

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Valle Verde Sociedad Financiera S.L. v. Bolivarian Republic of Venezuela  
(ICSID Case No. ARB/12/18)**

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**DECISION ON PROVISIONAL MEASURES**

Dr. Enrique Barros, President of the Tribunal  
Prof. Franco Ferrari, Arbitrator  
Dr. Raúl E. Vinuesa, Arbitrator

*Secretary of the Tribunal*  
Ms. Marisa Planells-Valero

January 25, 2016

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## I. PROCEDURAL HISTORY

1. On June 22, 2012, the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) received a Request for Arbitration (the “**Request**”), dated June 20, 2012 from Valle Verde Sociedad Financiera S.L. (“**Valle Verde**” or the “**Claimant**”), a company organized under the laws of Spain, against the Bolivarian Republic of Venezuela (“**Venezuela**” or the “**Respondent**”). On June 27, 2012, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“**ICSID Institution Rules**”), acknowledged receipt of the Request and transmitted a copy to Venezuela.
2. This case is brought on the basis of the *Acuerdo entre el Reino de España y la República de Venezuela para la Promoción Recíproca de Inversiones* dated November 2, 1995, and which entered into force on September 10, 1997 (the “**BIT**” or “**Treaty**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated March 18, 1965, and which entered into force on October 14, 1966 (the “**ICSID Convention**”).
3. The dispute relates to the alleged expropriation of Casa Propia Entidad de Ahorro y Préstamo, C.A. (“**Casa Propia**”) as well as Valle Verde’s capital contributions and/or funds held for investment in Casa Propia, through actions by Venezuela’s *Superintendencia de las Instituciones del Sector Bancario* in breach of the BIT.
4. On July 25, 2012, the Secretary-General of ICSID registered the Request, notified the parties of this registration pursuant to Article 36 of the ICSID Convention and ICSID Institution Rules 6 and 7, and invited them to constitute an arbitral tribunal as soon as possible.
5. The Tribunal was constituted on December 26, 2012. Its members were Dr. Enrique Barros Bourie, a national of Chile, appointed as president pursuant to Article 38 of the ICSID Convention; Prof. Franco Ferrari, a national of Italy, appointed by the Claimant; and Dr. Raúl E. Vinuesa, a national of Argentina and Spain (the latter nationality was communicated by Dr. Vinuesa in a letter dated April 5, 2014), appointed by the Respondent.
6. On that same date, the Secretary-General also informed the parties and the Tribunal that Ms. Ann Catherine Kettlewell, ICSID Counsel, would serve as Secretary of the Tribunal.
7. On December 27, 2012, the Centre requested both parties to make a first advance payment of US\$250,000 to meet the expenses to be incurred during the first three to six months of the proceeding, pursuant to Regulation 14(3)(d) of the ICSID Administrative and Financial Regulations.
8. On January 4, 2013, the Tribunal indicated its availability to hold the first session. On January 14, 2013, the Centre requested that the parties provide information regarding the advance payment in order to hold this first session with court reporting and translation services. On January 23, 2013, in view of the non-payment of the requested advances, the Tribunal cancelled the first session with the parties and proceeded to hold the session

only with the Tribunal Members as scheduled on January 25, 2013. On that same date, the Tribunal issued Procedural Order No. 1.

9. On February 12, 2013, the Centre informed the parties of the default and invited either party to pay the requested US\$250,000 pursuant to Regulation 14(3)(d) of ICSID Administrative and Financial Regulations. Not having received payment from either party, on March 1, 2013, the Secretary-General moved that the Tribunal suspend the proceeding in accordance with ICSID Administrative and Financial Regulation 14(3)(d).
10. On March 5, 2013, the Tribunal suspended the proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d).
11. On March 8, 2013, the Centre received from the Claimant an advance payment of US\$125,000.
12. On March 14, 2013, the Tribunal lifted the suspension and the proceeding resumed.
13. On April 4, 2013, the Centre requested an update regarding Respondent's outstanding advance.
14. On May 6, 2013, the Tribunal issued Procedural Order No. 2 recording the parties' agreements and the Tribunal's decisions on a number of procedural matters.
15. On May 30, 2013, the Centre invited either party to pay the outstanding amount of USD\$125,000 pursuant to ICSID Administrative and Financial Regulation 14(3)(d). On June 19, 2013, the Claimant paid the amount of USD\$125,000.
16. On June 9, 2013, the Claimant submitted a Petition for Declaration Regarding the Allocation of Costs (the "**Petition**") requesting the Tribunal to issue an interim order declaring that the advance payments not made by Venezuela be reflected in the final award on costs, and that Venezuela bear any additional costs resulting from its dilatory tactics, in the form of interests on any sum deposited by Valle Verde on its behalf.
17. On June 17, 2013, Venezuela responded that it was actively participating in these proceedings with no purpose of delay or abuse, and that the ICSID Convention provides for the moment in which the Tribunal shall decide about the expenses incurred by the parties in connection with the proceedings.
18. On June 26, 2013, the Claimant replied that, in its Petition, it was merely requesting the Tribunal to affirm its authority regarding allocation of costs in ICSID arbitrations and to state, at the earliest phase of these proceedings, that it will apply its discretion in determining the allocation of costs borne by Valle Verde in the final award.
19. On July 24, 2013, the Tribunal issued its Procedural Order No. 3, denying the Claimant's request regarding the allocation of costs and declaring that it would decide on the matter at the appropriate procedural stage, *i.e.* in the award.
20. On August 1, 2013, the Claimant informed of the parties' agreement to extend the deadlines of the submissions. On August 5, 2013, the Tribunal confirmed this agreement.

