

# International Centre for Settlement of Investment Disputes

**VESTHEY GROUP LIMITED**  
The Claimant

**v.**

**BOLIVARIAN REPUBLIC OF VENEZUELA**  
The Respondent

**ICSID Case No. ARB/06/4**

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## **AWARD**

Rendered by the Arbitral Tribunal composed of:

Professor Gabrielle Kaufmann-Kohler, President  
Professor Horacio Grigera Naón, Arbitrator  
Professor Pierre-Marie Dupuy, Arbitrator

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Assistant to the Tribunal  
Mr. David Khachvani

Secretary of the Tribunal  
Ms. Alicia Martín Blanco

*Date of Dispatch to the Parties: 15 April 2016*

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## ABBREVIATIONS

<b>ABV</b>	Adjusted Book Value
<b>BIT</b>	1995 Agreement of Promotion and Protection of Investments between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Venezuela
<b>C-Costs</b>	The Claimant's submission on costs, dated 7 August 2015
<b>CLA</b>	The Claimant's legal authority
<b>CM</b>	The Claimant's Memorial on Merits, dated 15 January 2013
<b>C-PHB1</b>	The Claimant's First Post Hearing Brief, dated 8 May 2015
<b>C-PHB2</b>	The Claimant's Second Post Hearing Brief, dated 3 July 2015
<b>C-Reply</b>	The Claimant's Reply on the Merits and Response to the Respondent's Jurisdictional Objections, dated 12 November 2013
<b>C-Rejoinder</b>	The Claimant's Rejoinder to the Respondent's Reply on Jurisdictional Objections, dated 30 May 2014
<b>DCF</b>	Discounted Cash Flow
<b>ER</b>	Expert report
<b>EO</b>	Econ One
<b>Exh. C-</b>	The Claimant's Exhibit
<b>Exh. R-</b>	The Respondent's Exhibit
<b>FMV</b>	The Fair Market Value
<b>ICSID</b>	International Centre for Settlement of Investment Disputes
<b>ICSID Convention</b>	1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States
<b>INTI</b>	The National Land Institute of Venezuela
<b>IVSC</b>	International Valuation Standards Council
<b>MOA</b>	Ministry of Public Power of Agriculture and Lands of Venezuela
<b>RCM</b>	The Respondent's Jurisdictional Objection and Counter-Memorial, dated 12 August 2013

<b>R-Costs</b>	The Respondent's submission on costs, dated 7 August 2015
<b>RLO</b>	The regional land office of the National Land Institute of Venezuela
<b>RLA</b>	The Respondent's Legal Authority
<b>R-PHB1</b>	The Respondent's First Post Hearing Brief, dated 8 May 2015
<b>R-PHB2</b>	The Respondent's Second Post Hearing Brief, dated 3 July 2015
<b>R-Rejoinder</b>	The Respondent's Reply on Jurisdictional Objections and Rejoinder [Redacted], dated 13 October 2014
<b>RfA</b>	The Claimant's Request for Arbitration, dated 20 October 2005
<b>VCLT</b>	The Vienna Convention on the Law of Treaties
<b>WACC</b>	Weighted Average Cost of Capital
<b>WS</b>	Witness statement

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## **I. INTRODUCTION**

### **A. THE DISPUTE**

1. The present dispute arises out of Venezuela's introduction of measures affecting the Claimant's purported ownership over a cattle farming business in Venezuela. More specifically, the claims relate to Venezuela's conduct under a legal regime governing agricultural estates, primarily contained in the law of 13 November 2001 entitled *Decreto 1546 con fuerza de ley de tierras y desarrollo agrario* (the "2001 Land Law") and its successive laws and amendments (together referred to as the "Land Law").
2. The Claimant contends that that conduct resulted in the unlawful expropriation of the Claimant's cattle farming business in Venezuela and constituted multiple breaches of the 1995 Agreement of Promotion and Protection of Investments between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Venezuela (the "BIT"). The Claimant seeks damages for harm caused by these alleged breaches.

### **B. THE PARTIES**

#### **1. The Claimant**

3. The Claimant, Vestey Group Limited is a private limited company incorporated under the laws of England and Wales under company number 4494323 and having its head offices at St. John's Lane, London EC1M 4AF, United Kingdom (the "Claimant" or "Vestey").
4. The Claimant is represented in this arbitration by Messrs. Nigel Blackaby, Sylvia Noury, Lluís Paradell, Jean-Paul Dechamps, Cristian Nitsch, Katrina Woolcock, Lucia Mazzuca of Freshfields Bruckhaus Deringer LLP, and by Julio Pinto and Pedro Rangel of Travieso Evans Arria Rengel & Paz.

#### **2. The Respondent**

5. The Respondent is the Bolivarian Republic of Venezuela (the "Respondent" or the "Republic").
6. Since 20 August 2014, the Respondent is represented in this arbitration by Messrs. Osvaldo Guglielmino, Diego Brian Gosis, Manuel Galindo, Debora Espinoza, David

Burguillos, Facundo Perez Aznar, Pablo Parrilla and Guillermo Moro of Guglielmino & Asociados S.A. Prior to 20 August 2014, the Respondent was represented by Messrs. Thomas B. Wilner, Fernando Mantilla-Serrano and Christopher M. Rayan of Shearman & Sterling LLP.

## **II. PROCEDURAL HISTORY**

7. On 21 October 2005 the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a Request for Arbitration filed by the Claimant against the Respondent (the “Request” or “RfA”) dated 20 October 2005. The Request concerned the alleged expropriation and other violations of the obligations under the BIT in relation with Claimant’s cattle farming business in Venezuela.
8. In the Request, the Claimant invoked Venezuela’s consent to dispute settlement through ICSID arbitration provided in the BIT. The Claimant also relied on Venezuelan law on the Promotion and Protection of Investments (Decreto con Rango y Fuerza de Ley de Promoción y Protección de Inversiones) dated 22 October 1999 (the “Venezuelan Investment Law”).
9. On 28 October 2005, the Centre acknowledged receipt of the Request pursuant to Rule 5 of the ICSID Institution Rules and transmitted a copy to Venezuela and to the Venezuelan Embassy in Washington, D.C.
10. The Request, as supplemented by the Claimant’s letter of 16 December 2005, was registered by the Secretary-General of ICSID on 14 March 2006 pursuant to Article 36(3) of the ICSID Convention. On the same day, the Secretary-General, in accordance with Rule 7(c) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, notified the Parties of the registration and invited them to proceed to constitute the Arbitral Tribunal.
11. On 12 May 2006, the Claimant requested the Centre to suspend the arbitral proceedings for a period of six months. On that same date, the proceedings were suspended until 19 September 2006. The suspension was extended at the Claimant’s request on several occasions. The last suspension expired on 19 December 2011.
12. By letter of 20 December 2011, the Claimant notified Venezuela that the proceedings were resumed as of that date. By that same letter, the Claimant made a proposal to Venezuela as to the number of arbitrators and the method of their appointment.

13. On 7 February 2012, the Parties agreed to again stay the proceedings until 21 February 2012.
14. In letter of 6 March 2012, the Claimant invoked the procedure for the constitution of the Arbitral Tribunal established in Article 37(2)(b) of the ICSID Convention, *i.e.* one arbitrator appointed by each party, and the third arbitrator, who would serve as President of the tribunal, to be appointed by agreement of the Parties. On 8 March 2012, Venezuela made a proposal about the number of arbitrators and the method of their appointment, which departed from the procedure under Article 37(2)(b) of the ICSID Convention.
15. Following various exchanges between the Parties, the Claimant informed the Centre on 15 March 2012 that the Parties had reached an agreement on the method of constitution of the Tribunal. By this same communication, the Claimant appointed Prof. Horacio Grigera Naón, a national of Argentina, as arbitrator. Prof. Grigera Naón accepted his appointment on 20 March 2012. By letter of 18 April 2012, Venezuela appointed Prof. Pierre-Marie Dupuy, a national of France, as arbitrator. Prof. Dupuy accepted his appointment on 24 April 2012 (on 4 June 2012, he submitted an addendum to his declaration of acceptance).
16. Pursuant to the Parties' agreement, the co-arbitrators were requested to jointly propose a list of candidates to be considered by the Parties for the position of President of the Tribunal.
17. By email of 29 June 2012, the co-arbitrators informed the Center that the Parties had jointly selected Prof. Gabrielle Kaufmann-Kohler, as President of the Tribunal, from the list of candidates that they had proposed. Prof. Kaufmann-Kohler, a national of Switzerland, accepted her appointment as President of the Tribunal on 5 July 2012.
18. By letter of 6 July 2012, the Centre informed the Parties that all of the arbitrators had accepted their appointments and that, pursuant to ICSID Arbitration Rule 6(1), the Tribunal was deemed to have been constituted and the proceedings to have begun on that date. Ms. Alicia Martín Blanco, ICSID Legal Counsel, was designated by the Secretary-General of ICSID to serve as the Secretary of the Tribunal.
19. The first session of the Tribunal was held by teleconference on 29 August 2012. Following the Parties' agreement that a meeting was not necessary, the first session was held among the Tribunal Members.



20. During the first session, the Tribunal addressed the items on the draft procedural order as revised and agreed by the Parties, confirmed the Parties' agreements and decided on the points in dispute. On 30 August 2012, the Tribunal circulated Procedural Order No. 1 containing the Parties' agreements and the Tribunal's decisions, including a schedule of the proceedings.
21. The Claimant submitted its Memorial on the Merits ("CM") and accompanying materials on 15 January 2013.
22. On 1 March 2013, the Respondent submitted its Request for Bifurcation, pursuant to which it requested the Tribunal to suspend the proceedings on the merits and to determine the Tribunal's jurisdiction as a preliminary matter.
23. The Claimant submitted its Observations on the Respondent's Request for Bifurcation on 15 March 2013.
24. On 5 April 2013, the Tribunal issued Procedural Order No. 2, denying the Request for Bifurcation.
25. The Respondent filed its Counter-Memorial on the Merits and Objections to Jurisdiction ("RCM") and accompanying materials on 12 August 2013.
26. On 2 September 2013, following exchanges between the Parties, the Claimant submitted its First Request for the Production of Documents. On 16 September 2013, the Respondent submitted its Objections and Responses to the Claimant's First Request for the Production of Documents. On 23 September 2013, the Claimant filed a reply and, on 4 October 2013, the Tribunal issued Procedural Order No. 3, containing the Tribunal's decision on Claimant's First Request for Document Production.
27. The Claimant filed its Reply on the Merits and Response to the Respondent's Objection to Jurisdiction ("C-Reply") and accompanying materials on 12 November 2013.
28. On 3 December 2013, following exchanges between the Parties, the Respondent submitted its First Request for the Production of Documents. On 17 December 2013, the Claimant submitted its Objections and Responses to the Respondent's First Request for the Production of Documents. On 24 December 2013, the Respondent filed its reply and, on 3 January 2014, the Tribunal issued Procedural Order No. 4,

containing the Tribunal's decision on Respondent's First Document Production Request.

29. The Respondent filed its Rejoinder on the Merits and its Reply on Jurisdiction and accompanying materials on 12 February 2014.
30. By letter of 24 March 2014, the Claimant requested an order from the Tribunal granting the Claimant six weeks to file a response to the additional submissions on jurisdiction that the Respondent had filed together with its Rejoinder. By letter of 4 April 2014, the Respondent opposed this request. The Claimant also requested an order from the Tribunal regarding the Respondent's alleged submission of privileged documents and the allegedly untimely submission of documents by the Respondent.
31. On 17 April 2014, the Tribunal issued Procedural Order No. 5, in which it addressed a number of objections and requests made by the Claimant in connection with the Respondent's Rejoinder and granted the Claimant's request regarding the filing of a Rejoinder on Jurisdiction.
32. By letter of 2 May 2014, the Claimant made additional observations in relation to the Respondent's alleged submission of privileged documents and untimely submission of documents. The Respondent commented on 16 May 2014.
33. On 30 May 2014, the Claimant filed a Rejoinder on Jurisdiction ("C-Rejoinder") and accompanying materials.
34. On 18 June 2014, the Tribunal issued Procedural Order No. 6 addressing the privilege issue and the timeliness of the documents submitted by the Respondent. The Claimant submitted an additional communication on these issues on 19 June 2014.
35. On 27 June 2014, the Respondent requested the postponement of the time limits in Procedural Orders Nos. 5 and 6 by 60 days due to the changes in the legal team representing Venezuela in this case. The Claimant confirmed that it had no objection to this postponement by letter of 2 July 2014. By letter of 16 July 2014, the Tribunal noted the Parties' agreement.
36. On 20 August 2014, Venezuela appointed new counsel in this case.
37. On 14 October 2014, in accordance with Procedural Order No. 6 and the Parties' agreement, the Respondent submitted a redacted version of its Reply on Jurisdictional Objections and Rejoinder ("R-Rejoinder").

38. On 3 December 2014, the President of the Tribunal, acting by delegation of her co-arbitrators, held a pre-hearing conference with the Parties to discuss outstanding matters in connection with the organization of the hearing.
39. The Tribunal followed up with Procedural Order No. 7 of 15 December 2014 dealing with hearing matters including a provisional schedule.
40. The hearing on jurisdiction and the merits was held in Paris from 28 January to 4 February 2015. The following persons attended the hearing in whole or in part:

For the Tribunal:

Prof. Gabrielle Kaufmann-Kohler, President  
Prof. Horacio Grigera Naón, Arbitrator  
Prof. Pierre-Marie Dupuy, Arbitrator  
Mr. David Khachvani, Assistant to the Arbitral Tribunal

For the ICSID Secretariat:

Ms. Marisa Planells-Valero, on behalf of the Secretary of the Tribunal

For the Claimant:

Mr. Nigel Blackaby, Freshfields Bruckhaus Deringer  
Ms. Sylvia Noury, Freshfields Bruckhaus Deringer  
Mr. Jean-Paul Dechamps, Freshfields Bruckhaus Deringer  
Mr. Ricardo Chirinos, Freshfields Bruckhaus Deringer  
Ms. Katrina Woolcock, Freshfields Bruckhaus Deringer  
Ms. Lucia Mazzuca, Freshfields Bruckhaus Deringer  
Mr. Alastair Stewart, Freshfields Bruckhaus Deringer  
Ms. Anne Marie Doernenburg, Freshfields Bruckhaus Deringer  
Mr. Ignacio Stratta, Freshfields Bruckhaus Deringer  
Mr. Julio Pinto, Travieso Evans Arria Rengel & Paz  
Lord Samuel Vestey, Vestey Group Ltd  
Mr. Robin Vestey, Vestey Group Ltd  
Mr. George Vestey, Vestey Group Ltd  
Mr. David Makin, Vestey Group Ltd  
Ms. Diana dos Santos, Vestey Group Ltd  
Mr. John Smith, Vestey Group Ltd  
Mr. David Nixon, Vestey Group Ltd  
Mr. Mark Harding, Vestey Group Ltd  
Mr. Howard Rosen, FTI Consulting  
Mr. Neal Mizrahi, FTI Consulting  
Mr. Herb McLane, Agriteam Canada Consulting Ltd  
Ms. Josefina Soriano, Best Valuation Activities CA

For the Respondent:

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Ms. Paola Francia Cestari, Guglielmino & Asociados  
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Mr. Quinn Smith, Special Counsel  
Ms. Katherine Sanoja, Special Counsel  
Ms. Yolanda Consuegra, Guglielmino & Asociados  
Ms. Camila Guglielmino, Guglielmino & Asociados  
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Dr. Felipe Daruiz, República Bolivariana de Venezuela  
Mr. Carlos Barrero, República Bolivariana de Venezuela  
Prof. Juan Carlos Loyo  
Dr. Daniel Flores, Econ One Research Inc.  
Prof. Miguel Ortega  
Ms. Andrea Cardani  
Mr. Nevin Aragan

41. The Tribunal dealt with several objections raised by the Parties during the hearing. At the end of the hearing, the Claimant was satisfied that there remained no unsolved objections, whereas the Respondent maintained the objections raised during the hearing. The Respondent's objections and the manner in which these objections were addressed by the Tribunal are considered in paragraph 118 below. The Respondent also raised a new objection to jurisdiction in the course of its opening statement, and was granted permission by the Tribunal to file an additional submission on jurisdiction on 29 January 2015. The Claimant submitted comments to the Respondent's additional submission on jurisdiction on 1 February 2015.
42. On 13 February 2015, the Tribunal issued Procedural Order No. 8 on post-hearing matters, including a calendar for the submission of the post-hearing briefs.
43. On 15 May 2015, each Party filed its first post-hearing brief. On 3 July 2015, each Party filed its second post-hearing brief.

44. On 7 August 2015, the Parties filed their respective submissions on costs.
45. The Tribunal declared the proceeding closed on 26 February 2016 in accordance with Rule 38(1) of the ICSID Arbitration Rules.

### **III. FACTUAL BACKGROUND**

46. In this section the Tribunal sets forth the main facts underlying the present dispute as they arise from the record. When it considers that a fact is not established, the Tribunal will so state, in particular, by noting that the fact is disputed or that it is alleged by one Party. It will refer to additional facts when needed in the context of its analysis.

#### **A. BRIEF OVERVIEW**

47. Vestey began its operations in Venezuela in 1909 and by the end of the 20<sup>th</sup> century it operated a cattle farming business extending over more than 290,000 hectares of land with a herd exceeding 100,000 heads of livestock.
48. In 1999, Venezuela adopted a new constitution mandating a land reform and the elimination of large idle estates ("*latifundios*"). To implement the land reform, Venezuela passed the 2001 Land Law on 13 November 2001. The 2001 Land Law authorized the State to recover illegally occupied idle estates for public utility purposes and social use.
49. Between 2001 and 2006, the Respondent served several recovery ("*rescate*") notices directed towards certain Farms which Vestey operated. In this context, Vestey agreed to sell one of its Farms and to donate another one to the State (the "2006 Agreement"). After failed negotiations, the Respondent ordered in 2011 the recovery of all the remaining Farms operated by Vestey and took control over Vestey's movable and immovable property located on the Farms.

#### **B. VESTEY'S CATTLE FARMING BUSINESS IN VENEZUELA**

50. Vestey started its activities in Venezuela in 1909 by leasing a slaughterhouse and a cold storage facility in Puerto Cabello for purchasing, processing and exporting beef<sup>1</sup>.

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<sup>1</sup> See CM, ¶19.

51. In 1916, Lancashire General Investment Trust Limited,<sup>2</sup> a UK corporation and a subsidiary of Vestey, established a Venezuelan branch, which it transformed much later in 1987 into a Venezuelan corporation by the name of Agropecuaria Flora "Agroflora" C. A. ("Agroflora").<sup>3</sup> Agroflora has been indirectly owned by the Claimant through Vestey Holdings Limited and Vestey Farms Limited.<sup>4</sup>
52. Between 1916 and 1988, Vestey registered the acquisition of the following agricultural land plots with the Venezuelan public registry of immovable property (the "Public Registry"):
- i. Hato Guataparo – State of Carabobo;
  - ii. Hato Matapalos – State of Apure;
  - iii. Hato Los Cocos – State of Apure;
  - iv. Hato Morichito – State of Apure;
  - v. Hato Los Viejitos – State of Apure;
  - vi. Hato La Bendición Ramera – State of Apure;
  - vii. Hato San Pablo Paeño – State of Apure;
  - viii. Hato Turagua – State of Apure;
  - ix. Hato Punta de Mata – State of Apure;
  - x. Hato Las Palmeras – State of Apure;
  - xi. Hato Cañafistolo – State of Apure;
  - xii. Hato La Cueva – State of Guárico;
  - xiii. Hato El Charcote – State of Cojedes;

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<sup>2</sup> In 1923, Lancashire General Investment Trust Limited, a company incorporated in the United Kingdom in 1911, was converted into the Lancashire General Investment Company Limited, while maintaining its Venezuelan branch, Exh. C-9.

<sup>3</sup> References to Agroflora will encompass its predecessor, Lancashire General Investment Trust Limited, later Lancashire General Investment Company Limited.

<sup>4</sup> Where relevant, the reference to "Vestey" or the "Claimant" will encompass Vestey Group Limited and its direct and indirect subsidiaries and their legal predecessors, Exhs. C-9, C-10.

xiv. Hato El Carmen – State of Falcón (each one a “Farm” and collectively the “Farms”).<sup>5</sup>

53. Over the years, Vestey improved the Farms by adding fences, developing pastures, and building warehouses and accommodations. Its activities consisted essentially in breeding, raising, fattening, slaughtering and selling cattle.
54. In its very early years, Vestey exported meat to Europe. Since 1919, however, the beef which it produced in Venezuela was sold exclusively on the domestic market. In addition to selling meat, Vestey also sold cattle to other farmers for further fattening and slaughter or for genetic improvements<sup>6</sup>. To improve the genetic quality of its own herd, Vestey imported purebred cattle and maintained a small genetic laboratory<sup>7</sup>.
55. As of 31 October 2011, when Venezuela ordered the recovery of the Farms, Vestey's cattle farming business counted 114, 327 heads of livestock, including purebred and commercial cattle, as well as buffalos and equine stock.<sup>8</sup> Vestey also owned 64 vehicles, including cars, motorcycles, pickups and trucks, 43 tractors and a light airplane<sup>9</sup>. Vestey employed around 280 permanent and up to 170 temporary staff in Venezuela.<sup>10</sup>

### **C. THE LAND REFORM**

56. In 1999, a year after President Chavez's election, Venezuela adopted a new constitution. The Constitution was in line with the socialist objectives that inspired Venezuelan politics at that time aimed at increasing agricultural productivity and ensuring a secure food supply.<sup>11</sup> The Constitution mandated a land reform, and in particular, called for the adoption of measures to eliminate large idle estates<sup>12</sup>.
57. In that context, Article 307 of the Constitution provides for the elimination of large idle estates in the following terms:

*“The predominance of large land estates is contrary to the interests of society. Appropriate tax law provisions shall be enacted to tax fallow lands and establish the necessary measures to transform them into productive economic units, likewise*

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<sup>5</sup> Extracts from the Public Registry, Exhs. C-17, C-229.

<sup>6</sup> CM, ¶53, 57.

<sup>7</sup> CM, ¶57.

<sup>8</sup> *Id.*

<sup>9</sup> CM, ¶46.

<sup>10</sup> CM, ¶51.

<sup>11</sup> R-Rejoinder, ¶5.

<sup>12</sup> CM ¶71; RCM, ¶7.

*recovering arable land. Farmers and other agricultural producers are entitled to own land, in the cases and forms specified under the pertinent law.*<sup>13</sup>

58. On 13 November 2001, in accordance with the powers vested in him,<sup>14</sup> the President of Venezuela passed the 2001 Land Law. The 2001 Land Law created the National Land Institute ("INTI"), an administrative organ within the structure of the Ministry of Public Power of Agriculture and Lands (the "MOA").<sup>15</sup> It also established regional land offices ("RLOs") as subdivisions of INTI. The 2001 Land Law reiterated the purpose of eliminating *latifundios* as contrary to justice.<sup>16</sup> It further provided for the recovery without compensation of state-owned agricultural land illegally occupied by private persons.<sup>17</sup>
59. About a year later, on 20 November 2002, the Constitutional Chamber of the Supreme Court of Venezuela struck down certain provisions of the 2001 Land Law.<sup>18</sup> In particular, the Court declared Articles 89 and 90 unconstitutional. Article 89 mandated the President of INTI to authorize a preventive intervention into idle or uncultivated land, and Article 90 denied the right of compensation for improvements found on the recovered land.
60. As a consequence, on 18 May 2005, the National Assembly of Venezuela (the "National Assembly") amended the 2001 Land Law (the "2005 Land Law").<sup>19</sup> Among other matters, the 2005 Land Law reiterated the procedure for recovery without compensation of illegally occupied state-owned land. Moreover, it restated that no compensation was due for the improvements present on the land subject to recovery.<sup>20</sup>
61. On 29 July 2010, the National Assembly amended the Land Law once again (the "2010 Land Law").<sup>21</sup> The 2010 Land Law maintained the procedure of recovery of

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<sup>13</sup> In Spanish: "El régimen latifundista es contrario al interés social. La ley dispondrá lo conducente en materia tributaria para gravar las tierras ociosas y establecerá las medidas necesarias para su transformación en unidades económicas productivas, rescatando igualmente las tierras de vocación agrícola. Los campesinos o campesinas y demás productores agropecuarios y productoras agropecuarias tienen derecho a la propiedad de la tierra, en los casos y formas especificados en la ley respectiva." Article 307, Constitution of Venezuela, Exh. C-69.

<sup>14</sup> Law Authorizing the President to Pass Decrees with the Force of Law, 11 November 2000, Exh. C-71.

<sup>15</sup> Article 120, 2001 Land Law, Exh. C-29.

<sup>16</sup> *Id.*, Article 1, Exh. C-29.

<sup>17</sup> *Id.*, Chapter VII, Exh. C-29.

<sup>18</sup> Decision of the Constitutional Court of Venezuela, Exh. C-31.

<sup>19</sup> Law of Partial Reform of the Law of Lands and Rural Development, 18 May 2005, Exh. C-41.

<sup>20</sup> *Id.*, Article 86.

<sup>21</sup> Law of Partial Reform of the Law of Lands and Rural Development, 29 July 2010, Exh. C-157.



illegally occupied state-owned estates and additionally introduced the possibility for INTI to recover lands over which no "perfect chain of title" could be established:

*"Similarly, the National Land Institute can recover the lands the ownership over which is attributed to individuals, if upon conducting the documentary analysis of the sufficient titles required to the individual to whom the ownership is attributed, this latter fails to demonstrate a perfect chain of titles and other alleged rights since the release validly granted by Venezuelan Nation, until the time of due protocolization of the acquisition by the individual who alleges the ownership."*<sup>22</sup>

#### **D. EVENTS BETWEEN 2000 AND 2006**

62. The Claimant alleges that between 2000 and 2006 different measures affected its Farms. It claims that the government failed to protect the Farms from invasions of squatters. It also contends that Venezuela took confiscatory measures against Vestey's Farms under the legal regime of the Land Law. In the following paragraphs, the Tribunal states the facts as they arise from the record to provide the reader with a picture as complete as possible. This said, it notes that the Claimant requests no relief in connection with events involving Hatos El Charcote, Guataparo and San Pablo Paeño.<sup>23</sup>

##### **1. Hato El Charcote<sup>24</sup>**

63. In October 2000, around 50 persons invaded Hato El Charcote. By April 2001, similar invasions resulted in the occupation of around 25% of Hato El Charcote.<sup>25</sup>

64. In 2002, INTI started investigating Agroflora's title over Hato El Charcote<sup>26</sup> and, by December 2003, the squatters were occupying more than a half of the *hato*. The RLO of the state of Cojedes noted in a technical report of June of that year that the squatters had built 140 homes and a school and were cultivating 3 400 hectares of El Charcote.<sup>27</sup>

65. In the following year, on 9 December 2004, the Governor of the state of Cojedes, Mr. Johnny Yáñez issued a decree according to which certain land plots, including

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<sup>22</sup> In Spanish: "Así mismo, el Instituto Nacional de Tierras podrá rescatar las tierras aun en los casos en que la propiedad sea atribuida a particulares, cuando, al efectuar el análisis documental de los títulos suficientes que fueran requeridos a aquel que se atribuye el derecho de propiedad, éste no lograre demostrar una perfecta secuencia y encadenamiento de las titularidades del dominio y demás derechos alegados, desde el desprendimiento válidamente otorgado por la Nación Venezolana, hasta el título debidamente protocolizado de adquisición por parte de quien alega propiedad." *Id.*, Article 82.

<sup>23</sup> C-Reply, ¶9.

<sup>24</sup> Agroflora sold Hato El Charcote to INTI by 2006 Agreement, as described below.

<sup>25</sup> CM, ¶85.

<sup>26</sup> *Punto de Información*, 5 December 2002, Exh. C-79.

<sup>27</sup> *Informe Técnico*, 9 June 2003, Exh. C-86, pp. 4-5.

Hato El Charcote, were declared idle or affected by an ownership defect.<sup>28</sup> The decree called for investigations and further measures of implementation of the 2001 Land Law. It also authorized the intervention into El Charcote. The Claimant claims that, shortly thereafter, during the three months from January to March of 2005, the squatters set fire to the farm buildings and pastures in Hato El Charcote.

66. On 28 February 2005, the RLO of the state of Cojedes transmitted the file of Hato El Charcote to INTI, with a determination that there was no chain of valid title transfers for the estate and that the land was thus idle.<sup>29</sup> That was followed by INTI's reports of 2 and 9 March 2005 which concluded that there was no valid title over Hato El Charcote and that the farm was unproductive.<sup>30</sup>
67. On 15 March 2005, INTI then issued a notice,<sup>31</sup> by which it:
- i. Declared Hato El Charcote idle and state property;
  - ii. Ordered interim measures for the protection of the environment;
  - iii. Gave the squatters present on the territory of Hato El Charcote the right to remain ("*derecho de permanencia*");
  - iv. Authorized the initiation of the process of recovery of Hato El Charcote.
68. A week later, on 22 March 2005, the Minister of Agriculture and Land, the Director of INTI and the Governor together with other government officials and armed forces entered Hato El Charcote and handed the *derechos de permanencia* to the squatters.
69. On 11 May 2005, Agroflora requested the annulment of INTI's resolution of 15 March 2005 before the Superior Agrarian Court. This request was still pending when Vestey sold Hato El Charcote to INTI in 2006 (see ¶¶ 73-78 below).

## 2. Other Farms

70. In February 2005, the RLO of the state of Apure started an investigation with respect to parts of Hato La Bendición Ramera.<sup>32</sup> In that same year, similar investigations were

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<sup>28</sup> *Decreto* 585/04, 9 December 2004, Exh. C-37.

<sup>29</sup> *Expediente*, 28 February 2005, Exh. C-99.

<sup>30</sup> INTI reports, 2 and 9 March 2005, Exhs. C-100, C-101.

<sup>31</sup> *Notificación*, 15 March 2005, Exh. C-43.

