INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceedings among

VALORES MUNDIALES, S.L. and CONSORCIO ANDINO, S.L.

Claimants

v.

BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

(ICSID Case No. ARB/13/11)

AWARD

Arbitrators
Dr. Eduardo Zuleta, Chairman
Dr. Horacio A. Grigera-Naón, Arbitrator
Dr. Yves Derains, Arbitrator

Secretary
Mrs. Marisa Planells-Valero

Date sent to the Parties: July 25, 2017

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LIST OF DEFINED TERMS

¶(¶)	Paragraph(s).
§(§)	Section(s).
Commitment Letter	Commitment Letter executed by the Bolivarian Republic of Venezuela and the Claimants on November 30, 2011.
ADM	Archer Daniels Midland Company.
ADM Latam	ADM Latin America.
BIT or the Treaty	Agreement on Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Venezuela, dated November 2, 1995.
Venezuela-Belarus BIT	Agreement between the Bolivarian Republic of Venezuela and the Government of the Belarus Republic on the Promotion and Reciprocal Protection of Investments, dated December 8, 2007.
Venezuela-Russia BIT	Agreement between the Government of the Bolivarian Republic of Venezuela and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments, dated November 7, 2008.
Venezuela-Vietnam BIT	Agreement between the Governent of the Bolivarian Republic of Venezuela and the Government of the Socialist Republic of Vietnam on the Promotion and Reciprocal Protection of Investments, dated November 20, 2008.
Hearing	Hearing in the arbitration *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/13/11), carried out on February 8-12, 2016.
Azteca Trademarks	Azteca International Trademarks, A.G.
CADIVI	Foreign Exchange Commission of the Bolivarian Republic of Venezuela (*Comisión de Administración de Divisas de la República Bolivariana de Venezuela*)
Instruction Letter to Dellepiane/Spiller	Letter from Mr. Miguel López Forastier (Covington & Burling LLP) addressed to Santiago Dellepiane and Pablo Spiller (Compass Lexecon), dated July 23, 2013.
CENCOEX	National Center for Foreign Commerce of the Bolivarian Republic of Venezuela (*Centro Nacional de Comercio Exterior de la República Bolivariana de Venezuela*).

ICSID or Center	International Centre for Settlement of Investment Disputes (*Centro Internacional de Arreglo de Diferencias Relativas a Inversiones*)
Liaison Commission	Official Transition Commission (*Comisión Oficial de Transición*), thereafter known as the Bolivarian Monaca National Liaison Commission (*conocida luego como la Comisión Nacional de Enlace Monaca Bolivariana*).
UNCITRAL	The United Nations Commission on International Trade and Law (*Comisión de las Naciones Unidas para el Derecho Mercantil Internacional).*
Companies	Molinos Nacionales, S.C. and Derivados de Maíz Seleccionado, Demaseca, C.A.
Consorcio	Consorcio Andino, S.L.
Consorcio Purchase Agreement	Consorcio Local Equity Interests Purchase Agreement among Archer-Daniels-Midland Company and GRUMA S.A.B de C.V. dated December 14, 2012.
Valores Purchase Agreeement	Valores Local Equity Interests Purchase Agreement among Archer-Daniels-Midland Company and GRUMA S.A.B de C.V., dated December 14, 2012.
ICSID Convention or Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States (*Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados*).
Vienna Convention	Vienna Convention on Treaties Law Vol. 1155, dated May 23, 1969.
CVA	Corporación Venezolana de Alimentos.
Decree No. 7.394 or Decree	Decree No. 7.394 dated April 27, 2010, issued by the President of the Bolivarian Republic of Venezuela, published on May 12, 2010.
Dellepiane/Spiller	Santiago Dellepiane Avellaneda and Pablo T. Spiller, from Compass Lexecon, Claimants' experts on damage valuation.
Respondent	Bolivarian Republic of Venezuela
Claimants	Valores Mundiales, S.L. and Consorcio Andino, S.L.
Demaseca	Derivados de Maíz Seleccionado, Demaseca, C.A.
Rejoinder	Rejoinder of the Bolivarian Republic of Venezuela on Jurisdiction and Merits, submitted on October 19, 2015.
EMBI	Emerging Markets Bond Index.