21. On September 6, 2013, the Claimant requested an additional extension for the submission of its Memorial. On September 10, 2013, the Respondent submitted its comments to this request. Further comments from the Respondent were filed on September 26, 2013 and from Claimant on October 3, 2013. On October 7, 2013, after considering the parties' arguments regarding the Claimant's request, the Tribunal issued its decision on the request and amended the procedural calendar accordingly.
22. On October 11, 2013, pursuant to the new procedural calendar, the Claimant submitted its Memorial together with witness statements, expert report, exhibits and legal authorities.
23. On April 16, 2014, the Respondent filed a Counter-Memorial on the Merits and a request to address the objections to jurisdiction as a preliminary question (the "**Request for Bifurcation**").
24. On May 23, 2014, the Claimant filed observations on the Request for Bifurcation.
25. On August 8, 2014, the Tribunal issued its Decision granting the Request for Bifurcation and suspending the proceeding on the merits until the resolution of this preliminary phase.
26. On August 12, 2014, the Centre requested from the parties a second advance payment of US\$500,000, pursuant to ICSID Administrative and Financial Regulation 14(3)(d), to meet the expenses incurred and to be incurred during the next three to six months of the proceeding. Not having received the requested funds, on September 12, 2014, the Centre informed the parties of the default and invited either party to pay the requested US\$500,000, pursuant to ICSID Administrative and Financial Regulation 14(3)(d).
27. On September 30, 2014, not having received the requested funds from the parties, the Secretary-General moved that the Tribunal suspend the proceeding in accordance with ICSID Administrative and Financial Regulation 14(3)(d). On October 1, 2014, the Tribunal suspended the proceeding.
28. On January 15, 2015, Ms. Marisa Planells-Valero, ICSID Counsel, was appointed as Secretary of the Tribunal, following Ms. Ann Catherine Kettlewell's departure from the ICSID Secretariat.
29. On March 23, 2015, the Centre informed the parties that, as no payment had been received in the six month-period following the suspension of the proceeding, the Secretary-General was considering moving that the Tribunal discontinue the proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d), and invited the parties to submit their observations by March 30, 2015.
30. On March 30 and April 1, 2015, the Respondent requested that the Tribunal discontinue the proceedings, and the Claimant requested a 60-day extension to secure the funds to make the outstanding payment.

31. On May 11, 2015, as the requested payment was still outstanding, the Secretary-General moved that the Tribunal discontinue the proceeding pursuant to ICSID Administrative and Financial Regulation 14(3)(d). On that same date, the Claimant requested a 72-hour extension to make the outstanding payment. On May 12, 2015, the Tribunal granted this extension.
32. On May 20, 2015, the Centre confirmed having received on May 15, 2015, from Valle Verde Sociedad Financiera S.L., the amount of US\$500,000, corresponding to the advance requested by the Centre's communications of August 12 and September 12, 2014.
33. On May 27, 2015, the Tribunal lifted the suspension and the proceeding resumed.
34. On June 11, 2015, the Tribunal issued its Procedural Order No. 4 establishing a new procedural calendar in this case.
35. On June 16, 2015, the Respondent requested to be granted the same 30-day extension conceded to the Claimant on September 23, 2014.
36. By letter of June 22, 2015, the Tribunal granted the Respondent's request for an extension and amended the procedural calendar established in Procedural Order No. 4 accordingly.
37. On June 29, 2015, DLA Piper LLP informed that it had been unable to reach an agreement with the Claimant concerning the terms under which it would be re-engaged to continue with the representation of the Claimant in this case. On that same date, Mr Cesar Daniel Camejo Blanco requested, on behalf of Valle Verde, a 60-day extension for the filing of the Claimant's Counter-Memorial on Jurisdiction, informing that it had no objection to the Tribunal providing Venezuela with a corresponding extension of time or any other extension of time that the Tribunal deemed suitable.
38. On July 1, 2015, the Tribunal granted the Claimant's request for an extension. The Tribunal also informed that the dates for the remaining filings fixed in Procedural Order No. 4 (as amended by letter of June 22, 2015) were vacated and that new dates would be fixed by the Tribunal after due reception of the Claimant's Counter-Memorial on Jurisdiction.
39. On July 10, 2015, the Respondent requested the Tribunal to revise its decision of July 1, 2015. On July 16, 2015, the Tribunal, after due consideration of the Respondent's arguments, decided to reaffirm its decision to grant the extension requested by the Claimant.
40. By communication of September 1, 2015, Mezgravis & Associates filed its Request for Extension and Provisional Measure in which it informed the Tribunal that on August 28, 2015, Mr Camejo Blanco had retained them as counsel for the Claimant in this case, asked a 3-month extension for the filing of the Counter-Memorial on Jurisdiction, and requested provisional measures in accordance with ICSID Arbitration Rule 39 (the "**Claimant's First Request**").