<sup>32</sup> *Boleta de Notificación*, Exh. C-52.b.

conducted with respect to other Farms, namely Hatos Guataparo, Turagua, Los Viejitos, Cañafístolo, Punta de Mata and Los Cocos.<sup>33</sup>

71. On 4 April 2005, INTI issued a notice declaring Hato Los Cocos Morichito idle and state property for lack of a valid title and insufficiency of agricultural activities.<sup>34</sup> Vestey sought the annulment of this notice before the Superior Agrarian Court on 8 June 2005.<sup>35</sup>
72. On 17 June 2005, INTI issued a similar notice declaring Hato San Pablo Paeño and Hato La Bendición Ramera idle and state property.<sup>36</sup> The notices included provisional measures for purposes of health and environmental protection. They also provided for the grant of *derechos de permanencia* to persons applying for such rights.
73. On 6 September 2005, INTI notified Agroflora about the provisional measures. Two days later, about 70 squatters accompanied by armed forces entered Hato La Bendición Ramera.<sup>37</sup> Following the intervention of the Director of INTI, who had been approached by Ms. dos Santos of Agroflora the squatters left the *hato* by November 2005.<sup>38</sup>

#### **E. THE 2006 AGREEMENT**

74. In October 2005 and then again in March of the following year, Ms. dos Santos met with the Director of INTI to discuss the situation at the Farms.<sup>39</sup> This led to the conclusion of an agreement on 17 March 2006 between Vestey (including Vestey Group Limited, Vestey Farms, Agroflora, Agroniña, and Haciendas Guataparo) and INTI, according to which Vestey undertook to sell Hato El Charcote to INTI for 9 billion bolivars (approximately USD 4 million) and to donate Hato San Pablo Paeño (the "2006 Agreement"). Vestey also agreed to stay the ICSID proceedings which it had initiated about half a year earlier. For its part, INTI agreed to revoke its resolutions of 2005 declaring certain Farms state property, including the two Farms subject to the 2006 Agreement as well as two others, namely Hatos Los Cocos and La Bendición Ramera. It did so in the following terms:

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<sup>33</sup> *Cartel de Notificación*, Exhs. C-104, R-61.

<sup>34</sup> *Notificación*, 4 April 2005, Exh. C-51.

<sup>35</sup> Exh. R-36. On 1 October 2007, the Court dismissed the claim on the ground that the proceedings had been inactive for more than six months.

<sup>36</sup> *Boleta de Notificación*, Exh. C-52.

<sup>37</sup> RfA, ¶184; RCM, ¶65.

<sup>38</sup> Dos Santos WS1, ¶27.

<sup>39</sup> CM, ¶106.

*"Revise and revoke its resolutions of 12 March 2005, concerning the farm El Charcote, 31 March 2005, concerning the farm Los Cocos-Morichito, 17 June 2005, concerning the farms San Pablo Paeño and La Bendición Ramera, and hand over the productivity and sufficiency of title to each of the said farms through the certificate of productive farm and/or relevant administrative acts, in accordance with the provisions of the Law on Lands and Agricultural Development [the Land Law] [...]."*<sup>40</sup>

75. The 2006 Agreement also contains the following language, the meaning of which is disputed and discussed later:

*"The recognition by INTI, through the certificate of the productive farm, in accordance with the provisions of the [Land Law], of the condition of productivity and sufficient title over the following farms: (i) Cañafistolo; (ii) Turagua; (iii) Punta de Mata; (iv) Los Viejitos; (v) Matapalos; (vi) Guataparó; (vii) El Carmen; (viii) La Cueva; and (ix) Las Palmeras, within sixty (60) days after the execution of the Agreement. This obligation contemplates revision and verification by INTI of the documents of acquisition of the said farms duly registered and other information presented by Agroflora or any legally competent authority, in relation with the titles over the said farms, as well as technical-legal reports of the respective Regional Technical Office with respect to the productivity of the said farms [...]."*

*Physical and legal relocation by INTI of any undue occupier present within the borders of the said farms [...], with the exception of the farms San Pablo Paeño and El Charcote, within the term of thirty (30) days after the administrative act confirming the productivity and the sufficiency of title on each of these farms."*<sup>41</sup>

76. Two days before the conclusion of the 2006 Agreement, INTI had already revoked its resolutions concerning Hato El Charcote and Hato San Pablo Paeño.<sup>42</sup> On 2 April

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<sup>40</sup> Tribunal's translation; in Spanish: "Revisar y revocar sus Resoluciones de fecha 12 de marzo de 2005, respecto del fundo El Charcote, 31 de marzo de 2005., respecto del fundo Los Cocos-Morichito, 17 de junio de 2005, respecto de los fundos San Pablo Paeño y La Bendición Ramera; y otorgar la productividad y suficiencia del título de cada uno de dichos fundos por medio de un certificado de finca productiva y/o los actos administrativos pertinentes, de conformidad con las disposiciones de la Ley de Tierras y Desarrollo Agrario [...]." Article 8.1, 2006 Agreement, Exh. C-120.

<sup>41</sup> Tribunal's translation; in Spanish: "El reconocimiento por el INTI de la condición de productividad y suficiencia del título sobre los siguientes fundos, por medio de un certificado de finca productiva, de conformidad con las disposiciones de la Ley de Tierras y Desarrollo Agrario, dentro de un lapso que no excederá de los sesenta (60) días contados a partir de la celebración de este Convenio: (i) Cañafistolo; (ii) Turagua; (iii) Punta de Mata; (iv) Los Viejitos; (v) Matapalos; (vi) Guataparó; (vii) El Carmen; (viii) La Cueva; and (ix) Las Palmeras. Este reconocimiento contempla la revisión y verificación por el INTI de los documentos de adquisición de dichos fundos debidamente registrados y demás información presentada por AGROFLORA o cualquier autoridad legalmente competente, con respecto a los títulos de propiedad de dichos fundos, así como de los informes técnico-jurídicos realizados por la Oficina Técnica Regional respectiva con respecto a la productividad de dichos fundos [...]."

La reubicación física y legal por parte del INTI de cualquier ocupante indebido que se encuentre dentro de los linderos de los fundos mencionados en la cláusula segunda de este Convenio con excepción de San Pablo Paeño y El Charcote dentro un lapso que no excederá de los treinta (30) días siguientes contados a partir del acto administrativo pertinente que confirme la productividad y suficiencia del título de cada uno de estos fundos." Articles 8.2, 8.3.

<sup>42</sup> *Exposición*, 15 March 2006, Exhs. C-249, C-250.

2006, Vestey effected the sale of Hato El Charcote by a separate agreement<sup>43</sup> and executed a deed by which it donated San Pablo Paeño in favor of INTI.<sup>44</sup>

77. In April 2006, President Chávez visited Hato San Pablo Paeño to participate in the official handover of the Farm to INTI. He made a public statement welcoming Vestey's donation of the Farm to the state and asserting that the Republic was not going to take Vestey's cattle without compensation:

*"They have even gone as far as to donate the installations, that is to say, here there are houses, fences, things called improvements; and we are going to buy the cattle from them [...], and we are going to pay that to the Compañía Inglesa [Vestey], it is theirs, how could we steal from them? We would be thieves, we would be... well, it would be cattle rustling, if we were to arrive here all macho, with the Army, the National Guard: "This belongs to the State...". No, that would not be the law or anything, it would be a real abuse. Therefore I want to affectionately salute the owners of the Compañía Inglesa [...]."*<sup>45</sup>

78. On 12 May 2006, Vestey requested the suspension of the ICSID proceedings. While it did not revoke its resolutions concerning Hatos Los Cocos and La Bendición Ramera, INTI issued productivity certificates for all the remaining Farms except Hato El Carmen.

79. In 2007, Vestey sold Hato Guataparó to a private person.

#### **F. SQUATTERS AT HATO MORICHITO**

80. In May 2008, 30 to 40 indigenous families entered Hato Morichito, burned the fields and settled down on the farm land.<sup>46</sup> The Claimant alleges that Venezuela took no action to expel the squatters from Hato Morichito and that Ms. dos Santos raised the issue during a meeting with Minister Loyo without success.
81. In a letter dated 21 January 2009, the head of the RLO of the state of Apure, informed the National Guard about the settlement of indigenous families on the territory of Hato

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<sup>43</sup> Sale and purchase agreement, Exh. C-124.

<sup>44</sup> Donation, Exh. C-125.

<sup>45</sup> Claimant's translation, in Spanish: "Ellos incluso han llegado a donar las instalaciones, es decir, aquí hay casas, cercas, lo que se llama bienhechurías; y nosotros les vamos a comprar ese ganado [...], y vamos a pagarle eso a la Compañía Inglesa, eso es de ellos, ¿cómo les vamos a estar robando?, seríamos unos ladrones, seríamos unos... bueno, estaríamos practicando el abigeato pues, si nosotros llegáramos aquí a lo macho, con el Ejército, la Guardia: "Esto es del Estado...". No, que eso no sería ni ley ni nada, sería un verdadero atropello. Así que yo quiero saludar con todo afecto, a los dueños de la Compañía Inglesa [...]." Statement by President Chávez, Exh. C-123, p. 35.

<sup>46</sup> CM, ¶116.

Morichito and requested help to provide them with agricultural infrastructure and water supply.<sup>47</sup>

82. The Respondent concedes that there was a "minor intrusion" into Hato Morichito, but asserts that the Claimant complained about it for the first time one year later on 11 May 2009 when Agroflora requested an injunction from the Superior Agrarian Court.<sup>48</sup>
83. It is undisputed that this request for injunction was still at the stage of a summons in 2011 when the Respondent took control of the Farms (¶¶96-107 below).

#### **G. NEGOTIATIONS FOR THE SALE OF AGROFLORA**

84. In late 2008, the Respondent initiated negotiations with Vestey with a view to buying Agroflora. Then, in March 2009, Ms. dos Santos and the Vice-President of Agroflora met with Mr. Ramírez, the President of state-owned PDVSA Agrícola to discuss the prospects of a sale of Agroflora's shares to PDVSA Agrícola. During the following month, Mr. Ramírez, with a delegation from PDVSA Agrícola, including management, technicians and veterinarians, visited Agroflora's premises and inspected the Farms in the state of Apure for one week.
85. Several meetings followed such inspection and, on 2 July 2009, Vestey Farms, represented by Mr. Edelmann, and PDVSA Agrícola, represented by Mr. Ramírez, signed a letter of intent.<sup>49</sup> The letter of intent recorded that the parties were interested in entering into a sale and purchase of the totality of the shares of Agroflora. It also laid down certain modalities of payment in installments for the event that the parties would agree on a price.
86. In November 2009, Ernst & Young carried out a valuation of Agroflora's assets upon the instruction of PDVSA Agrícola. The valuation process included visits to the Farms and a review of documents necessary for a due diligence exercise.
87. On 3 March 2010, the parties met again to discuss the terms of the sale and purchase. Two days later, Mr. Edelmann wrote to Mr. Ramírez accepting to sell all the shares of Agroflora at the price of USD 120 million to be paid in instalments, terms which -

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<sup>47</sup> Mr. Suarez's letter concerning the indigenous families, 21 January 2009, Exh. C-139.

<sup>48</sup> Court decision, 11 May 2009, Exh. C-144.

<sup>49</sup> Letter of intent, Exh. C-147.

according to him - had been proposed at a meeting held at the offices of PDVSA Agrícola.<sup>50</sup>

88. Approximately three months later, Minister Loyo called Ms. dos Santos to a meeting, where he informed her that the MOA would replace PDVSA Agrícola in the sale and purchase negotiations.
89. Thereafter, on 17 August 2010, President Chávez approved a directive ("*punto de cuenta*") of the MOA, pursuant to which the government was authorized to pay between 247.5 million and 302.5 million bolivars for the acquisition of Agroflora. This valuation assigned no value to Agroflora's land.
90. Following up on the directive, on 29 September 2010, Minister Loyo wrote to Ms. dos Santos offering a price of 247.5 million bolivars.<sup>51</sup> The following day, Ms. dos Santos replied with a counteroffer of 273 million bolivars. She specifically referred to Vestey's right to repatriate the funds at the exchange rate of 1 USD to 2.60 bolivars pursuant to Article 2 of the Exchange Agreement No.14 issued by the Minister of Popular Power of Economy and Finance.<sup>52</sup>
91. On 26 November 2010, Mr. Edelmann signed a term sheet, which insisted on Vestey being entitled to convert the proceeds of the sale, i.e. 273 million bolivars at 4.30 bolivars for 1 USD through CADIVI, the Venezuelan Foreign Currency Administration:

*"a. It is the essence of this agreement that [Vestey] shall obtain from the Bolivarian Republic of Venezuela, through Venezuelan Exchange authorities, the payment for the sale of the shares [of Agroflora] at the Exchange rate of four point thirty bolivars per one United States dollar.*

*b. – [Vestey] shall process the purchase price through C.A.D.I.V.I in conformity with the legislation of Venezuela, and, to this end, the Bolivarian Republic of Venezuela shall proceed with this state entity to affect the above-established conversion of the purchase price in an expeditious manner."*<sup>53</sup>

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<sup>50</sup> Exh. C-152.

<sup>51</sup> Exh. C-160.

<sup>52</sup> Exh. C-150.

<sup>53</sup> Tribunal's translation; in Spanish: "a.- Es de la esencia de este convenio que [Vestey] obtenga de la República Bolivariana de Venezuela, a través de la autoridades cambiarias venezolanas, el pago de la venta de las acciones [de Agroflora] a una tasa de cambio igual a cuatro punto treinta bolívares fuertes (BsF4,30) por un dólar de los Estados Unidos de América. b.- [Vestey] tramitará el precio de la venta a través de C.A.D.I.V.I. de conformidad a la legislación Venezolana, y, a tales efectos, la República Bolivariana de Venezuela procederá con esta negociación de estado a efectuar de manera expedita la conversión del precio arriba establecido." Exh. C-291.

92. On 4 February 2011, President Chávez approved the directive authorizing the purchase of Agroflora for 273 million bolivars. The directive did not refer to the conversion of such amount nor to an exchange rate.<sup>54</sup>
93. In May 2011, Minister Loyo and Ms. dos Santos discussed the possibility that Vestey obtain the conversion of the purchase price from bolivars into US dollars through CADIVI. Ms. dos Santos then met the Head of the International Transactions Department and Chief Legal Advisor of CADIVI, who - according to the Claimant - advised that, as a foreign enterprise, Vestey could not register with CADIVI to buy and transfer US Dollars outside Venezuela. On 16 May 2011, Ms. dos Santos informed Minister Loyo about the outcome of the meeting with CADIVI.<sup>55</sup>
94. On 26 August 2011, the MOA sent Vestey a new draft sale and purchase agreement.<sup>56</sup> The draft did not refer to a payment in US dollars or to the conversion of the purchase price into a foreign currency.
95. In mid-September 2011, Minister Loyo again met with Ms. dos Santos. He reiterated the offer of payment in bolivars, but Ms. dos Santos objected that Vestey was not prepared to accept a payment in local currency without a guarantee that it could be converted into US dollars currency.
96. On 21 September 2011, Ms. dos Santos reported to Mr. Edelmann about such meeting.<sup>57</sup> Shortly thereafter, on 9 October 2011, she advised Minister Loyo that his offer was unacceptable and that Vestey would only continue negotiations on the premises that the payment be made in a foreign currency.<sup>58</sup>

## **H. 2011 RECOVERY**

97. On 30 October 2011, at the meeting of the United Socialist Party of Venezuela, the MOA presented a draft directive to President Chávez. The directive sought the President's approval to either purchase Agroflora with a payment in US dollars or recover the Farms pursuant to the Land Law.<sup>59</sup> The President approved the recovery and made a public statement declaring "the initiation of the administrative proceedings

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<sup>54</sup> *Punto de cuenta*, 4 February 2011, Exh. C-169.

<sup>55</sup> Exh. C-172.

<sup>56</sup> Email of 26 August 2011 from Ms. Liyuny Sosa's to Mr. Omar Benitez, attaching the draft sale and purchase agreement, Exh. C-177.

<sup>57</sup> Email of 21 September 2011 from Ms. Dos Santos to Mr. Edelmann, Exh. C-313.

<sup>58</sup> Email of 9 October 2011 from Ms. Dos Santos's to Minister Loyo, Exh. C-181.

<sup>59</sup> *Punto de cuenta*, 30 October 2011, Exh. C-187.



of recovery of land for exceptional circumstances of social interest and public use”.<sup>60</sup> He continued: “With this we take the complete administrative and operational control of Agropecuaria Flora. ... Rumbo al socialismo!”<sup>61</sup>

98. On the following day, Minister Loyo made a public statement asserting that the President's declaration “implies that the Bolivarian government assume immediate control of all the operations carried out by this transnational corporation [Vestey].”<sup>62</sup> On 1 and 2 November 2011, Vestey received from INTI the notices of recovery for each one of the eleven Farms.<sup>63</sup> The notices cited Article 84 of the Land Law allowing recovery based on exceptional interests of public utility and social use, regardless of the productivity of the land in question.
99. While delivering the recovery notices, the representatives of INTI insisted on taking over the administration of Agroflora. They left, however, after they were advised that the recovery notices did not give them the right to do so.<sup>64</sup> On 11 November 2011, Agroflora challenged the recovery notices in court.<sup>65</sup>
100. Subsequently, governmental commissions composed of representatives of INTI and semi-armed members of the group called “Marisela”, accompanied by armed forces, entered into the Farms and assumed control. INTI and Marisela rivaled to establish control over Agroflora's operations. Following the takeover, Agroflora's staff received a number of contradictory instructions from the representatives of INTI and Marisela.<sup>66</sup> Despite advice to the contrary from the staff, the new administration conducted a cattle count in November at a time when the cows were pregnant. As a result, many cows miscarried and lost calves. The Marisela workers also disarmed the security guards in charge of defending the borders of the Farms.<sup>67</sup> As a result, cattle theft increased. Several Marisela workers also began slaughtering cattle for their personal consumption. There were instances when Marisela workers invaded the personal

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<sup>60</sup> In Spanish: "el inicio de un procedimiento administrativo de rescate de tierras por circunstancias excepcionales de interés social o utilidad pública [...]."

<sup>61</sup> Claimant's translation, in Spanish: "Con esto, tomamos el control total administrativo y operacional de Agropecuaria Flora. ... Rumbo al socialismo!", Transcript of President Chávez's statement at *Vive Televisión*, Exh. C-183.

<sup>62</sup> Claimant's translation, in Spanish: "[i]mplica de inmediato que asume el Gobierno Bolivariano el control total de todas las operaciones que se llevan a cabo a través de esta transnacional [Vestey]."  
Transcript of Minister Loyo's statement at *Contragolpe*, Exh. C-188.

<sup>63</sup> INTI's recovery notices, Exh. C-179.

<sup>64</sup> C-Reply, ¶137.

<sup>65</sup> *Oposición al procedimiento de rescate*, Exh. R-63.

<sup>66</sup> Transcript, English, Day 3, 4:19 – 6:18.

<sup>67</sup> Smith WS, ¶57.

premises where Agroflora's farm managers lived with their families.<sup>68</sup> As a result, Agroflora's farm managers and several chief staff, including John Smith, who had been in charge of Agroflora's cattle operations, decided to resign.<sup>69</sup>

101. On 13 November 2011, Ms. dos Santos wrote to Minister Loyo asking for a meeting in an attempt to find an amicable solution.<sup>70</sup> Her message remained unanswered.
102. In another attempt, Vestey wrote to President Chávez on 25 November 2011. It complained about the expropriation of its cattle farming business without payment of compensation, as well as of multiple breaches of the 2006 Agreement, Venezuelan law and international law. Vestey insisted that, if the government did not offer compensation, it would resume the ICSID proceedings.<sup>71</sup> It received no answer.
103. On 30 November 2011, the MOA sought interim measures from the Superior Agrarian Court authorizing it to assume control over Agroflora's operations. The request noted that the purpose of the recovery was to allow "all domestic livestock producers, whether large, medium or small, the possibility of accessing developed genetic material through the sale of semen and bulls at affordable prices for the national agro-industrial sector of the economy" and to "strengthen and ensure the raising and fertility of the livestock with high genetic value."<sup>72</sup>
104. On the very next day, on 1 December 2011, the Superior Agrarian Court granted the interim measures, allowing the MOA to occupy, possess and use Agroflora's property. The order also provided for the creation of an *ad hoc* administrative board, composed of three public officials to supervise the management and administration of Agroflora.<sup>73</sup>
105. On 5 December 2011, the Superior Agrarian Court served the interim order on Agroflora. On the same day, the MOA notified Agroflora of the appointment of the *ad hoc* administrative board composed of Messrs. Tomás Rodríguez, Angel Alemán

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<sup>68</sup> Transcript, English, Day 3, 17:21 – 18:17.

<sup>69</sup> CM, ¶152.

<sup>70</sup> Email of 25 November 2011 from Ms. Dos Santos's to minister Loyo, Exh. C-196.

<sup>71</sup> Letter of 25 November 2011 from Vestey to President Chávez, Exh. C-198.

<sup>72</sup> Respondent's translation, in Spanish: "permitiendo a todos los productores ganaderos nacionales ya sean grandes, medianos o pequeños, la posibilidad de acceder al material genético desarrollado mediante la venta de semen y padrotes a precios solidarios para la economía del sector agroproductivo nacional.", Request of 30 November 2011 from the MOA to the Superior Agrarian Court, Exh. C-200.

<sup>73</sup> Interim measures of 1 December 2011, Exh. C-202.

and Richard Díaz. The *ad hoc* board assumed the management of Agroflora and later dismissed Ms. dos Santos from her position as President of Agroflora.

106. On 9 December 2011, the Claimant filed an appeal from the decision granting the interim measures.<sup>74</sup> The appeal was dismissed about 20 months later on 13 August 2013.<sup>75</sup> The Claimant alleges that it was never served with the decision dismissing the appeal and that it learned of it through the Respondent's Rejoinder.
107. On 19 December 2011, as a conclusive step of the recovery proceedings, INTI issued the final decisions of recovery for each of the Farms, thereby rejecting Agroflora's challenge of the earlier recovery notices.<sup>76</sup> The Claimant similarly alleges that it did not receive any of these final recovery decisions until the submission of the Respondent's Counter-Memorial.<sup>77</sup>
108. The Respondent maintains that, after the recovery, it approached the Claimant's representatives to offer compensation<sup>78</sup>, a fact that the Claimant denies.<sup>79</sup>

#### **IV. ANALYSIS**

109. This part deals with preliminary matters (A), preliminary objections (B), liability (C), quantum (D), and costs (E). Wherever appropriate, it first sets out the parties' positions before going into the Tribunal's analysis.

##### **A. PRELIMINARY MATTERS**

110. This section addresses the scope of this Award (1), the relevance of previous decisions or awards (2), the law applicable to jurisdiction and merits (3), and certain procedural objections raised in the course of the proceedings (4).

##### **1. Scope of this Award**

111. In Procedural Order No. 2, the Tribunal decided to join the proceedings on preliminary objections to the merits.<sup>80</sup> Therefore, the present award finally disposes of all the issues in dispute, i.e. jurisdiction, admissibility, liability, and quantum.

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<sup>74</sup> *Oposición a la medida preventiva*, Exh. C-204.

<sup>75</sup> Decision of the Supreme Court, Exh. R-115.

<sup>76</sup> Final recovery decisions, Exh. R-66.

<sup>77</sup> C-Reply, ¶139.

<sup>78</sup> RCM, ¶95.

<sup>79</sup> C-Reply, ¶144.

<sup>80</sup> Procedural Order No.2.

## **2. The relevance of previous decisions or awards**

112. Both Parties have relied on previous decisions or awards in support of their positions, either to conclude that the same solution should be adopted in the present case or in an effort to explain why this Tribunal should depart from that solution.
113. The Tribunal considers that it is not bound by previous decisions. At the same time, in its judgment it must pay due consideration to earlier decisions of international tribunals. Specifically, it believes that, subject to compelling grounds to the contrary, it has a duty to adopt principles established in a series of consistent cases. It further believes that, subject always to the text of the BIT and the circumstances of each particular case, it has a duty to contribute to the harmonious development of international investment law, with a view to meeting the legitimate expectations of the community of states and investors towards legal certainty and the rule of law.

## **3. Applicable law to jurisdiction and merits**

114. It is common ground between the Parties that jurisdiction must be established under both Article 25 of the ICSID Convention and the BIT. Subject to the defenses discussed below, there is agreement that the jurisdictional requirements of these two instruments are met, and rightly so.
115. It is equally undisputed that the Tribunal's jurisdiction is governed by international law (save of course when international law refers to municipal law, which it does, for instance, in connection with the legality requirement; see ¶¶202-206 below). Similarly, it is uncontroversial that the interpretation of the ICSID Convention and the BIT is governed by customary international law as codified in the Vienna Convention on the Law of Treaties of 23 May 1969 ("VCLT"). It is finally accepted that the Tribunal has the power to rule on its own jurisdiction.<sup>81</sup>
116. As to the law applicable to the merits, the Tribunal must resort to Article 42(1) of the ICSID Convention, which reads as follows:

*"The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such an agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."*

117. The Parties have not agreed on the rules of law that govern the merits of this dispute. Consequently, the Tribunal shall apply, in addition to the Treaty, Venezuelan law and

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<sup>81</sup> Article 41(1), ICSID Convention.

international law when appropriate. The Tribunal is of the view that the second sentence of Article 42(1) of the ICSID Convention does not allocate matters to either law. It is thus for the Tribunal to determine whether an issue is subject to national or international law.<sup>82</sup>

118. When applying the law (whether national or international), the Tribunal is of the view that it is not bound by the arguments and sources invoked by the Parties. The principle *iura novit curia* – or better, *iura novit arbiter* – allows the Tribunal to form its own opinion of the meaning of the law, provided that it does not surprise the Parties with a legal theory that was not subject to debate and that the Parties could not anticipate.<sup>83</sup>

#### **4. Procedural objections at the hearing**

119. In the course of the hearing, the Parties made a few procedural objections. At the end of the hearing, the Claimant indicated that there remained no unresolved objections.<sup>84</sup> The Respondent, however, maintained the objections put forward throughout the hearing.<sup>85</sup> The Tribunal has considered and resolved the objections during the hearing. For the sake of the record, the Tribunal restates its decisions on those main objections.

##### **a. Exhibit C-178**

120. In its opening statement, Venezuela relied on a word document which was purportedly attached to the email presented by the Claimant as exhibit C-178. The Respondent maintained that the author, Mr. Tomás Rodríguez, an employee of the MOA, first sent the email and its attachment to Minister Loyo, and then forwarded it to Ms. dos Santos. The word document, entitled “*Agroflora Justificativo de divisas*”, had been prepared

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<sup>82</sup> See, e.g., *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, Exh. CLA-78, 14 December 2012, ¶179.

<sup>83</sup> See, e.g., *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment, 7 January 2015, ¶295 (“[...] an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, *sua sponte*, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it”). See also *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), Merits, Judgment, 25 July 1974, ¶18 (“[i]t being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the Parties, for the law lies within the judicial knowledge of the Court.”); *Albert Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL Case, Award, 23 April 2012, ¶141; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, ¶287.

<sup>84</sup> Transcript, English, Day 6, 197:6.

<sup>85</sup> Transcript, English, Day 6, 197:8-10.

by Agroflora's advisors in order to persuade the government to pay for Agroflora in foreign currency. The Respondent sought to rely on the metadata of the word document in order demonstrate its origins and the date of its creation. According to Venezuela, Mr. Tomás Rodríguez misled Minister Loyo by not mentioning that the document originated from Agroflora.<sup>86</sup> He now faces criminal charges. This matter, says the Respondent, is outside the jurisdiction of the Tribunal, since it involves issues of criminal law.

121. The Claimant objected to the Respondent's reliance on the content of the word document. According to Vestey, the word document is not in the record. Exhibit C-178 is an email from Mr. Tomás Rodríguez to Ms. dos Santos, which forwards an email earlier sent to Minister Loyo. The attachment is not included in Exhibit C-178. If Venezuela wished to rely on the attached word document, says the Claimant, it should have introduced it into the record. That would allow the Claimant to refute the arguments which Venezuela purports to make in connection with that document. In any event, the Claimant adds that the authorship of the document is undisputed, as it had noted in its Memorial (footnote 297) that Agroflora's external counsel had prepared that word document.
122. After the Claimant's explanation that the document originated from Agroflora's advisors, the President of the Tribunal asked the Respondent whether the explanation as to the authorship of the document and the reference to footnote 297 of the Claimant's memorial resolved the matter.<sup>87</sup> Counsel for the Respondent answered affirmatively.<sup>88</sup> Therefore, the Tribunal deemed the procedural incident resolved. For the avoidance of doubt, the Tribunal has not relied on Exhibit C-178 or its attachment in the following analysis. Nor did the Tribunal rely on the statement or conduct of Mr. Tomás Rodríguez.

#### **b. Sequestration of Diana dos Santos**

123. Ms. dos Santos stated during her cross-examination on the second day of the hearing that she was informed of Mr. Tomás Rodríguez's arrest.<sup>89</sup> The arrest having been mentioned on the first day of the hearing, the Respondent raised an objection, according to which the witness's knowledge of the content of the hearing was a

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<sup>86</sup> Transcript, English, Day 1, 196:6-15.

<sup>87</sup> Transcript, English, Day 1, 220:11-15.

<sup>88</sup> Transcript, English, Day 1, 220:16.

<sup>89</sup> Transcript, English, Day 2, 140:3-12.

violation of the procedural rules. In particular, the Respondent referred to paragraph 11.6 of Procedural Order No. 7 providing for the sequestration of witnesses. In the Respondent's opinion, a witness may not become privy of the content of the hearing before he or she takes the witness stand.<sup>90</sup>

124. The Claimant replied that paragraph 11.6 of Procedural Order No. 7 meant that a witness shall not attend a hearing prior to his or her examination and shall have no communication with the Party offering his or her evidence from the moment the examination begins. In any event, according to the Claimant, counsel had merely asked Ms. dos Santos on the eve of her appearance whether she was aware of Mr. Rodríguez's detention.<sup>91</sup>

125. Faced with these positions, the Tribunal invited the Parties to examine the text of paragraph 11.6 of Procedural Order No. 7, which reads as follows:

*"(a) In accordance with paragraph 14.19 of Procedural Order No. 1, fact witnesses are not permitted to attend the hearing (including the opening arguments) before their testimony but can attend thereafter. Expert witnesses can attend the hearing at any time, both before and after their testimony.*

*(b) Once their testimonies have begun, witnesses and experts shall be isolated until they have completed their testimony and shall have no contact with the Party which presented them, or that Party's Counsel, during any recesses or interruptions that may arise. In addition, fact witnesses shall not read the transcript before their testimony is closed."*

126. The Tribunal noted that it read the provision to bar a fact witness from attending the hearing before the oral examination and to require sequestration or isolation throughout the duration of the oral examination.<sup>92</sup> In the Tribunal's view, the provision had not been breached, since Ms. dos Santos had not attended the hearing before her oral testimony or communicated with the Claimant and its counsel after her examination began. On this basis, the Tribunal deemed the procedural objection resolved.<sup>93</sup> It asked the Respondent if the proceedings could move on and received a positive answer.<sup>94</sup>

### **c. Baker & McKenzie's legal advice to Agroflora**

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<sup>90</sup> Transcript, English, Day 2, 140:18-24.

<sup>91</sup> Transcript, English, Day 2, 144:8-16.

<sup>92</sup> Transcript, English, Day 2, 142:18-25.

<sup>93</sup> Transcript, English, Day 2, 146:18-23.

