UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PETRÓLEOS DE VENEZUELA, S.A., PDVSA PETRÓLEO, S.A., and PDV HOLDING, INC., Plaintiffs, - against - MUFG UNION BANK, N.A. and GLAS AMERICAS LLC, Defendants.	Case No: 19-cv-10023-KPF

REPLY DECLARATION OF ALLAN R. BREWER-CARÍAS IN SUPPORT OF PLAINTIFFS' SUMMARY JUDGMENT MOTION

I, ALLAN R. BREWER-CARÍAS, hereby declare pursuant to 28 U.S.C. § 1746 and Local Rule 7.1 as follows:

1. I have been provided with a declaration of the defendants' Venezuelan law expert, [redacted], dated June 27, 2020, which I understand was filed in opposition to the plaintiffs' motion for summary judgment.

2. I have prepared this declaration in reply to [redacted] opposition declaration, which is filled with erroneous opinions and mischaracterizations of what I have said in my reports. Given how much has already been written in this case, especially regarding the Constitutional Chamber's *Andrés Velásquez* decision, I have confined this reply to just a couple of points.

I. PARTIES CANNOT CONTRACTUALLY EXEMPT THEMSELVES FROM LAWS GOVERNING THE PUBLIC ORDER

3. Article 151 of the Venezuelan Constitution provides that, "*if not inappropriate according to their nature*," public interest contracts will be deemed to include a clause requiring

that any "question and disputes" arising regarding the contract that cannot be settled "shall be decided by the competent courts of the Republic, in accordance with its laws."[1] As explained in my initial report, public debt contracts are among the contracts of a commercial nature for which the inclusion of such a clause would be "inappropriate according to their nature," and thus public debt contracts can provide for the resolution of questions and disputes by foreign courts under foreign law.[2] As I also explained, however, parties cannot contractually opt themselves out of laws governing the public order, including, in the case of public entities, constitutional limitations on their authority.[3] Thus, while foreign law can govern the performance of a public interest contract, it cannot govern the validity of the contract in regard to its formation and the authority of a public entity to enter into a contract, which must be governed by Venezuelan public law.[4]

4. In his opposition declaration, [redacted] claims that I have "created" a distinction "without any support" between the law applicable to questions and disputes relating to performance and the law applicable to questions and disputes relating to validity.[5] By "without any support," he seems to mean that the distinction is not expressly set forth in the text of Article 151 itself. But this is because the distinction is not specific to Article to 151. Rather, the distinction is inherent in one of the most basic foundations of Venezuelan law—that parties cannot contractually exempt themselves from laws governing the public order. In paragraphs 122-133 of my initial report and the accompanying footnotes, I cited numerous authorities for this principle, including Article 6 of the Venezuelan Civil Code,[6] which provides that "[l]aws in

[1] 1999 VENEZUELAN CONSTITUTION art. 151, Pls. Ex. 4.
[2] Brewer Report ¶ 122.
[3] *Id.* ¶¶ 122–133.
[4] *Id.*
[5] Supplemental Declaration of [redacted] dated June 27, 2020 ("[redacted]") ¶ 33.
[6] CODIGO CIVIL [C. CIV.] [CIVIL CODE] art. 6 (Venez.). Brewer Reply Decl., Ex.1.

which public order and good morals are involved cannot be renounced or relaxed by private agreements,"[7] and the Public Administration Organic Law, which expressly establishes that the legal provisions regulating the competency and powers of entities within the Public Administration are provisions governing public order and therefore must be governed by Venezuela law.[8] As Professor Roberto Ruiz Díaz Labrano has written, contracting parties can submit "their contractual relations" or "their contractual obligations," which have "inter partes effects," to foreign law, but always "with the limitations resulting from imperative or public order provisions to which the applicability of the foreign law is subjected."[9] Thus, it would be absurd to suggest that Article 151 abrogated this basic principle, which is reflected in the Civil Code and the Public Administration Organic Law.