41. On that same date, the Respondent opposed the extension and requested an opportunity to reply to the Claimant's First Request.
42. On September 2, 2015, the Tribunal invited the Respondent to provide comments to the Claimant's First Request by September 16, 2015, and informed the parties that the deadline for the filing of the Claimant's Counter-Memorial on Jurisdiction was suspended until the Tribunal was able to take a decision on the Claimant's request for an extension.
43. On September 9, 2015, the Tribunal, after due deliberation and considering the circumstances of the case, granted the Claimant a 45-day extension for the filing of its Counter-Memorial on Jurisdiction.
44. On September 16, 2015, Venezuela submitted its Response to the Claimant's First Request ("**Venezuela's Response**"). On September 17, 2015, the Claimant requested an opportunity to reply to the Venezuela's Response. On September 18, 2015, the Respondent opposed the Claimant's request and asked for an opportunity to reply should the Claimant's request be granted.
45. On September 21, 2015, the Tribunal invited the Claimant to submit a reply to Venezuela's Response by October 2, 2015, and indicated that the Respondent would be given an opportunity to respond to the Claimant's comments in due course.
46. On October 5, 2015, the Tribunal confirmed receipt of the Claimant's reply of October 2, 2015 (the "**Claimant's Reply**"), in which the Claimant included a request for an additional provisional measure ("**Claimant's Additional Request**"), and invited the Respondent to submit comments by October 19, 2015.
47. On October 19, 2015, the Respondent submitted its rejoinder on the Claimant's Request for Provisional Measures ("**Venezuela's Rejoinder**").
48. On October 26, 2015, the Claimant submitted its Counter-Memorial on Jurisdiction together with witness statements, expert report, exhibits and legal authorities.
49. On October 27, 2015, the Tribunal, pursuant to its letters of July 1 and 16, 2015, invited the parties to reach an agreement as to the new procedural calendar for written submissions in this case and to inform the Tribunal of their agreement, if any, or of their respective positions, by November 5, 2015.
50. On November 5, 2015, the parties informed the Tribunal that they had been unable to reach an agreement and communicated their respective proposals as to the new procedural calendar in this case.
51. On November 9, 2015, the Claimant submitted a further communication regarding the procedural calendar in this case. On November 13, 2015, the Respondent replied to this communication.
52. On November 17, 2015, the Tribunal issued its Procedural Order No. 5 establishing a new procedural calendar for written submissions in this proceeding.

53. On November 20, 2015, the Claimant requested the Tribunal to revise its decision of November 17, 2015. On November 27, 2015, the Respondent submitted its comments to this request. On December 4, 2015, the Tribunal informed that, after due consideration of the parties' arguments, it saw no reason to modify its decision of November 17, 2015.
54. On January 19, 2016, pursuant to the procedural calendar established by Procedural Order No. 5, the parties submitted to the Tribunal their requests for production of documents.
55. This decision rules on (1) the Claimant's First Request for Provisional Measures seeking that the Tribunal order the Respondent to make the advance payment for its portion of costs as set by the ICSID Secretariat, and to repay the US\$375,000 advanced by the Claimant, and on (2) the Claimant's Additional Request for Provisional Measures seeking that the Tribunal order the Respondent to correct or destroy the information published in two websites reporting a statement made by the President of Venezuela's National Assembly against DLA Piper and Valle Verde's representative, and to refrain from carrying out any other conduct which could aggravate or extend this dispute.

## **II. REQUEST FOR PROVISIONAL MEASURES**

### **a. Claimant's Arguments**

56. In its First Request for Provisional Measures of September 1, 2015, the Claimant requests the Tribunal to issue provisional measures ordering the Respondent:
  - (a) "To make the advance payment for its portion on costs as set by the ICSID Secretariat;
  - (b) [To] repay within a reasonable period of time the sum of US\$375,000 the Claimant had to pay in advance due to the Respondent's unjustified failure,
  - (c) And in case of reluctance, to issue on its own initiative and pursuant to Arbitration Rule 39(3) any other provisional measure it may deem as convenient."<sup>1</sup>
57. The Claimant argues that Venezuela's disregard of its obligation to make advance payments in this proceeding pursuant to Article 61(2) of the ICSID Convention, ICSID Arbitration Rule 28 and ICSID Administrative and Financial Regulation 14, has put it in a critical financial situation, which seriously infringes on its right of defense and access to justice.<sup>2</sup>
58. The Claimant concedes that the Request is based on the same facts that founded its Petition of June 9, 2013 (*i.e.*, the lack of advance payments by Venezuela) (see § 16 above), and argues that it has a legitimate right to make different petitions based on the

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<sup>1</sup> Claimant's Request ¶¶ 61.