<sup>94</sup> Transcript, English, Day 2, 146:24-25, 147:1; It is also telling that Venezuela has not raised any concerns on this point in its PHBs.

127. On the second day of the hearing, the Respondent requested that Vestey produce the documents pertaining to the legal opinion given by Baker & McKenzie to Agroflora in connection with the legality of the requirement to prove chain-of-title. According to Venezuela, it emerged from Mr. George Vestey's cross-examination that Baker & McKenzie had given the advice to Agroflora and not to Vestey and that the former had shared it with the latter. Hence, says the Respondent, Vestey cannot claim that the documents are privileged.
128. The Claimant opposed the request on several grounds. First, it maintained that Venezuela could and should have requested those documents during the document production phase. Second, because all documents were seized by the government in 2011, the documents exchanged between Baker & McKenzie and Agroflora were since in the Respondent's possession. Third, Vestey claimed that the documents are protected by attorney-client privilege, as Mr. Vestey had not said that Agroflora shared the legal advice with Vestey. He was simply aware of the conclusions of that opinion in his capacity of a member of Vestey's board of directors.
129. The Tribunal asked whether Venezuela had submitted the same request at the document production stage. Counsel for the Respondent contested in the negative and explained that the need to consult those documents only arose after Ms. dos Santos relied on them during her cross-examination. The Tribunal noted that it would assess testimonies of witnesses having due regard to all the surrounding circumstances that affect the credibility of the statements of a particular witness, including the absence from the record of any document on which the witness relies in his or her answers. Upon this explanation, the Respondent modified the request and asked the Tribunal leave to rely on the fact of the existence of those documents.<sup>95</sup> The Tribunal concurred, and the hearing went on.
130. The Tribunal considers the above procedural objections to be minor incidents with no effect on the content of the Award. They are mentioned for the sole purpose of the avoidance of doubt. It is indeed telling that none of the Parties has put forward any complaints in connection with the Tribunal's handling of the hearing in their post hearing briefs. The Tribunal thus trusts that all objections have been satisfactorily resolved.

## **B. PRELIMINARY OBJECTIONS**

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<sup>95</sup> Transcript, English, Day 2, 138:6-15.



131. The Respondent has raised the following preliminary objections involving the lack of identity of the present dispute and the one submitted to arbitration (1), and the absence of an investment (2).

#### **1. Lack of Identity of the Disputes**

132. This preliminary objection which was first raised during the opening statement at the hearing,<sup>96</sup> relates to the alleged lack of identity between the dispute originally registered with the Center and the dispute now before the Tribunal. The Claimant opposes this objection as untimely and in any event unsubstantiated.

133. Because this objection had not been raised earlier, the Tribunal invited the Respondent to set it forth in an additional submission filed on 29 January 2015 (*Escrito Adicional: Objeciones Jurisdiccionales y de Admisibilidad*) and gave the Claimant an opportunity to respond in writing by 31 January 2015. The Parties also addressed this objection in their post-hearing briefs, both in terms of timeliness or admissibility and substance.

##### **a. The Respondent's Position**

134. The Respondent submits that this objection is admissible irrespective of the time when it was raised. In support, it relies on ICSID Arbitration Rule 41(2) according to which an ICSID tribunal may assess its jurisdiction *sua sponte* at any stage of the arbitration. For Venezuela, this rule entails that the Tribunal must examine a jurisdictional objection even if it is belated or has not been raised at all. In reliance on decisions of ICSID tribunals<sup>97</sup> and of the ICJ,<sup>98</sup> the Respondent contends that jurisdiction cannot be acquired by way of estoppel.

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<sup>96</sup> Counsel for the Respondent argued that “the measures that [...] the Tribunal has to decide upon [...] were not included in that registration request” (Transcript, English, Day 1, 222:10-13). The President then asked if the Respondent was “raising a new [...] objection [...]: that there is no identity between the claims as they stand today and the claims as they were brought in the request for arbitration in 2005?” (Transcript, English, Day 1, 222:21-25). The Respondent’s counsel replied that “paragraph 4(h) of the [Claimant’s] jurisdiction rejoinder [...] cuts any link there may be between the original claims of the request for arbitration and the present claims [...]” (Transcript, English, Day 1, 225:12-16). After the President’s further question about the nature of the new objection, the Respondent’s counsel noted: “We could call it a matter of inadmissibility; we could call it a consequence of the same objection of no investment” (Transcript, English, Day 1, 227:3-5).

<sup>97</sup> E.g. *Government of the Province of East Kalimantan v. PT Karim Prima Coal*, ICSID case No. ARB/07/3, ¶219; *Daimler Financial Services AG v. Argentina*, ICSID Case No. ARB/05/1, ¶¶109-110.

<sup>98</sup> Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ Judgment, 26 February 2007, ¶¶118, 127.

135. On the merits of the defense, the Respondent argues that “the Tribunal lacks jurisdiction due to the complete lack of identity between the claims before it and the claims presented upon registration that gave rise to these arbitration proceedings.”<sup>99</sup> The 2006 Agreement settled the original legal dispute. The issues and the legal framework which the Claimant invoked thereafter “are completely different” from those relied upon when it started the arbitration in 2005.<sup>100</sup>
136. To substantiate its claim of difference, the Respondent refers to paragraph 4.h of the Claimant’s rejoinder on jurisdiction<sup>101</sup>, which supposedly shows that Vestey does not challenge the Land Law itself, but only “how the law was applied”.<sup>102</sup>
137. The dispute about the application of the Land Law, so says the Respondent, is a new dispute that could not have existed at the time of the Request for Arbitration. In light of the 2006 Agreement, “there is a complete termination of the claims contained in the Request for Arbitration which gave rise to the arbitration proceedings”.<sup>103</sup> In this context, Venezuela invokes *Azpetrol*, where the tribunal declined jurisdiction due to a binding settlement agreement entered into between the parties.<sup>104</sup>
138. The Respondent adds that the representatives of the Claimant have acknowledged the settlement of the original dispute. It points in particular to a letter from Ms. dos Santos to President Chávez, saying that the 2006 Agreement established a solid basis for the “alliance” between the government and Agroflora.<sup>105</sup> The Respondent also relies on Lord Vestey’s communication to President Chávez saying that he was delighted to have reached an amicable settlement.<sup>106</sup>
139. The Respondent further refutes Vestey’s invocation of ICSID Arbitration Rule 40(1)<sup>107</sup> as this rule only governs incidental or additional claims and therefore does not apply here. In this case, the new claims concern an entirely new legal dispute, which

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<sup>99</sup> R-PHB1, ¶66.

<sup>100</sup> R-PHB1, ¶32.

<sup>101</sup> “The 2010 Land Law did not change the system of registration and ownership of land in Venezuela” (Claimant’s Rejoinder, ¶4.h, quoted at R-PHB1, ¶33).

<sup>102</sup> R-PHB1, ¶35.

<sup>103</sup> R-PHB1, ¶58.

<sup>104</sup> R-PHB1, ¶38.

<sup>105</sup> Letter of 11 April 2008 from Ms. Dos Santos to President Chávez, Exh. C-134.

<sup>106</sup> Letter of 9 May 2006, from Lord Vestey’s to President Chávez, Exh. R-95.

<sup>107</sup> ICSID Rule 40(1) reads as follows:

“Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.”

replaced the original dispute.<sup>108</sup> As a consequence, the Respondent concludes that “it is impossible to consider that Venezuela has given its consent to an arbitration proceeding whose alleged causes have completely changed to the point that there is no identity between them and those stated in the request for arbitration that gave rise to such proceeding”.<sup>109</sup>

#### **b. The Claimant’s Position**

140. The Claimant contends that this objection is inadmissible, because it is raised too late. It in particular cites to ICSID Arbitration Rule 41(1), which provides that jurisdictional defenses must be raised “as early as possible”.
141. According to the Claimant, the Respondent had ample opportunity to raise its objections during the three rounds of written submissions. Even assuming that the basis for the objection lies in the Rejoinder on Jurisdiction, the objection would be time barred since the Rejoinder was filed over eight months prior to the hearing (Claimant’s submission of 31 January 2015, p.8). “If a Respondent were able to introduce objections at will in a final hearing”, writes the Claimant, “the most fundamental rights of due process would be infringed to the Claimant” (Claimant’s submission of 31 January 2015, p.8).
142. The Claimant further relies on ICSID Arbitration Rule 27, pursuant to which a party which knows or should have known of a breach of an applicable rule and which fails to object promptly, is deemed to have waived its objection. By replying to Vestey’s arguments without raising an objection, Venezuela waived its right to object.
143. In any event, the Claimant submits that the nature of the legal dispute initially registered before the Centre remains unaltered. In the 2006 Agreement, the Parties did not settle the dispute. Rather, Vestey only agreed to suspend the ICSID arbitration, while its discontinuance was “specifically made subject to the prior fulfilment by the INTI of ‘each and all’ of its obligations under that Agreement”.<sup>110</sup> Under Article 8 of the 2006 Agreement, Venezuela was to revoke the resolutions against the Farms, recognize the sufficiency of Vestey’s title, and relocate the squatters. Venezuela failed to fully comply with these obligations. Indeed, Vestey

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<sup>108</sup> *Escrito Adicional*, ¶24.

<sup>109</sup> R-PHB1, ¶45; see also ¶63.

<sup>110</sup> C-PHB2, ¶57.

consistently noted in its correspondence with ICSID and Venezuela after the 2006 Agreement that the implementation of the latter was “still in course”.<sup>111</sup>

144. In addition, Vestey submits that the requirement of Article 36 of the ICSID Convention that the Claimant provide “information concerning the issues in dispute” cannot mean that such information must be exhaustive, nor can it prevent the Claimant from adding subsequent measures taken against the same investment after the initiation of the arbitration.<sup>112</sup>
145. Finally, if the Claimant’s current claims are considered new or ancillary, they must be admitted under Article 46 of the ICSID Convention and ICSID Arbitration Rule 40. They are directly connected to the subject matter of the dispute and are within the scope of the consent of the Parties and the jurisdiction of the Centre.<sup>113</sup>

### **c. Analysis**

146. The Tribunal will first address the admissibility of the new objection. ICSID Arbitration Rule 41(1) requires that a jurisdictional objection be raised “as early as possible”:

*“Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.”*

147. Venezuela argues that it learned of Vestey’s abandonment of its original claims through the Rejoinder on Jurisdiction, which was filed on 30 May 2014.<sup>114</sup> Be this as it may, it then waited until the first day of the hearing on 28 January 2015 to raise its defense. A time lag of eight months does obviously not meet the “as early as possible” requirement.
148. The Respondent is of the view that its delay is without consequence as the Tribunal is under a duty to assess its jurisdiction of its own motion. In support of this argument, it relies on ICSID Arbitration Rule 41(2), which reads as follows:

*“The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.” (Emphasis added)*

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<sup>111</sup> C-PHB2, ¶62.

<sup>112</sup> C-PHB2, ¶67.

<sup>113</sup> C-PHB2, ¶74.

<sup>114</sup> *Escrito Adicional*, ¶32.

149. The Tribunal’s discretionary power to review its jurisdiction *ex officio* does not absolve the parties from compliance with ICSID Arbitration Rule 41(1). If Venezuela really believed that the 2006 Settlement Agreement settled the dispute, that rule would have required it to raise its objection at the time when the arbitration resumed in 2011. Similarly, if the supposed novelty of the claims only became apparent in May 2014, the rule would have required Venezuela to react well before the hearing.
150. For these reasons, the Tribunal considers this objection untimely and thus inadmissible. This being so, it notes that if the objection were admissible, it would not succeed on the merits. Indeed, the Tribunal cannot follow the Respondent when it argues that the present dispute is entirely different from the one presented in the Request for Arbitration.
151. Under Article 25(1) of the ICSID Convention as well as under the BIT, the Tribunal must have jurisdiction over the “dispute”. A dispute is not the equivalent of a claim. The former is a broader concept than the latter. As the *CMS* tribunal had put it, “the fact that [the claims] may originate from different sources or emerge at different times does not necessarily mean that the disputes are separate and distinct.”<sup>115</sup> In the present case, the dispute hinges on the lawfulness of Venezuela’s introduction of rules for the elimination of idle estates and the measures taken against Vestey’s cattle farming business under such rules. While the factual matrix of the dispute has evolved and the formulation of the claims has followed this evolution, the essence of the dispute is unchanged. A review of the chronology confirms the unity or identity of the dispute.
152. In the Request for Arbitration filed in 2005, the Claimant noted that “the Land Law provided a new legal framework for state intervention with rural land in Venezuela”<sup>116</sup> and that the “dispute concerns the illegal treatment and confiscation by Venezuela of the country’s principal cattle farming business, which has been owned by Vestey for some 90 years”.<sup>117</sup>
153. The 2006 Agreement did not put an end to the dispute so described. The Parties do not dispute that it merely suspended the arbitration. It failed to resolve the major aspect of the dispute which turns on the ownership of the Farms. The Respondent itself argues that the 2006 Agreement did not provide for an unconditional recognition

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<sup>115</sup> *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, Exh. CLA-139, ¶109. (“*CMS*”).

<sup>116</sup> RfA, ¶52.

<sup>117</sup> RfA, ¶7.

of Vestey's title to the Farms.<sup>118</sup> Nor did the 2006 Agreement change the allegedly expropriatory regime of the Land Law about which Claimant complained in its Request for Arbitration.

154. The Claimant's submissions after the recommencement of this arbitration in 2011 further demonstrate that the 2006 Agreement did not bring about a solution to the dispute. The Claimant continued to complain of Venezuela's adoption of the Land Law, which, it said, eviscerated "the legal framework upon which landowners like Vestey had relied".<sup>119</sup> In its Reply, the Claimant captured the essence of the dispute as follows:

*"As from 2001, the regime of President Chávez decided to fundamentally alter the concept of ownership of property, annihilating over a hundred years of property rights, as enshrined in the Constitution, and otherwise in Venezuelan law, by requiring owners (in some cases decades after the land was purchased with registered title or acquired by way of acquisitive prescription) to collect and furnish to the government documentary evidence of a chain of title back to beyond 1848".<sup>120</sup>*

155. History did not stand still after Vestey had initiated arbitration in 2005. The situation evolved, new facts accrued with the Respondent's amendment of the Land Law and measures taken under its regime, such as the recovery notices, the interim measures and final recovery. While these developments have densified the dispute, they have not changed its nature and identity.
156. In contrast, the Respondent submits that paragraph 4(h) of the Rejoinder on Jurisdiction demonstrates the termination of the original dispute. The passage quoted by the Respondent reads as follows: "[t]he 2010 Land Law did not change the system of registration and ownership of land in Venezuela". The paragraph, however, continues to explain: "Nonetheless, it [the Land Law] introduced, by way of Article 82, an administrative process enabling the INTI to 'recover' land 'attributed to individuals' (including, according to the INTI, those holding registered title) who could not document Chain of Title." Put in their context, these words show no intention to abandon the original complaint about the unlawfulness of the regime of the Land Law. Instead, the Claimant continues to denounce the incompatibility of the Land Law with the rules of private ownership in Venezuela and with Venezuela's obligations under international law.

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<sup>118</sup> "[T]he only unqualified obligation that the Republic undertook in the 2006 Agreement was to provide payment to Agroflora for *Hato El Charcote* and the cattle in *Hato San Pablo Paeño*" (R-Rejoinder, ¶98).

<sup>119</sup> C-Reply, ¶260.

<sup>120</sup> C-Reply, ¶177.

157. Finally, the Tribunal notes that the Respondent does not object to the admissibility of the Claimant's ancillary and new claims under ICSID Arbitration Rule 40(1), and rightly so. The current claims are indeed closely connected to the original claims, as they both concern violations of the BIT by measures taken under the Land Law against the Claimant's cattle farming business.

## 2. Investment: Lack of Title

158. The Parties disagree on the existence of a protected investment. Specifically, they diverge on whether Vestey has made an investment in accordance with the laws of Venezuela as required by the BIT. Their major difference turns on whether, prior to the disputed land reform, Venezuelan law required a registered land owner to prove a perfect chain of title tracing back to the period when the land was first released into private ownership, in some cases as early as 1848.<sup>121</sup>

### a. The Respondent's Position

159. The Respondent argues that the Tribunal lacks jurisdiction under Article 25(1) of the ICSID Convention and under the BIT, because the Claimant has made no investment in accordance with the law of Venezuela as it has not acquired sufficient ownership title to the Farms.

160. Venezuela notes that Article 25(1) of the ICSID Convention lacks a definition of "investment" and leaves it to the parties "to define a certain transaction as an investment or accept certain types of investments under the protection of the treaty".<sup>122</sup> By contrast, Article 13 of the BIT contains a "clear condition imposed by [Venezuela] and the United Kingdom" that it "applies only to investments made in accordance with the laws and regulations of the host country".<sup>123</sup>

161. The Respondent relies on *Saba Fakes v. Turkey*<sup>124</sup> to submit that, if the legality requirement is not met, the BIT will not apply and there will be no consent to arbitrate the dispute within the meaning of Article 25(1) of the ICSID Convention. The Respondent also invokes *Fraport v. Philippines*<sup>125</sup>, contending that disrespect for the

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<sup>121</sup> RCM, ¶¶114, 115; R-Rejoinder, ¶¶59, 60, 61.

<sup>122</sup> RCM, ¶101.

<sup>123</sup> RCM, ¶102.

<sup>124</sup> *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, RLA-61 ("*Saba Fakes v. Turkey*").

<sup>125</sup> *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014. ("*Fraport v. Philippines*").

laws of the host state places an investment outside the protection of the investment treaty. It adds that Vestey's good faith purchase of the Farms is not disputed. Rather, the disagreement hinges on Vestey's inability to prove the ownership over the land under the applicable rules of Venezuelan law.<sup>126</sup>

162. In reliance on *Cementownia v. Turkey*,<sup>127</sup> Venezuela further submits that the legality must be assessed on the date of the events which form the basis for the claims.
163. The Respondent goes on to argue that, in the present case, the Claimant failed to demonstrate that it made an investment in accordance with the laws of the host state.<sup>128</sup> Specifically, the Claimant has not shown that it acquired title over the Farms. To substantiate this argument, the Respondent contends that "[u]nder the Land Law, farm lands are considered to be state property unless the possessor can demonstrate its ownership through a perfect chain of title tracing back to the valid release of the land by the Venezuelan government".<sup>129</sup>
164. For the Respondent, the requirement of a perfect chain of title is not new; it was present in Venezuelan law since at least 1936.<sup>130</sup> The legislation governing vacant land and certain domestic court decisions provide for a presumption that the state is the owner of vacant agricultural land until a private person proves its ownership. Specifically, the Respondent relies on the 1848 Vacant Land Law ("*Ley de 10 abril de 1848, Sobre Averiguación de Tierras Baldías, su Deslinde, Mensura, Justiprecio y Enajenación*"), as well as on 1919 and 1936 Vacant Land Laws, the latter being still in force.
165. To substantiate the existence of the presumption, Venezuela particularly cites Article 1 of the 1936 Vacant Land Law, which reads as follows:

*"All lands within the borders of the Republic, which are not communal or private property and do not belong legitimately to corporations or juridical persons shall be considered vacant."*<sup>131</sup>

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<sup>126</sup> Transcript, English, Day 6, 161:11-24.

<sup>127</sup> *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009. ("*Cementownia v. Turkey*").

<sup>128</sup> RCM, ¶107.

<sup>129</sup> RCM, ¶112, citing the 2010 Land Law, Art. 82.

<sup>130</sup> R-Rejoinder ¶292.

<sup>131</sup> Tribunal's translation; in Spanish: "Son baldíos todos los terrenos que, estando dentro de los límites de la República, no sean ejidos ni propiedad particular ni pertenezcan legítimamente a corporaciones o personas jurídicas." The Vacant Land Law of 1936, Exh. R-3.



166. The Respondent also refers to decisions of the Supreme Court of Venezuela handed down in 1933 and 1991. The latter suggests that Article 1 of the 1936 Vacant Land Law “creates a legal presumption in favor of the Republic, as claimant, so that it is only necessary to claim that certain land is vacant for creating the burden of the respondent to demonstrate its ownership of said lands [...]”.<sup>132</sup>
167. On this basis, the Respondent maintains that Vestey failed to discharge its burden of proving the ownership over the land. Especially, during the administrative recovery proceedings initiated by INTI, the Claimant was given multiple opportunities to prove ownership by showing an uninterrupted chain of title since the time when the land was first privately owned. The Claimant failed to do so and expressly recognized that failure in its internal communications.<sup>133</sup>
168. The Respondent further contends that the extracts from the Public Registry presented by the Claimant<sup>134</sup> in an attempt to prove ownership contain numerous inaccuracies, especially with respect to the areas of land. In any event, the Respondent argues that the registration merely proves “just title” (“*justo titulo*”), which is not sufficient to prove ownership. Just title shows the good faith intentions of the parties to a transaction. However, it does not establish that title was legally transferred, since no one can transfer more rights than he or she holds. Hence, any deficiency in the title that may have existed earlier in the chain affects the validity of all subsequent titles.
169. Consequently, for Venezuela, “Vestey’s inability to prove a perfect chain of title means that Vestey has not made an ‘investment’ in accordance with the laws of Venezuela”.<sup>135</sup> Moreover, “even if the Tribunal were to consider the Farms to be an “investment” under the Treaty, they are not an investment of a national of a Contracting Party, as required by Article 2 of the Treaty. Without perfect title, Vestey is not the lawful owner of the Farms and, as such, is not an investor within the meaning of the Treaty”.<sup>136</sup>

#### **b. The Claimant's Position**

170. The Claimant first submits that Venezuela’s objection concerning land ownership “cannot go to jurisdiction”.<sup>137</sup> Irrespective of the Tribunal’s finding on the title over the

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<sup>132</sup> Respondent’s translation, Supreme Court Decision, Exh. RLA-21.

<sup>133</sup> RCM, ¶¶124, 125, 130.

<sup>134</sup> Extracts from the Public Registry, Exhs. C-17, C-229.

<sup>135</sup> RCM, ¶135.

<sup>136</sup> RCM, ¶135.

<sup>137</sup> First C-PHB, ¶36.

land, its ownership over the "buildings, infrastructure, improvements to the land, livestock or vehicles that were seized by the Venezuelan government in November 2011 has not been contested by the Respondent".<sup>138</sup> Thus, according to the Claimant, "[t]here can be no doubt that the Tribunal has jurisdiction over Vestey's claims insofar as they relate to the seizure of these (non-land) assets by Venezuela".<sup>139</sup>

171. The Claimant accepts that jurisdiction only extends to disputes arising out of an investment made in accordance with the laws of the host state. It submits that it has made such an investment as it held registered title over the Farms. For Vestey, such registered title is sufficient ownership title under Venezuelan law.
172. About the alleged inaccuracies in the registered land areas, the Claimant explains that "many of Agroflora's old registered titles did not employ modern measurement techniques and referred often to physical defining features and so the listed areas do not always correspond precisely to what can now be measured with precision".<sup>140</sup> In any event, the discrepancies between the actual surface of the Farms and their registered surface has no impact on Vestey's ownership.<sup>141</sup>
173. Furthermore, the Claimant submits that Venezuela's reliance on the Land Law and in particular on Article 84 of the 2010 Land Law introducing the requirement of the perfect chain of title is a matter for the merits. For Vestey, the Land Law is itself a measure in breach of the BIT, which allowed Venezuela to recover the land without compensation.<sup>142</sup> If Venezuela could rely on the Land Law to avoid jurisdiction, the treaty protections would become illusory.<sup>143</sup> Or in Claimant's words, "Venezuela cannot avoid its liability under the Treaty by invoking its own domestic law, and the very measure that constitutes part and parcel of its wrongful conduct under the Treaty and international law".<sup>144</sup>
174. According to the Claimant, the existence of an investment and hence the validity of the title over the assets comprising an investment must be assessed as of "the date on which the measures that gave rise to the dispute took place".<sup>145</sup> Thus, for jurisdictional purposes the Claimant only needs to demonstrate that it held an

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<sup>138</sup> C-Reply, ¶148.

<sup>139</sup> C-Reply, ¶149.

<sup>140</sup> C-PHB 1, ¶240.

<sup>141</sup> C-PHB2, p.37.

<sup>142</sup> C-Reply, ¶154.

<sup>143</sup> C-Reply, ¶155.

<sup>144</sup> C-Reply, ¶156.

<sup>145</sup> C-PHB1, ¶32, footnote 43.

ownership title over the Farms before the introduction of the measures complained of in this arbitration.

175. To prove that it acquired the ownership title over the land, the Claimant relies on the presumption of validity of its registered title. The Civil Code of Venezuela and the Law of Public Registry provide that the registered title constitutes valid and sufficient title. For Vestey, only a final judicial decision can invalidate a registered ownership title.
176. In addition, the Claimant invokes the principle of acquisitive prescription. The Civil Code of Venezuela provides for the acquisition of ownership by operation of continued and uninterrupted possession of the land for more than 10 years. In reply to the Respondent's argument that acquisitive prescription may only be declared by a judge, the Claimant asserts that it raised acquisitive prescription in court proceedings in 2005 when it sought the annulment of INTI's resolutions. The Agrarian Court considered however, that annulment proceedings were not the appropriate procedural setting to rule on a claim of acquisitive prescription. The Claimant could not have presented an independent request for declaration of acquisitive prescription as, according to the Code of Civil Procedure, an action for declaration of acquisitive prescription may be filed against persons who are registered owners of the real estate in question. As Vestey was itself a registered owner, it could not have brought the action against itself.<sup>146</sup>
177. The Claimant also opposes the Respondent's argument that Venezuelan Law required demonstrating the perfect chain of title even prior to the introduction of the Land Law. The 1848 Vacant Land Law merely "provided a way for occupiers or tenants of vacant lands to be transferred ownership of lands – nothing else".<sup>147</sup> As for the 1919 Vacant Land Law, the Claimant contends that "Article 6.3 required proof of title (such as the registered title) for land acquired after 10 April 1848 but did not require proof of a *chain of title* back to or before that date".<sup>148</sup> Under 1936 Vacant Land Law, the possessors of land were only required to show title "in cases where their possession of allegedly idle land was being challenged before a court pursuant to Article 10 of the same law".<sup>149</sup>

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<sup>146</sup> C-Rejoinder, ¶156.

<sup>147</sup> C-Rejoinder, ¶126.

<sup>148</sup> C-Rejoinder, ¶128.

<sup>149</sup> C-Rejoinder, ¶132.

178. Moreover, according to Vestey, the 1991 Supreme Court decision invoked by the Respondent did not require a chain of title to prove ownership; registered title is sufficient for purposes of proof of ownership.<sup>150</sup>
179. Further, to refute the Respondent's argument that Agroflora's staff acknowledged not being able to prove title, the Claimant submits that "[t]hese emails (written by business executives, not lawyers) do nothing more than discuss the INTI's unreasonable requests for Agroflora to produce documentation to prove Chain of Title. At no stage do these communications acknowledge that the INTI's requirements were legal or properly applied to Agroflora as a matter of Venezuelan law".<sup>151</sup>
180. Finally, the Claimant invokes the principle of estoppel to argue that, in light of the government's prior recognition of Vestey's title on multiple occasions and "after decades of peaceful possession [...], Venezuela must be prevented from changing course at this stage and denying the validity of Vestey's title in this arbitration".<sup>152</sup>

### **c. Analysis**

181. As mentioned earlier, jurisdiction must be established under both the ICSID Convention and the BIT. Both instruments make jurisdiction conditional upon the existence of an investment. Article 25(1) of the ICSID Convention does so in the following terms:

*"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre."*

182. And Article 8 of the BIT reads as follows:

*"Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former [...] shall [...] be submitted to international arbitration [ICSID]"*

183. Article 13 of the BIT further specifies the scope of application of the treaty and introduces a legality requirement with the following wording:

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<sup>150</sup> C-Rejoinder, ¶34.

<sup>151</sup> C-Rejoinder, ¶43.

<sup>152</sup> C-Reply, ¶173.

*"The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by nationals or companies of the other Contracting Party ..."*

184. It is common ground between the Parties that the investment must satisfy the legality requirement of Article 13 of the BIT to be protected.
185. In the following section, the Tribunal will start by determining whether there is an investment within the meaning of the ICSID Convention (i) and of the BIT (ii). It will then assess if the investment at issue is an investment "of" the Claimant as required by Article 8(1) of the BIT (iii). Thereafter, the Tribunal will analyze whether the investment complies with the requirement of legality contained in Article 13 of the BIT (iv). It will not address the other jurisdictional requirements of the ICSID Convention and the BIT, which are undisputed and rightly so.

i. *Investment under the ICSID Convention*

186. The lack of definition in the ICSID Convention does not deprive the term "investment" of its significance. Like any other term of a treaty, it must be interpreted on the basis of its ordinary meaning, in its context, and in the light of the treaty's object and purpose.<sup>153</sup>
187. A majority of ICSID tribunals hold that the term "investment" in Article 25 of the ICSID Convention has an independent meaning.<sup>154</sup> On the basis of ICSID jurisprudence as it has evolved, it can now be considered that the definition of "investment" comprises three components: a commitment or allocation of resources, risk, and duration.<sup>155</sup>
188. The Parties do not dispute that during more than a century from 1909 to 2011, Vestey contributed substantial resources to establish and operate cattle farming enterprise in Venezuela. It paid for the land, livestock, vehicles and other equipment; it incurred the costs for maintaining the Farms, creating and improving pastures, and genetically improving the herd. It is not disputed that Vestey's operations in Venezuela involved risks; nor that Vestey operated in Venezuela for a long time.

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<sup>153</sup> Article 31, VCLT.

<sup>154</sup> E.g. *Saba Fakes v. Turkey*, ¶108; *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, Award, 1 December 2010, ¶43.

<sup>155</sup> See e.g. *LESI Spa et Astaldi S.p.A. v. People's Democratic Republic of Algeria*, Decision on Jurisdiction, 12 July 2006, ¶72; *Saba Fakes v. Turkey*, ¶102.

189. Hence, Vestey's business in Venezuela meets the definition of investment within the meaning of the ICSID convention.

ii. *Investment under the BIT*

190. Article 1 of the BIT defines investment as follows:

*"Investment' means every kind of asset and in particular, though not exclusively, includes:*

*(i) movable and immovable property and any other property rights such as mortgages liens or pledges;*

*(ii) shares in and stock and debentures of a company and any other form of participation in a company;*

*(iii) claims to money or to any performance under contract having a financial value;*

*(iv) intellectual property rights, goodwill, technical processes and know-how;*

*(v) business concessions conferred by Law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.*

*A change in the form in which assets are invested does not affect their character as investments;"*

191. Vestey held 100% ownership interest in its cattle farming enterprise, *i.e.* Agroflora. Vestey's shareholding in Agroflora clearly falls within the BIT's list of assets and, in particular, under the category of "shares in and stock and debentures of a company and any other form of participation in a company."

