

**PCA Case No. 2013-34**

**IN THE MATTER OF AN ARBITRATION PURSUANT TO THE AGREEMENT BETWEEN  
THE GOVERNMENT OF BARBADOS AND THE REPUBLIC OF VENEZUELA FOR THE  
PROMOTION AND PROTECTION OF INVESTMENTS**

**-between-**

**VENEZUELA US, S.R.L.**

**(the “Claimant”)**

**-and-**

**THE BOLIVARIAN REPUBLIC OF VENEZUELA**

**(the “Respondent”, and together with the Claimant, the “Parties”)**

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**DECLARATION OF PROFESSOR MARCELO KOHEN  
(JURISDICTION AND LIABILITY)**

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**5 February 2021**

1. I wish to recall that, in the previous phase of this case, I considered that the Tribunal did not have jurisdiction and explained my point of view in this respect in a dissenting opinion. My colleagues decided the contrary and I am therefore called upon to address, in the present phase, the issues for decision, even if my views expressed previously have not changed.
2. I broadly agree with much of the analysis made in the present Partial Award and with its conclusions, although I may have reached them in some cases through different avenues. I would have preferred that the analysis of the attribution to the State of the relevant acts were examined through the rubric of jurisdiction *ratione personae*, since if such acts are not attributable to the State, the Tribunal lacks jurisdiction. It is true that the attribution of the alleged acts to the State is one of the constitutive elements of an internationally wrongful act, together with the finding of a breach of an international obligation and the absence of the circumstances that preclude wrongfulness. However, to undertake such an analysis, which concerns the merits of the case, it is first necessary to establish the jurisdiction of the Tribunal. It is not necessary that I examine in this declaration other issues of jurisdiction *ratione personae* that may have arisen in the present case and that were not addressed by the Parties. In other circumstances, the Tribunal should have decided *proprio motu* on issues related to its jurisdiction *ratione personae*, even if they were not raised by the Parties.
3. Of all the violations of the obligations under the Barbados/Venezuela BIT alleged by the Claimant, the only one upheld was that relating to the arbitrary and discriminatory conduct against the Claimant for the non-payment of the dividends that corresponded to it in 2008 and 2009. The Partial Award examines why such dividends were paid to one of the shareholders of Petroritupano, who was also a foreign investor (Petrobras Argentina). In my view, the key issue is not that the dividends were paid to another foreign investor, but that the only shareholder of Petroritupano to which those dividends have not been paid was the Claimant. This is sufficient to consider the act to be discriminatory. I understand that the Partial Award deemed it necessary to undertake such an analysis to reach the conclusion that such discriminatory act can be attributed to the Respondent. I reach the same conclusion, including in regards to the attribution of such decision to the Respondent, without any need to address the reasons for the payment to Petrobras Argentina.
4. For the foregoing reasons, I agree with my colleagues on the decision reached in this Partial Award.



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**Professor Marcelo Kohen**