5. [redacted] next argues that "[g]iven that PDVSA and PDVSA Petróleo are State Corporations and not the Republic, Article 151 of the Constitution is inapplicable . . . to PDVSA and PDVSA Petróleo."[10] It is difficult to understand what point he is trying to make. Even if Article 151 did not apply to contracts entered into by public corporations and state-owned enterprises (which it does because such entities can enter into national public interest contracts), such entities would still not be able to renounce public order laws by private agreement because no contracting party can do that. I began my analysis with Article 151 only because, as explained in my reports, the concept of national public interest contracts includes contracts entered into by state-owned enterprises such as PDVSA and PDVSA Petróleo,[11] and

[7] *Id.*; Brewer Report ¶¶ 129–30.
[8] Organic Law of the Public Administration, GACETA OFICIAL *No. 6.147*, Nov. 17, 2014, art. 26, Brewer Reply Decl., Ex. 2; Brewer Report ¶¶ 131.
[9] *See* Roberto Ruiz Díaz Labrano, *El principio de la autonomía de la voluntad y las relaciones contractuales* [*The principle of the autonomy of will and contractual relations*]," *in* 1 LIBRO HOMENAJE AL PROFESOR EUGENIO HERNÁNDEZ BRETÓN 735–40 (Editorial Jurídica Venezolana ed., 2019), Brewer Reply Decl., Ex. 3; Brewer Report ¶ 123, n. 149.
[10] [redacted] ¶ 37.
[11] Brewer Report ¶¶ 31–45.

thus the first question that must be addressed is whether contacts such as those at issue are contracts for which the deemed inclusion of a clause requiring application of Venezuelan law by Venezuelan courts is "inappropriate according to their nature."

6. In that regard, I would point out that Article 151, like Article 150, does not refer to any specific organ or entity as the public contracting party, but speaks categorically of "public interest contracts."[12] The applicability of Article 151 to contracts entered into by state-owned enterprises was confirmed in the former Supreme Court of Justice's 1999 decision in the *Apertura Petrolera* case, in which the Court was asked to review a legislative resolution approving terms and conditions for oil industry national public interest contracts to be entered into by PDVSA subsidiaries.[13] The resolution was challenged on the theory that, by allowing for the resolution of questions and disputes in international arbitration, it violated Article 126 of the 1961 Constitution, which is equivalent to Article 151 of the current Constitution. Accepting that the agreements in question (which did not have the Republic itself as a party) were national public interest contracts subject to Article 126, the Court ruled that resolution of questions and disputes in international arbitration was not unconstitutional because of the contracts' commercial nature.[14] I note that, although the Chamber did not address the Article corresponding to current Article 150 in this decision, a contract that is subject to Article 151 as a national public interest contract is, by definition, also subject to National Assembly authorization under Article 150.

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[12] 1999 VENEZUELAN CONSTITUTION art. 151, Pls. Ex. 4; Brewer Report ¶ 118.
[13] Allan Randolph Brewer-Carías, *El Caso de la Apertura Petrolera (Documentos del Juicio de Nulidad Contra la Autorización Parlamentaria para los Convenios de Asociación Petrolera 1996-1999)* ("*Simón Muñoz Armas, et al*.") 318–319 (2001) (emphasis added), Salerno Ex. 67; Brewer Rebuttal Report ¶ 13.
[14] Brewer-Carías, *El Caso de la Apertura Petrolera*, *supra* note 13 at 319, Salerno Ex. 67; Brewer Rebuttal Report ¶¶ 13, 94.

7. The quoted writings of Professors Maekel and Hernández Bretón do not support [redacted] erroneous argument. These professors were specifically criticizing a 1996 opinion of the Attorney General of the Republic (reversing a previous opinion issued in 1977) that public debt contracts entered into by the Republic could not be subject to foreign law or foreign jurisdiction under Article 126 of the 1961 Constitution.[15] They only mentioned public debt contracts entered into by the Republic because those were the only ones considered in the 1996 opinion.[16] They did not exclude the possibility that contracts entered into by decentralized state-owned entities could be national public interest contracts and thus subject to Article 126 of the 1961 Constitution (equivalent to current Article 151). Professors Maekel and Hernández Bretón were not addressing that question at all.