192. In line with a series of more recent decisions,<sup>156</sup> the Tribunal is of the opinion that the BIT notion of investment implies that the asset falling within the list be the result of an allocation of resources made by the investor. In this case, as was just mentioned, it is undisputed that Vestey contributed substantial economic resources into its Venezuelan cattle farming business. This condition is thus met.

iii. *Investment "of" an investor*

193. The consent to arbitrate expressed in Article 8 of the BIT covers disputes about the Respondent's obligations "in relation to an investment of the national or company" of the other Contracting State. It is common ground that Vestey qualifies as such a "national or company" of the UK. The Respondent, however, maintains that the

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<sup>156</sup> *Romak S.A. v. The Republic of Uzbekistan*, UNCITRAL, PCA Case No. AA280, Award, 26 November 2009, ¶207; *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, ¶165.

investment is not an investment "of" Vestey, as Vestey failed to acquire the necessary title over the land.<sup>157</sup>

194. The Parties do not dispute that Venezuelan law governs the issue of ownership of the asset constituting the purported investment.<sup>158</sup> While the term "investment" itself is to be defined under the applicable rules of international law,<sup>159</sup> the question whether or not the Claimant holds title over the assets constituting an investment is a matter of municipal law.<sup>160</sup>
195. In the present case, the investment out of which the dispute arose is Vestey's interest in the cattle farming enterprise, Agroflora, a company incorporated under Venezuelan law. The relevant inquiry is thus whether the Claimant held title to the shares in Agroflora under Venezuelan law.
196. The question remains whether Vestey also needs to show title to the individual assets (land, livestock, equipment, vehicles, etc.) to hold an investment and, hence, for jurisdiction to be established over this dispute. In the Tribunal's opinion, this question must be answered in the negative. This dispute arises out of measures affecting Vestey's interest in the cattle farming enterprise in its entirety. The measures were not directed exclusively at individual assets, such as the land plots. They targeted the enterprise as a whole. It is thus the cattle farming enterprise as a whole that must qualify as an investment of an investor.
197. The reasoning of the *Holiday Inns* tribunal is instructive in this regard:
- "It is well known [...] that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others."*<sup>161</sup>
198. Therefore, to conclude that the present dispute arises directly out of an investment of an investor, it is sufficient to find that Vestey held title to the shares in Agroflora. Title

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<sup>157</sup> RCM, ¶135.

<sup>158</sup> C-PHB1, ¶32.f.

<sup>159</sup> *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ("Enron") ¶38; *AES v. Argentina*, Decision on Jurisdiction, 26 April 2005, ¶¶34–39; *Camuzzi v. Argentina I*, Decision on Jurisdiction, 11 May 2005, ¶¶15–17, 57; *Sempra v. Argentina*, Decision on Jurisdiction, 11 May 2005, ¶¶25–28; *Jan de Nul v. Egypt*, Decision on Jurisdiction, 16 June 2006, ¶¶65–68; *Saipem v. Bangladesh*, Decision on Jurisdiction, 21 March 2007, ¶¶68–70, 78–82; *Noble Energy v. Ecuador*, Decision on Jurisdiction, 5 March 2008, ¶¶56, 57 – cited at Schreuer *et al*, *ICSID Convention: A Commentary*, 2<sup>nd</sup> Ed. 2009, p. 552, ¶8.

<sup>160</sup> Schreuer *et al*, *ICSID Convention: A Commentary*, 2<sup>nd</sup> Ed. 2009, p. 552, ¶9. See also Douglas, *International Law of Investment Claims*, CUP, 2009, p. 52, ¶102.

<sup>161</sup> *Holiday Inns v. Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction, 12 May 1974, at Lalive, The First "World Bank" Arbitration, p. 159. ("*Holiday Inns*").

to the individual assets will certainly be relevant to determine the value of the allegedly expropriated investment. This is, however, a question for the merits.

199. The case law relied upon by the Respondent confirms this approach limiting the jurisdictional enquiry to the ownership of the shares. In *Libananco v. Turkey*, the tribunal indeed held that:

*“Turkish law applies to the issue of whether (and when) Libananco acquired the shares in question and thus had an “Investment” under Article 26(1) of the ECT and Article 25(1) of the ICSID Convention.”*<sup>162</sup>

200. Nowhere did the *Libananco* tribunal analyze whether the local subsidiary held each and every asset in accordance with the applicable rules of ownership. Venezuela shares such understanding, when it notes that the *Libananco* tribunal declined jurisdiction because of the claimant’s failure to prove title to the shares “over which the measures in question applied”<sup>163</sup>. The reasoning in *Saba Fakes* was similar, when the Tribunal enquired into the claimant’s ownership of the shares in the local company.<sup>164</sup>

201. It is undisputed that Vestey owned Agroflora's shares and Vestey presented registered corporate documents to this effect.<sup>165</sup> Nothing in the record suggests nor is it alleged that Vestey did not follow Venezuelan law when it acquired the shares. Therefore, the Tribunal cannot but conclude that the present dispute arises out of the investment "of" the Claimant.

iv. *Investment made in accordance with Venezuelan law*

202. Even when the dispute arises out of an investment of an investor, the Tribunal may lack jurisdiction if the investment was made in violation of the host state's law. The Respondent is right when it maintains that the legality requirement set forth in Article 13 of the BIT limits the scope of BIT application to investments made in compliance with the rules of the host state.
203. During the hearing, the President asked the Respondent whether its objection under Article 13 of the BIT related to the "absence or non-existence of an investment" or

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<sup>162</sup> *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011, EXH. RLA-102, ¶112, emphasis added (“*Libananco*”).

<sup>163</sup> Tribunal’s translation; in Spanish: “sobre las que habrían recaído las medidas en cuestión”; R-PHB1, ¶74, footnote 44.

<sup>164</sup> *Saba Fakes v. Turkey*, part V.B.2.iii.

<sup>165</sup> Exh. C-9.



whether it was "an objection based on legality". The answer was that "the objection is the existence of the investment because there is no proof of title."<sup>166</sup>

204. The legality requirement enshrined in Article 13 of the BIT is distinct from that of the existence or ownership of an investment. To conflate the two would imply that an investment treaty without a legality requirement would do away with the condition of the existence of ownership of the investment. There is no need for long explanations to understand that this would be an absurd result. This view is for instance confirmed when looking at *Saba Fakes*, which the Respondent cites. There, the tribunal considered the claimant's failure to acquire the ownership of the shares to be fatal to its jurisdiction under Article 25(1) of the ICSID Convention and Article 1 (definition of investment) of the Netherlands-Turkey BIT, irrespective of the legality requirement in Article 2(2) of that investment treaty.<sup>167</sup>
205. The Respondent does not allege that Vestey committed a violation of Venezuelan law when attempting to acquire the land. Nor does it dispute that Vestey acted in good faith in connection with the acquisition of the land.<sup>168</sup> It rather argues that the Claimant's attempt did not succeed because it did not fulfill the requirements for a valid acquisition of title. Assuming *arguendo* that this argument were correct, a failed good faith attempt to acquire property would not constitute a breach of laws and regulations contrary to the legality requirement. In other words, the objection falls outside the ambit of Article 13 of the BIT. It invokes the existence and ownership of the investment, which the Tribunal has already affirmed.
206. Thus, even if it were established, Vestey's alleged failure to acquire ownership of the land would not deprive the Tribunal of jurisdiction. The Tribunal will therefore address the issue of Vestey's land ownership in the context of its analysis of the merits.

### **C. LIABILITY**

207. The Claimant argues that Venezuela breached its obligations under the BIT. It primarily invokes Article 5 of the BIT, contending that Venezuela unlawfully expropriated Vestey's investment. Moreover, the Claimant argues that Venezuela breached Article 2 of the BIT by taking arbitrary measures contrary to the standards

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<sup>166</sup> Transcript, English, Day 6, 162:4-17; Upon the Presiding Arbitrator's further request for clarification as to whether the objection "[was] purportedly on the basis of the inexistence of the investment" the Counsel reconfirmed: "Yes, that is correct." (Transcript, English, Day 6, 163:8-10).

<sup>167</sup> In any event, the Tribunal notes that the Respondent does not contest the legality of Vestey's acquisition of the shares in Agroflora.

<sup>168</sup> Transcript, English, Day 6, 161:19-24.

of full protection and security and fair and equitable treatment. However, according to the Claimant, if the Tribunal "make[s] a finding of unlawful expropriation, with the natural damages consequences", it need not consider the claims related to the alleged breaches of Article 2 of the BIT.<sup>169</sup>

## 1. Expropriation

### a. The Claimant's Position

208. The Claimant invokes Article 5 of the BIT, which prohibits expropriation, "except for a public purpose related to the internal needs of [the State] on a non-discriminatory basis and against prompt, adequate and effective compensation [...]".<sup>170</sup>
209. The Claimant contends that "[t]he critical factor in determining whether a government measure constitutes expropriation is the effect that the measure has on the asset in question; neither the state's intent, nor its subjective motives, nor the form of the measures are relevant in this regard".<sup>171</sup>
210. It adds that measures that "effectively deprive an investor of the use or enjoyment of its investment, including the deprivation of all or a significant part of the economic benefit of property, are just as expropriatory as the seizure of an investor's formal title to his property".<sup>172</sup>
211. For the Claimant, the Respondent's justification concerning the absence of a valid title is "divorced from reality, [and is] a mere pretext to take Vestey's farms without compensation".<sup>173</sup> In reliance on *CME*, the Claimant also argues that "a change in the legal environment does not authorize a host state to deprive a foreign investor of its investment, unless proper compensation is granted".<sup>174</sup>
212. The Claimant further submits that, through the Land Law, Venezuela set a legal framework allowing it to take over private property without compensation. This was followed by the takeover of the Farms and the appointment of the *ad hoc* administrative board in November 2011. As a result, "[t]oday Vestey has no voting rights in relation to Agroflora, is unable to select the company's management or

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<sup>169</sup> Transcript, English, Day 1, 94:7-11.

<sup>170</sup> CM, ¶175.

<sup>171</sup> CM, ¶177.

<sup>172</sup> CM, ¶183.

<sup>173</sup> CM, ¶179.

<sup>174</sup> CM, ¶178, citing *CME*.

otherwise control its operations, and cannot sell or pledge any business assets. Vestey has received no dividends since the takeover, and given that the *ad hoc* board is tasked with collecting value for the state, no dividends will be forthcoming in future. The Claimant has thus, been deprived of all of the fundamental property rights that it once held in Agroflora and its assets, and no longer receives any economic benefit from its investment".<sup>175</sup>

213. In rebuttal of Venezuela's argument that Vestey did not own the Farms because it is unable to prove a perfect chain of title Vestey states that the requirement of a chain of title is arbitrary and was introduced by the Land Law, which Venezuela is not entitled to invoke here. The contrary "would be to give States *carte blanche* to circumvent their obligation not to expropriate without compensation simply by passing a law justifying the seizure of asset in each case on the basis that the government had determined that the asset actually belonged to the State".<sup>176</sup>
214. Vestey claims that it had registered title to the land, which Venezuela endorsed by acquiescence throughout decades. Since no judicial decision invalidated such registered title, Vestey must be deemed the legitimate owner of the land under Venezuelan law. In any event, Vestey notes that its ownership over the movable property (including livestock, vehicles and other assets) is undisputed. Accordingly, Venezuela's takeover of the Farms constituted an expropriation.
215. The Claimant argues that the expropriation effected through the takeover of the Farm was contrary to Article 5 of the BIT as it was not for a public purpose (i), was conducted in breach of due process (ii), without compensation (iii); and in a discriminatory manner (iv).

i. *Public purpose*

216. The Claimant's submission is that the expropriation of Agroflora lacked the public purpose demanded by Article 5 of the BIT. In spite of the broad margin of appreciation that is recognized to expropriating states, tribunals do assess the existence of a genuine public purpose.<sup>177</sup> For instance, the *ADC* tribunal scrutinized the justification advanced by Hungary in the following terms:

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<sup>175</sup> CM, ¶187.

<sup>176</sup> C-Reply, ¶178, emphasis omitted.

<sup>177</sup> C-Reply, ¶223.

*"In the Tribunal's opinion, a treaty requirement for "public interest" requires some genuine interest of the public. If mere reference to "public interest" can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met."*<sup>178</sup>

217. For Vestey, the requirement of public purpose in Article 5 of the BIT cannot be self-judging. Otherwise it would lack *effet utile*, an interpretive result contrary to the Tribunal's "duty to interpret and apply the provisions of the Treaty in accordance with international law".<sup>179</sup>
218. It is Vestey's submission that the alleged aim of safeguarding the availability of food for the citizens is not a valid public purpose under the circumstances. In reality, Agroflora was a very productive cattle farming business which served the domestic market exclusively, thereby meeting the goal of making food available to the Venezuelan people. There is no evidence that under the government's control Agroflora's livestock was sold to the public at subsidized prices, or that purebred cattle was donated to local farmers to improve the genetic stock of their herd.<sup>180</sup> In fact, so says Vestey, Venezuela targeted certain agrifood businesses for political reasons and not for the purposes which it puts forward.<sup>181</sup>

ii. *Due process*

219. The Claimant submits that Article 5 of the BIT affords the expropriated investor the right to a prompt review of its case and of the valuation of its investments by a judicial or independent authority. It further argues that it is entitled to broader due process rights provided by other BITs of Venezuela which are made applicable by way of the most favored nation ("MFN") clause of the BIT. In particular, the Claimant seeks to rely on Article 5 of the BIT between Venezuela and the Czech Republic, which expressly provides that an expropriation must be carried out "under due process of law".<sup>182</sup>
220. The Claimant also submits that, in addition to an independent review mechanism, due process requires compliance with the procedures set forth by domestic law. According to Vestey, Venezuela failed to follow these procedures. Specifically, INTI's recovery notices violated the provisions of the Land Law, pursuant to which the interim

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<sup>178</sup> *ADC v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, Exh. CLA-37, ¶432.

<sup>179</sup> C-Reply, ¶228.

<sup>180</sup> C-Reply, ¶225.

<sup>181</sup> C-Reply, ¶226.

<sup>182</sup> C-Reply, ¶231.

measures must specify the period of their application and expressly protect the right of residence of the squatters.<sup>183</sup> Moreover, as the interim measures did not provide the legal basis for the seizure of Agroflora's assets other than the land, the government asked the court to establish an *ad hoc* administrative board. The court granted this request in one day even though there was no threat of dissipation of the assets.

221. According to the Claimant, the expropriation process also failed to comply with Venezuela's own Expropriation Law, which imposes amicable negotiations involving the valuation of the property by three experts. The Respondent admits, so says Vestey, that it did not apply the Expropriation Law.<sup>184</sup>
222. Moreover, Venezuela never informed the Claimant of the final Recovery Decisions of 19 December 2011. It is Vestey's case that it did not learn about their existence until it received Venezuela's Counter-Memorial. It was thus prevented from filing an appeal in time.<sup>185</sup> Similarly, the Supreme Court's decision of 13 August 2013 dismissing Agroflora's appeal against the order for interim measures was not communicated to Vestey until the Respondent filed it as an exhibit to its Rejoinder in this arbitration.<sup>186</sup>
223. Overall, these multiple procedural flaws deprived Vestey of its right to a prompt review of its case and of the valuation of its investments by a judicial or independent authority. It is thus Vestey's submission that Venezuela breached the due process requirement embodied in Article 5 of the BIT.<sup>187</sup>

### iii. *Compensation*

224. The Claimant contends that the Respondent failed to provide prompt, adequate and effective compensation as required by Article 5 of the BIT. The requirement that compensation be prompt implies that the monies be paid as soon as possible. The compensation must also be adequate, *i.e.* "equivalent to the full value of the asset taken".<sup>188</sup> Moreover, the Claimant relies on Articles 5 and 6 of the BIT to suggest that the compensation must "be effectively realizable and be freely transferable" and

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<sup>183</sup> C-Reply, ¶234.

<sup>184</sup> Transcript, Spanish, Day 3, 936:13-15; C-PHB1, ¶159, citing Minister Loyo.

<sup>185</sup> C-Reply, ¶237.

<sup>186</sup> C-PHB1, ¶157.

<sup>187</sup> C-Reply, ¶239.

<sup>188</sup> CM, ¶192.

"should be paid in a currency that can be immediately converted into other currencies on the foreign exchange market".<sup>189</sup>

225. The Claimant refutes the Respondent's invocation of the offer made during the 2010 purchase negotiations. For Vestey, the offer to pay 273 million bolivars made by Minister Loyo more than a year before Agroflora's recovery cannot be deemed an offer to compensate the expropriation.<sup>190</sup> In any event, that offer did not meet the criteria of effectiveness and adequacy.
226. Effectiveness entails that compensation be paid in freely convertible currency.<sup>191</sup> Even if Article 5 were read not to require compensation in freely transferable currency, the Claimant contends that it is entitled to invoke the relevant provisions of other treaties by virtue of the MFN clause of the BIT. The Claimant specifically refers to Article 5 of the investment treaty concluded by Venezuela with the Czech Republic, which requires compensation to be "effectively realizable and be made freely transferrable in a freely convertible currency".<sup>192</sup>
227. The Claimant recalls that the MOA made its final offer in bolivars, leaving the risk of the currency conversion to Vestey. The only possible conversion was through CADIVI, which "rarely authorized access to foreign currency and had effectively stopped providing US Dollars to private applicants by the end of 2008".<sup>193</sup> In addition, officials of CADIVI had informed Ms. dos Santos that neither Agroflora nor Vestey were authorized to obtain US dollars. In other words, the price in local currency "would have been neither freely transferable nor freely convertible".<sup>194</sup>
228. In any event, the price offered during the sales negotiations was inadequate. The offer was far below the value assigned to Agroflora by the Claimant's expert. It also failed to ascribe any value to Agroflora's land – which alone was worth USD 40.8 million. The fact that Vestey was prepared to accept Venezuela's offer if paid in US dollars does not make the offer adequate, since Vestey's acceptance "represented a compromise, proffered in view of the relentless political pressure applied by Venezuela [...]."<sup>195</sup>

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<sup>189</sup> CM, ¶193.

<sup>190</sup> C-Reply, ¶192.

<sup>191</sup> C-Reply, ¶197, citing *Biloune*.

<sup>192</sup> C-Reply, ¶202, emphasis omitted.

<sup>193</sup> C-Reply, ¶204.

<sup>194</sup> C-Reply, ¶204.

<sup>195</sup> C-Reply, ¶209.

229. Venezuela also failed to pay the compensation promptly. Almost five years after the recovery, no payment has yet been made. The Claimant opposes the Respondent's argument that compensation may be paid even as late as five years after the taking. Relying on the authorities cited by the Respondent, the Claimant contends that the normal time for a payment of compensation is between three and six months and, in exceptional circumstances if the payment is made in installments, it should in any event not exceed five years, taking into account interest accrued on the deferred installments.<sup>196</sup> Venezuela faced no exceptional circumstances. It did pay much larger settlement and compensation amounts to other foreign investors, thereby evidencing that it had sufficient foreign currency reserves.<sup>197</sup> Even assuming extraordinary circumstances *quod non*, Venezuela did not offer alternative arrangements, such as the payment in installments.

iv. *Discrimination*

230. The Claimant also submits that the expropriation of Agroflora was discriminatory. In reliance on the *Saluka* test, also invoked by the Respondent, the Claimant observes that "a claim for discrimination would be made out where (a) similar cases, (b) are treated differently, (c) without reasonable justification".<sup>198</sup> The Claimant points to instances where Venezuela paid a purchase price or expropriation compensation in convertible currency to foreign investors, including in the food sector.<sup>199</sup> By refusing to make a payment in US dollars for Agroflora, Venezuela treated Vestey differently from these other foreign investors in like circumstances.

231. The Claimant concludes that "Venezuela unlawfully expropriated Agroflora by seizing all of its assets (including its land, to which it had valid legal title) and control of its operations, in a manner that failed to meet each and every requirement of Article 5 of the Treaty."<sup>200</sup>

**b. The Respondent's Position**

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<sup>196</sup> C-Reply, ¶213, citing UNCTAD Report; UNCTAD Report, Exh. CLA-75.

<sup>197</sup> C-Reply, ¶214.

<sup>198</sup> C-Reply, ¶218.

<sup>199</sup> C-Reply, ¶219, footnotes 360, 361.

<sup>200</sup> C-Reply, ¶240.

232. The Respondent submits that the right to take private property for a public purpose is "one of the essential elements of State sovereignty"<sup>201</sup> which entails "a presumption of legitimacy [of expropriation], which needs to be proven wrong".<sup>202</sup>
233. For Venezuela, the allegedly expropriated land was in reality state property recovered in accordance with the Land Law, being specified that the requirement of continuous chain of title existed for decades.<sup>203</sup> Vestey having failed to demonstrate its title over the land, the Respondent ordered the recovery of Agroflora "for reasons of social interest and public utility pursuant to Article 84 of the Land Law".<sup>204</sup> Venezuela also took control of the non-land assets of Agroflora "based on a court interim order issued under Article 196 of the Land Law", as a "fully appropriate means for obtaining timely control of such assets without disrupting the agrarian production".<sup>205</sup>
234. The Respondent in particular calls attention to the decision of the Supreme Court which held that the interim measures did not affect Agroflora's ownership title over its non-land assets.<sup>206</sup> Venezuela thus considers that, if it were ordered to compensate the Claimant, it would be entitled to ownership over these assets. In any event, the Respondent finds the distinction drawn between land and non-land assets artificial, as "the Republic's actions may only be judged against the standard set forth in Article 5(1) of the Treaty".<sup>207</sup> The Respondent contends that it has complied with this standard, as the recovery pursued a public purpose (i); respected due process of law (ii); was accompanied by a good faith attempt to compensate Vestey (iii); and was non-discriminatory (iv).

i. *Public purpose*

235. The Respondent maintains that it "is not required to justify the public policy rationale for which it decided to recover [Agroflora]" as "a State is 'entitled to a measure of deference' in defining the public interest".<sup>208</sup> It is not open to the Tribunal to call into question Venezuela's economic policies. Each state, so says the Respondent, is "free to judge for itself what it considers useful or necessary for the public good".<sup>209</sup>

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<sup>201</sup> *AIG Capital Partners, Inc. & CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, Exh. RLA-34; RCM, ¶139.

<sup>202</sup> R-Rejoinder, ¶325.

<sup>203</sup> R-Rejoinder, ¶320.

<sup>204</sup> RCM, ¶137.

<sup>205</sup> R-Rejoinder, ¶¶317, 321.

<sup>206</sup> Supreme Court Decision, 13 August 2013, Exh. R-115, p. 11; R-Rejoinder, ¶322.

<sup>207</sup> R-Rejoinder, ¶323.

<sup>208</sup> R-Rejoinder, ¶348.

<sup>209</sup> R-Rejoinder, ¶351.



Contrary to the Claimant's argument, such deference does not render the BIT's requirement of public purpose meaningless. The Respondent adds that none of the authorities relied upon by the Claimant suggests "second-guess[ing] the sovereign determination of the public purpose".<sup>210</sup> In particular, "the strategic interest invoked by Hungary in *ADC* was a mere pretense." In the present case, the "recovery occurred in implementation of genuine, proven public policy objectives that the Republic has championed for many years".<sup>211</sup>

236. The Respondent goes on to argue that it "recovered Agroflora as part of its overarching plan to ensure sovereign control over the domestic production of food".<sup>212</sup> This purpose is clearly stated in all the recovery notices, which refer to the "[d]esarollo [r]ural [i]ntegral."<sup>213</sup> The Respondent rejects the Claimant's allegation that food security would have equally, if not better, been achieved, if it had continued to run Agroflora. In any event, to Venezuela, "it is not for Vestey to judge how the Republic should best achieve its public policy objectives".<sup>214</sup> Moreover, notes the Respondent, Vestey has not shown that the recovery of Agroflora was driven by other political motives.

ii. *Due process*

237. The Respondent rejects the Claimant's argument that Article 5 of the BIT provides for due process. For it, Article 5(1) of the BIT only envisages a right to have the measure reviewed.<sup>215</sup> In line with this right, Venezuelan law established a mechanism of administrative and judicial review of recovery decisions. The Claimant made use of this mechanism by challenging the recovery notices and the interim measures before the Superior Agrarian Court. The Respondent further rejects the Claimant's contention that the Expropriation Law should have applied to the recovery process. According to Venezuela, the recovery was rightly conducted under the Land Law, which sets out a special legal regime for the recovery of agricultural land.
238. The Respondent submits that a breach of domestic procedures does not necessarily constitute a violation of due process. Accordingly, it is irrelevant that the Claimant asserts that "the INTI provisional measures did not establish the exact time during

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<sup>210</sup> R-Rejoinder, ¶352.

<sup>211</sup> R-Rejoinder, ¶354.

<sup>212</sup> RCM, ¶143.

<sup>213</sup> Recovery notices, 1 November 2011, Exh. R-61.

<sup>214</sup> R-Rejoinder, ¶359.

<sup>215</sup> R-Rejoinder, ¶369.

which they could take effect and did not expressly state that they protect the right of permanent residents of squatters [...]".<sup>216</sup> Similarly, the Claimant's allegation that the provisional measures did not refer to the legal basis for the recovery of the non-land assets is a matter of domestic law and has no bearing on the due process requirement under the Treaty. In the same vein, the Claimant's allegation that it received no formal notice of the interim measures lacks relevance for purposes of the Treaty application.

239. Furthermore, according to Venezuela, it is disingenuous for the Claimant to argue that Venezuela's alleged failure to notify the final recovery decisions prevented a timely appeal. It also rejects Vestey's allegation that its appeal from the order for interim measures has never been decided and submits a decision of the Supreme Court dated 13 August 2013 by which such court dismissed the appeal.<sup>217</sup>
240. On this basis, the Respondent maintains that Vestey has failed to demonstrate that the recovery of the Farms violated the due process requirement under the BIT.

### iii. *Compensation*

241. It is the Respondent's submission that the non-payment of compensation does not make the expropriation unlawful *per se*. Indeed, when the terms of the compensation are disputed, the duty to pay does not arise since it is yet to be determined what specific compensation is due.<sup>218</sup>
242. Moreover, the requirement that compensation be prompt does not imply that it be immediate, but merely calls for payment as soon as possible.<sup>219</sup> Even accepting the period of three to six months suggested by the Claimant, this requirement would not be breached here. Indeed, only about two months elapsed from the beginning of the recovery until the initiation of this arbitration. The time since the start of the arbitration cannot be taken into account, as it precisely serves to set the amount of the compensation.<sup>220</sup>
243. In any event, the Republic offered compensation to Vestey both before and after the recovery. Minister Loyo offered to purchase Agroflora for 273 million bolivars.<sup>221</sup> This amount, so says the Respondent, was convertible into US dollars in Venezuela

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<sup>216</sup> R-Rejoinder, ¶374.

<sup>217</sup> R-Rejoinder, ¶322; Exh. R-115.

<sup>218</sup> R-Rejoinder, ¶330.

<sup>219</sup> R-Rejoinder, ¶331.

<sup>220</sup> R-Rejoinder, ¶332.

<sup>221</sup> Draft sale and purchase agreement, 25 November 2010, Exh. C-291.

through a legally established method of conversion. In particular, the Claimant could have sought the conversion of the purchase price through CADIVI. In such a case, it would have obtained USD 63.5 million at the rate of 1 US dollar for 4.3 bolivars.

244. Contrary to the Claimant's allegation, this compensation offer, which the Claimant first accepted and then later refused, qualifies as compensation offer under the Treaty.<sup>222</sup> The offer was also more than adequate, as it was higher than the market value ascribed to Agroflora by Econ One, the Respondent's damage expert in these proceedings whose valuation amounts to USD 45.8 million. This offer was made in local currency in good faith and Venezuela agreed in Clause 3 of the draft 2010 agreement<sup>223</sup> that it would assist in expediting the conversion process with CADIVI.<sup>224</sup> The fact that the offers were made in bolivars does not make them inadequate as it was the Claimant's refusal to pursue negotiations that prevented further discussions on currency.<sup>225</sup> In the Respondent's view, Vestey was acting unreasonably when it turned down this offer.
245. The Respondent also submits that it repeated its compensation offer after the recovery. As Minister Loyo's testified, he personally called Ms. dos Santos to offer a payment during the second week of November 2011.<sup>226</sup> Vestey can thus not blame Venezuela now for not having received compensation.<sup>227</sup>

#### iv. *Discrimination*

246. The Respondent observes that the Parties concur on the definition of discriminatory conduct as it was established in *Saluka*, i.e. a claim for discrimination would be made out where (a) similar cases (b) are treated differently (c) without reasonable justification. On this basis, it submits that the fact that it may have paid a purchase price or expropriation compensation in foreign currency to other foreign investors is irrelevant for four reasons.
247. First, the duty of non-discrimination does not extend to compensation. Rather, as Article 5 of the BIT makes clear, it applies only to the taking itself. Second, the payments made in other cases where there was an agreement on the amount are of no relevance, since unlike there Vestey and Venezuela failed to reach an agreement

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<sup>222</sup> R-Rejoinder, ¶338.

<sup>223</sup> *Id.*, Clause 3.

<sup>224</sup> R-Rejoinder, ¶341.

<sup>225</sup> R-Rejoinder, ¶345.

<sup>226</sup> Loyo WS1, ¶¶30-31; Loyo WS2, ¶¶70-71; R-Rejoinder, ¶¶261, 344.

<sup>227</sup> R-Rejoinder, ¶346.

on the amount due. Third, none of the enterprises compensated in foreign currency operated in the farming industry. Only one of them, namely the supermarket chain Cativen, was in the food business. In any event, the government compensated Cativen because, contrary to Vestey, it pursued the negotiations with the government. Fourth, unlawful discrimination implies an intent, which is lacking here because the Republic's actions did not consider the nationality of the persons involved. Venezuela recovered food businesses held by foreigners and Venezuelans alike.<sup>228</sup>

248. Therefore, Venezuela's recovery of Agroflora was in conformity with all the requirements of Article 5 of the BIT.<sup>229</sup>

### **c. Analysis**

249. The relevant part of Article 5(1) of the BIT reads as follows:

*"Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of the Party, on a non-discriminatory basis and against prompt, adequate and effective compensation."*

250. The Tribunal will start by determining whether there has been an expropriation. In the affirmative, it will then examine whether the expropriation was lawful. In this context, it notes that the Parties do not dispute that the criteria for the legality of the expropriation enshrined in Article 5(1) of the BIT are cumulative.

#### *i. Act of expropriation*

251. It is common ground between the Parties that Venezuela took over the control of Agroflora's administration and assets. The Respondent contends, however, that Vestey did not own the land of its Farms and that, therefore, it simply recovered public land for which it owes no compensation.<sup>230</sup>

252. To determine whether Venezuela's taking of Agroflora's land constitutes an expropriation, the Tribunal must assess whether Vestey held a title to the land. The Parties agree that Venezuelan law governs ownership of the land. They disagree,

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<sup>228</sup> R-Rejoinder, ¶¶363-366.