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ERP	Estimated market risk premium.
Respondent's Post-Hearing Brief	Writ filed by the Bolivarian Republic of Venezuela on April 5, 2016.
Claimants' Post-Hearing Brief	Writ filed by Valores Mundiales, S.L. and Consorcio Andino, S.L. on April 5, 2016.
Respondent's Costs Brief	Submission of costs by the Bolivarian Republic of Venezuela on April 22, 2016.
Claimants' Costs Brief	Writ regarding costs by Valores Mundiales, S.L. and Consorcio Andino, S.L., on April 22, 2016.
Spain	Kingdom of Spain.
United States or U.S.A.	United States of America.
Valuation Date	January 21, 2013.
DCF	Discounted Cash Flows.
Gruma	Gruma S.A.B. de C.V.
Hart/Vélez	Timothy H. Hart and Rebecca Vélez, from Credibility International, Respondent's damage valuation experts.
Gruma's 2012 20-F Report	20-F Report filed by Gruma before the *U.S. Securities & Exchange Commission* on April 30, 2013, corresponding to the fiscal year concluded on December 31, 2012.
Gruma's 2013 20-F Report	20-F Report filed by Gruma before the *U.S. Securities & Exchange Commission* on April 30, 2014, corresponding to the fiscal year concluded on December 31, 2013.
Dr. Ametrano's Report	Dr. Antonio Ametrano Vidal Expert Report dated March 6, 2015.
Dr. Velázquez´ Report	Dr. José Luis Velásquez Bolívar Legal Opinion dated October 18, 2015.
Prof. Schreuer's Report	Christoph Schreuer Expert Report dated June 1, 2015.
Investments	Jointly, the stock owned by Valores in Monaca and the stock owned by Consorcio in Demaseca.

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Eleventh Judge	Eleventh Judge of the Criminal Circuit of the Caracas Metropolitan Area.
Award	This award, corresponding to the ICSID Case No. ARB/13/11.
Memorial	Memorial filed by Valores Mundiales, S.L. and Consorcio Andino, S.L. on July 28, 2014.
Counter Memorial	Counter Memorial on Jurisdiction and Merits filed by the Bolivarian Republic of Venezuela on March 9, 2015.
Ministry of Agriculture and Property	Ministry of Agriculture and Property (*Ministerio del Poder Popular para la Agricultura y Tierras*).
Ministry of Food	Ministry of Food (*Ministerio del Poder Popular para la Alimentación*).
Ministry of Economy and Finance	Ministry of Economy and Finance (*Ministerio del Poder Popular para la Economía y Finanzas*).
Monaca	Molinos Nacionales, S.C.
Dispute Notice	Letter from Valores Mundiales, S.L. and Consorcio Andino, S.L. to the Executive Vice-president of the Bolivarian Republic of Venezuela, dated November 7, 2011 and received on November 9, 2011.
Parties	Valores Mundiales, S.L. and Consorcio Andino, S.L. and the Bolivarian Republic of Venezuela.
Dr. Canova's First Report	Expert Statement from Dr. Antonio Canova González, on July 24, 2014.
Dellepiane/Spiller First Report	Damage Valuation Report on the Investments by Valores Mundiales and Consorcio Andino in Venezuela, prepared by Santiago Dellepiane Avellaneda and Pablo Spiller, dated July 28, 2014.
Hart/Vélez First Report	Expert report prepared by Timothy H. Hart and Rebecca Vélez, dated March 9, 2015.
First Session	First session among the Tribunal and the Parties held via conference call on Wednesday, February 5, 2014.
Attorney General's Office	Attorney General's Office of the Bolivarian Republic of Venezuela.

Administrative Ordinance	Administrative Ordinance No. 004-13 issued by the Ministry of Internal Affairs and Justice (*Ministerio del Poder Popular para las Relaciones Interiores y Justicia*) published on January 22, 2013.
Arbitration Rules	Applicable Procedural Rules for Arbitration Proceedings of the International Centre for Settlement of Investment Disputes in force as of January 1, 2003.
Institution Rules	Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings of the International Center for Settlement of Investment Disputes.
Replication	Replication Brief filed by Valores Mundiales, S.L. and Consorcio Andino, S.L. on June 29, 2015.
RFB Holdings	RFB Holdings de Mexico, S.A. de C.V.
Rotch	Rotch Energy Holdings, N.V.
SAREN	Registries and Notaries Autonomous Service of the Bolivarian Republic of Venezuela (*Servicio Autónomo de Registros y Notarías de la República Bolivariana de Venezuela*).
Dr. Canova's Second Report	Second Expert Statement from Dr. Antonio Canova González dated June 29, 2015.
Prof. Reinisch's Second Report	Dr. José Luis Velásquez Bolívar Second Legal Opinion dated November 13, 2015.
Dellepiane/Spiller Second Report	Damage Valuation Report on the Investments by Valores Mundiales and Consorcio Andino in Venezuela, prepared by Santiago Dellepiane Avellaneda and Pablo Spiller, dated June 29, 2015.
Hart/Vélez Second Report	Complementary expert report prepared by Timothy H. Hart and Rebecca Vélez, dated October 12, 2015
SIEX	Foreign Investments Agency of the Bolivarian Republic of Venezuela (*Superintendencia de Inversiones Extranjeras de la República Bolivariana de Venezuela*).
Request for Arbitration	Request for arbitration filed by Valores Mundiales, S.L. and Consorcio Andino, S.L. on May 10, 2013.
SUDEBAN	Banks and Other Financial Institutions Agency of the Bolivarian Republic of Venezuela (*Superintendencia de Bancos y Otras Instituciones Financieras de la República Bolivariana de Venezuela*).
NAFTA	North America Free Trade Agreement.
Tr. [page: line]	Hearing transcription.