<sup>2</sup> Claimant's Request ¶¶ 3-4 and 28.

same facts and that, by doing so, has not waived its right of defense or infringed the estoppel doctrine.<sup>3</sup>

59. According to the Claimant, Venezuela cannot justify its disregard of the obligation to pay the requested advances on its objections to the competence of the Tribunal and the jurisdiction of the Centre.<sup>4</sup>
60. The Claimant alleges that the requested measures are necessary and urgent because the proceeding, already at risk, could become even more difficult to conduct if the Tribunal rejected the Request.<sup>5</sup> The Claimant adds that “the cost burdening the Respondent if the measure is issued is virtually inexistent and significantly lower, by far, than the damage (actually irreparable) that the Claimant would suffer.”<sup>6</sup>
61. The Claimant also explains that, if the Request is rejected, “it would have no choice but to recur to a third party funding”, a recourse that would be “highly expensive, uncertain, and quite remote” since, due to the risk of default, “very few aid [...] funds are willing to fund disputes against Venezuela,” and they are only willing to do so in exchange of an “extremely high percentage on the indemnification granted.”<sup>7</sup> The dispute would also be aggravated in a significant way due to these extremely high funding costs.<sup>8</sup>
62. The Claimant affirms that Venezuela provides with an erroneous and biased interpretation of ICSID Administrative and Financial Regulation 14, following which the failure to pay leads to the stay and subsequent termination of the arbitration proceeding.<sup>9</sup> According to the Claimant, while a party has the right to cover the payment that the other party has failed to fulfil, it is not obliged to do so: the obligation to pay remains on the defaulting party and does not expire.<sup>10</sup>
63. In its Reply, the Claimant requests an additional measure (see § 46 above) pursuant to which Venezuela should correct or destroy the information published in two websites reporting certain statement made by the President of Venezuela’s National Assembly against DLA Piper LLP and Mr Camejo Blanco, and refrain from carrying out any other conduct which could aggravate or extend the current dispute. Valle Verde claims that such statement violates Venezuela’s obligation to provide full protection and security.<sup>11</sup>

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<sup>3</sup> The Claimant explains that the Petition aimed to obtain an order from the Tribunal declaring that the advances payments not made by Venezuela and any additional costs derivated from Venezuela’s dilatory and abusive tactics should be reflected in the final award on costs, and the First Request focuses on the negative effects on the non-payment by Venezuela on an appropriate defense and on the access to the arbitral justice agreed. Claimant’s Request ¶¶ 13-14; Claimant’s Reply ¶ 10.

<sup>4</sup> The Claimant refers to Venezuela’s letter of April 26, 2013, listing the circumstances under which Venezuela would refrain from making payments related to arbitration proceedings initiated against it after its denunciation of the ICSID Convention, and argues that none of those circumstances is present in this case. Claimant’s Request ¶¶ 15-23; Claimant’s Reply ¶ 28.

<sup>5</sup> Claimant’s Request ¶ 52.

<sup>6</sup> Claimant’s Request ¶ 59.

<sup>7</sup> Claimant’s Request ¶ 55.

<sup>8</sup> Claimant’s Reply ¶ 29.

<sup>9</sup> Claimant’s Reply ¶¶ 18 and 33.

<sup>10</sup> Claimant’s Reply ¶¶ 24-26.

<sup>11</sup> Claimant’s Reply ¶¶ 43-49.

Together with its Reply, the Claimant included a new witness statement from Mr Camejo Blanco (“**Mr Camejo Blanco’s Witness Statement**”), which refers to the current financial situation of Valle Verde and to several actions adopted by the Venezuelan authorities against him.

**b. Respondent’s Arguments**

64. The Respondent argues that the Claimant’s First Request is inadmissible as it is precluded by the doctrine of estoppel. In requesting this measure, the Claimant is contradicting its own procedural acts submitting arguments contrary to the ones presented to the Tribunal in its Petition of June 9, 2013.<sup>12</sup> The Respondent submits that the Tribunal has already decided on the present issue and has denied any possibility of rendering a decision on the allocation and payment of costs prior to the final award.<sup>13</sup>
65. The Respondent also argues that the Claimant’s First Request is inconsistent with ICSID Administrative and Financial Regulation 14, which provides for the “only applicable solution” to this issue,<sup>14</sup> and explains that “the failure to pay leads to the stay and subsequent discontinuance of the arbitration proceeding, but in no case does it lead to the granting of provisional measures ordering one of the parties to make those advance payments”.<sup>15</sup>
66. Moreover, the Claimant’s First Request should be rejected by the Tribunal as it does not meet any of the essential requirements for the adoption of this type of measures: the Claimant has not identified the alleged protected right in connection with the main claim, there is no urgency, and there is not irreparable harm. Since there is no obligation that a State make an advance payment of costs, the Claimant does not have a right that warrants protection.<sup>16</sup> Since the funds provided by the Claimant seem to be enough for the Tribunal to render a decision on its jurisdiction and the Claimant has just retained new counsel, there is no urgency.<sup>17</sup> Since the Claimant admits that, without this measure, it would have other ways of obtaining the necessary funds, there is no risk of irreparable harm.<sup>18</sup> The Respondent adds that, in bringing this arbitration, the Claimant should have taken into account the costs that it would be required to pay.<sup>19</sup>
67. On the contrary, Venezuela argues, granting the requested measures would entail a genuine risk of irreparable harm to the Respondent<sup>20</sup> since it may not be reimbursed at the costs stage as a result of the Claimant’s delicate financial situation.<sup>21</sup> Venezuela adds that this is the reason why it has requested security for any costs incurred in this proceeding.<sup>22</sup>

<sup>12</sup> Venezuela’s Response ¶¶ 5-13; Venezuela’s Rejoinder ¶ 16.

<sup>13</sup> Venezuela’s Rejoinder ¶ 14.

<sup>14</sup> Venezuela’s Response ¶ 18.

<sup>15</sup> Venezuela’s Response ¶ 17.