<sup>229</sup> R-Rejoinder, ¶367.

<sup>230</sup> R-PHB1, § IV.A.1.a.

however, on whether the Land Law, being one of the contested measures, must be taken into account when reviewing ownership.

253. As was described above, the present dispute arose when Venezuela introduced certain measures under the Land Law, starting with the adoption of the 2001 Land Law itself and culminating in the recovery proceedings in 2011.<sup>231</sup> The Land Law is the very measure that Vestey is challenging before this Tribunal as one of the expropriatory acts which deprived it of its investment.<sup>232</sup> The Parties are in agreement that an investor's ownership over the allegedly affected assets must be assessed immediately before the adoption of the challenged measures.<sup>233</sup> Accordingly, the Tribunal will review the validity of Vestey's title just before the introduction of the Land Law, *i.e.* as of 13 November 2001.
254. Using a later date would render the protection granted in Article 5 of the BIT illusory. If one were to set the date of assessment of the investor's ownership any later than the date of the first contested measure, a state could adopt a law making it impossible for a private owner to prove ownership and thereby circumvent the Treaty guarantee. This cannot be the meaning of the Treaty.<sup>234</sup> Therefore, the Tribunal will not consider the provisions of the Land Law in assessing Vestey's ownership over the allegedly expropriated land.
255. The Claimant contends that, in light of the Republic's previous recognition of Vestey's title in particular through the 2006 Agreement and the productivity certificates, the Respondent is estopped from challenging Vestey's land ownership. For the event that Venezuela is not so estopped, Vestey claims that its ownership is proven by the existence of a registered title. The Respondent, on the other hand, submits that the Claimant must establish the historic chain of valid title transfers to the land and that it failed to do so. The Parties further diverge on whether Vestey acquired title by acquisitive prescription. Each of these matters will be dealt with in turn.

*a) Estoppel and recognition of title through productivity certificates and other governmental acts*

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<sup>231</sup> The alleged events before the enactment of the 2001 Land Law, *i.e.*, the squatters' invasions at Hato El Charcote no longer form the basis of the claims, The Claimant's Reply to Venezuela's Request for Bifurcation, 15 March 2013, ¶9. Therefore, the 2001 Land Law is chronologically the first measure giving rise to the claims.

<sup>232</sup> C-Rejoinder, ¶¶35, 36.

<sup>233</sup> R-Opening, slide 64.

<sup>234</sup> This would also go against the cornerstone rule of international law, according to which "the characterization of an act of a State as internationally wrongful [...] is not affected by the characterization of the same act as lawful by internal law." Article 3, ILC Articles on State Responsibility, Exh. CLA-19.

256. In support of its argument of estoppel, the Claimant first submits that, pursuant to Article 8.2 of the 2006 Agreement, the government recognized its title when issuing the productivity certificates to Agroflora. It also invokes the fact that the government did not challenge its peaceful possession of the land for decades.
257. The Tribunal is not convinced by these arguments. The requirements for acquiring property rights over immovable assets situated in Venezuela are governed by specific norms of Venezuelan property law. For a private person to have a claim under international law arising from the deprivation of its property, it must hold that property in accordance with applicable rules of domestic law. The principle of estoppel cannot create otherwise inexistent property rights. This is so if one grounds the principle of estoppel on international law.
258. It is equally so if one seeks to find a basis for estoppel in domestic law. Indeed, Venezuelan law leaves no room for the acquisition of property by estoppel. Specifically, Article 796 of the Civil Code provides that property rights can be acquired by the following means:
- “Property and other rights can be acquired and transferred by virtue of the law, by succession, and by contract. They can be also acquired through prescription.”<sup>235</sup>*
259. These means do not include estoppel. One of them, acquisitive prescription, could be compared to estoppel in the sense that it implies that acquiescence to peaceful possession can create property rights. The creation of property rights through acquisitive prescription is, however, subject to stringent legal conditions.
260. Putting aside the estoppel argument which cannot succeed here, the Tribunal notes that the governmental acts on which Vestey relies are incapable of creating or transferring property rights under Article 796 of the Civil Code. In particular, the 2006 Agreement did not contemplate selling or otherwise transferring the property over the land. Nor could the productivity certificates issued pursuant to the 2006 Agreement accomplish that end. A productivity certificate, which is only valid for two years, merely certifies the productivity of the land.<sup>236</sup>

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<sup>235</sup> Tribunal’s translation; in Spanish: “La propiedad y demás derechos se adquieren y transmiten por la Ley, por sucesión, por efecto de los contratos. Pueden también adquirirse por medio de la prescripción.” Article 796, Civil Code of Venezuela, Exh. C-366.

<sup>236</sup> Articles 44, 48, Land Law, Exh. C-29.

261. Finally, Venezuela’s lack of challenge of Vestey’s possession could only create rights if the conditions for acquisitive prescription were fulfilled, a question that the Tribunal will review later in this analysis.

*b) Registered title*

262. The Parties disagree on the value of a registered title under Venezuelan law. For the Claimant, a registered title evidences sufficient ownership title unless it is invalidated by a final decision of the competent Venezuelan court. By contrast, the Respondent argues that a registered title shows “just title” (“*justo título*”).

263. Article 27 of the Law on Public Registries provides that the entries into public registries qualify as public documents:

*“Registry entries and information contained and officially issued from the registrar system shall have all legal effects pertaining to public documents.”<sup>237</sup>*

264. It is common ground between the Parties that the registry extracts presented by the Claimant have been issued by the Public Registry. Hence, they constitute public documents within the meaning of the Law on Public Registries.

265. Pursuant to Article 1359 of the Civil Code, a public document is presumed valid. Such provision reads in pertinent part as follows:

*“A public instrument carries faith, both as between the parties and as to the third parties, so long as it is not declared false [...].”<sup>238</sup>*

266. As Brewer-Carías writes, a public document “does not only serve the purpose of informing of the occurrence of the registration, [but] it [also] constitutes public faith and, therefore, should be taken as valid unless otherwise proven in court [...].”<sup>239</sup> The

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<sup>237</sup> Claimant’s translation, in Spanish: “Los asientos e informaciones registrales contenidos y emanados oficialmente del sistema registral, surtirán todos los efectos jurídicos que corresponden a los documentos públicos”, Article 27, Law on Public Registries, Exh. C-253.I.

<sup>238</sup> Tribunal’s translation; in Spanish: “El instrumento público hace plena fe, así entre las partes como respecto de terceros, mientras no sea declarado falso [...]”, Article 1359, Civil Code of Venezuela, Exh. C-366.

<sup>239</sup> Tribunal’s translation; in Spanish: “el sólo registro en sí mismo no es prueba de que el título registrado es “válido”, el mismo hace fe pública y por tanto, se debe tener como válido, salvo que se demuestre lo contrario, en juicio”, Allan R. Brewer-Carías, “La Figura del ‘Rescate’ Administrativo de Tierras Agrícolas de Propiedad Privada Regulada en la Reforma de Ley de Tierras y Desarrollo Agrícola de 2010, Su Inconstitucionalidad, y el Tema de la Acreditación de la Titularidad de la Propiedad Privada Sobre Tierras Rurales”, January 2014, Exh. C-372, p.4.

Respondent accepts that the registration creates a rebuttable presumption, i.e. presumption *iuris tantum*, of validity of the registered act.<sup>240</sup>

267. However, as the Respondent asserts, it is not the act of the registration which gives rise to the transfer of property. Indeed, Article 796 of the Civil Code, which contains an exhaustive list of the modes of transfer or creation of a property right, does not list registration as an independent method of acquisition of property rights. By contrast, that provision does list contracts as self-standing means of transferring property.<sup>241</sup> Venezuela acknowledged this in the following terms:

*“In the moment when there is a consent about – the asset sold and the price, the property is transferred automatically.”<sup>242</sup>*

268. Accordingly, although registration is not an independent mode of acquisition of property, it is not disputed that it creates a presumption that the act underlying the registration is valid. In the present case, that underlying act is the contract for the transfer of property. Such contract does constitute an independent mode of acquisition of a property right, a matter that is uncontroversial. Unless it is invalidated through the means established by law, the registration obliges any third party, including this Tribunal, to presume that the property right has been validly transferred by operation of the registered property transfer agreement.

269. That conclusion is in line with the overarching legislative objective of legal certainty in property transactions. Or in the words of the Venezuelan legislators:

*“The mission of the registry is to guarantee the legal certainty of the registered acts and rights vis a vis third persons, through the publicity of the registry.”<sup>243</sup>*

270. If the registered title were to account solely for the good faith intention of the acquirer of the property it would not produce any legal consequences for third parties and registry entries would not need to be public. These entries are public precisely because they create the presumption of validity of a registered legal act *vis a vis* the

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<sup>240</sup> Tribunal’s translation, in Spanish: “la titularidad registral solo crea una presunción legal iuris tantum”, Transcript, Spanish, Day 1, 239:17-19.

<sup>241</sup> Article 796, Civil Code of Venezuela, Exh. C-366.

<sup>242</sup> Transcript, Spanish, Day 1, 240:18-22, 241:1-4. And in Spanish: “En el momento en que hay consentimiento sobre lo -- el bien que se está vendiendo y el precio, la propiedad se transmite automáticamente.”

<sup>243</sup> Tribunal’s translation; in Spanish: “La misión de los registros es garantizar la seguridad jurídica de los actos y de los derechos inscritos, con respect a terceros, mediante la publicidad registral”, Article 25, Law on Public Registries, Exh. C-253.I.



entire public. Therefore, any third person can and must presume that legal acts entered into the Public Registry are valid.

271. The Public Registry may of course contain invalid or inaccurate data. The fact of registration does not validate an otherwise invalid legal act; it merely creates a rebuttable presumption that the act is valid.<sup>244</sup> That presumption can only be overcome by a final judicial decision. Article 43 of the Law on Public Registries sets forth the method of impeaching the validity of a registered legal act in the following terms:

*"[R]egistry entries where a void or voidable legal act is recorded may only be annulled pursuant to a final judgment not subject to appeal."<sup>245</sup>*

272. Consequently, the validity of a registered act is not self-judging. Third persons, such as the government or this Tribunal, cannot judge for themselves whether a registered legal act is valid or not. They must presume the validity of the act until and unless the contrary is established by the competent Venezuelan court. In the absence of a judicial decision to the contrary, the Tribunal will thus consider that the registered property transfer agreements presented by Vestey validly transferred the property rights over the land plots.

273. The Respondent further objects that the areas indicated in the registered titles do not coincide with the areas claimed by Vestey. The Claimant answers that the discrepancies are due to the fact that the old registered titles did not employ modern measurement techniques.

274. In the Tribunal's view, these discrepancies do not *per se* affect the validity or existence of the registered titles. Venezuelan law does not provide for such a consequence. If the Respondent deemed the registered titles invalid as a result of these errors, it could have initiated the judicial action provided in Article 43 of the Law on Public Registries. Yet, it is undisputed that the government never started any legal proceedings to invalidate Vestey's registered title.

275. The outcome could have been different if the registry extracts made reference to land plots different from those claimed by the Claimant. However, in this instance, the physical defining features and names of the registered plots coincide with those

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<sup>244</sup> *Id.*, Article 43: "La inscripción no convalida los actos o negocios jurídicos inscritos que sean nulos o anulables conforme a la ley."

<sup>245</sup> Claimant's translation, in Spanish: "los asientos registrales en que consten esos actos o negocios jurídicos solamente podrán ser anulados por sentencia definitivamente firme", *Id.*

claimed by Vestey. The divergences merely involve the precise surfaces of the land registered in Agroflora's name. The actual surface at issue may be relevant for valuation purposes, but it has no bearing on the existence or validity of a registered title. On this basis, the Tribunal's conclusion that Agroflora validly acquired title over the land applies to the surface areas stated in the registry extracts.

*c) Acquisitive prescription*

276. In any event, even if the registrations were not deemed to confer valid title, Vestey would hold such title on the ground of acquisitive prescription.

277. Indeed, where the property transfer agreement is invalid (for instance, because, the seller did not own the asset), ownership may be acquired through prescription, which is an independent mode of acquisition of a property right. As Article 796 of the Civil Code stipulates, "[t]he property and other rights can be acquired [...] through prescription."<sup>246</sup> Article 1952 of the Civil Code further clarifies that "prescription is a mode of acquisition of a right [...]."<sup>247</sup>

278. Article 1979 of the Civil Code provides a specific rule for the acquisition of property rights through prescription:

*"One who acquires an immovable good or a property right over an immovable good in good faith through a duly registered title not invalid for a defect in form, acquires the ownership or the property right within ten years from the date of the registration of the title."<sup>248</sup>*

279. The Respondent does not dispute that Vestey acted in good faith when it acquired registered title over the land. Nor does it challenge the formal validity of the registration. It arises from the record that Vestey completed the registration in respect of its last acquisition of contested land in 1988, namely more than ten years before the present dispute arose. The requirements for an acquisitive prescription provided in Article 1979 of the Civil Code are thus met.

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<sup>246</sup> Tribunal's translation; in Spanish: "La propiedad y demás derechos se adquieren y transmiten [...] por medio de la prescripción." Article 796, Civil Code of Venezuela, Exh. C-366.

<sup>247</sup> Tribunal's translation; in Spanish: "La prescripción es un medio de adquirir un derecho [...]." *Id.*, Article 1952.

<sup>248</sup> Tribunal's translation; in Spanish: "Quien adquiere de buena fe un inmueble o un derecho real sobre un inmueble, en virtud de un título debidamente registrado y que no sea nulo por defecto de forma, prescribe la propiedad o el derecho real por diez años, a contar de la fecha del registro del título", *Id.*, Article 1979.

280. The Respondent opposes that the prescriptive acquisition of a property right requires a declaration from the Venezuelan courts. In support, it relies on Article 690 of the Code of Civil Procedure, which stipulates as follows:

*"For claiming the declaration of the property through acquisitive prescription or the declaration of any other right susceptible of acquisitive prescription, the interested person must present a formal demand before a First Instance Civil Judge of the location of the real estate, which will substantiate and resolve in accordance with rules set forth in this Chapter."<sup>249</sup>*

281. The wording of this provision is straightforward. It sets forth a procedural framework for a *declaration* of acquisitive prescription and not for the acquisitive prescription itself. Nothing in this article suggests that the declaration is a prerequisite for the acquisition of a property right through prescription. Article 796 of the Civil Code is clear in that "[t]he property and other rights can be acquired [...] through prescription". It does not require a declaration of prescription. The property right is acquired once the substantive requirements for this particular mode of acquisition are satisfied, as they are set forth in Article 1979 of the Civil Code.

282. Article 691 of the Code of Civil Procedure confirms that a judicial declaration is not a condition for the acquisition of rights by prescription:

*"The request [for the declaration of acquisitive prescription] shall be presented against all those persons who appear in the respective Registry Office as owners or holders of the title over any property right over the real estate. The request shall be accompanied with a certificate from the Registry in which the name, surname and domicile of such persons will be indicated, and with a certified copy of the respective title."<sup>250</sup>*

283. If a judicial declaration under Article 691 of the Code of Civil Procedure were a prerequisite of acquisitive prescription, Article 1979 of the Civil Code would be rendered inutile, since the registered owner would never be able to initiate declaratory proceedings against oneself. The only understanding that reconciles these two provisions is that one acquires a property right once it meets the substantive

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<sup>249</sup> Tribunal's translation; in Spanish: "Cuando se pretenda la declaración de propiedad por prescripción adquisitiva según la ley, o la declaración de cualquier otro derecho real susceptible de prescripción adquisitiva, el interesado presentara demanda en forma ante el Juez de Primera Instancia en lo Civil del lugar de situación del inmueble, la cual se sustanciara y resolverá con arreglo a lo dispuesto en el presente Capítulo." Article 690, Code of Civil Procedure, Exh. R-91, emphasis added.

<sup>250</sup> Tribunal's translation; in Spanish: "La demanda [de la declaración de prescripción adquisitiva] deberá proponerse contra todas aquellas personas que aparezcan en la respectiva Oficina de Registro como propietarias o titulares de cualquier derecho real sobre el inmueble. Con la demanda deberá presentarse una certificación del Registrador en la cual conste el nombre, apellido y domicilio de tales personas, y copia certificada del título respectivo." Article 691, Code of Civil Procedure, Exh. C-367.

requirements prescribed in Article 1979, while the rules of the Code of Civil Procedure provide a legal process to formally declare that acquisition has validly occurred.

284. Venezuela also argues that Vestey is estopped from invoking acquisition by prescription as it did not raise this defense at the time of the recovery proceedings.<sup>251</sup> In fact, Vestey relied on acquisitive prescription seeking to annul INTI's resolution effecting the recovery of El Charcote in judicial proceedings in 2005. The court dismissed the argument as procedurally inapposite.<sup>252</sup> In any event, the Tribunal can discern no requirement in the applicable legal framework according to which the beneficiary of an acquisitive prescription must invoke the prescription before any court or authority or otherwise inform third parties. Therefore, even if Vestey had never invoked the acquisitive prescription it would not change the legal position, i.e. that it had acquired ownership in accordance with Article 1979 of the Civil Code.

d) *Chain of title*

285. The Tribunal has already established that Vestey held title to the land at the time of the impugned measures. Venezuela's takeover of Agroflora and its land constitutes an expropriation. For the sake of completeness, the Tribunal will nevertheless address the Respondent's central argument about the chain of title.

286. The Respondent argues that, in order to demonstrate the sufficient ownership title over land, one must prove that the person from whom the land was acquired held him- or herself sufficient title. Accordingly, for Venezuela, proof of ownership involves establishing the validity of all the title transfers from the first release of the property into the private ownership. This requirement hinges on the principle that no one can transfer more rights than he or she holds - *nemo plus iuris transferre potest quam ipse habet*. The Respondent particularly relies on the 1936 Vacant Land Law to assert that the purported private owner of the land bears the burden to prove ownership by demonstrating the chain of title.<sup>253</sup> The Claimant disagrees, arguing that the 1936 Vacant Land Law does not require private owners to establish their title by proving the chain of title. It submits that there was no legal basis for the chain of title requirement in Venezuelan law until it was introduced by the challenged Land Law.

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<sup>251</sup> R-PHB1, ¶¶89, 90.

<sup>252</sup> Decision of the Superior Agrarian Court, 28 September 2005, Exh. C-114, p.19.

<sup>253</sup> The Respondent also relies on the 2010 Land Law. However, as it has been established above, the relevant date for assessing the ownership is the date when the first complained measure gave rise to the dispute. The 2010 Land Law itself constitutes one of the challenged measures. Therefore, it will not be taken into account when examining Vestey's title over the land.

287. The Tribunal notes that the principle that no one can convey more rights than he or she holds implies that a defect in the chain of title affects all subsequent transactions. Most domestic property laws balance this principle against the interest of a good faith buyer and legal certainty in property transactions. Instead of imposing the burden of proving the chain of title, those laws offer more easily ascertainable ways of establishing ownership. These include in particular the presumption of validity of registered titles<sup>254</sup>, acquisitive prescription,<sup>255</sup> and the protection notion of the *bona fide* purchaser.
288. Under Venezuelan property law, the presumption of validity of registered titles, as well as the institution of acquisitive prescription allow owners to establish their ownership without investigating the chain of title. The Venezuelan legislators have also made sure that a private person will only be burdened to prove its ownership title in a limited number of cases. The Parties are in agreement that the general rule on distribution of burden of proof under Venezuelan law requires that a person who brings an action against the purported private owner disprove the ownership.<sup>256</sup> This allocation can only be reversed in exceptional circumstances. In particular, in a case invoked by the Respondent, the Supreme Court of Venezuela noted that “the regular principle on the allocation of the burden of proof does not apply to the vindication of the vacant land” by the government in accordance with the 1936 Vacant Land Law.<sup>257</sup> According to the court, the reversal of the burden of proof in favor of the state derives from Article 1 of the 1936 Vacant Land Law:

*“[I]t suffices that the State attempt to vindicate the particular land because it considers it vacant, for the respondent [i.e. the private owner] to bear the burden of proving ownership over the claimed land [...]”<sup>258</sup>*

289. Nowhere did the court hold that there is a general reversal of the burden of proof in favor of the state in all types of ownership disputes between a private person and the state. Rather, according to the court, the burden will be reversed if the state “*attempts to vindicate*” allegedly vacant land. The rules on the vindication of vacant land are prescribed by Article 10 of the 1936 Vacant Land Law, which provides as follows:

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<sup>254</sup> See, e.g., Section 58, English Land Registration Act 2002.

<sup>255</sup> See, e.g., Article 2265, Civil Code of France.

<sup>256</sup> *Contraciones Morphe*, Decision of the Supreme Court of Venezuela, Exh. RLA-21, p. 9.

<sup>257</sup> Tribunal’s translation; *Id.*, p. 7.

<sup>258</sup> Tribunal’s translation; *Id.*, emphasis added.

*"In case the vacant land appear to be unlawfully occupied as a private property, the Federal Executive shall arrange to initiate the civil action before the competent courts, in conformity with the present Law."<sup>259</sup>*

290. The Parties do not dispute that the government of Venezuela has never initiated a vindication action against Vestey seeking a declaration that the Farms were vacant pursuant to Article 10 of the 1936 Vacant Land Law. Consequently, the reversal of the burden of proof provided by Article 1 of the 1936 Vacant Land Law and invoked by the Respondent does not apply by its own terms. Hence, even if the 1936 Vacant Land Law were deemed to oblige Vestey to show the chain of title, *quod non*, that obligation was never been triggered by the government.<sup>260</sup>
291. Furthermore, Article 11 of the 1936 Vacant Land Law provides for limitations to civil vindication actions instituted by the state under Article 10. Article 11 bars the state from initiating such action altogether "when there is evidence that, if invoked, the defense of acquisitive prescription will be successful".<sup>261</sup> Article 11 further authorizes the private person whose ownership is challenged to invoke acquisitive prescription as a defense during the vindication action under Article 10. Hence, even if the government had started a vindication action, Article 11 would have allowed Vestey to prove its ownership by claiming acquisitive prescription as a defense without the need to show chain of title.
292. On the basis of this analysis, it is clear that Respondent has never placed Vestey in a procedural setting in which Venezuelan law would have required to show the chain of title. In conclusion, by the time of the measures, Vestey had acquired the full ownership title over the contested land. Therefore, the government's takeover of control over Agroflora's property and administration constitutes an expropriation within the meaning of Article 5 of the BIT.

ii. *Public purpose*

293. Article 5 of the BIT requires that an expropriation be "for a public purpose related to the internal needs of the Party". The Respondent accepts that "[p]ursuant to Article 5

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<sup>259</sup> Tribunal's translation; Article 10, 1936 Vacant Land Law, Exh. R-3.

<sup>260</sup> The additional case law invoked by the Respondent further supports such interpretation of the burden of proving the chain of title. In particular, the 1997 decision of the Superior Agrarian Court established that a person bringing the vindictive action bears the burden of proving the chain of title. Exh. RLA-95, p. 6.

<sup>261</sup> Tribunal's translation; Article 11, 1936 Vacant Land Law, Exh. R-3.

the [state's] actions must be for a declared public purpose".<sup>262</sup> In other words, there must be a public purpose and the measure must be aimed at achieving that purpose.

294. The Tribunal must thus first assess whether there existed a public purpose. It concurs with the Respondent that for purposes of this assessment states deserve broad deference.<sup>263</sup> In the words of the *LIAMCO* tribunal, the state is "free to judge for itself what it considers useful or necessary for the public good".<sup>264</sup> International tribunals should thus accept the policies determined by the state for the common good, except in situations of blatant misuse of the power to set public policies.
295. Here, the Respondent submits that its purpose was "to ensure the availability and timely access to food by its citizens, as part of its national plan to ensure food self-sufficiency".<sup>265</sup> It also submits that "the widespread access to agricultural and livestock resources [...] make[s] up one of the main drivers of the Bolivarian Republic of Venezuela's food strategy to provide resources to its population".<sup>266</sup> The Tribunal defers to this policy determination. In any event, that policy appears perfectly legitimate and worth of protection and there is no suggestion in the record that it was not.
296. This finding, however, does not end the inquiry. The Tribunal must also assess whether the impugned expropriatory measure was "for" the public purpose as Article 5(1) of the BIT requires. In doing so, it must consider all the relevant circumstances, including the government's post-expropriation conduct.<sup>267</sup> While the objective is not to review the effectiveness of the measures, the government's failure to advance a declared purpose may serve as evidence that the measure was not taken in furtherance of such purpose. Thus, the idea is to determine whether the measure had a reasonable nexus with the declared public purpose or in other words, was at least capable of furthering that purpose.
297. While it argues that the purpose of Agroflora's take over was to secure the population's access to food, the Respondent has accepted on multiple occasions that Agroflora was a very productive enterprise.<sup>268</sup> It is also undisputed that the entire beef

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<sup>262</sup> R-Rejoinder, ¶351.

<sup>263</sup> *Ioannis Kardassopoulos and Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, Exh. CLA-68, ¶391.

<sup>264</sup> *Libyan Am. Oil Co. (LIAMCO) v. Libyan Arab Republic*, 20 I.L.M. 1, Award, 1977, Exh. RLA-15, p. 58.

<sup>265</sup> R-PHB1, ¶108.

<sup>266</sup> R-PHB1, ¶110.

<sup>267</sup> *ADC v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, Exh. CLA-37, ¶433.

<sup>268</sup> Certificates of Productivity, Exh. C-253.

output of Agroflora was sold on the domestic market at the regulated price. During the hearing, the Respondent's expert testified that the Venezuelan government imports cattle from abroad at higher prices than the domestic ones and then uses a budgetary subsidy to domestically resell the imported cattle at the lower domestic price.<sup>269</sup> In such circumstances, a productive private farming enterprise selling the entirety of its beef output on the domestic market at regulated prices contributes to the implementation of the state's access to food policy. It in fact shares the burden of meeting the alimentary needs of the population. It is difficult to see how the purpose of wider access to food would be better served by expropriating such private enterprise. Nothing in the record suggests that Agroflora's output increased after the expropriation, or that the population gained wider or cheaper access to the beef produced by Agroflora. To the contrary, there are unrebutted statements of the Claimant's witnesses that the government's management of Agroflora resulted in a decline of the production levels.<sup>270</sup>

298. Another justification advanced by Venezuela for the takeover of Agroflora was the need to guarantee wider public access to Vestey's genetically superior cattle. The fact shows, however, that Vestey regularly sold its purebred cattle and semen of high genetic quality to local producers.<sup>271</sup> There is no evidence that after the expropriation the government increased the purebred cattle sales or decreased its sales price. To the contrary, the record suggests that under the government's control Agroflora sold purebred cattle at higher than regulated prices.<sup>272</sup> In any event, if the government indeed aimed at wider public access to Agroflora's purebred cattle, measures lighter than expropriation were available. The government could for instance have adopted a regulation obliging Agroflora to increase the sales of purebred cattle or semen and/or to lower the prices.
299. The Respondent also argued that its aim to facilitate public access to food warranted the redistribution to the people of the large uncultivated land plots in private hands (*latifundios*). This justification can hardly apply here, where the government clearly acknowledged that Agroflora was a productive enterprise. At the hearing, the Respondent's expert testified that there was no "higher and better" use for Agroflora's land than that practiced by Agroflora.<sup>273</sup> In any event, there is no evidence that the

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<sup>269</sup> Transcript, English, Day 5, 165:12-25.

<sup>270</sup> Transcript, English, Day 3, pp. 5, 19.

<sup>271</sup> Smith WS, ¶¶7, 12; Sales of semen and purebred cattle, Exh. C-149.

<sup>272</sup> Authorization issued by the *ad hoc* board, Exh. C-322.

<sup>273</sup> Transcript, English, Day 5, 111:6-8.



government distributed the ownership to the land to private persons or had any plans to this effect.

300. On this basis, the least that the Tribunal can say is that the nexus between Venezuela's declared purpose to achieve wider public access to food and the expropriation of Agroflora is not obvious. That being so, the Tribunal can dispense with a definitive ruling on this requirement in light of the conclusion reached in the following section.

iii. *Due process*

301. It is a common ground between the Parties that Article 5(1) of the BIT guarantees an opportunity for an investor "to prompt review, by a judicial or other independent authority, of his or its case".<sup>274</sup> That guarantee also applies to an independent review of the "valuation of his or its investment".
302. The Parties are also in agreement that Venezuela did not regard its measures as expropriation within the meaning of Venezuelan law. It took control of Agroflora under the legal regime of *rescate* provided in the Land Law.<sup>275</sup> Indeed, when Vestey appealed the interim measures issued against Agroflora under the Land Law, the Supreme Court denied the application of the guarantees enshrined in the Expropriation Law, because this was not the relevant framework:

*"[W]e are not within the framework of an expropriation proceeding, but rather in the implementation of measures intended to ensure agro-food security and sovereignty of the Venezuelan people."*<sup>276</sup>

303. Venezuela's Expropriation Law provides detailed procedural guarantees. It requires that compensation for expropriation be determined by a commission of three experts, and requires the state to initiate a judicial action to expropriate an asset.<sup>277</sup> This legal regime differs drastically from that of the Land Law. The *rescate* proceedings under the Land Law are based on the premise that the land is state property and, therefore, the state owes no compensation to the persons from whom the land is recovered. It goes even further by denying the right to compensation for any improvements found on the recovered land:

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<sup>274</sup> R-Rejoinder, ¶¶368, 369.

<sup>275</sup> Transcript, Spanish, Day 3, 936:13-15.

<sup>276</sup> Respondent's translation, Decision of the Supreme Court, 13 August 2013, Exh. R-115.

<sup>277</sup> Articles 22, 28-30, 32-35, Expropriation Law, Exh. C-235.

*"The persons illegally occupying the public land, which is susceptible of recovery, cannot claim any indemnity for any improvement or fruits present at the occupied land."<sup>278</sup>*

304. In 2002, the Constitutional Court of Venezuela struck down this latter provision as unconstitutional.<sup>279</sup> However, in 2005, the Parliament reintroduced the same provision in Article 86 of the Land Law.<sup>280</sup> Similarly, the Land Law contains no rules for the compensation for the movable property, such as cattle or vehicles, seized with the recovered land.
305. By introducing and applying the Land Law to Vestey's investment and thereby derogating from the procedural guarantees of the Expropriation Law, Venezuela deprived Vestey not only of the opportunity to have the valuation of its investment reviewed by an independent authority, but of the right to be compensated altogether. The regime provided by the Land Law fails to satisfy the due process requirements of the BIT.
306. Furthermore, Venezuela failed to comply procedural regime of the Land Law itself, as rudimentary as it is. Namely, Article 93 of the Land Law provides that the *rescate* proceedings are concluded by INTI's final recovery decision. Article 94 of the same law stipulates that such final recovery decision must be notified to the occupant of the land and the latter then has 60 days to appeal that decision.<sup>281</sup>
307. INTI issued the final recovery decisions for the Farms on 19 December 2011.<sup>282</sup> Venezuela filed these decisions as Exhibit R-66 to its Counter-Memorial, on 12 August 2013, over a year after the decisions were handed down. The Claimant complained that it then learned of these decisions for the first time.<sup>283</sup> The Respondent neither alleges nor provides for that the decisions were conveyed to the Claimant earlier. The Tribunal thus concludes that Venezuela failed to communicate the final recovery decisions to Vestey as required by Article 94 of the Land Law, thereby depriving Vestey of the opportunity to appeal the decisions before a judicial authority.<sup>284</sup> This conduct breached the guarantee of a prompt review by an independent authority enshrined in Article 5(1) of the BIT.