ADM Transaction	Transaction conducted in December 2012 whereby Gruma acquired all the shares ADM held in Valores and Consorcio.
Tribunal	Arbitral tribunal integrated by Eduardo Zuleta (Chariman), Horacio Grigera-Naón and Yves Derains, in the ICSID Case No. ARB/13/11.
Valores	Valores Mundiales, S.L.
Venezuela or the Republic	Bolivarian Republic of Venezuela.
US$	United States Dollars.
WACC	Weighted average cost of capital.

LIST OF CASES

Abaclat et al v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility dated August 4, 2011 ("*Abaclat v. Argentina*"), Annex CLA-093.

Achmea B.V. v. Slovak Republic, CPA—UNCITRAL Case No. 2008-13, Award dated December 7, 2012 ("*Achmea v. Slovakia*"), Annex CLA-049.

ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary, ICSID Case No. ABR/03/16, Award dated October 2, 2006 ("*ADC v. Hungría*"), Annex CLA-010.

AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary, ICSID Case No. ARB/07/22, Award dated September 23, 2010 ("*AES v. Hungría*"), Annex CLA-033.

Aguas del Tunari, S.A. v. Republic of Bolivia, ICSID Case No. ARB/02/3, Decisions on jurisdictional exceptions filed by the Respondent on October 21, 2005 ("*Aguas del Tunari v. Bolivia*"), Annex CLA-105.

Alex Genin, Eastern Credit Ltd., Inv. and A.S. Baltoil v. Republic of Estonia, ICSID Case No. ARB/99/2, Award dated June 25, 2001 ("*Genin v. Estonia*"), Annex RLA-035.

Applicability of the Obligation to Arbitrate under Section 21 of the Agreement of June 26, 1947, International Tribunal of Justice, Request for Advisory Opinion dated April 26, 1988, *V.I.J. Recueil* (1988) ("*Applicability of the Obligation to Arbitrate under Section 21 of the Agreement of June 26, 1947*"), Annex CLA-167.

Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award dated July 14, 2006 ("*Azurix v. Argentina*"), Annex CLA-058.

Bayindir Insaat Turizm Ticaret ve Sanayi A.Ş . v. Islamic Republic of Pakistán, ICSID Case No. ARB/03/29, Award dated August 17, 2009 ("*Bayindir v. Pakistán*"), Annex CLA-050.

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award dated July 24, 2008 ("*Biwater Gauff v. Tanzania*"), Annex CLA-020.

British Caribbean Bank Limited v. Belize Government CPA—UNCITRAL Case No. 2010-18, Award dated December 19, 2014 ("*BCB v. Belize*"), Annex CLA-127.

Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italia), International Tribunal of Justice, Award dated July 20, 1989, *V.I.J. Recueil* (1989) ("*ELSI Case (United States v. Italia)*"), Annex CLA- 071.

Case Concerning the Factory at Chorzów (Germany v. Polonia), Permanent Tribunal of International Justice, Award and Observations by M. Rabel dated September 13, 1928. Series A., No. 17 (1928) ("*Case Concerning the Factory at Chorzów (Germany v. Polonia)*"), Annex CLA-077.

Case Concerning the Mavrommatis Palestine Concessions (Greece v. United Kingdom), Permanent Tribunal of International Justice, Award dated August 30, 1924, Series A., No. 2 (1924) ("*Mavrommatis Case (Greece v. United Kingdom)*"), Annex CLA-163.

