

# Kluwer Arbitration Blog

## New Developments in Proceedings Involving Venezuela: Interim President Guaidó Intervenes Before US Courts

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Interesting developments in disputes involving Venezuela and its national oil company *Petróleos de Venezuela S.A. (PDVSA)* took place after Juan Guaidó, the president of the Venezuelan National Assembly, took the interim Presidency of the State in January 2019. Since then, he has [adopted a series of measures](#) and intervened in a series of proceedings involving Venezuela and/or PDVSA pending before domestic courts and international arbitration tribunals with the express aim of safeguarding Venezuela's financial interests abroad.

Some of these cases [have already been discussed in this Blog](#); but new developments emerged in the last few months in proceedings involving Venezuela and PDVSA before US courts. These new developments, together with previous cases, allow to take stock of the practice and to discuss the criteria (legitimacy *vis-à-vis* effectivity) to be applied for the recognition of a foreign government under international law and - more broadly - on the impact that situations of contested government may have on the protection of foreign investments and trade relationships.

Old and new cases involving Venezuelan Interim President Juan Guaidó will be discussed below from this perspective.

### Guaidó intervenes before US courts and international arbitration tribunals

The motions before US courts have been filed by Juan Guaidó after the [US President officially recognized him as Interim President of Venezuela](#).

The *Crystallex* case revolves around the Canadian company *Crystallex's* attempts to enforce a [2016 ICSID award](#) against Venezuela and to seize the capital-shares of the company *PDVH*, owned by PDVSA, which is estimated to be Venezuela's most valuable commercial asset in the US. [Crystallex was granted permission](#) to seize PDVSA's assets to satisfy its credit by a Delaware Court on August 9, 2018.

In subsequent proceedings brought by PDVSA before the US Court of Appeals for the Third Circuit, the Venezuela Interim President [intervened](#) to ask the revision of the Delaware Court's decision on the ground of "changed circumstances." According to

Guaidó, the measures he adopted to preserve “PDVSA’s ... independence *vis-à-vis* the Republic” since his appointment had the effect of abating the State’s control over PDVSA, with the consequence that PDVSA cannot anymore be defined as an *alter ego* of Venezuela and Crystallex cannot collect its judgment against Venezuela by attaching the property belonging to PDVSA. [Crystallex opposed](#) Guaidó’s motion and a [hearing](#) took place on April 15, 2019. The US Court of Appeals issued its [Opinion](#) on July 29, 2019.

During the [hearing](#), the Court observed that it is uncertain whether Guaidó is exercising effective authority over PDVSA so as to affect Crystallex’s claim on the ground of changed circumstances. Judge Greenway explained that “...if the new president hasn’t really sort of taken over the firmament of government, it is hard for [the Court] to ... say ... [this] is a changed circumstance.” In its Opinion, the US Court confirmed “Guaidó’s regime as authorized to speak and act on behalf of Venezuela” following the US President recognition; but also observed that “there is reason to believe that Guaidó’s regime does not have meaningful control over Venezuela or its principal instrumentalities such as PDVSA,” with the consequence that there has been no relevant change of factual circumstances concerning PDVSA’s independence *vis-à-vis* Venezuela and no impact on Crystallex’s seizure of PDVSA’s assets.

In the [Red Tree Investment](#) case, the US District Court for the Southern District of NY decided to stay the proceedings involving the US hedge fund Red Tree Investment and PDVSA and concerning PDVSA’s alleged default on four loan agreements. The US Court’s order to stay followed a motion filed by Guaidó’s Special Attorney General, Mr. Hernandez, on March 27, 2019. The [motion](#) pointed out that “[a]lthough the Guaidó government is the sole government recognized by the United States, it does not have full access to the personnel and documents of the government and its instrumentalities.” Accordingly, the US District Court [ordered a 120-days stay](#) to “ensure that Venezuela and its agents and instrumentalities are able to make fully informed decisions that protect their interests during this crucial moment in Venezuela’s history.”

[As already reported](#) in this Blog, Venezuelan Interim President has also intervened in cases pending before international arbitration tribunals. In the [Favianca](#) case, Guaidó’s attorney general asked the ICSID Committee to “not process any submissions signed by individuals acting on behalf of Maduro.” The Committee rejected Guaidó’s request arguing “that [Venezuela] is being represented by attorneys from the Attorney General’s Office ‘as required by [its] domestic law’” and further added that “evidence on record did not justify a change in the status quo” in the Country.

In the case [PDVSA v. PETROPAR](#), an ICC Tribunal seated in Paris decided on a request filed by the Paraguayan State entity, PETROPAR, to stay the proceedings and strike out the Claimant (PDVSA)’s reply on the merits on the ground that the latter represents the views of the Maduro government, which is not recognized by Paraguay. The ICC Tribunal decided in favour of the stay and reserved on the merits. The ICC Tribunal has been keen to decide in favour of the stay considering that Guaidó intervened in support of the request of the Respondent to explore the possibility of negotiating an amicable resolution to the dispute.

## **Effectiveness *vis-à-vis* legitimacy in the recognition of governments and their impact on pending proceedings**

The cases under discussion are significant as they arise from the competing claims of authority of the *de facto* government of Maduro and the legitimate government of Guaidó to represent Venezuela. They demonstrate the impact that a situation of disputed government may have on the conduction of pending international arbitration and domestic proceedings involving the State or its national companies.