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<sup>278</sup> Tribunal's translation; Article 90, Land Law, Exh. C-29.

<sup>279</sup> Decision of the Constitutional Court, Exh. C-31.

<sup>280</sup> 2005 Land Law, Exh. C-41.

<sup>281</sup> *Id.*, Articles 93, 94.

<sup>282</sup> Exh. R-66.

<sup>283</sup> C-Reply, ¶1237.

<sup>284</sup> It only managed to appeal the interim measures and the initial recovery notices.

308. Moreover, Vestey also learned of the outcome of its appeal from the interim measures through this arbitration. The Respondent filed the Supreme Court decision as Exhibit R-115 to its Rejoinder of 13 October 2014. There is no allegation or evidence of an earlier communication of the decision dated from 13 August 2013. This procedural omission further infringed on Vestey's treaty right of independent review.
309. It flows from the foregoing discussion that the limited procedural guarantees existing under the *rescate* regime of the Land Law were insufficient to comply with the Treaty's due process requirement and that Venezuela's repeated failures to notify Vestey of its decisions breached even the limited procedural guarantees available under the Land Law. Therefore, the Tribunal cannot but find that Venezuela's expropriation of Vestey's investment was not in accordance with the procedural guarantees of Article 5(1) of the BIT. This determination suffices to conclude that the expropriation is unlawful. The Tribunal could thus dispense with the analysis of the remaining criteria of a lawful expropriation under Article 5(1) of the BIT, *i.e.* discrimination and compensation. Because of the particular facts of the case involving sales negotiations first and recovery proceedings later, which the Parties have extensively briefed, the Tribunal will nevertheless briefly address compensation.

iv. *Compensation*

310. The Respondent does not dispute that it paid no compensation to Vestey, but insists that it offered to do so. Whether compensation was offered would be relevant if the Tribunal were to assess the lawfulness of the expropriation. However, the Tribunal has already found that the expropriation was unlawful because it failed to comply with at least one other cumulative requirement of legality. This finding could end the inquiry under Article 5 of the BIT. However, as stated above, the Tribunal will nevertheless briefly discuss the requirement of compensation for the sake of completeness.
311. The Respondent submits that its offer for a purchase price during the sale and purchase negotiations of Agroflora must be considered as a compensation offer for expropriation purposes. In particular, it refers to the term sheet signed by Mr. Edelmann on 5 March 2010<sup>285</sup> and to the draft sale and purchase agreement of 25 November 2010.<sup>286</sup>

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<sup>285</sup> Exh. C-152.

<sup>286</sup> Exh. C-291.

312. The Tribunal is not convinced that an offer to pay a price to buy a company can be assimilated to an offer to compensate for the expropriation. Article 5(1) of the BIT requires the expropriation to be “*against* prompt, adequate and effective compensation.” The sales negotiations took place over one year prior to the *rescate*. One can hardly see how a price offer made in that context could relate to compensation for the expropriation. The fact that the sales negotiations failed, for whatever reason, did not release Venezuela from its obligation under Article 5(1) of the BIT to provide compensation for expropriation.
313. Notably, throughout the sales negotiations, the government offered to pay a purchase price, without ever making reference to an expropriation. The present facts differ from the circumstances of *Mobil* and *ConocoPhillips* which the Respondent invokes. In *Mobil*, there was evidence of “discussions [that] took place in 2007 between the Parties on the compensation that was due to the Claimants *on the account of the expropriation*.”<sup>287</sup> The representative of Mobil Oil Cerro Negro himself testified during the proceedings that the claimant “had several meetings with the Ministry of Energy regarding compensation for *government’s taking* of [their] interests in [...] joint ventures.”<sup>288</sup> Similarly, the term sheets proposed by the government in *ConocoPhillips* “clearly showed that Venezuela intended to take the existing interests of ConocoPhillips in those Projects [...]”<sup>289</sup> In contrast, here PDVSA Agrícola and later the MOA expressed an interest to purchase Vestey’s shares in Agroflora. The offers relied upon by the Respondent make no reference whatsoever to expropriation or recovery.
314. Venezuela also alleges that it repeated its offer of payment in bolivars after the recovery of Agroflora, a fact which Vestey denies. Minister Loyo maintained in his witness statement that he called Ms. dos Santos to offer an indemnity and that she rejected it.<sup>290</sup> During the hearing, Minister Loyo clarified that he made that offer

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<sup>287</sup> *Mobil Corporation, Venezuela Holdings, BV, Mobil Cerro Negro Holding, Ltd, Mobil Venezolana de Petróleos Holdings, Inc, Mobil Cerro Negro, Ltd, and Mobil Venezolana de Petróleos, Inc v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014, Exhibit CLA-124, ¶302, emphasis added.

<sup>288</sup> *Id.*, ¶304, emphasis added.

<sup>289</sup> *ConocoPhillips Petrozuata BV, et al v Bolivarian Republic of Venezuela*. ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, Exhibit CLA-122, ¶382.

<sup>290</sup> Loyo WS2, ¶71:

“Posteriormente, llamé a la Sra. Dos Santos para manifestarle que la Ley de Tierras nos obligaba a indemnizar a Agroflora y que estábamos en disponibilidad financiera para ello. La Sra. Dos Santos rechazó mi oferta indicando que a Vestey no le interesaba recibir pago alguno en Bolívares.”

The Respondent points to Vestey’s board minutes referring to “the continuous pressure to accept Bolivars” (Exh. C-319). However, this is likely to refer to the offers made in the

personally by telephone.<sup>291</sup> Other than these conflicting statements on the very fact of this offer, there is nothing in the record confirming that an offer was actually made and, if so, upon what terms.

315. What is more, the events that followed tend to belie the thesis that the state offered compensation for the expropriated assets. Indeed, after the takeover of Agroflora on 13 November 2011, Ms. dos Santos wrote to Minister Loyo soliciting a meeting.<sup>292</sup> Minister Loyo admits that he left this communication unanswered.<sup>293</sup> Shortly thereafter, Jesper Edelmann traveled to Venezuela and also requested to meet with the Minister, again in vain. If Venezuela was really prepared to pay compensation, one would have expected it to entertain these requests and meet with Vestey's representatives to advise them of the terms upon which payment could be effected. In circumstances where Venezuela refused to meet the representatives of Vestey and failed to answer their written communications, a mere reference to a telephone offer without any corroboration appears insufficient to establish that the expropriation was carried out "against prompt, adequate and effective compensation" as required by Article 5(1) of the BIT.
316. The Tribunal therefore concludes that Venezuela failed to provide compensation for the expropriation of Vestey's assets.

## 2. Violations of Article 2

317. The Claimant alleges that the Respondent has also breached Article 2 of the BIT, which provides protection against unfair, inequitable, arbitrary and discriminatory measures, and requires ensuring the full protection and security of investments. The Respondent argues that the Claimant's claims under Article 2 of the BIT are subsumed in the claim for unlawful expropriation as, once compensation is

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context of the sales negotiations and not to the alleged telephone conversation. The Respondent further points to George Vestey's testifying that Minister Loyo had offered Bolívars after the expropriation (R-PHB2, ¶115, citing Transcript, Spanish, Day 2, 509:8-18). From the transcript passage cited by the Respondent, it is clear that Mr. Vestey was answering a question about the sales negotiations *in November 2010* (Transcript, Spanish, Day 2, 508:17-510:2). In the original language, both the question and the answer started with the words "In November 2010" (Transcript, English, Day 2, 116:1; 116:4).

<sup>291</sup> Transcript, Spanish, Day 3, 1030:11-17:

"PRESIDENTE KAUFMANN-KOHLER: ¿Es usted que hizo la oferta o... SEÑOR LOYO: Sí, como no, hicimos el ofrecimiento.

PRESIDENTE KAUFMANN-KOHLER: ¿Usted personalmente?

SEÑOR LOYO: Personalmente, exactamente."

<sup>292</sup> Email of 13 November 2011, from Ms. Dos Santos email to Minister Loyo, Exh. C-196.

<sup>293</sup> Transcript, Spanish, Day 3, 1000:5-15.

determined for the taking, "there can be, virtually by definition, no loss or damage left to be compensated separately based on a breach of other, lesser standards".<sup>294</sup> In any event, the Respondent denies the claim that it has violated Article 2 of the BIT.

318. At the hearing, the Claimant stated that, if the Tribunal "ma[de] a finding of unlawful expropriation, with the natural damages consequences", it would not need to consider the claims for breaches of Article 2 of the BIT.<sup>295</sup> On the basis of this statement and of the principle of procedural economy<sup>296</sup> and having held that Venezuela is liable for the unlawful expropriation of Vestey's investment, the Tribunal will dispense with ruling on the claims for breach of Article 2 of the BIT.

#### **D. QUANTUM**

319. The Parties disagree on many issues related to quantum. They primarily diverge on the applicable standard of compensation (1); causation (2); the method of valuation (3); the determination of the fair market value of the expropriated assets (4); and interest (5). The Tribunal will address each of these matters in turn.

##### **1. Standard of Compensation**

###### **a. The Claimant's Position**

320. Vestey seeks reparation for the harm caused by the unlawful expropriation. As restitution is not available, reparation must take the form of compensation, which will "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed".<sup>297</sup> Opposing the Respondent's argument that the BIT standard of compensation prevails over the customary rule of full reparation, Vestey explains that Article 5 of the BIT merely sets the standard of compensation for a lawful expropriation. As the expropriation was unlawful, that standard does not apply.

321. The customary standard of full reparation provides for compensation of the fair market value ("FMV") of the expropriated asset, together with commercially reasonable interest.<sup>298</sup> Vestey agrees with the Respondent that the value of the expropriated

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<sup>294</sup> RCM, ¶161.

<sup>295</sup> Transcript, English, Day 1, 94:7-11.

<sup>296</sup> See e.g. *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012, ¶272.

<sup>297</sup> CM, ¶¶229-231, quoting *Chorzów*.

<sup>298</sup> C-Reply, ¶207, citing among others *CMS*, *Azurix*, and *Enron*.

asset must be established as of the date of the announcement of the recovery of Agroflora, *i.e.* 29 October 2011 (the “Valuation Date”). It adds that discounts for transaction costs or liquidity of the assets are incompatible with the principle of full reparation.

#### **b. The Respondent’s Position**

322. The Respondent notes that it addresses quantum only *ex abundanti cautela* and that none of its arguments should be construed as an acceptance of the obligation to pay damages.<sup>299</sup>
323. This said, the Respondent argues that “the customary international law standard of full compensation is preempted by Article 5 of the Treaty as *lex specialis*”.<sup>300</sup> Pursuant to Article 5 of the BIT, the amount of compensation “is limited to [...] the fair market value of Agroflora”.<sup>301</sup> Venezuela observes that the BIT does not limit its compensation standard to lawful expropriations. It argues that, therefore, the standard of compensation set forth by Article 5 of the BIT applies to both lawful and unlawful expropriations.
324. Even if the standard of full reparation were applicable, the damages would not exceed the FMV of Agroflora.<sup>302</sup> According to the Respondent, the Claimant did not demonstrate that it suffered a loss exceeding such value.<sup>303</sup> Venezuelan law, so says the Respondent, only knows one compensation standard, which refers to the “fair price of the expropriated investment”.<sup>304</sup> Any award of damages should thus be confined to the FMV of Agroflora on the Valuation Date.

#### **c. Analysis**

325. The Parties agree on the Valuation Date, an agreement that the Tribunal will implement. They disagree, however, on the standard of compensation and on the implication of the latter on the methodology for quantifying the value of the expropriated assets.

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<sup>299</sup> R-Rejoinder, ¶463.

<sup>300</sup> R-Rejoinder, ¶472.

<sup>301</sup> R-Rejoinder, ¶469.

<sup>302</sup> R-Rejoinder, ¶474.

<sup>303</sup> RCM, ¶208.

<sup>304</sup> RCM, ¶210, footnote 371.

326. By unlawfully expropriating Vestey's investment, Venezuela has breached its obligation under the Treaty. The Parties do not dispute that that breach is attributable to Venezuela. Thus, Venezuela has committed an internationally wrongful act as defined by Article 2 of the ILC Articles on State Responsibility,<sup>305</sup> which entails the international responsibility of the state, and gives rise to an obligation to make full reparation for the injury caused by the illicit act.<sup>306</sup> The Tribunal notes here that, while the ILC Articles govern a State responsibility vis-à-vis another State and not a private person, it is generally accepted that the key provisions of the ILC, such as Article 31(1) can be transposed in the context of the investor-State disputes.

327. States are free to derogate from this general framework of responsibility.<sup>307</sup> This said, the Tribunal cannot follow the Respondent when it submits that the rules on compensation set in Article 5 of the BIT constitute such a derogation. The relevant part of Article 5 of the BIT prohibits expropriation in the following terms:

*"Investments [...] shall not be [...] expropriated [...] except for a public purpose related to the internal needs of the Party, on a non-discriminatory basis and against prompt, adequate and effective compensation."*

328. The provision goes on to set out the parameters of compensation:

*"Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier. Such compensation, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable."*

329. In these terms, Article 5 of the BIT does not purport to establish a special regime of reparation for expropriations which are unlawful due to reasons other than the absence of compensation. In *Chorzów*, the PCIJ applied the standard of full reparation after noting that the wrongful act of Poland did not consist "merely in not having paid to the Companies the just price of what was expropriated."<sup>308</sup> Similarly, Venezuela's expropriation of Vestey's investment was not illegal only because no compensation

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<sup>305</sup> Pursuant to Article 2 ILC of the Articles on State Responsibility, "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State" (Exh. CLA-19).

<sup>306</sup> Articles 1, 31(1), ILC Articles on State Responsibility, Exh. CLA-19.

<sup>307</sup> Article 55 of the ILC Articles, which reads as follows: "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law" (Exh. CLA-19).

<sup>308</sup> *Factory of Chorzów, Germany v. Polish Republic*, PCIJ Series A, No. 17, Judgment on Merits, 13 September 1928, Exh. CLA-2, p. 47.



was paid. Venezuela also failed to grant due process as required by Article 5(1) of the BIT.

330. The Tribunal is also unconvinced by the Respondent's reliance on its domestic law to argue that the relevant standard of compensation for expropriation is the "fair price" of the expropriated asset.<sup>309</sup> By unlawfully expropriating Vestey's investment, Venezuela breached its obligations under international law and the consequences of that breach are exclusively governed by international law.
331. For these reasons, the Tribunal comes to the conclusion that Venezuela must provide full reparation under customary international law. The Tribunal will thus review the application of the standard of full reparation to the facts of this case. It notes at the outset that Vestey claims monetary damages and that Venezuela does not oppose this form of reparation.
332. Before closing this discussion of the standard of compensation, the Tribunal must address the Respondent's alternative argument, according to which "once the Republic compensates the Claimant for the fair market value of the entire Agroflora business, the Republic will need to be given the title to [the non-land] assets in return", since "the interim measures did not affect Agroflora's ownership of its assets (other than the land it allegedly owned)".<sup>310</sup>
333. If this argument is characterized as a counterclaim, it must be deemed inadmissible under Article 46 of the ICSID Convention. Indeed, that provision requires that a counterclaim be "within the scope of the consent of the parties and [...] otherwise within the jurisdiction of the Centre." The scope of the consent to arbitrate is provided in Article 8 of the BIT. It is limited to "[d]isputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former ...." The Respondent's request to be awarded title over Agroflora's assets does not concern an obligation of Venezuela under the BIT and thus falls outside the scope of the consent to arbitrate. In the Tribunal's view, this is a matter to be dealt with by the local courts in application of municipal property law.
334. Venezuela's argument would not be successful either if it were not deemed a counterclaim but rather a defense against the claim for compensation. Article 5 of the

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<sup>309</sup> RCM, ¶210.

<sup>310</sup> R-Rejoinder, ¶322.

BIT prohibits expropriations and measures tantamount to expropriations which do not meet the legality requirements without distinguishing between direct or indirect expropriation. In other words, Article 5 does not distinguish depending on whether title of the expropriated assets has passed or not. Hence, even where title to the assets is not formally affected, an unlawful expropriation must be remedied by an award covering the full value of the property taken.

## **2. Causation**

### **a. The Claimant's Position**

335. The Claimant contends that Venezuela's actions deprived Vestey of the entire economic benefit of its investment.<sup>311</sup> It submits that in situations such as the present one "the element of causation is implicit in the initial determination that an expropriation has taken place."<sup>312</sup> The dismissal of the claims for damages in *Biwater*, which the Respondent invokes, is inapposite under the circumstances of this case. In *Biwater*, the tribunal dismissed the request for damages on the ground that the value of the expropriated investment was nil on the date of the expropriation.<sup>313</sup> This is not arguable here, where both Parties agree that Agroflora had a certain value. The Claimant adds that whether Vestey's accounts showed an accounting loss is irrelevant to the assessment of the economic damages.<sup>314</sup>

### **b. The Respondent's Position**

336. The Respondent raised a new argument at the hearing asserting that there was no causal link between the alleged breaches of international law committed by the Respondent and the damages claimed by the Claimant. It relied on *Biwater* to argue that, in the absence of a showing of damage caused by the unlawful act, there can be no award of damages.<sup>315</sup> The consolidated financial statements of Vestey Group Limited do not reflect the losses sought to be recovered in this arbitration. Therefore, for Venezuela, the Claimant has failed to prove that the alleged breaches of the BIT caused a loss.

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<sup>311</sup> C-PHB1, ¶¶202-204.

<sup>312</sup> *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, Exh. CLA-52, ¶780.

<sup>313</sup> C-PHB1, ¶204.

<sup>314</sup> C-PHB1, ¶206.

<sup>315</sup> R-PHB1, ¶¶341, 342.

### c. Analysis

337. It is common ground between the Parties that damages are only due if harm was caused by the wrongful act in question. However, the Parties diverge on whether Venezuela's conduct caused damage to Vestey.
338. The Respondent relies on the *Biwater* decision to substantiate its position about the lack of damage sustained by the Claimant. In *Biwater*, however, the tribunal found that "by 1 June 2005, being the date BGT [the claimant] states its investment was expropriated by the Republic, the said investment was of no economic value."<sup>316</sup> The tribunal then reviewed the reasons for the depreciation of the investment and came to the conclusion that "none of the Republic's violations of the BIT between 13 May 2005 and 1 June 2005 in fact caused the loss and damage in question, or broke the chain of causation that was already in place."<sup>317</sup> Hence, in *Biwater*, the expropriated asset had lost its entire value at the time of the expropriation for reasons unrelated to the state's conduct.
339. The *Biwater* scenario cannot be compared to the facts before this Tribunal. In the present case, there is no dispute that Agroflora had a certain value at the time of the taking and the Respondent does not claim that Vestey lost its investment for causes independent from its conduct.
340. As was established in earlier sections of this award, the Claimant held an investment in Venezuela through its 100% share participation in Agroflora and Venezuela unlawfully expropriated the totality of the assets of Agroflora. As a result of this expropriation, Vestey lost the entirety of the value and economic benefit of its investment as well as the ability to manage, sell or otherwise dispose of it. The Tribunal thus has no doubt that causation is established. It is obviously a different matter to determine the amount of the loss that was caused by the expropriation.
341. Before the Tribunal turns to the valuation of the loss, it must deal with the Respondent's objections that Vestey's financial statements do not reflect the loss claimed in this arbitration. It first notes that these statements are not in the record, which in and of itself disposes of the objection. Moreover, even if they were on record and their content were to confirm Venezuela's allegations, they could not do away with the existence of the damage. Indeed, the fact that a parent company does not

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<sup>316</sup> *Id.*, ¶792.

<sup>317</sup> *Id.*, ¶798.

set off the value of its investments or provide for a contingent loss in its accounts cannot be conclusive evidence of the existence of a loss of the subsidiary. In this respect, the explanations which Mr. Rosen at the hearing appear plausible. He stated that “a loss may not even be recorded in a parent company’s accounts in certain circumstances, including where the parent company has a claim under an investment treaty and believes that its investment is recoverable.”<sup>318</sup>

### **3. Method of Valuation**

#### **a. The Claimant’s Position**

342. The Claimant submits that an asset-based valuation is “[t]he most appropriate valuation methodology to establish the fair market value of a land-intensive farming business such as Agroflora ...”<sup>319</sup> Venezuela itself proposed to use this valuation method during the aborted sales negotiations<sup>320</sup>. The FMV of Agroflora, so says the Claimant, cannot be less than the sum of the FMV of the individual assets, including vehicles, cattle and real estate.<sup>321</sup> The Respondent’s expert, Dr. Flores agreed that “a willing seller would never agree to sell its business based on a DCF valuation if an asset-based valuation produced a higher price ...”<sup>322</sup>.
343. According to the Claimant, the value of Agroflora’s assets is not adequately represented by the cash flow stream that these assets may generate since “the value of the land is realized only once, with a sale, and not on an annual or other regular basis” (as captured by a DCF valuation).<sup>323</sup> Based on the common business practice of “land banking”, Vestey’s long term business strategy contemplated that it could sell parcels of land at a profit from time to time, as it had done with the Santa Clara and Guataparo Farms, in 1998 and 2007 respectively. Only an asset-based method “takes into account longer term appreciation in real estate assets which, while not generating cash flow, may be significantly greater on net than operational returns.”<sup>324</sup>
344. Contrary to the arguments of the Respondent’s experts, the Claimant argues that there is a market for Agroflora’s cattle in Venezuela since there is a regulated price both for beef and livestock.<sup>325</sup> Moreover, Ms. Soriano’s rebuttal report well identified

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<sup>318</sup> Transcript, English, Day 5, 100:9-25.

<sup>319</sup> CM, ¶235

<sup>320</sup> *Punto de Cuenta*, 17 August 2010, Exh. C-158.

<sup>321</sup> CM, ¶237.

<sup>322</sup> Citing Transcript, English, Day 5, 150:8-12; C-PHB1, ¶214.

<sup>323</sup> C-Reply, ¶315.

<sup>324</sup> C-PHB1, ¶216, footnote omitted.

<sup>325</sup> C-Reply, ¶324.

comparable transactions on the Venezuelan real estate market, evidencing the existence of the relevant market. In any event, any illiquidity on this market can be explained by Venezuela's measures "overturning established principles of land ownership". For Vestey, the Respondent should not be permitted to benefit from its own measures, which is why the valuation is based on a "counter-factual" or "without measure" scenario. For this, according to the Claimant, the valuations of comparable land plots in neighboring Brazil would be an appropriate benchmark.<sup>326</sup>

345. The Claimant criticizes not only the method employed by the Respondent, but also the accuracy of Venezuela's proposed valuation. According to the Claimant, Econ One's DCF valuation is a desktop exercise carried out "without grounding in the reality of Agroflora's business expectations".<sup>327</sup> If Econ One had consulted with management, it would have learned that Agroflora intended to increase its cattle sales, as its land reached the carrying capacity in 2011.<sup>328</sup> Not having considered this factor, the Econ One projections cannot be accurate. The Tribunal should thus rely on the asset-based valuation produced by the Claimant's experts.

#### **b. The Respondent's Position**

346. The Respondent argues that the DCF method is the most appropriate method for determining the FMV of a going concern like Agroflora. While it agrees that a valuation based on assets is an accepted method, it argues that it "cannot be used when there is no reliable market information for the assets being appraised".<sup>329</sup> It also contends that there is no market in Venezuela for land plots as large as those of Agroflora. Nor is there any reliable market information for Agroflora's livestock.<sup>330</sup>
347. Dr. Flores of Econ One explains that, if the asset-based method produces a higher result than the income-based method, there must be an objective explanation for the difference.<sup>331</sup> No such explanation exists in the present case. Vestey made the best possible use of the land. The land plots, being semi-inundated farm land, had no better potential. Therefore, the cash flows they generated must reflect their full value.

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<sup>326</sup> C-Reply, ¶323.

<sup>327</sup> C-PHB1, ¶271.

<sup>328</sup> C-PHB1, ¶269.

<sup>329</sup> RCM, ¶217.

<sup>330</sup> R-Rejoinder, ¶499.

<sup>331</sup> Transcript, English, Day 5, 150:8-12.

348. The Respondent further argues that the authorities cited by the Claimant do not support an asset-based valuation of agricultural businesses.<sup>332</sup> In particular, Kantor states that the DCF method must be used for going concerns, while Ripinsky and Williams support an asset-based methodology only when the enterprise to be valued has a low probability of success. Agroflora was a profitable business with a long track record. Thus, it should be valued under the DCF method.
349. The Respondent further opposes the Claimant's reliance on arbitral awards such as *Vivendi II*, *Waguib Elie*, *Metalclad*, *Tecmed*, and *Wena*. The tribunals in these cases discarded the DCF method only because the enterprise in question lacked a sufficient record of profits, was unprofitable or at an early stage of development.<sup>333</sup> None of these factors are relevant in the present case.

### **c. Analysis**

350. It is common ground between the Parties that the income-based and the asset-based methods are both widely accepted in valuation theory. Both methods can be used to set the FMV of an asset and should in principle yield similar results. However, there are circumstances which may render one method more appropriate than the other.
351. On the basis of the record and in particular of the expert evidence, the Tribunal arrives at the conclusion that the full value of Vestey's land is not captured by the cash flows that the business generates. The Claimant has established that it relied on the occasional sale of parcels of land, which appreciated over time in line with a general trend of rising prices for agricultural land. The DCF analysis does not reflect this appreciation, which is captured by an asset-based methodology of comparable sale and purchase transactions.
352. The experts on both sides agree that the market practice is to value agricultural farms under an asset-based methodology.<sup>334</sup> The Respondent's expert also testified that market practice is a relevant consideration when choosing a valuation method.<sup>335</sup> This appears indeed correct. A valuation is aimed at determining the FMV of an asset, namely the amount at which the asset would change hands between a willing buyer and a willing seller. Thus, if the actors in a particular market tend to use a certain

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<sup>332</sup> R-Rejoinder, ¶¶502, 503.

<sup>333</sup> R-Rejoinder, ¶508.

<sup>334</sup> Transcript, English, Day 3, 33:8-19; Transcript, Spanish, Day 4, 1323:8-16.

<sup>335</sup> Transcript, English, Day 5, 139:17-24.

method of valuation in their transactions, the FMV will be best determined by that method.

353. The record shows that the asset-based valuation method is not only widely used for agricultural farms in general, but that it was also employed specifically in relation to Agroflora. The Respondent's expert agreed that the *Punto de Cuenta* of 17 August 2010, on which PDVSA Agrícola relied in the sales negotiations, reflects an asset-based valuation of Agroflora.<sup>336</sup> Notably, the government subsequently founded its purchase offer of 273 million bolivars on that asset-based valuation and not on the alternative DCF valuation prepared by Vazquez & Asociados upon the instructions of Vestey.<sup>337</sup>
354. The Tribunal cannot follow Venezuela when it contends that there is no market in the country for Agroflora's real estate and livestock. As will be discussed in detail in the following section, the valuation advanced by the Claimant's experts identifies sufficient information to arrive at robust results. In particular, the land plots selected by Ms. Soriano are comparable to Agroflora's land in terms of bio-economic use. To the extent that the bio-economic use is comparable, adjustments can then be made for size, transaction date and other relevant factors. As for the livestock, the existence of regulated prices allows an accurate calculation of the base price of the herd, which can then be adjusted to take account of the uncontested genetic quality of Agroflora's livestock.
355. By contrast, the Respondent's DCF valuation appears flawed. Indeed, Dr. Flores admitted that the cash flows projections did not take into account the actual cattle count.<sup>338</sup> As Ms. dos Santos testified, Agroflora's land would reach its carrying capacity at the end of 2011,<sup>339</sup> forcing Agroflora to increase cattle sales. In the Tribunal's opinion, this would necessarily have an impact on cash flows.
356. For all these reasons, the Tribunal will value Agroflora adopting an asset-based methodology. The only asset-based valuation on record is the one offered by the Claimant's expert, on which the Respondent has extensively commented. The Tribunal will thus use this valuation and the Respondent's comments as the starting point of its assessment.

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<sup>336</sup> *Id.*; Transcript, English, Day 5, 147:1-7.

<sup>337</sup> Financial projections for Agroflora, July 2009, Exh. C-266.

<sup>338</sup> Transcript, English, Day 5, 201:23-25.

<sup>339</sup> Dos Santos WS2, ¶182.

#### 4. Fair Market Value

357. The Claimant's experts divided Agroflora's assets into three categories: livestock, real estate, and vehicles. For all three categories, they arrived at an aggregate value of USD 157,363,348.<sup>340</sup> The Tribunal will assess the damages following this division.

##### a. Real Estate

###### i. *The Claimant's Position*

358. To establish the FMV of Agroflora's real estate, the Claimant relies on the valuation report provided by Josefina Soriano of Best Valuation Activities ("BVA"). Ms. Soriano regularly provided valuation services to Agroflora from 1993 to 2011 and her reports were used to prepare Agroflora's audited financial statements.<sup>341</sup> BVA's valuations were also accepted as the basis for the valuation of Hato El Charcote and Hato San Pablo Paeño, which were sold and donated to Venezuela in 2006.<sup>342</sup>

359. To value Agroflora's land, BVA used comparable land transactions as proxies.<sup>343</sup> If there were any improvements on the comparable land plots, BVA deducted the value of such improvements and only retained the value of the undeveloped land. This was done in this manner because the improvements were valued separately from the land value by the replacement cost approach.<sup>344</sup> The value of existing equipment necessary for the functioning of the structures, including motor pumps, fuel tanks, electricity generators, but excluding work equipment and tools, were added to the value of the real estate. Finally, BVA also valued Agroflora's administrative offices in Valencia. To this effect, it applied a market-based method and used comparable transactions as proxy.<sup>345</sup>

360. In response to the criticism of the Respondent's experts, Professor Ortega and Econ One, BVA submitted a rebuttal report, in which it modified the final result of the valuation. Among other matters, BVA's rebuttal report addressed the objections about some technical errors in the initial report and about the lack of comparability of the chosen transactions. The rebuttal report identifies new comparators regarded as relevant for their climatic, agronomic and socioeconomic characteristics. Such report

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<sup>340</sup> C-Reply, ¶367.