<sup>16</sup> Venezuela’s Response ¶¶ 28-30 and 38.

<sup>17</sup> Venezuela’s Response ¶ 40.

<sup>18</sup> Venezuela’s Response ¶ 46.

<sup>19</sup> Venezuela’s Response ¶ 44.

<sup>20</sup> Venezuela’s Response ¶ 45.

<sup>21</sup> Venezuela’s Response ¶ 50.

<sup>22</sup> *Ibid.*

68. According to the Respondent, the Tribunal does not have the necessary *prima facie* jurisdiction to issue a decision on this First Request.<sup>23</sup> Moreover, the adoption of the requested measures would prejudice the Tribunal's decision on jurisdiction since it would anticipate an issue (i.e., the allocation of costs) which, according to the Tribunal, can only be decided in the award.<sup>24</sup>
69. The Respondent also demands that the Tribunal rejects the Claimant's Additional Request. According to the Respondent, the Claimant has failed to demonstrate how such a statement to the press can aggravate the present dispute,<sup>25</sup> the declarations in question were not addressed to Mr Camejo Blanco, did not refer to any company related to him, were not connected to any aspect of this proceeding, cannot be attributed to the Venezuelan State,<sup>26</sup> and the Tribunal cannot exercise coercive power over third parties to these proceedings, such as the Venezuelan media.<sup>27</sup>
70. The Respondent also argues that the filing of Mr Camejo Blanco's Witness Statement is inconsistent with Procedural Order No. 2,<sup>28</sup> and requests the Tribunal to remove it from the record in this case.<sup>29</sup>

### III. TRIBUNAL'S ANALYSIS

#### a. Preliminary Issues

71. The Tribunal will first deal with three issues discussed by the parties that, under the Tribunal's view, have a preliminary character: (i) the Tribunal's authority to recommend provisional measures; (ii) the connection between the Claimant's Petition of June 9, 2013 and the Claimant's First Request of September 1, 2015; and (iii) the compatibility between the Claimant's First Request and ICSID Administrative and Financial Regulation 14(3)(d).

##### (i) Tribunal's Authority To Recommend Provisional Measures

72. The relevant provisions dealing with a request for provisional measures are: (i) Article 47 of the ICSID Convention and (ii) Rule 39 of the ICSID Arbitration Rules.
73. Article 47 of the ICSID Convention provides as follows:

*Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*

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<sup>23</sup> Venezuela's Response ¶ 56.

<sup>24</sup> Venezuela's Response ¶¶ 58-60; Venezuela's Rejoinder ¶ 23.

<sup>25</sup> Venezuela's Rejoinder ¶ 26.

<sup>26</sup> Venezuela's Rejoinder ¶ 27-30.

<sup>27</sup> Venezuela's Rejoinder ¶ 5, footnote 11.

<sup>28</sup> Venezuela's Rejoinder ¶ 8.

<sup>29</sup> Venezuela's Rejoinder ¶ 10.

74. In turn, Rule 39(1) of the ICSID Arbitration Rules provides as follows:

*At any time after the institution of the proceedings, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.*

75. In light of the abovementioned rules, it is unquestionable that, in general, a tribunal operating under the ICSID Convention and the ICSID Arbitration Rules has the authority to order provisional measures to preserve a party's right. Although the two provisions indicate that the tribunal may only "recommend" the adoption of provisional measures, it is well settled among ICSID tribunals that decisions recommending such measures are binding.<sup>30</sup>

76. In this case, the Respondent has questioned the Tribunal's authority to adopt the requested measures on the ground that the Tribunal's jurisdiction to rule on the dispute is under objection. The Respondent argues that the Tribunal cannot assume *prima facie* jurisdiction for the purpose of granting these measures because of the strong jurisdictional objections that Venezuela has raised, objections that led the Tribunal to bifurcate the proceeding. The Respondent adds that such assumption would have the effect of prejudging the pending jurisdictional issues.

77. The Tribunal disagrees with the Respondent on this point, for the following reasons:

- (a) The sole fact that the jurisdiction of a tribunal is contested does not exclude its power to recommend provisional measures. Article 47 and Rule 39 are formulated in broad terms and do not restrict the tribunal's authority to grant such measures, even if the tribunal has not yet decided on the issue of jurisdiction. Moreover, Rule 39 clearly states that provisional measures can be ordered at any time after the institution of the proceedings.<sup>31</sup> Since "any time" includes the time before the Tribunal has made a determination on jurisdiction, it follows that it must be possible to consider a request for provisional measures before ruling on jurisdiction provided that the Tribunal is satisfied that it has *prima facie* jurisdiction.
- (b) Considering the arguments on jurisdiction at face value as presented by the Claimant under the instruments governing the Tribunal's jurisdiction in the present case (the ICSID Convention and the BIT), the Tribunal is satisfied that they could afford a basis on which jurisdiction could be founded. Accordingly, the Tribunal is satisfied that it has *prima facie* jurisdiction. This finding is, of course, without prejudice to the Tribunal's decision on jurisdiction.<sup>32</sup>

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<sup>30</sup> See, for example, *Tethyan v. Pakistan* (ICSID Case No. ARB/12/1), Decision on Provisional Measures, December 13, 2012, ¶ 120; *Occidental v. Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, August 17, 2007, ¶ 58; *Tokios Tokelès v. Ukraine* (ICSID Case No. ARB/02/18), Procedural Order No. 1, July 1, 2003, ¶ 4; *Maffezini v. Spain* (ICSID Case No. ARB/97/7), Procedural Order No. 2, October 28, 1999, ¶ 9.

