

Kluwer Arbitration Blog

Representation of Venezuela in Investment Arbitration

Héctor Fernández (AFALEGAL S.C.) · Saturday, January 16th, 2021

Nicolas Maduro was “reelected” President of Venezuela for the constitutional period from 2019 to 2025. This presidential election was the subject of serious questions by large representative sectors of Venezuelan society, as well as by the United States, the European Union, and most Western Hemisphere countries. Given this situation, Juan Guaidó, as head of the National Assembly of Venezuela, announced that he would assume the powers of the executive branch, and was sworn-in as Interim President of Venezuela on January 23, 2019.

On the same day that Guaidó took the oath, the US government expressly recognized him as President and rejected the legitimacy of Maduro, which was followed by the governments of more than 50 countries, including the US, the UK, Canada, Japan, Switzerland, Israel, Australia, South Korea, almost every Member State of the European Union, and most Latin American nations.

Despite the above, Maduro continues to control the real and effective functions of the government. In addition, Maduro is backed by some countries of a certain geopolitical weight such as China, Russia, Turkey, Cuba, and Iran.

This unusual political situation leads to the introduction of the problem that this post seeks to address: who holds the right to represent Venezuela in investment arbitrations?

A brief overview of two disputes under the ICSID Convention in which the problem has been presented

This dilemma has already arisen in several ICSID cases. The first case is *ConocoPhillips v. Venezuela* (ICSID Case No. ARB/07/30) for which, the tribunal issued its final award on 8 March 2019. On 16 April 2019, the law firm Curtis, Mallet-Prevost, Colt & Mosle LLP (“Curtis”), claiming to act on behalf of Venezuela, submitted a rectification request, alleging that there were errors in the final award. Curtis enclosed with its request a power of attorney to represent Venezuela, granted by Hernández, Special Attorney appointed by the Guaidó Administration.

However, on 19 April 2019, the law firm De Jesús & De Jesús (“De Jesús”) submitted a letter to the tribunal, in which it stated that on 7 March 2019, De Jesús had been granted a power of attorney to represent Venezuela by Muñoz, Attorney General appointed under the authority of the Maduro Administration. Interestingly, in the 19 April 2019 letter, De Jesús made the following statement: “on behalf of the Republic the Application that was previously submitted by our

colleagues from *Curtis*, which you will find enclosed.”

In short, two separate law firms claimed to be the exclusive representatives of Venezuela in the same dispute. How did the tribunal address this issue? The tribunal determined that there was no conflict because both law firms had filed the same request for rectification.

In the case of *Global Values v. Venezuela* (ICSID Case No. ARB/13/11), the same issue arose during the annulment proceedings. The Special Attorney appointed by the Guaidó Administration filed a request alleging that only Guaidó had the authority to assert the interests of Venezuela, seeking to exclude the Attorney General of the Maduro Administration. The *Ad Hoc* Committee rejected this request, considering that the Special Attorney appointed by the Guaidó Administration did not demonstrate – even though he had the burden of doing so – that he represented an independent government exercising effective authority and control within Venezuela. In this regard, the *Ad Hoc* Committee clarified that the recognition that several states of the international community had given to Guaidó did not demonstrate the effectiveness of his authority.

How should future tribunals address this issue?

It is an inherently political exercise to assess the legitimacy of one’s claims of being the rightful government of a sovereign State. Recognition, or lack thereof, of one particular government over another has significant implications, including with respect to a country’s sovereignty and independence, and its ability to engage with the international community. It is worth questioning whether arbitral tribunals are the appropriate bodies to make determinations as to which political leader has the right to represent a sovereign nation. Moreover, it seems undesirable to burden tribunals with the task of recognition of governments, given that the implications of such recognition are of significant political importance. There is, in addition, an attendant risk that different tribunals will arrive at divergent views, adding to the political turmoil.

Prima facie, it would appear that the Maduro faction is the *de facto* government of Venezuela because it exercises effective authority within the country. This has probably been the reason Russia, China, Turkey, and Iran, among other States, have granted recognition to the Maduro government.

Despite this, Guaidó’s international status as *de jure* President has been recognised by the governments of more than 55 countries, including almost all major trading nations and host countries with large investment flows. On that basis, it is possible that the national courts of those States may treat officials appointed by Guaidó as the only legal representatives of Venezuela. US Courts have taken this approach in *Rusoro Mining Limited, Gold Field Limited v Venezuela* and *OI European Group v. Venezuela*. In these cases, the respective domestic courts held that the decision of what government is to be regarded as representative of a foreign State is a political rather than judicial decision; as such, they recognized the Guaidó government lawyers as the appropriate representatives of Venezuela because the United States has recognized Juan Guaidó as the Interim President of Venezuela.

This approach taken by the US national courts, accompanied by the possibility that other national courts may follow suit, raises particular concerns about enforceability of arbitral awards. Arbitral tribunals are not empowered to enforce the pecuniary obligations imposed by their awards. Such power only belongs to courts of the countries in which the award is intended to be enforced.

Therefore, it may well be that a court of one of the countries whose government has expressly recognized Guaidó as president will need to set aside a final international arbitration award issued as part of an arbitral process where the representation of Venezuela has been denied to lawyers appointed under the authority of Guaidó.

As such, it may be prudent for arbitration tribunals to hear the arguments of counsels empowered by both factions when they each ask to act on behalf of Venezuela. It could also help ensure that the different perspectives on key issues in a matter are fully represented, allowing the arbitral tribunal to obtain a better understanding of the facts. Of course, such an approach, albeit more politically neutral, is not without its risks and setbacks.

Firstly, this approach could lead to increased costs and delays. Tribunals would need to proactively mitigate that risk by drafting procedural orders with strict parameters.

Secondly, this approach could make it difficult and expensive for claimants to defend their case, considering they will have to simultaneously respond to submissions made by both factions. In the disputes mentioned above where this issue has arisen, the competing submissions did not lead to issues relating to substantive law or facts, because the substance of each faction's submission was identical. In the event that the two factions take conflicting positions in future disputes, tribunals would be faced with the unenviable position of having to balance their political neutrality with ensuring procedural justice for the claimant.

Nevertheless, it would not be justified for an arbitration tribunal to make such a significant political decision (i.e., who has the right to govern Venezuela), simply to make the arbitration process less procedurally complicated for claimants. Instead, tribunals would most likely have to focus on setting strict boundaries for how each Venezuelan political faction may engage in the dispute.

It is worth noting, of course, that if a tribunal finds that counsels of one faction did not present their case with diligence and in good faith, in due compliance with the applicable rules of professional conducts and ethics, then the tribunal would be able to exclude them from the proceedings, keeping in mind that some ICSID decisions support a tribunal's powers to exclude counsel from arbitrations in compelling circumstances, e.g., [Hrvatska Elektroprivreda d.d. v Republic of Slovenia](#).

The existing political crisis in Venezuela will undoubtedly raise some concerns for arbitral tribunals presiding over disputes involving Venezuela. It remains to be seen whether future tribunals would be able to take the politically neutral approach that ICSID tribunals have opted for thus far.

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