<sup>341</sup> C-Reply, ¶346.

<sup>342</sup> C-Reply, ¶346, Exh. C-248.

<sup>343</sup> BVA ER1, Exh. C-214, p. 20.

<sup>344</sup> *Id.*, p. 28.

<sup>345</sup> *Id.*, pp. 31, 32; CM, ¶259.



also addresses the objection that the number of comparator transaction was insufficient by extending the time frame back to 2003 and making related inflation adjustments.<sup>346</sup> On such basis, BVA then calculated the average price per hectare in the Venezuelan states where the Claimant's land was located, with the following results:

- State of Apure: average USD 115 per hectare;
- State of Guárico – average USD 167 per hectare;
- State of Falcón – Average USD 1,702 per hectare.

361. The Claimant is of the view that BVA's calculations are conservative. Specifically, the price calculated by BVA for Hato La Cueva at USD 167 per hectare is significantly lower than the price of a farm with similar characteristics, Hato El Charcote, which was sold in 2006 at USD 322 per hectare.<sup>347</sup> Similarly, in neighboring Brazil, land plots comparable to the ones valued by BVA at an average of USD 115.11 per hectare are valued at USD 471 per hectare.<sup>348</sup>

362. In the aggregate, BVA valued Agroflora's real estate at USD 60.9m.

ii. *The Respondent's Position*

363. The Respondent observes at the outset that the Claimant itself conceded that "... the calculations regarding land valuation (including the calculations between comparable land transactions) in the BVA Report of November 2011 [BVA's first report] are no longer relied by Vestey in this arbitration".<sup>349</sup>

364. As to the second BVA report, the Respondent contends that the transactions selected by BVA cannot be compared to Agroflora's land, as they apply to much smaller areas than Agroflora's land plots combined.<sup>350</sup> In this context, it stresses that Ms. Soriano was not able to submit a single land transaction as large as 50% of the combined size of the Farms.<sup>351</sup> Moreover, it disputes the bio-economic comparability of the chosen transactions. To identify such characteristics, BVA relied upon a report prepared by Gabriel Bittara of *Consultoría Ambiental y Diseño Gráfico* ("CADIGRA") who failed to

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<sup>346</sup> BVA ER2, ¶¶15-20.

<sup>347</sup> C-Reply, ¶353.

<sup>348</sup> C-Reply, ¶355.

<sup>349</sup> R-Rejoinder, ¶¶512, 517, footnote 765.

<sup>350</sup> R-Rejoinder, ¶522.

<sup>351</sup> Econ One ER2, ¶256; R-Rejoinder, ¶537.

disclose that he was a former consultant of Agroflora.<sup>352</sup> Ms. Soriano admitted at the hearing that she had relied on the CADIGRA report without conducting an independent verification of the bio-economic characteristics of the comparator land plots.<sup>353</sup>

365. The Respondent also challenges BVA's reference to transactions going back to 2003. It notes that BVA itself recognized that the transactions used as comparators should be contemporaneous to the Valuation Date<sup>354</sup>, but that "out of 24 comparable transactions used by BVA, only four took place within two years from the valuation date".<sup>355</sup>
366. The Respondent's experts also dispute the methodology adopted by Ms. Soriano to take account of the differences in size, transaction times and land improvements.<sup>356</sup> They observe that the adjustments, which relate to land size, transaction time and payment method, access roads, proximity to nodal points, and improvements, account for 50% of the price. Being the main value determinant, they render the result unreliable.<sup>357</sup>
367. The Respondent disputes that its expert Ortega accepted the value of the improvements to the land put forward by Vestey. Instead, Professor Ortega insisted that BVA's first report is invalid in its entirety.<sup>358</sup> According to him, BVA counted the value of the improvements twice: first, as part of the unit price and, second, by a replacement cost method.<sup>359</sup>
368. The Respondent further challenges the Claimant's reliance on comparators from Brazil. It invokes "[t]he economic, social and regulatory differences between Pentanal Region (Brazil) and the Estates of Apure, Guárico and Falcón (Venezuela)" that "make any attempt to compare their land prices unworkable".<sup>360</sup> Land as immovable property can only be valued in the context of its local market. Furthermore, in the Respondent's view, Vestey's reference to the sale price of El Charcote in the 2006 Agreement is ill-placed. By that agreement, Vestey also donated Hato San Pablo Paeño and

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<sup>352</sup> R-Rejoinder, ¶524.

<sup>353</sup> R-PHB1, ¶295.

<sup>354</sup> R-Rejoinder, ¶530.

<sup>355</sup> R-Rejoinder, ¶531.

<sup>356</sup> *Id.*, ¶¶282-288.

<sup>357</sup> R-Rejoinder, ¶535.

<sup>358</sup> R-Rejoinder, ¶541.

<sup>359</sup> Ortega ER2, ¶100.

<sup>360</sup> R-Rejoinder, ¶544.

undertook to suspend the ICSID proceedings<sup>361</sup>, which justified the higher price paid for Hato El Charcote.

iii. *Analysis*

369. At the outset, the Tribunal recalls the differences between the land areas which Vestey claims and those to which its title documents refer. A willing buyer would necessarily have noted these discrepancies and refused to pay for surfaces of land that did not appear in the registered title. Thus, the Tribunal is of the opinion that only the surface area figuring in the title documents is compensable.

370. In accordance with Annex 2 to the Claimant's First PHB, the Tribunal finds that Vestey's registered titles (column 3) extended to the following areas of the claimed land (column 2), which thus represent the compensable area (column 4):

Farms	Claimed Area	Documented Area	Compensable Area
Los Cocos	55,843.72	106,602.00	55,843.72
Morichito			
Matapalos	42,467.02	36,913.58	36,913.58
Los Viejitos			
La Bendición Ramera	27,717.27	24,800.00	24,800.00
Turagua	111,622.54	99,145.72	99,145.72
Cañafístolo			
Punta de Mata			
Las Palmeras	39,578.34	46,875.00	39,578.34
La Cueva	12,189.18	0 <sup>362</sup>	0
El Carmen	4,644.21	5,106.00	4,644.21
<b>TOTAL</b>	<b>294,062.28</b>	<b>319,442.30</b>	<b><u>260,925.57</u></b>

371. Consequently, out of the claimed area of 294,062.28 hectares, Vestey has demonstrated its legal title in respect of 260,925.57 hectares. The FMV of Vestey's land should thus be determined on the basis of this latter figure.

<sup>361</sup> R-Rejoinder, ¶448.

<sup>362</sup> The registered title documents for Hato La Cueva, indicate no area. The figure of 12,189.18 hectares is drawn from INTI's 2011 recovery decision. However, this decision merely accounts for the area taken over by INTI in actual fact, it does not speak to title. Thus, the Claimant has prepared no registered document evidencing the area of Hato La Cueva, which explains that the Tribunal has not taken the alleged but unproven surface of this Farm into account.

372. Having determined the surfaces of compensable land involved, the Tribunal must now assess their value. For this purpose, the Claimant relies on the expert report of Ms. Soriano of BVA. The Parties do not dispute that Ms. Soriano appraised Agroflora's real estate every third year since 1993. Nor is it contested that from 1993 to 2011 her valuations were used as the basis of the book value of the real estate for purposes of Agroflora's audited financial statements. Moreover, the government considered Ms. Soriano's valuations of El Charcote and San Pablo Paeño to arrive at the value of those Farms when INTI purchased one and accepted the other as a donation in 2006.<sup>363</sup>
373. Yet, the Respondent questions the independence of Ms. Soriano because she used information supplied by Vestey about the areas of the land plots and because she failed to conduct an independent investigation into the technical or biological characteristics of the comparator land plots reported by CADIGRA.
374. The Tribunal notes that Ms. Soriano is not a legal nor an agricultural expert. As a consequence, she could not offer an independent opinion on the validity of Agroflora's title and on the areas covered by registered documents. Nor could she advance independent conclusions about the biological characteristics of the land. It is not inappropriate for an expert to rely on information supplied by the client if that information relates to matters outside his or her expertise and the reliance is disclosed. Similarly, it is not improper for an expert to use the data obtained from consultants with specific expertise if that use is similarly disclosed.
375. The Respondent also complains that Ms. Soriano employed registry data gathered by her assistant. The Tribunal finds this unobjectionable, provided the expert exercised due care in supervising the assistant. It would indeed be unreasonable to require that a valuation expert personally collect all the data necessary for his or her report, such as records from registries located in different regions. In addition, there is no indication in the record that Ms. Soriano failed to exercise due care or that the data collected by her assistant is somehow deficient.<sup>364</sup>
376. Having reviewed the written evidence and having heard her testify at the hearing, the Tribunal has no reason to doubt the expertise and independence of Ms. Soriano. The record shows that she has vast experience in valuing real estate in Venezuela,

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<sup>363</sup> *Bases de Negociaciones Presentadas*, Exh. C-248.

<sup>364</sup> The Tribunal notes that when the Respondent's expert discovered certain inaccuracies in the registry information of the comparator transactions, BVA addressed these concerns in the second expert report.

including in particular Agroflora's farms, and her methodology appears well conceived. As a result, the Tribunal is satisfied that nothing prevents it from accepting BVA's evidence.

377. To arrive at the FMV of Agroflora's land, BVA identified 24 comparator land sales based on the similarity of their bio-economic characteristics. The Respondent challenges BVA's report for using comparators significantly smaller in size and dated as early as 2003. It is undisputed, however, that BVA applied adjustments accounting for the size of the land plots and the time of the transactions. The fact that the comparator land plots were not of the combined size of Agroflora's eleven farms does not render the comparison unavailing. Nor do the differences in transaction times *per se* vitiate the comparison. As the Respondent's expert Ortega testified, there is no rigid rule concerning the relevant timing of comparator sales.<sup>365</sup> Here, 20 out of the 24 comparator transactions selected by BVA took place within a 5-year range from the Valuation Date. On this basis, the Tribunal accepts that the transactions chosen by BVA constituted a valid basis for a comparison, subject to adequate adjustments for the relevant differences.
378. As mentioned above, BVA applied a number of adjustments to the comparator transactions accounting for surface area, access roads, proximity to nodal points, conditions of payment, improvements, and transaction time. Except for the adjustments for improvements, which will be addressed below (¶383), the Respondent's expert essentially repeats his objections about the choice of comparators and the multiplicity of the required adjustments.<sup>366</sup> He also criticizes BVA's choice of the formula of size adjustment recommended by the Costa Rican *Órgano de Normalización Técnica*. According to Professor Ortega, the use of the Costa Rican formula is ill-founded due to the differences in the bio-climatic conditions between Costa Rica and Venezuela. The Tribunal has difficulty seeing the connection between the standard for size adjustments and the differences in bio-climatic conditions. In the absence of further substantiation from Venezuela's expert, the Tribunal has no reason to question the methodology of BVA's size adjustments. Since the value of Agroflora's land is adjusted for size, the application of an additional size discount would be redundant. Indeed, the size adjustments already account for differences in unit prices of smaller plots compared to larger ones.

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<sup>365</sup> Transcript, Spanish, Day 4, 1367:19-1368:3.

<sup>366</sup> Ortega 2, ¶¶78-96.

379. To assess the FMV of Agroflora’s land, the Tribunal sought to multiply the unit values calculated by BVA by the surface areas over which Agroflora’s title is supported by the registered documents, as established above. Yet, this calculation confronted one difficulty: while BVA identifies different unit prices for each individual farm, the data on registered areas sometimes combine two or more farms without specifying how much land belong to each farm. To avoid any overcompensation by an inaccurate allocation of land among farms, the Tribunal multiplied the compensable surface area of the combined land masses (Matapalos and Los Viejitos; Turagua, Cañafístolo and Punta de Mata) by the lowest unit value determined by BVA. This difficulty did not arise for Los Cocos and Morichito, since the registered documents justify the entirety of the claimed area.
380. On this basis, the Tribunal concludes that the total value of Agroflora’s land amounts to USD 31,155,964, broken down as shown in the following chart:

Farms	Compensable Area	Unit Value Bolivars/Ha	Value Bolivars
Los Cocos	32.004,97	363.14	11,622,285.00
Morichito	23.838,75	378.02	9,011,524.00
Matapalos	36,913.58	672.75 <sup>367</sup>	24,833,611.00
Los Viejitos		805.06	
La Bendición Ramera	24,800.00	390.00	9,672,000.00
Turagua	99,145.72	704.63	30,230,521.00
Cañafístolo		304.91 <sup>368</sup>	
Punta de Mata		466.91	
Las Palmeras	39,578.34	369.30	14,616,281.00
La Cueva	0	717.15	0
El Carmen	4,644.21	7,317.59	33,984,425.00
<b>TOTAL</b>	<b>260,925.57</b>		<b>133,970,647.00</b>
<b>TOTAL in USD (exchange rate 1:4.3/ USD:Bs)<sup>369</sup></b>			<b>USD 31,155,964.00</b>

<sup>367</sup> The distribution of surfaces between Matapalos and Los Viejitos inside the documented total area is unknown. The Tribunal therefore uses the lower unit value for the combined area of the two Farms, *i.e.* 672.75 Bolivars/ha.

<sup>368</sup> The distribution of surfaces between La Bendición Ramera, Turagua and Cañafístolo inside the documented total area is unknown. The Tribunal therefore uses the lower unit value for the combined area of the three Farms, *i.e.* 304.91 Bolivars/ha.

<sup>369</sup> The Parties do not dispute that the only official exchange rate applicable on the Valuation Date is 1:4.3/ USD:Bs.

381. Having reached a conclusion on the value of the land, the Tribunal now turns to the other immovable assets. BVA calculated the value of the non-land immovable property by reference to the replacement cost and arrived at the following values:
- Buildings: USD 6,695,577;
  - Improvements to the land: USD 5,550,949;
  - Formed pastures: USD 6,539,570;
  - Office premises in Valencia - USD 1,360,113.
382. Professor Ortega objects that BVA double counted the improvements. According to him, the improvements were directly valued by the replacement cost approach and indirectly valued in the unit price of the land, as the comparator land plots already included certain improvements. However, he does not specifically dispute the calculations made by BVA in reliance on the replacement cost method.
383. It is true that improvements were present on certain comparator land plots selected by BVA. However, BVA applied an adjustment in order to arrive at the unit prices. In a section dedicated to “adjustment for the existence of improvements”, Ms. Soriano explains that “this valuation of the Farms assumes its lands to be virgin, undeveloped land, [as] any improvements have been valued separately”.<sup>370</sup> BVA thus excluded the value of the improvements from the unit prices. Thereafter, it separately valued the improvements found on Vestey’s land and added their value to the overall value of the real estate. Therefore, the method of valuation implies no double counting.
384. That being so, the Tribunal is not convinced that the method used by BVA to adjust the value of the buildings and improvements is sufficiently accurate. Professor Ortega points to the fact that Ms. Soriano did not visit the comparator farms to inspect the improvements. Ms. Soriano admits that, in a number of instances, she had no information about the value of the improvements present on the comparator lands. In such cases, “[t]he value of the improvements [was] estimated by reference to the percentage of the total market value estimated, which pertain to improvements for the Agroflora Farm that is closest to the reference property or best approximates it in terms of characteristics” (BVA 2, table 6). Thus, BVA assumed that the improvements present on the comparator land plots shared similarities with those found on Agroflora’s land. Such assumptions may have led to substantial underestimation of

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<sup>370</sup> BVA 2, ¶53.

the share of the improvements in the overall price of the comparable land plots. That in turn would result in accounting for at least a part of the improvements twice: first in the unit prices of the land, and second, when valued separately by the replacement cost approach. In order to avoid such risk of double counting, the Tribunal cannot but dismiss BVA's separate calculation of the value of the non-land assets. Such dismissal does not concern the value of the office premises in Valencia since they could not have possibly affected the unit prices of Vestey's agricultural land.

385. As a result of the foregoing discussion, the Tribunal considers it established that the value of Agroflora's real estate on the Valuation Date amounted to **USD 32,516,077**.

## **b. Livestock**

### *i. The Claimant's Position*

386. The Claimant provides an expert report from Herb McLane of Agriteam Canada, who valued Agroflora's livestock, including cattle, buffalo and equine stock, based on Agroflora's livestock inventory of 30 November 2011. To calculate the base price of a head of cattle, Agriteam used (i) the regulated beef price of 13.67 bolivars/kilo, (ii) multiplied by the average weight of bulls and cull cows sent to slaughter, and (iii) taking into account the so-called "dressing percentage", a proportion of meat to the animal's live weight. He thus arrived at a base price for bulls of 3,554 bolivars/head (USD 827/head) and for cull cows of 2,679 bolivars/head (USD 623/head). The Claimant calls these calculations conservative, as they were based on the regulated beef price, the "street price" of the beef being around 28% higher.
387. After identifying the base price, Agriteam applied a genetic multiplier factor (GMF) in order to account for the genetic merit and contribution of certain animals into the herd. The GMF varies depending on gender, age and breeding status. The highest GMF of 5 is attributed to breeding bulls, the most valuable animals in the herd.<sup>371</sup> In some cases, the GMF is less than 1, "signaling young livestock which had not yet fulfilled their growth potential and contribution to the herd".<sup>372</sup> According to Agriteam, the GMF gave full account to fertility, stayability and growth rate of the cattle.
388. The Claimant argues that the prices calculated by Agriteam are fully supported by comparators, such as government-controlled prices at which Agroflora sold purebred

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<sup>371</sup> CM, ¶252.

<sup>372</sup> C-Reply, ¶334.



and commercial cattle, prices quoted at local and foreign auctions, as well as prices paid by the government for imported cattle.<sup>373</sup> Based on all these factors Agriteam values Agroflora's 114,327 heads of livestock at USD 92,593,308.

389. Refuting the Respondent's argument, the Claimant submits that a size or liquidity discount is incompatible with the principle of full reparation as "Venezuela took over all of Agroflora's livestock and other assets in a single day".<sup>374</sup> In any event, even if the size discount were applicable in theory, it is not relevant in this case due to the high demand on cattle existing in Venezuela.<sup>375</sup> Agroflora's livestock did not make up more than 1% of Venezuela's total national herd.<sup>376</sup> Further, in respect of the deductions for marketing costs, the Respondent's expert himself testified that such costs would not exceed 5% of the sales value.<sup>377</sup>
390. In order to demonstrate the conservative nature of its GMF valuation, the Claimant's expert, David Makin, CFO of Vestey Farm Advisors, provided an alternative valuation based on productivity metrics. Mr. Makin first calculated the liquidation value of the cattle, buffalo and equine stock, and then the productivity value of the cattle only based on the beef output. This calculation does not take into account the value of the genetic enhancement of the livestock. It thus represents the lowest possible price that Agroflora could have obtained should it have chosen to sell all of its animals on the market at the regulated price. With this calculation, Mr. Makin arrived at a final figure of USD 61.8 million.
391. In order to then account for the genetic merit of Agroflora's herd, Mr. Makin drew up a simulation model over a 10-year period. The model takes account of the potential of Agroflora's herd to wean a higher number of calves with a higher growth rate compared to an average non-Agroflora herd. This model shows that over a 10-year period the Agroflora herd would produce 79% more output than the non-Agroflora herd. Mr. Makin thus concluded that the genetic merit of Agroflora's herd warranted the application of a 79% premium to the base price. By contrast, Agriteam's valuation on the basis of the GMF only attributes a 43% premium for genetic merit.
392. For these reasons, the Claimant submits that Agriteam conservatively valued the FMV of Agroflora's livestock at USD 92,593,308.

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<sup>373</sup> C-Reply, ¶338.

<sup>374</sup> C-PHB1, ¶264.

<sup>375</sup> C-PHB2, ¶242.a.

<sup>376</sup> Econ One ER1, ¶14, as referred to by the Claimant.

<sup>377</sup> Ortega ER2, ¶8; C-PHB2, ¶242.d.

ii. *The Respondent's Position*

393. The Respondent objects to Agriteam's unsupported GMF method. Contrary to the Claimant's assertions, the Respondent states that it never accepted the use of the GMF.<sup>378</sup> Agriteam fails to explain the basis on which it allocates a monetary value to the GMF.<sup>379</sup> The allocation of different values to different traits of Agroflora's cattle is unsupported. Agriteam's use of data from Canada as a proxy for testing the GMF is "wholly inappropriate" given the "completely different environment and market" existing in Venezuela.<sup>380</sup>
394. The Respondent also challenges the Claimant's reliance on the prices of the local auction (Seprocébú). According to the Respondent, at this auction only about 50 heads of purebred cattle are sold annually. Similarly, Vestey incorrectly refers to the price paid by the government for the importation of cattle from Brazil and Colombia. That reference is ill-placed as the state has initiated public investigations about overpricing these transactions.<sup>381</sup> As for the auctions in Colombia and Brazil, they occur on a different market and thus cannot serve as valid comparators.<sup>382</sup>
395. In relation to Mr. Makin's valuation, the Respondent asserts that the report arbitrarily assumes a linear increase in the weight of the animals throughout their growth. It ignores conditions, such as weather and the animal's own characteristics that influence weight increase. Moreover, Mr. Makin's assumption that Agroflora's cattle produced a herd 79% over the baseline of other cattle farms in Venezuela is based on 1997-2002 input which is outdated. In any event, the conclusion that a 79% increase in output automatically translates into 79% increase in profit is flawed.<sup>383</sup> While comparing Agroflora's cattle with that of other producers, Mr. Makin failed to consider that Agroflora had higher costs than less sophisticated Venezuelan farmers, including laboratory expenses, management costs, genetic costs, as well as labor, investment and operative costs.<sup>384</sup>
396. For the Respondent, Mr. Makin also fails to account for the costs of liquidation that would be incurred had Agroflora decided to dispose of its cattle at once, such as sales

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<sup>378</sup> R-Rejoinder, ¶561.

<sup>379</sup> R-Rejoinder, ¶554.

<sup>380</sup> R-Rejoinder, ¶559.

<sup>381</sup> R-Rejoinder, ¶564.

<sup>382</sup> R-Rejoinder, ¶565.

<sup>383</sup> R-Rejoinder, ¶573.

<sup>384</sup> R-Rejoinder, ¶475.

fees, transportation, taxes, marketing and labor costs.<sup>385</sup> Hence, Mr. Makin's calculation cannot be used as an alternative valuation of Agroflora's livestock.

397. The Respondent further submits that the large size of Agroflora's herd warrants the application of a liquidity or size discount.<sup>386</sup> It also insists that the 34% sales tax applicable in Venezuela must be deducted from the value of the livestock.<sup>387</sup> According to Venezuela, the Claimant failed to prove the quantum of the damages by refusing to give a figure for the size discount. This failure prevents the Tribunal from assessing damages and thus from awarding any compensation for the livestock.<sup>388</sup>
398. Finally, Venezuela invokes an email exchange between Ms. dos Santos and Mr. Edelmann,<sup>389</sup> to assert that by 2008 Agroflora valued its cattle at USD 32.4 million, a number which stands in stark contrast with the result reached by Agriteam.<sup>390</sup>
399. For all these reasons, it is the Respondent's case that the asset-based valuation of Agroflora's livestock should be discarded.

### iii. *Analysis*

400. To determine the FMV of Agroflora's livestock, the Claimant's expert started by calculating the base price or the "beef value" of the herd. Mr. Makin's valuation of the base price takes into account only one possible use of the livestock that is beef. It does not account for the genetic merit of the herd. The base price of the cattle and buffalo herd was calculated by reference to Agroflora's uncontested inventory and to the average weight of different categories of animals multiplied by the regulated beef price. Mr. Makin thus arrived at a base price of USD 60,622,750.
401. The Respondent disputes Mr. Makin's base price calculation in several respects. It first contends that the size of Agroflora's herd imposes a liquidity or size discount. For the Claimant, on the other hand, such a discount is incompatible with the principle of full reparation and with the fact that there has been no liquidation of the herd.
402. The Tribunal's task is to establish the FMV of Agroflora on the Valuation Date. This is primarily an economic exercise, which involves identifying the price at which the asset

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<sup>385</sup> R-Rejoinder, ¶476.

<sup>386</sup> R-PHB1, ¶¶320-327.

<sup>387</sup> R-PHB1, ¶322.

<sup>388</sup> R- PHB1, ¶327.

<sup>389</sup> Email of 30 May 2008 from Diana dos Santos to Jesper Edelmann, Exh. R-119.

<sup>390</sup> R-Rejoinder, ¶568.

would change hands between a willing buyer and a willing seller in an arm's length transaction where the parties each act knowledgeably, prudently, and without coercion. The fact that Venezuela took over control of Agroflora in a single day does not change the Tribunal's task.

403. Let us assume that a willing seller presents to a willing buyer an asset-based valuation of a farming enterprise, in which the value of a herd of more than 100,000 animals is calculated by multiplying the value of a single animal by the total number of animals. Under this assumption, the buyer is likely to insist on a size discount, because the demand for 100,000 animals taken together is lower than the demand for a single cow. A similar consideration guided BVA when it applied a size adjustment to Agroflora's land. As the Claimant itself underscored, "[the size adjustment] reflects the fact that smaller properties tend to be more desirable and attract higher prices than larger ones".<sup>391</sup>
404. That being said, the Tribunal's task is not to value an abstract farming enterprise, but to determine the FMV of Agroflora taking into account the actual circumstances in the Venezuelan market. In this context, it recalls that Agroflora's livestock represented less than 1% of Venezuela's national herd and less than 8% of Venezuela's annual slaughter capacity.<sup>392</sup> Moreover, as the Respondent's expert testified, Venezuela imported cattle from abroad at prices above the regulated price to resell it on the domestic market at the regulated price.<sup>393</sup> In other words, it used to bear the difference in price by way of subsidies. In 2011, imports amounted to around 320,000 heads of cattle, i.e. three times Agroflora's herd. Hence, had Agroflora desired to sell its livestock, the market demand in Venezuela would most likely have been high. The government at least would have been willing to acquire Agroflora's entire herd to reduce spending higher amounts to purchase cattle from abroad. As a result, the specific market circumstances do not justify the application of a size or liquidity discount.
405. Second, the Respondent argues that the 34% sales tax should be deducted from the value of the livestock. According to the Respondent, the sales tax is applicable on the sale of goods, such as livestock, but not on the sale of an agricultural enterprise. The Tribunal notes that the asset-based valuation presented by the Claimant is aimed at determining the value of Agroflora as a going concern. Such valuation does not

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<sup>391</sup> C-PHB1, ¶238.

<sup>392</sup> Agriteam ER1, Table 2.

<sup>393</sup> Transcript, English, Day 5, 165:12-25.

contemplate a sale of the individual assets of Agroflora. The individual assets are only valued based on the premise that they would be sold to a willing buyer in combination with one another, as part of one enterprise. Therefore, the Tribunal understands that the 34% sales tax would not be payable and thus no adjustment is required.

406. Third, Professor Ortega further criticizes Mr. Makin's calculation of the average weight of the different categories of Agroflora's animals. According to him, Mr. Makin arbitrarily assumed that the weight of the animals would grow linearly between different ages.<sup>394</sup> The Tribunal notes that Professor Ortega does not challenge the actual data of animal weights extracted by Mr. Makin from Agroflora's records. This undisputed data determines the average weights of different categories of animals at birth, as well as at the ages of approximately 8, 18, 36, and 60 months. It also takes into consideration the weight loss of the animals after the age of 7-8 years.
407. The Tribunal understands that the weight of the animals at milestone ages of their life is established. What is in dispute is merely the evolution of the weight curve from one milestone to the other. In circumstances where the expert had no opportunity to measure the animals between the milestones and the Respondent's expert provides no indications on the evolution of the curve, assuming linear weight growth (and weight loss after 7-8 years) appears like a reasonable approximation of the reality that lies within the Tribunal's discretion in matters of assessment of the quantum.
408. For these reasons and for lack of further substantiated objections to Mr. Makin's calculation of the "beef value", the Tribunal is convinced that the base price of Agroflora's cattle and buffalo, without considering the genetic merit, amounts to USD 60,622,750.
409. Fourth, the Respondent relies on an email message which was sent by Ms. dos Santos to Mr. Edelmann on 30 May 2008. There, Ms. dos Santos estimated the value of Agroflora's herd at USD 32.4 million. The Tribunal has asked itself whether that estimate could be used as a benchmark for its valuation of the herd. It has essentially answered this question in the negative for various reasons. First, in her own words, Ms. dos Santos was replying with "a very simplistic calculation based on our assessment of the Country actual situation, our best judgement, and the strategic strength of our cattle herd now [...]"<sup>395</sup> to a request from Jesper Edelmann for "some information", which "does not have to be very elaborate". Second, the figure provided

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<sup>394</sup> Ortega 2, ¶¶160, 161.

<sup>395</sup> Email of 30 May 2008 from Diana dos Santos to Jesper Edelmann, Exh. R-119, p.1.

by Ms. dos Santos factored in the fact that a part of the Farms was occupied by indigenous squatters, resulting in an increase of cattle theft, further threatening the remaining Farms.<sup>396</sup> These problems no longer existed three and half year later on the Valuation Date. Third, it is undisputed that Agroflora's herd increased in numbers between 2008 and 2011. Without considering those factors, the estimate could not have accurately reflected the actual value of the herd. Fourth, since Ms. dos Santos's estimate in 2008, Agroflora was subjected to expert valuations several times. For instance, in November 2009, Ernst & Young valued Agroflora's assets based on a thorough analysis and multiple visits at the Farms. It was on the basis of this expert valuation that PDVSA Agrícola offered USD 120 million for the shares of Agroflora in 2010.<sup>397</sup> *Genetic multiplier factor or GMF*

410. Having determined the "base value", the Claimant's expert then valued the genetic merit of Agroflora's livestock by attributing GMF figures to different categories of the cattle. The GMF figures vary from 0.35 (for commercial calves) to 5.00 (for purebred bulls) multiplied by the average weight of the respective category of animals. The Respondent objects that these GMF figures have no connection with the actual economic and market data.
411. The Tribunal notes that the Parties agree on the high genetic quality of Agroflora's herd.<sup>398</sup> The Respondent's expert also testified that the market is prepared to pay more for a higher quality herd, which certainly makes commercial sense.<sup>399</sup>
412. The question remains, however, how much the market would pay for the genetic merit of Agroflora's herd? Agriteam represents that in assigning the particular GMF values, it considered factors such as fertility, stayability and growth rate. It does not, however, explain how those factors translate into the particular figures of the GMF. For instance, it has not justified why the market would pay five times the "beef price" for breeding bulls. A reason could possibly have been that such bulls have a potential to generate five times more income in comparison with ordinary bulls without the same genetic merit. However, Agriteam presented no such economic analysis. Mr. Makin attempted to offer an economic justification of the GMF by a productivity simulation model. The model calculated the value of the increase in productivity of the livestock owing to the genetic merit<sup>400</sup>, but, as the Respondent's experts rightly observe, it fails to take into

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<sup>396</sup> *Id.*, p.2.