<sup>31</sup> See *Azurix v. Argentina* (ICSID Case No. ARB/01/12), Decision on Provisional Measures, August 06, 2003, ¶¶ 30-31.

<sup>32</sup> See, for example, *Occidental v. Ecuador* (ICSID Case No. ARB/06/11) Decision on Provisional Measures, August 17, 2007 ¶¶ 55; *Perenco Ecuador Limited v. Ecuador* (ICSID Case No. ARB/08/6), Decision on Provisional Measures, May 8, 2009 ¶¶ 39-41; *Quiborax S.A. and Non-Metallic Minerals S.A. v. Bolivia* (ICSID Case No. ARB/06/2), Decision on

- (c) The Tribunal's authority to recommend provisional measures is not undermined by its decision on bifurcation. As it was stated in the respective order, the bifurcation of the proceedings is a discretionary power of the tribunal, which main purpose is to ensure procedural fairness and efficiency, according to the circumstances of the case.<sup>33</sup> In other words, it is a case management determination that runs on its own rules and has no implication on the Tribunal's determination of jurisdiction.
- (d) Finally, the Tribunal stresses that interim measures are essentially provisional, thus any recommendation on this matter would not prejudice the dispute on jurisdiction or merits. If the Tribunal finds that a specific request requires anticipating an opinion on the contested issues at stake, it will reject it, as it did in Procedural Order No. 3.<sup>34</sup>
78. In light of the above, the Tribunal finds that it has authority and *prima facie* jurisdiction at this point to recommend provisional measures. It should be emphasized that this determination is without prejudice to a later decision on Venezuela's objections to the jurisdiction of the Tribunal.
- (ii) Connection between the Claimant's Petition of June 9, 2013, and the Claimant's First Request of September 1, 2015
79. The Tribunal considers that the Petition of June 9, 2013, and the Request for Provisional Measures of September 1, 2015, are substantially different. In its Petition of June 9, 2013, Valle Verde requested an interim order declaring that (i) advance payments not made by Venezuela would be reflected in the final award on costs, and (ii) Venezuela would bear additional costs resulting from dilatory and abusive tactics. On that occasion, the Tribunal dismissed the Petition because it implied a decision on allocation of costs, a matter which the Tribunal will decide in the award. On this occasion, the Request is different: it does not point to the allocation of costs in the award, but to the payment of the advances fixed by the ICSID Secretariat for the funding of the process.
80. The main question at this point is whether the Petition of June 9, 2013 prevents the Claimant from making the First Request (estoppel). The Tribunal considers that it does not, for the following reasons:
- (a) As already stated, interim measures are essentially provisional (see § 77 (d) above). As a consequence of their own nature, these type of measures are temporary and dependent upon the existence (and maintenance) of the circumstances that justified their adoption. In principle nothing prevents parties from requesting the same or

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Request for Provisional Measures, February 26, 2010 ¶¶ 108-112; *Nuclear Tests (Australia v. France)*, Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 102 ¶ 17; *Nuclear Test Case (New Zealand v. France)*, Interim Protection, Order of 22 June 1973, p. 138 ¶ 18; See also Gabrielle Kaufmann-Kohler & Aurélia Antonietti, Interim Relief in International Investment Agreements, *Arbitration under International Investment Agreements: An Analysis of the Key Procedural, Jurisdictional and Substantive Issues* (Katia Yannaca-Small ed.), Oxford University Press, pp. 530-532 (2010).

<sup>33</sup> Decision on Bifurcation, August 08, 2014, ¶¶ 49-53.

<sup>34</sup> Procedural Order No. 3, July 22, 2013, ¶¶ 15-17.

different measures if new circumstances arise, even if the request is based on the same facts.<sup>35</sup>

- (b) As Venezuela recognizes, the doctrine of estoppel seeks to prevent, in a procedural context, a dramatic and abusive change of position from one party that undermines the position of the other party. However, the Tribunal does not consider that Valle Verde's First Request meets this threshold. By filing this First Request, the Claimant has not modified the arguments contained in its previous Petition in the manner described. A party is entitled to request that the other party be ordered to meet its advance payment obligations and that its reluctance be reflected in the Tribunal's ruling on costs. Nor has the Respondent acted in reliance of the Claimant's Petition such that its position has been undermined. Accordingly, the filing of the First Request is not prevented by the doctrine of estoppel.

81. In conclusion, the Tribunal considers that the doctrine of estoppel does not prevent Valle Verde from making the First Request for provisional measures.

