural situation, where there had been two rival representatives of Venezuela acting, and on the record for nearly a year. I have questioned whether the approach of the Committee was, in all the circumstances, appropriate, and proceeded on the premise that it was not. But I have concluded that this does not lead to any inference of lack of independence or impartiality on the part of the Tribunal as a whole. This applies equally to Professor Fernández Arroyo, considered individually. The fact that he agreed with his colleagues that, in the procedural position prevailing, it was appropriate to reach a different procedural result from that to which he had been party as a member of the Committee in the *Fábrica de Vidrios* case would not lead an objective onlooker to infer that he had lost his independence or impartiality.

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<sup>101</sup> Proposal for Disqualification, para. 55.

<sup>102</sup> Paras.114-124.

## RECOMMENDATION

135. For these reasons, my Recommendation to the Chair of the Administrative Council of ICSID is that the Disqualification Proposal should be dismissed.

[signed]

*Nicholas Phillips*

The Rt. Hon. Lord Phillips of Worth Matravers, K.G.

10 July 2020