<sup>397</sup> An email of 3 March 2010 from Mr. Edelmann to Mr. Ramírez, Exh. C-152.

<sup>398</sup> Transcript, Spanish, Day 4, 1368:15-16.

<sup>399</sup> Transcript, Spanish, Day 4, 1349:1-2.

<sup>400</sup> Makin, ¶¶39-47.

account the increased expenses associated with establishing and maintaining the high genetic quality herd. It is undisputed that Agroflora owned and operated a genetic laboratory and incurred other expenses related to the genetic program as well as the increased security needs. Without accounting for such expenses, Mr. Makin's simulation model cannot serve as an accurate economic justification for Agriteam's GMF figures.

413. The Claimant further sought to justify its results by pointing to several market benchmarks, including the prices at which cattle was imported by the government as well as the prices of purebred cattle at the auctions in Venezuela and abroad. The Tribunal first notes that the prices paid by the government for imported cattle, as well as those paid at foreign auctions cannot serve as appropriate value indicators, since those transactions do not occur in the Venezuelan market. As for the records of the Seprocebú auctions, they reflect the sales of individual animals where the potential buyer has an opportunity to review the genetic data of each animal. The prices achieved in such settings may not accurately represent the value of the genetic merit of the different categories of Agroflora's cattle.<sup>401</sup> Moreover, the Seprocebú data identifies prices only for purebred bulls and cows, which is insufficient to establish the value of the genetic merit of the other categories of Agroflora's herd.
414. For the reasons just discussed, the Tribunal considers that the Claimant has not established the value of the genetic merit of Agroflora's herd in a sufficiently reliable manner. As a consequence, the Tribunal cannot but award compensation at the base price of the livestock. The base price of Agroflora's cattle and buffalos was held to amount to USD 60,622,750. One must add the value of the equine stock calculated by Agriteam at USD 1,152,126, which is not controversial. Therefore, the Tribunal finds that the total value of Agroflora's livestock amounts to **USD 61,774,876**.

### **c. Vehicles**

#### *i. The Claimant's Position*

415. The Claimant relies on the valuation of its vehicles provided by Ingeniería Automotriz C.A ("INMA"). INMA's calculation is based on the replacement cost of the vehicles. It applies the depreciation factor in order to account for the age of the vehicles.<sup>402</sup>

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<sup>401</sup> The authorization issued by the *ad hoc* board (Exh. C-322) is insufficient for establishing the FMV of the genetic merit for each category of Agroflora's herd.

<sup>402</sup> Valuation letter of 21 December 2012 from INMA to Vestey, Exh. C-226; CM, ¶261.

Agroflora owned three types of vehicles: general vehicles, tractors, and a light airplane. The Claimant further relies on Agritruck's valuation letter, which appraised the 43 Ford New Holland tractors owned by Agroflora based on the information received from the Ford New Holland official dealership in Argentina.<sup>403</sup> The Claimant explains the references to comparators from Argentina by governmental limitations in Venezuela causing a low turnover of agricultural vehicles. As for the 1979 Cessna 182Q airplane, the Claimant relies on the replacement cost for which it was ensured.<sup>404</sup>

416. The Claimant opposes the Respondent's allegation that the vehicles were subject to heavy use and wear. It submits that the vehicles were kept in good working conditions and that INTI's report confirmed the "*buenas condiciones*" of the vehicles.<sup>405</sup> The Claimant argues further that its valuation takes account of the age of the vehicles as well as their wear and tear due to the harsh conditions in which they operated<sup>406</sup> by applying a depreciation factor. Following Venezuela's objection that INMA used a valuation in 2012 and not on the Valuation Date, the Claimant reverted with a valuation as of November 2011. The revised valuation produces a lower result, as inflation pushed prices up between 2011 and 2012.<sup>407</sup>
417. In rebuttal to the Respondent's argument that the insurance cost of the airplane is not an appropriate proxy, the Claimant puts forward examples of sales of comparable airplanes in Venezuela.<sup>408</sup> It also argues that the airplane website listings relied upon as comparators by Venezuela are invalid, as they list prices in the US and prices of airplanes in the US and Venezuela differ due to Venezuelan import restrictions.<sup>409</sup>
418. The Claimant finally counters the Respondent's argument that the price of subsequent repair of the airplane must be deducted from the valuation. According to the Claimant, it kept the airplane in good condition and, "[i]n fact, the invoice for maintenance filed by Venezuela (dated five months after the takeover of Agroflora) indicates that more than half of the maintenance costs of 137,000 bolivars that Venezuela is now trying to deduct from the value of the airplane had already been paid by Agroflora as a credit

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<sup>403</sup> Valuation letter of 4 January 2013 from Agritruck to Vestey, Exh. C-227; CM, ¶263.

<sup>404</sup> Airplane insurance policy, Exh. C-216; CM, ¶263.

<sup>405</sup> *Informe técnico*, 30 June 2010, Exh. C-281; C-Reply, ¶359.

<sup>406</sup> C-Reply, ¶362.

<sup>407</sup> C-Reply, ¶361.

<sup>408</sup> C-Reply, ¶363, Exh. C-350.

<sup>409</sup> C-Reply, ¶363.



into its account in July and November 2011 (when the company was still under the control of Vestey)".<sup>410</sup> Therefore, Vestey claims the full value of the airplane.

419. As a result, the Claimant contends that the FMV of its vehicles as of the Valuation Date amounted to USD 3,854,372.

ii. *The Respondent's Position*

420. The Respondent submits that, unlike for the livestock and real estate, there is a market in Venezuela for Agroflora's vehicles, but that the Claimant miscalculated the relevant value.<sup>411</sup>

421. According to Venezuela, INMA's first valuation was erroneous because it referred to the period of December 2012/January 2013. Its second valuation is equally misleading, as it values vehicles used in normal conditions. Agroflora's vehicles, however, were used in severe weather conditions, in flooded and muddy areas.<sup>412</sup> Similarly, Agritruck's valuation of Agroflora's tractors is unreliable, as it lists the prices of tractors in perfect condition, when the conditions under which Agroflora's tractors operated were extremely harsh.<sup>413</sup>

422. Moreover, Venezuela takes issue with the valuation of the Cessna 182Q airplane. The insurance replacement value, so says the Respondent, does not reflect the FMV. The listings on US websites offer the same plane model at significantly lower prices. Moreover, the airplane underwent overdue repairs in April 2012, the cost of which must in any event be deducted from the valuation.<sup>414</sup>

423. For these reasons, the Respondent's position is that the valuation of Agroflora's vehicles is unreliable and this amount must thus be disallowed.

iii. *Analysis*

424. The Respondent does not challenge the inventory underlying the valuation of the vehicles or the existence of the relevant market in Venezuela. Its objections to this item of damages focus on two aspects.

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<sup>410</sup> C-Reply, ¶364.

<sup>411</sup> RCM, ¶260.

<sup>412</sup> R-Rejoinder, ¶583.

<sup>413</sup> RCM, ¶265, R-Rejoinder, ¶585.

<sup>414</sup> RCM, ¶266, R-Rejoinder, ¶587.

425. First, the Respondent submits that Agroflora's valuation does not take into account that the vehicles operated in harsh climatic conditions. The Tribunal finds it difficult to accept this submission for a number of reasons. It starts by recalling that INTI's report confirmed that Agroflora's vehicles were in good condition.<sup>415</sup> It also notes that the Claimant's expert applies a depreciation factor reflecting the age of the vehicles. Further, as the Claimant rightly underlines, tractors are vehicles designed for tough conditions. Finally, it is telling that Venezuela has not sought to substantiate its objection with evidence of the condition of the vehicles, when it was in control of the fleet since late 2011.
426. Second, the Respondent objects to Vestey's valuation of the airplane, which is based on the insurance replacement cost of USD 185,023.<sup>416</sup> It claims that planes of this type are offered at lower prices in the U.S. It also notes that maintenance costs should be deducted. The Claimant has satisfactorily rebutted the first argument by submitting evidence of prices of comparable airplanes, which confirm the reasonableness of the valuation.<sup>417</sup> Vestey has equally established that Agroflora had paid more than half of the future maintenance costs in advance before the expropriation.<sup>418</sup> Be this as it may, the maintenance costs were incurred after the expropriation and there is no indication on record that it was due to the usage of the airplane by Vestey before the expropriation. The Tribunal is thus satisfied that the value of the vehicles and the airplane is established in an amount of **USD 3,854,372**.

#### **d. Conclusion**

427. On the basis of the reasons discussed in this section, the Tribunal considers that the FMV of the cattle farming business of Agroflora on the Valuation Date, as it has been established in these proceedings, amounted to **USD 98,145,325**.

### **5. Interest**

#### **a. The Claimant's Position**

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<sup>415</sup> *Informe técnico*, 30 June 2010, Exh. C-281.

<sup>416</sup> Insurance policy, Exh. C-216.

<sup>417</sup> The Respondent's comparators, on the other hand, are located in the US, which is a different market and may not serve as proper benchmarks for the value of Agroflora's airplane.

<sup>418</sup> Summary of expenses for repair of Cessna 182 Q, 17 April 2012, Exh. EO-27.

428. Vestey requests pre-award interest to bring Agroflora's FMV forward to present value<sup>419</sup>, because "[t]o the extent the payment is delayed, Vestey loses the opportunity to use the compensation to productive ends [...]".<sup>420</sup>
429. The Claimant argues in favor of applying the rate of Venezuela's sovereign bonds in US dollars. Such a rate, so says the Claimant, "will account for the fact that Venezuela has had use of the compensation amount since the date of injury, effectively compelling Vestey to lend it funds without remuneration".<sup>421</sup> It adds that "[a]n award of interest at a rate lower than the state's borrowing cost would create an incentive for states to 'refinance' fiscal obligations by withholding compensation for internationally wrongful acts".<sup>422</sup> The rate of the sovereign bonds amounts to 11.75%, which is lower than Agroflora's WACC, determined at 13% by Venezuela itself. According to the Claimant, applying the rate of Agroflora's WACC is another commercially sound alternative.<sup>423</sup> The Claimant rejects the Respondent's choice of the US Treasury bond risk-free rate, as being merely meant to achieve the lowest possible result. Alternatively, it claims interest at 6 month LIBOR +2%.<sup>424</sup>
430. Furthermore, the Claimant requests that interest be compounded semi-annually in accordance with standard business practice.<sup>425</sup> It opposes the Respondent's argument that Venezuelan law governs the issue of compound interest. In reliance on *BG*, It submits that "the *Chorzów* standard 'would not be achieved if the award were to deprive Claimant of compound interest'".<sup>426</sup> Compounding will result in the effective rate being 12.10%. Thus, the claim for pre-award interest until the date of the Second PHB, amounts to USD 82,426,582.
431. In order not to incentivize Venezuela to postpone the payment of the award, the Claimant also requests post-award interest accruing from the date of the award until payment in full.<sup>427</sup> It submits that post-award interest should be computed at the same rate as the pre-award interest and should be also compounded semi-annually.

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<sup>419</sup> C-Reply, ¶¶299, 300.

<sup>420</sup> C-Reply, ¶301.

<sup>421</sup> CM, ¶268.

<sup>422</sup> C-Reply, ¶372.

<sup>423</sup> C-Reply, ¶374.

<sup>424</sup> C-Reply, ¶375.

<sup>425</sup> CM, ¶269, citing *Azurix, Pey Casado, Continental Casualty*.

<sup>426</sup> C-Reply, ¶310.

<sup>427</sup> CM, ¶270, citing *CMS, Metalclad, and Occidental*.

## b. The Respondent's Position

432. The Respondent argues that the Claimant is not entitled to pre-award interest, which is not compatible with the BIT standard of compensation. If any, interest should accrue after a 60-day grace period following the award.<sup>428</sup> A grace period is necessary to account for the state's internal payment procedures.<sup>429</sup> In the alternative, pre-award interest should accrue from the time when the Republic became aware of the claims, *i.e.* from the Claimant's first memorial which was filed on 15 January 2013.<sup>430</sup>
433. Further, the Respondent asserts that the Claimant is only entitled to the rate applicable to US Treasury bond, as it faces no lending or investment risk in relation to an investment that it no longer owns.<sup>431</sup> Higher interest rates, such as Venezuela's 15 year sovereign bond, WACC or Libor +2%, fail to acknowledge that interest is only meant to compensate the Claimant for not having the use of its money. In particular, the WACC and the Venezuelan sovereign bond rate proposed by the Claimant account for the long term risk of sovereign default. However, the Claimant does not bear these risks.<sup>432</sup> Similarly, LIBOR plus 2% is irrelevant as the Claimant has not shown that it needed to borrow money because it did not receive its compensation from the recovery of Agroflora immediately.<sup>433</sup>
434. Moreover, for Venezuela, the Claimant is not entitled to compound interest. Pursuant to Article 42(1) of the ICSID Convention, the Tribunal should apply Venezuelan law as the Parties have not agreed on the law applicable to interest. Venezuelan law does not provide for compound interest, except where the Parties have specifically agreed on it<sup>434</sup>, which is not the case here. International tribunals do not award compound interest when the law of the respondent state does not provide for it (citing *CME, Autopista*). In addition, an award of compound interest must be justified as part of the damages granted to a claimant. Here, the Claimant has not even attempted to show that it incurred a loss by not being able to earn compound interest.<sup>435</sup>

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<sup>428</sup> RCM, ¶284, citing *Liamco, and Lamire*.

<sup>429</sup> R-PHB1, ¶371.

<sup>430</sup> RCM, ¶288, citing *SD Myers, CME, Feldman, and Amco Asia*.

<sup>431</sup> RCM, ¶290.

<sup>432</sup> R-Rejoinder, ¶623.

<sup>433</sup> R-Rejoinder, ¶628.

<sup>434</sup> R-PHB1, ¶372.

<sup>435</sup> RCM, ¶¶296-302.

435. For these reasons the Respondent contends that interest, if any, should start running at the end of a 60 day grace period following the final award, interest should be simple; and the rate should be risk-free.<sup>436</sup>

### **c. Analysis**

436. Vestey claims both pre- and post-award interest. The Respondent objects that no pre-award interest is due. It argues in particular that the standard of compensation of the BIT does not warrant an award of pre-award interest.

437. As discussed above, Venezuela is under a duty to repair all the consequences of its internationally wrongful act and the BIT standard of compensation does not apply to unlawful expropriation. It is well established in the practice of international tribunals that pre-award interest is necessary to fully compensate the loss caused by an unlawful expropriation.<sup>437</sup>

438. A state's duty to pay damages arises at the time when the internationally wrongful act causes harm, which is in the present case the Valuation Date. This duty does not arise later, such as on the date of the injured party's complaint or of the judgment. As a result, interest will start running on the Valuation Date until payment in full.

439. The Parties also diverge on the interest rate. The Claimant argues for the rate of Venezuelan 15-year sovereign bonds. The Respondent objects that this rate accounts for a long term risk of sovereign default, which Vestey does not assume.

440. The function of reparation is to compensate the victim for its actual losses. It is not to reward it for risks which it does not bear. As the Claimant itself argues, the award should reestablish the situation which would in all probability have existed but for the wrongful measures. As the Parties agree on the Valuation Date, the "but for" scenario involves placing Vestey in the position in which it would have been if it had received compensation on that date. In that case, Vestey would have been able to make use of the funds received as compensation. At no point in that scenario would Vestey have borne the risk of Venezuela's sovereign default. The Claimant argues that "[a]n award of interest at a rate lower than the state's borrowing cost would create an incentive for states to 'refinance' fiscal obligations by withholding compensation for internationally

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<sup>436</sup> RCM, ¶303.

<sup>437</sup> E.g., in lieu of many others, *Funnekotter v. Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, Exh. CLA-61, ¶115.

wrongful acts".<sup>438</sup> However, reparation focuses on making the victim whole; it is not concerned with the possible enrichment of the Respondent. As the *SPP* tribunal stressed, "the measure of compensation should reflect the claimant's loss rather than the defendant's gain."<sup>439</sup>

441. Alternatively, the Claimant suggests Agroflora's weighted average cost of capital or WACC as interest rate. In the Tribunal's view, this is not an appropriate measure for interest here. Indeed, the WACC reflects a variety of risks associated with doing business. After the expropriation, Vestey was no longer doing business in Venezuela and did not assume these risks. In the "but for" scenario, it would have received the compensation on time, i.e. on the Valuation Date, and would have incurred no business related risks anymore.
442. As another alternative, the Claimant proposes to use a borrowing rate, specifically LIBOR plus 2%. This could indeed be an appropriate rate if the Claimant had to borrow funds because it did not receive the expropriation indemnity on time. In the present circumstances, there is no indication in the record to this effect, with the result that the Tribunal discards this possibility.
443. The Claimant further argues that the interest rate should reflect the risk that Venezuela may not comply voluntarily with the Tribunal's award, which the Respondent opposes.
444. Article 53(1) of the ICSID Convention creates an international obligation for the respondent state to comply with the award in the following terms:
- "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."*
445. First and foremost, the Tribunal does not find it appropriate for it to assume by anticipation that a sovereign state will breach a treaty obligation. Having said this, even if the assumption were made, it would in any event not justify an interest rate incorporating the risk of defaulting on the payment of the award. Indeed, accounting for this risk would mean seeking to repair a (hypothetical) breach of the ICSID Convention when this Tribunal's jurisdiction is limited to breaches of the BIT.

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<sup>438</sup> C-Reply, ¶372.

<sup>439</sup> *SPP v. Egypt*, ICSID Case No. ARB/84/2, Award, 20 May 1992, Exh. RLA-74, ¶247.

446. In conclusion, the Tribunal will resort to a risk free rate applicable to US currency debt, i.e. the six-month US Treasury bond rate. The practice of international tribunals confirms this conclusion.<sup>440</sup> So, for instance, in the words of the *Siemens* tribunal:

*“[T]he rate of interest to be taken into account is [...] the interest rate the amount of compensation would have earned had it been paid after the expropriation. Since the awarded compensation is in dollars, the Tribunal considers that the average rate of interest applicable to US six month certificates of deposit is an appropriate rate of interest.”*<sup>441</sup>

447. The Parties further diverge on whether interest should be compounded. The Tribunal cannot follow the Respondent when it argues that compound interest is inadmissible as a matter of Venezuelan law. The consequences of internationally wrongful acts are governed by international law. International law requires that Vestey be reinstated in the situation in which it would have been had it received the compensation on the Valuation Date. It would then have been able to deposit the amount and earn interest. It is standard practice that interest on deposits is compounded. Thus, the Tribunal is of the view that, to make Vestey whole, interest must be compounded. Case law confirms this choice.<sup>442</sup>

448. The Parties agree on the applicability of post-award interest. The Tribunal considers that interest must accrue at the same rate and upon the same terms both before and after the award. This is the consequence of the fact that the Respondent’s obligation to pay damages does not arise on the date of the award but rather at the time when the internationally wrongful act caused harm. For the same reason, there is no legal justification for granting a grace period.

449. Therefore, interest on the amount awarded shall accrue at the rate applicable to six-month US Treasury bonds, compounded semi-annually, from the Valuation Date until payment in full.

## **E. COSTS**

450. Pursuant to Procedural Order No. 8, the Parties submitted their cost submissions on 7 August 2015. Each Party claims that the entirety of the costs of this Arbitration

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<sup>440</sup> E.g. among others, *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No ARB/02/1, Award, 25 July 2007, Exh. CLA-43, (“*LG&E v. Argentina*”) ¶102; *BG Group Plc. v. The Republic of Argentina*, UNCITRAL Final Award, 24 December 2007, Exh. CLA-47, ¶455.

<sup>441</sup> *Siemens A.G. v. The Argentine Republic*, ICSID Case No ARB/02/8, Award, 17 January 2007, Exh. CLA-40, ¶396.

<sup>442</sup> *Middle East Cement & Handling Co S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, Exh. CLA-23, ¶174; *LG&E v. Argentina*, ¶103.

should be borne by the other Party. In this section the Tribunal will summarize the Parties' respective positions (1 and 2) and discuss the allocation of costs (3).

## 1. The Claimant's Position

451. The Claimant requests the Tribunal to order the Respondent to pay all the costs of this arbitration, including the fees and expenses of the legal representation and expert advice, the fees and expenses of the Tribunal, and the ICSID administrative fees. According to the Claimant, in exercising their discretion in matters of costs allocation under Article 61(2) of the ICSID Convention, tribunals often rely on the "loser pays" principle.<sup>443</sup> They also look to the procedural conduct of the Parties. The Claimant is of the view that a number of factors militate for an award of costs in its favor.
452. First, in order to achieve full reparation, the Claimant must be compensated for all the costs that it incurred as a result of the Respondent's unlawful conduct, including the costs of the arbitration proceedings.<sup>444</sup> Thus, if the Tribunal decides the substantive issues in favor of the Claimant, the costs must follow such determination.
453. Second, Venezuela's procedural conduct in the course of the document production significantly increased the Claimant's legal and expert costs. In particular, the Republic only disclosed "a grand total of 28 documents in relation to six of the 40 requests ordered by the Tribunal or agreed to by Venezuela". Vestey adds that the documents were in any event largely unresponsive or already in its possession. It also stresses that, "the Respondent refused to disclose the Ernst & Young valuation report, which would have saved substantial efforts in establishing the value of the expropriated assets". In contrast, Vestey fully cooperated in the document production phase "eventually producing some 360 documents to Venezuela in the course of that exercise".<sup>445</sup>
454. Third, Venezuela ambushed Vestey by raising a new untimely and unmeritorious jurisdictional objection on the first day of the hearing. This required additional

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<sup>443</sup> *PSEG Global Inc. and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, Exh. CLA-39, ¶352; *LG&E v. Argentina*, ¶112; *Victor Pey Casado v. Republic of Chile*, ICSID Case No. 98/2, Award, 8 May 2008, Exh. CLA-51, ¶728; *Rumeli Telekom AS v Telsim Mobil v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, Exh. CLA-53, ¶819.

<sup>444</sup> *Tidewater Investment Srl and Tidewater Caribe, CA v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Award, 13 March 2015, Exh. CLA-138, ¶213.

<sup>445</sup> C-Costs, ¶20.



submissions and two rounds of post hearing briefs, which imposed substantial additional costs.

455. Fourth, in the Rejoinder, Venezuela improperly filed evidence that it had obtained unlawfully when it took over Agroflora. It also improperly produced documents that it should have filed with the Counter-Memorial. Vestey was forced to request the Tribunal to strike the improper evidence. The Tribunal granted Vestey's request as to the privileged documents and allowed Vestey to produce additional documents in rebuttal. Venezuela nevertheless continued to refer to the documents.<sup>446</sup> Vestey further incurred extra costs in connection with the rebuttal evidence.
456. Fifth, throughout the hearing, Venezuela relied on the materials not on record. It also introduced 14 new legal authorities without previously notifying Vestey or the Tribunal. This behavior obliged Vestey to raise an objection.<sup>447</sup> Thereafter, Venezuela introduced new factual and legal exhibits in its second PHB contrary to the applicable procedural rules. The Tribunal exceptionally admitted those documents and Vestey had again to file additional evidence in rebuttal.
457. On this basis, the Claimant seeks reimbursement of all the costs incurred in relation to this arbitration in the aggregate amounts of USD 1,920,310.85 and GBP 7,659,105.76, broken down as follows:
- (i) USD 675,000, corresponding to the Claimants' advance on the ICSID fees and expenses;
  - (ii) GBP 7,285,955.74, corresponding to the fees and disbursements of the Claimant's international counsel, Freshfields Bruckhaus Deringer LLP;
  - (iii) USD 476,470.99, corresponding to the fees and disbursements of the Claimant's Venezuelan counsel, Travieso Evans Arria Rengel & Paz;
  - (iv) USD 768,839.86, corresponding to the fees and expenses of the Claimant's valuation experts, FTI Consulting;
  - (v) GBP 45,811.72, corresponding to the fees and expenses of the Claimant's Venezuelan land expert Soriano Cabrera of BVA;

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<sup>446</sup> C-Costs, ¶22.a, citing a letter from Venezuela to ICSID of 17 July 2015, page 5.

<sup>447</sup> C-Costs, ¶22.c, d.

(vi) GBP 275,149.43, corresponding to the fees and expenses of the Claimant's cattle expert McLane (Agriteam Canada);

(vii) GBP 52,188.87, corresponding to reasonable travel and other expenses incurred by the Claimant for the purposes of these arbitral proceedings, including travel costs and related expenses of the Claimant's witnesses and representatives.

458. Vestey also asks the Tribunal to order Venezuela to pay interest on the amounts just listed at the rate of 11.75% applicable to Venezuela's 15-year sovereign bonds from the date of the costs submission until the date of payment, compounded semi-annually.

## **2. The Respondent's Position**

459. Venezuela requests the Tribunal to award it all the costs of this arbitration including the fees and expenses of the legal representation and expert advice, the fees and expenses of the Tribunal and the ICSID administrative fees. According to the Respondent, the Tribunal has broad discretion to award costs pursuant to Article 61(2) of the ICSID Convention and ICSID Rule 47 provided that its award is based on sound reasoning.<sup>448</sup> When making its cost determination, the Tribunal should take account of "[t]he degree of success of the parties", any dilatory tactics or misconduct throughout the proceedings, as well as the "adoption of an excessive, frivolous or unreasonable position".<sup>449</sup> Venezuela relies on the following circumstances to justify its request for costs.

460. First, after the suspension of the arbitration as a result of the settlement reached through the 2006 Agreement and in spite of Venezuela's full compliance with the terms of that agreement, Vestey recommenced the proceedings in 2011 by submitting an entirely new dispute before the Tribunal. The Republic was thus forced to defend itself and incur enormous expenses.<sup>450</sup>

461. Second, Vestey has sought on several occasions to deprive the Tribunal of evidence that could have been useful to find the truth. It requested the exclusion of certain valuation documents prepared in the course of Agroflora's sales negotiations. The Tribunal, however, did not grant such request and only ordered that these documents

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<sup>448</sup> R-Costs, ¶17.

<sup>449</sup> R-Costs, ¶23.

<sup>450</sup> R-Costs, ¶¶40-45.

be redacted.<sup>451</sup> The Claimant further attempted to exclude documents obtained by Venezuela when it took over Agroflora, although those documents could have shed light on Agroflora's sales negotiations and in particular on the issue of convertibility of the offered bolivars.<sup>452</sup>

462. Third, during the hearing, the Claimant objected to Venezuela's reliance on Vestey's financial statements even though those statements were submitted by Vestey during the document production phase. Vestey also unsuccessfully sought to exclude new legal authorities introduced by the Republic during the hearing.<sup>453</sup>

463. Fourth, the Claimant mounted another attack to exclude evidence introduced by the Respondent with its second PHB. The Tribunal again denied that request. Vestey also unsuccessfully tried to prevent the Respondent from substantiating its answers to the Tribunal's questions with relevant evidence.<sup>454</sup>

464. Fifth, on a number of occasions, the Claimant provided false information to the Tribunal. In particular, the Claimant's expert BVA admitted the existence of factual inaccuracies in its first report and sought to clarify them in the second report. Another example is Vestey's reliance on land areas that are not corroborated by any document.<sup>455</sup>

465. For the foregoing reasons, the Respondent requests the Tribunal to order Vestey to bear all costs of this arbitration as follows:

(i) For the fees and expenses of the Tribunal and ICSID administrative fees: USD 525,000.00;<sup>456</sup>

(ii) For the costs of representation and legal assistance: USD 4,989,157.45;

(iii) For the cost of the hearing and the expenses incurred for travel, accommodation and supplies: USD 74,152.90.

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<sup>451</sup> Letter of 17 July 2014 from Venezuela to the Tribunal, p. 4; Letter of 26 March 2014 from Vestey to the Tribunal, p. 2; R-Costs, ¶25.

<sup>452</sup> R-Costs, ¶30.

<sup>453</sup> R-Costs, ¶32.

<sup>454</sup> R-Costs, ¶34.

<sup>455</sup> R-Costs, ¶37.

<sup>456</sup> At the time of issuance of the Award, Venezuela was in default of the last advance payment of USD 150,000 and had stated that payment was forthcoming.

466. Therefore, the aggregate costs requested by the Respondent total USD 5,588,310.35.

### 3. Analysis

467. Both Parties seek an award of the entirety of the costs related to this arbitration, including the legal fees and expenses incurred in connection with these proceedings.

468. The Claimant's costs amount to USD 1,920,310.85 and GBP 7,659,105.76, which includes USD 675,000 paid by the Claimant as advance of ICSID arbitration costs. The Respondent's costs amount to USD 5,588,310.35, which also includes USD 525,000 advanced to ICSID.

469. The Parties have not disputed that the Tribunal has broad discretion to allocate the costs of the arbitration, including the Parties' legal fees and expenses, as it deems appropriate pursuant to Article 61(2) of the ICSID Convention:

*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.*

470. The Tribunal has considered all of the Parties' arguments as well as the circumstances of this case. It observes in particular that (i) the Respondent's raised a new preliminary objection at the final hearing; (ii) Contrary to the applicable rules, it introduced new factual exhibits and legal authorities in its second PHB, which the Tribunal exceptionally admitted, (iii) it failed to comply with the Tribunal's order on document production in respect of Ernst & Young's report on Agroflora's valuation, a document that might possibly have simplified the quantification exercise.

471. In light of these factors and of an overall assessment of the course and outcome of these proceedings, the Tribunal concludes in its discretion that it is fair for the Respondent to bear the entirety of the ICSID arbitration costs, i.e. the fees and expenses of the Tribunal and ICSID's administrative fees, the amount of which costs will arise from ICSID's final financial statement in this case. For the remainder of costs, the Tribunal considers it fair for each Party to bear its own legal fees and other costs and expenses incurred in connection with this arbitration.

## V. OPERATIVE PART

472. On the basis of the foregoing facts and legal arguments, the Tribunal makes the following decision:

- i. The Tribunal has jurisdiction over this dispute;
- ii. The Respondent has breached Article 5(1) of the BIT;
- iii. The Respondent shall pay to the Claimant USD **98,145,325**, together with interest at the rate applicable to six-month US sovereign bonds, compounded semi-annually, from 29 October 2011 until payment in full;
- iv. The Respondent shall bear the entirety of the ICSID arbitration costs and shall, accordingly, reimburse to the Claimant the latter's payments of the ICSID arbitration costs as established in ICSID's final financial statement of this case;
- v. Each Party shall bear its own fees and expenses incurred in connection with this arbitration;
- vi. All other claims are dismissed.

Prof. Horacio Grigera Naón

Arbitrator

Date: 03/12/16

Prof. Pierre-Marie Dupuy

Arbitrator

Date: 03/21/16

Prof. Gabrielle Kaufmann-Kohler

President

Date: 03/29/16