(iii) Compatibility between the Claimant's First Request and ICSID Administrative and Financial Regulation 14(3)(d)

82. A third preliminary aspect of Claimant's First Request relates to its compatibility with ICSID Administrative and Financial Regulation 14(3)(d), which provides as follows:

*[...] in connection with every conciliation proceeding, and in connection with every arbitration proceeding unless a different division is provided for in the Arbitration Rules or is decided by the parties or the Tribunal, each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention. All advances and charges shall be payable, at the place and in the currencies specified by the Secretary-General, as soon as a request for payment is made by him. If the amounts requested are not paid in full within 30 days, then the Secretary-General shall inform both parties of the default and give an opportunity to either of them to make the required payment. At any time 15 days after such information is sent by the Secretary-General, he may move that the Commission or Tribunal stay the proceeding, if by the date of such motion any part of the required payment is still outstanding. If any proceeding is stayed for non-payment for a consecutive period in excess of six months, the Secretary-General may, after notice to and as far as possible in consultation with the parties, move that the competent body discontinue the proceeding;*

83. The main question at this point refers to the scope and effects of Regulation 14(3)(d) above quoted. As will be explained in the following paragraphs, the Tribunal considers that the requested measures are incompatible with the scheme of Regulation 14(3)(d).

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<sup>35</sup> See, for example, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (ICJ Reports 2006), First Decision on Provisional Measures, July 13, 2006, ¶ 86, and Second Decision on Provisional Measures, January 23, 2007, ¶ 55.

84. The Tribunal first notes that the purpose of the requested provisional measures relating to the advance payments is the enforcement of Venezuela's obligation to pay its half of the advances fixed by the ICSID Secretariat. Non-compliance with this obligation is expressly regulated by Regulation 14(3)(d), which main purpose is to allow the interested party to cover the unpaid portion of the advances in order to avoid the discontinuance of the proceeding. Naturally, the payment of the outstanding portion by the interested party does not mean that the other party is discharged from its obligation to pay. Regulation 14(3)(d) also provides that the distribution of the advances is *without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention*.<sup>36</sup> Therefore, a tribunal has the authority to mend a situation of default in the final allocation of costs by awarding costs to the party that financed the proceeding. The Tribunal has no authority to modify the default scheme provided by Rule 14(3)(d). This is simply part of the "rules of the game". Accordingly, the possibility of default is a consideration that should be taken into account by the parties to ICSID proceedings. Valle Verde always knew about the possibility of having to cover Venezuela's share and therefore cannot claim a breach of its procedural rights once this possibility materialized.<sup>37</sup>
85. In consequence, the Tribunal considers that the Claimant's First Request cannot proceed under the default structure provided by ICSID Administrative and Financial Regulation 14(3)(d) and is therefore rejected as inadmissible. Nevertheless, the Tribunal reiterates that the Respondent has the obligation to pay half of the advance payments requested by the ICSID Secretariat, in accordance with Section 5.1 of Procedural Order No. 2, ICSID Administrative and Financial Regulation 14(3)(d), and Rule 28 of the ICSID Arbitration Rules. The Tribunal reserves its right to rely on defaulted advance payments when considering its final allocation of costs.

**b. Requirements for the adoption of provisional measures**

86. As can be derived from Article 47 of the ICSID Convention and Rule 39(1) of the ICSID Arbitration Rules, an order recommending provisional measures must be motivated by *exceptional circumstances*.<sup>38</sup> Several ICSID tribunals have confirmed that those

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<sup>36</sup> Article 61(2) of the ICSID Convention states: "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award".

<sup>37</sup> This understanding is coherent with the decision adopted in *Highbury International AVV, Compañía Minera de Bajo Caroní AVV, and Ramstein Trading Inc. v. Venezuela II* (ICSID Case No. ARB/14/10), Decision on Provisional Measures, September 24, 2015, ¶¶ 35 and 50. The Tribunal has also analysed the decision taken in *Crespo and others v. Poland* (ICC Case No. 113921KCA), Preliminary Award, October 25, 2002 (Annex C-41). The Tribunal considers that this last decision cannot serve as a guide for the Tribunal, since it was taken under different procedural rules and factual circumstances.

<sup>38</sup> See, for example, *RSM v. Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs, August 13, 2014, ¶ 75; *Commerce Group v. El Salvador* (ICSID Case No. ARB/09/17), Decision on El Salvador's Application for Security for Costs, September 20, 2012, ¶ 44; *Burimi v. Albania* (ICSID Case No. ARB/11/18), Procedural Order N°2, March 5, 2012, ¶ 34; *Grynberg v. Grenada* (ICSID Case No. ARB/10/6), Decision on Respondent's Application for Security for Costs, October 14, 2010, ¶ 5.17; *Occidental v. Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, August 17, 2007, ¶ 59; *Phoenix v. Czech Republic* (ICSID Case No. ARB/06/5), Decision on Provisional Measures, April 06, 2007, ¶ 32; *Saipem v. Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, ¶ 174; *Plama v. Bulgaria*

circumstances have to be such that the applicant cannot await the outcome of the decision on the merits (*urgency*)<sup>39</sup> and that the measures are necessary to protect an existing right<sup>40</sup> and to avoid irreparable harm (*necessity*).<sup>41</sup> It is also well settled that these circumstances have to be proven by the requesting party.<sup>42</sup>

(i) First Request for Provisional Measures

87. Even if the First Request were considered to be admissible, the Tribunal would still reject it since, as explained in the following paragraph, this Request does not meet the legal requirements for its adoption.
88. The Tribunal is conscious that procedural rights such as the right of defense (as opposed to “substantive rights”, which form part of the main claim or subject matter of the dispute) have been deemed worthy of protection through provisional measures.<sup>43</sup> However, in this case, the Tribunal considers that the Claimant has not proven the existence of circumstances that could impede the exercise of those rights. Particularly, the availability of other sources of funding, as recognized by the Claimant, shows that its financial difficulties –even if they were proven– would not be an impediment for the continuation of the proceeding.
89. Therefore, the Tribunal considers that the legal requirements for the recommendation of the provisional measures sought in the First Request for would not have been met had it been considered admissible.