8. [redacted] third argument is that "[even] if the Governing Documents were Contracts of National Interest . . . and Article 151 applied to them, the nature of the Governing Documents would have allowed PDVSA and PDVSA Petróleo to validly choose the law and jurisdiction of the State of New York to govern the validity of the Governing Documents as well as other disputes arising thereunder."[17] As supposed support for this argument, he quotes from the above-referenced 1977 opinion of the Attorney General advising that, because of their commercial nature and being governed predominantly by private law, public financing agreements can be "submitted to the jurisdiction of the lending State" without violating Article 126 of the 1961 Constitution (equivalent to current Article 151) and that "[t]he mere public interest of these contracts is not sufficient to affirm the exclusivity of the Venezuelan

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[15] [redacted] ¶ 37; Tatiana de Maekelt & Eugenio Hernández-Bretón, *Jurisdicción y derecho aplicable en materia de contratos de empréstito público* [*Jurisdiction and applicable law in matters of public loan contracts*], 102 REVISTA DE LA FACULTAD DE CIENCIAS JURÍDICAS Y POLÍTICAS 326 (Universidad Central de Venezuela, 1997), Brewer Reply Decl., Ex. 4.

[16] *Id.*

[17] [redacted] ¶ 42.

jurisdiction."[18] This opinion is not at all inconsistent with my opinion and is entirely correct as far as it goes. It simply does not address the fundamental limitation, which applies to all contracts, that parties cannot exempt themselves by private stipulation from laws governing the public order, which include constitutional provisions limiting the competencies and powers of public entities.

9. Finally, [redacted] asserts that, "[b]ased on the freedom to contract or autonomy of will afforded to the contracting parties, PDVSA and PDVSA Petróleo had the right to choose New York laws to govern both the Indenture, based on which the 2020 Notes were issued, as well as the Pledge Agreement."[19] He then states that I have "acknowledged as much" in my published work.[20] It should go without saying that, when I acknowledge that "[in] public contracts signed by public national entities . . . such as Petróleos de Venezuela S.A. and its subsidiary companies, [it] can be freely established that the applicable law is some foreign law and that the applicable jurisdiction may be that of the courts of any other State or that of arbitral tribunals,"[21] I am not intending to deny the fundamental limitation on freedom of contract that always exists with respect to laws governing the public order. Once again, the chosen foreign law cannot govern the conditions of validity that must be satisfied before the signing of the contract; in particular, conditions regarding the expression of the will of a public contracting party and its manifestation of consent, which is essential to contract formation.[22]

[18] *Id.* ¶ 41 (quoting at [redacted] Ex. 4 at 443).
[19] [redacted] ¶ 44.
[20] *Id.* ¶ 45.
[21] *Id.* ¶ 45 (quoting [redacted] Ex. 5 at 391).
[22] Brewer Report ¶¶ 122–133.

II. AMBASSADOR VECCHIO'S LETTER TO THE COURT IS CONSISTENT WITH MY OPINIONS

10. Contrary to [redacted] assertions,[23] Ambassador Vecchio's letter to the Court is *entirely consistent* with the opinions expressed in my reports. I particularly concur with the statements in the letter addressing: (i) the character of "the Indenture and the Pledge as national public interest contracts that required authorization by the National Assembly"[24]; (ii) the invalidity of the 2020 Notes Transaction due to the Indenture and the Pledge being "void ab initio," having been executed in violation of the Venezuelan Constitution[25]; and (iii) the strategic importance of CITGO to the democratic transition of Venezuela.[26] The basic thrusts of [redacted] attack on the substance of the letter are by now very familiar, and I will not reply to them again here.

11. Regarding the letter's reference to National Assembly resolutions authorizing PDVSA joint venture agreements (to which the Republic was not a party) as national public interest contracts,[27] [redacted] tries to draw a false distinction between authorizations (prior approval) based on Article 33 of the Hydrocarbon Organic Law and authorizations based on Article 150 of the Constitution.[28] [redacted] apparently does not realize that it is precisely because joint ventures regulated by Article 33 of the Hydrocarbon Organic Law[29] are considered national public interest contracts that, when enacting that Organic Law, the National Assembly required authorization ("prior approval") pursuant to the first part of Article 150 of the Constitution, which provides that national public interest contracts must be authorized by the

[23] [redacted] ¶ 10–12.
[24] Letter from Ambassador Carlos Vecchio to Hon. Katherine Polk Failla, *PDVSA et al.* v. *MUFG, et al.*, No. 1:19-cv-10023 (S.D.N.Y. June 9, 2020), ECF No. 80, ¶¶ 10–12.
[25] *Id.* at ¶¶ 14–19.
[26] *Id.* at ¶¶ 20–27.
[27] *Id.* at ¶ 4.
[28] [redacted] ¶ 14.
[29] *Hydrocarbons Organic Law, Gaceta Oficial* No. *37.323*, (Nov. 13, 2001), art. 33 Brewer Reply Decl., Ex. 5.