The criterion of legitimacy has emerged in the last decades as “a distinct criterion for the legal recognition of governments” in addition to effectiveness and it seems to **have acquired a new momentum in the case of Venezuela**. The legitimacy criterium requires the authority of the government to be founded on democracy, the respect of relevant constitutional law and human rights, effectiveness by contrast rests on the government’s capacity to control at least some part of territory and population. In practice, the criterion of legitimacy has been applied to consolidate the authority of disputing governments in absence of effective control over the territory, only in cases where such government had been democratically elected and a significant international consensus emerges as to its legitimacy.<sup>1)</sup> The application of the criterion of legitimacy necessarily requires the States to make a normative test on the way in which the relevant regime came to power and admits the recognition of the government only if the test is met.

In the case at hand, however, the recognition of the Guaidó regime does not seem to have undergone any normative test by States, nor the Interim President appears to meet the requirements to get a pass mark. Indeed, Mr. Guaidó adopted the interim Presidency of the State under articles 233, 333 and 350 of Venezuela’s Constitution, but he has not won the majority of Venezuela people’s votes through democratic elections for presidency, nor has he taken any concrete steps towards the call for new elections. Moreover, his authority is still **disputed** within the international community: whereas the majority of the States of the Lima Group, including Paraguay, and the US recognized the interim presidency of Guaidó; a number of States still support the Maduro regime, who remains steadily in control of the territory; and the EU countries issued a **joint declaration** to support Guaidó only “in order for him to call for free, fair and democratic presidential elections.” Finally, **it has been observed** that despite States’ “‘recognition’ of Guaidó, few States have been willing to accredit his envoys as representatives of the Venezuelan State,” with the result that Guaidó seems to have collected more political support, rather than recognition in a legal sense.<sup>2)</sup>

The recognition of the government of Guaidó has not undergone any normative test by international arbitrators and domestic judges. From the point of view of domestic courts, recognition pertains to the executive and the judicial shall only follow. Thus, the recognition of Guaidó by the US President has been accepted by the US Courts as a sufficient element to give the Interim President the authority to speak and act on behalf of Venezuela. Such recognition, however, has not been considered enough to overcome uncertainties as to who has effective control of the Venezuelan State and its

instrumentalities; with the consequence, for example, that Guaidó's motion to set aside Crystallex's request of enforcement over PDVSA's assets has been dismissed by the US court.

International arbitration tribunals, by contrast, are usually guided by criteria of *realpolitik* based on the practical needs of the parties and material factors. Thus, in the case involving PDVSA and PETROPAR, Paraguay's recognition of Interim President Guaidó has been considered as a matter of fact that, together with the agreement between Claimant and Respondent to suspend the proceedings and the prospects of settlement, have persuaded the ICC Tribunal to decide in favour of the stay.

The ongoing conflict between the Maduro and Guaidó regimes in Venezuela and the reactions of the States *vis-à-vis* such situation, including the US decision to adopt “[maximum pressure on former Maduro regime](#)” and the enactment of sanctions, are expected to give rise to new arbitration proceedings and to further impact on existing cases pending before domestic courts and international arbitration tribunals. Stay tuned.

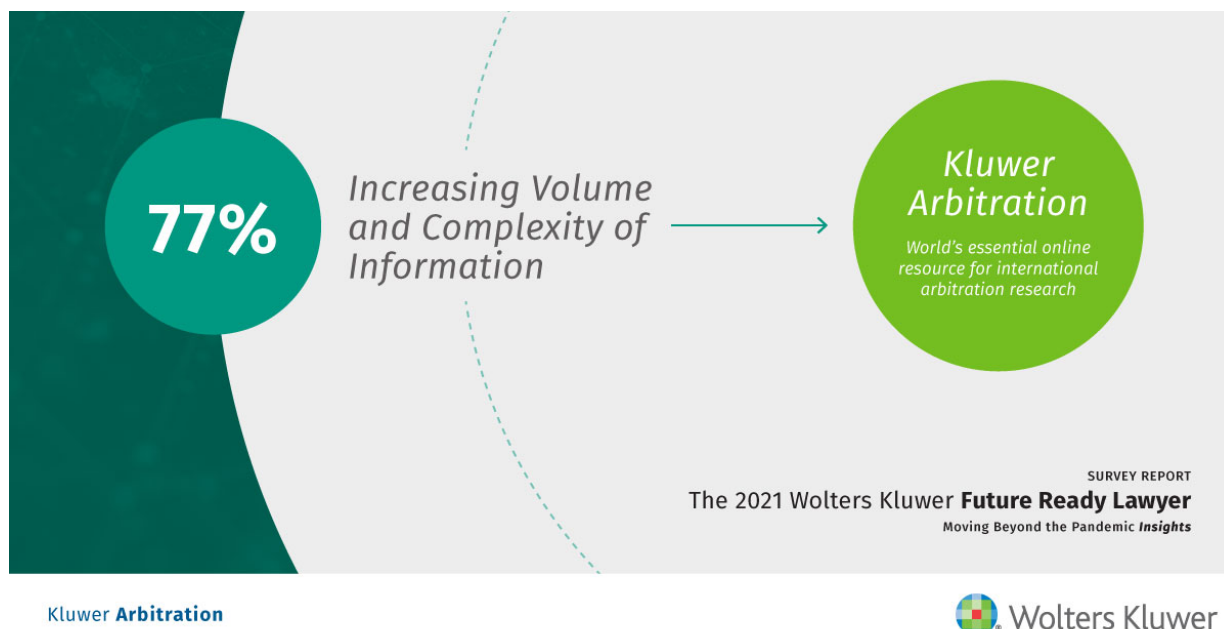
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