(ii) Additional Request for Provisional Measures

90. Valle Verde alleges that Venezuela should correct or destroy the information published in two websites reporting certain statement made by the President of Venezuela’s National Assembly against DLA Piper LLP and Mr Camejo Blanco, and refrain from carrying out any other conduct which could aggravate or extend the current dispute in

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(ICSID Case No. ARB/03/24), Order of the Tribunal on the Claimant’s Request for Urgent Provisional Measures, September 06, 2005, ¶ 38.

<sup>39</sup> It has been accepted that if the requested measure relates to the integrity of the proceedings or to the non-aggravation of the dispute, it is always urgent; see, for example, *Quiborax v. Bolivia*, Decision on Provisional Measures, February 26, 2010, ¶ 153.

<sup>40</sup> See, for example, *Tethyan v. Pakistan* (ICSID Case No. ARB/12/1), Decision on Provisional Measures, December 13, 2012, ¶ 118; *Burimi v. Albania* (ICSID Case No. ARB/11/18), Procedural Order No. 2, May 03, 2012, ¶ 34; *Perenco v. Ecuador* (ICSID Case No. ARB/08/6), Decision on Provisional Measures, May 08, 2009, ¶ 43; *Saipem v. Bangladesh* (ICSID Case No. ARB/05/7), Decision on Jurisdiction and Recommendation on Provisional Measures, March 21, 2007, ¶ 174; *Plama v. Bulgaria* (ICSID Case No. ARB/03/24), Order of the Tribunal on the Claimant’s Request for Urgent Provisional Measures, September 06, 2005, ¶ 38; *Tanzania Electric v. IPTL* (ICSID Case No. ARB/98/8), Decision on the Respondent’s Request for Provisional Measures, December 20, 1999, ¶ 18.

<sup>41</sup> See, for example, *Occidental v. Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, August 17, 2007, ¶¶ 59 and 61; *Plama v. Bulgaria* (ICSID Case No. ARB/03/24), Order of the Tribunal on the Claimant’s Request for Urgent Provisional Measures, September 06, 2005, ¶ 38.

<sup>42</sup> See, for example, *Tanzania Electric v. IPTL* (ICSID Case No. ARB/98/8), Decision on Provisional Measures, December 20, 1999, ¶ 18; *Maffezini v. Spain* (ICSID Case No. ARB/97/7), Decision on Provisional Measures (Procedural Order No. 2), October 28, 1999, ¶ 10.

<sup>43</sup> See, for example, *Burlington Resources v. Ecuador* (ICSID Case No. ARB/08/5), Procedural Order No. 1, June 29, 2009 ¶ 60.

breach of Venezuela's obligation to provide full protection and security in accordance with the BIT.<sup>44</sup>

91. In turn, the Respondent requests the Tribunal to reject the Additional Request as the Claimant has failed to demonstrate how such statements could aggravate the present dispute as the declarations in question were not addressed to Mr Camejo Blanco or to any company related to him, and were not connected to any aspect of this proceeding. The Respondent adds that such statements cannot be attributed to the Venezuelan State, and that the Tribunal cannot exercise coercive power over the Venezuelan media.
92. The Tribunal considers that these issues should be dealt with in the merits phase (if the Tribunal affirms its jurisdiction to do so), taking into account the evidence presented by the parties. In any case, the Tribunal considers that the Claimant has not shown the required urgency and necessity in order to grant this additional measure.
93. In light of the above, Valle Verde's Additional Request is also denied.

**c. Other issues**

(i) Admissibility of Mr Camejo Blanco's Witness Statement

94. Section 11.5 of Procedural Order No. 2 establishes that the Tribunal "shall not admit any testimony or other evidence that has not been filed with the written submissions, unless the Tribunal determines that exceptional circumstances exist." The Tribunal considers that the limitation contained in Section 11.5 does not apply to submissions made in the context of a request for provisional measures. Accordingly, and in the understanding that it has been offered in the context of the requested provisional measures, the Tribunal accepts the introduction into the record of Mr Camejo Blanco's Witness Statement.

**IV. DECISION OF THE TRIBUNAL**

95. On the basis of the reasons set out above, the Tribunal decides as follows:
  - (a) The Tribunal rejects Claimant's First Request for Provisional Measures.
  - (b) The Tribunal rejects Claimant's Additional Request for Provisional Measures.
  - (c) The Tribunal accepts the introduction into the record of Mr Camejo Blanco's Witness Statement, under the conditions stated in § 94 above.
96. The Tribunal will issue its decision on the allocation of the costs generated by Claimant's requests at the appropriate procedural time (i.e., the award).

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<sup>44</sup> Claimant's Reply ¶¶ 43-49.

Dated: January 25, 2016

*enrique barros*

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Dr. Enrique Barros  
President

*Franco Ferrari*

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Prof. Franco Ferrari  
Arbitrator

*Raúl E. Vinuesa*

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Dr. Raúl E. Vinuesa  
Arbitrator