National Assembly when "required by law" (*i.e.*, by statute).[30] The referenced resolutions, *which expressly refer to Article 150*, are significant because they are examples of contracts entered into by PDVSA subsidiaries (and not the Republic itself) that were authorized by the National Assembly *as national public interest contracts*.[31] Thus, the National Assembly's September 2016 Resolution cannot in any way be characterized as an attempt to "rewrite history" or change Venezuelan law, and there have also been subsequent National Assembly resolutions relating to national public interest contracts to which the Republic was not a party, including other PDVSA contracts.[32]

12. I must also address [redacted] assertion that "[t]he Vecchio Letter adopts a different definition of Contracts of National Interest that contradicts the thesis defended by Professor Brewer-Carías. Specifically, Ambassador Vecchio asserts that the Governing Documents are 'national public interest contract[s]' because of '[t]he purported pledge of a controlling interest in CITGO.'"[33]

13. As explained in my reports and my prior declaration, the Constitutional Chamber has not established any "binding interpretation" of the concept of national public interest contracts in accordance with Article 335 of the Constitution.[34] My opinion in this case, as clearly expressed in my reports, is that the Indenture, the Pledge, and the 2020 Notes are national public interest contracts under any potentially applicable definition, including the non-binding qualitative criteria enumerated in the *Andrés Velásquez* decision (some of which are referenced in the Ambassador's letter), especially because the purported CITGO pledge is an integral part of

[30] Brewer Report ¶ 23.
[31] *See, e.g.,* Resolutions of May 4, 2006 establishing the terms and conditions for Corporación Venezolana del Petróleo to enter into national public interest contacts for the incorporation and functioning of certain mixed enterprises (*Official Gazette* No. 38.430, May 5, 2006), Brewer Opp. Decl. Ex. 6.
[32] Brewer Report ¶ 23; Brewer Rebuttal Report ¶¶ 67– 70.
[33] [redacted] ¶ 17.
[34] Brewer Report ¶¶ 109–111; Brewer Rebuttal Report, ¶¶ 8, 15, 34, 39, 40–54, 74; Brewer Opp. Decl. ¶ 7–8.

the transaction, of which the Indenture, the Pledge, and the 2020 Notes are interrelated components (a "complex contract" under Venezuelan law).[35]

14. If called to testify at trial, I would testify under oath as set forth herein.[36]

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of July, 2020

Allan R. Brewer-Carías

[35] Brewer Report ¶ 42; Brewer Rebuttal Report ¶¶ 55-57.

[36] For the sake of completeness with respect to the Constitutional Chamber's *Attorney General of the Republic II* decision, I would like to point out that the BANDAGRO promissory notes, the authenticity of which had been questioned (and which were later found to be fabricated), were purportedly signed by BANDAGRO's General Manager and Legal Advisor on behalf of BANDAGRO as the "Borrower"—that is, with BANDAGRO as the public contracting party. [redacted] Ex. 19. The notes included a "Guarantee Collateral" purportedly signed by BANDAGRO's then "Intervener" (Waldemar Cordero Vale). *Id*. An "Intervener" pursuant to the Venezuelan banking law then in force was someone appointed at the request of the Superintendent of Banks to supervise and control the finances of a failing bank. The relevant type of "intervention" did not eliminate the bank's autonomy and preserved the bank's organizational structure. An "Intervener," which was a position within the structure of the corporation, had no express power to guarantee the bank's obligations. The "Guarantee Collateral" was purportedly signed by Cordero Vale in his own capacity as Intervener (not on behalf of the Republic), stating: "I confirm that all engagement of BANDAGRO have the backing of the National Government of the Republic of Venezuela according to the letter of Minister of Hacienda number 733 dated November 5, 1981." [redacted] Ex. 19. The purported "guarantee" letter is not part of the record in this case and is not mentioned in the Constitutional Chamber's decision.