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Case Concerning Timor Oriental (Portugal v. Australia), International Tribunal of Justice, Award dated June 30, 1995, *V.I.J. Recueil* (1995) ("*Case Concerning Timor Oriental (Portugal v. Australia)*"), Annex CLA-168.

Case Concerning Septentrional Cameroon (Camerún v. United Kingdom), International Tribunal of Justice, Aaward dated December 2, 1963, *V.I.J. Recueil* (1963) ("*Case Concerning Septentrional Cameroon (Camerún v. United Kingdom)*"), Annex CLA-166.

Cases Concerning South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), International Tribunal of Justice, Award on Preliminary Objections dated December 21, 1962, (*V.I.J. Recueil* (1962) ("*Cases Concerning South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*"), Annex CLA-165.

Chevon Corp. v. Republic of Ecuador, UNCITRAL, Partial Award on the Merits dated March 30, 2010 ("*Chevron v. Ecuador*"), Annex CLA-089.

CME Czech Republic B.V. v. Check Republic, UNCITRAL, Partial Award dated September 13, 2001 ("*CME v. Check Republic*"), Annex CLA-039.

CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/08, Award dated May 12, 2005 ("*CMS v. Argentina*"), Annex CLEX-038.

Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award dated August 20, 2007 ("*Vivendi v. Argentina II*"), Annex CLA-026.

ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits dated September 3, 2013 ("*ConocoPhillips v. Venezuela*"), Annex RLA-121.

Daimler Financial Services A.G. v. Argentine Republic, ICSID Case No. ARB/05/1, Award dated August 22, 2012 ("*Daimler v. Argentina*"), Annex RLA-114.

Desert Line Projects LLC v. Republic of Yemen, ICSID Case No. ARB/05/17, Award dated February 6, 2008 ("*Desert Line v. Yemen*"), Annex RLA-078.

Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award dated October 31, 2012 ("*Deutsche Bank v. Sri Lanka*"), Annex CLA-045.

Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award dated August 18, 2008 ("*Duke Energy v. Ecuador*"), Annex RLA-082.

EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award dated October 8, 2009 ("*EDF v. Romania*"), Annex RLA-089.

El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award dated October 31, 2011 ("*El Paso v. Argentina*"), Annex CLA-036.

Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction dated January 25, 2000 ("*Maffezini v. Spain*"), Annex RLA-032.

Industria Nacional de Alimentos, S.A. and Indalsa Perú, S.A. (formerly Empresas Lucchetti, S.A. and Lucchetti Perú, S.A.) v. Republic of Peru, ICSID Case No. ARB/03/4, Award dated February 7, 2005 ("*Lucchetti v. Peru*"), Annex CLA-169.

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EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL, Award dated February 3, 2006 ("*EnCana v. Ecuador*"), Annex RLA-066.

Enron Corporation and Ponderosa Assets, L. P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction dated January 14, 2004 ("*Enron v. Argentina (Decision on Jurisdiction)*"), Annex RLA-053.

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award dated May 22, 2007 ("*Enron v. Argentina (Award)*"), Annex RLA-069.

Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V. v. United Mexican States, ICSID Case No. ARB(AF)/04/3, Award dated June 16, 2010 ("*Gemplus v. Mexico*").

Generation Ukraine, Inv. v. Ukraine, ICSID Case No. ARB/00/9, Award dated September 16, 2003 ("*Generation Ukraine v. Ukraine*"), Annex CLA-022.

Glamis Gold, Ltd. v. United States of America, UNCITRAL, Award dated June 8, 2009 ("*Glamis Gold v. United States*"), Annex RLA-086.

Gold Reserve Inv. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award dated September 22, 2014 ("*Gold Reserve v. Venezuela*"), Annex CLA-103.

Grand River Enterprises Six Nations, Ltd., et al v. United States of America, UNCITRAL, Award dated January 12, 2011 ("*Grand River v. United States*"), Annex RLA-101.

Holiday Inns S.A. et al v. Morocco, ICSID Case No. ARB 72/1, Decision on Jurisdiction dated May 12, 1974 ("*Holiday Inns v. Morocco*"), Annex CLA-005.

Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Stage), International Tribunal of Justice, Advisory Opinion dated March 30, 1950, *V.I.J. Recueil* (1950) ("*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Stage)*"), Annex CLA- 164.

Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05/18, Award dated March 3, 2010 ("*Kardassopoulos v. Georgia*"), Annex RLA-094.

Jan Oostergetel and Theodora Laurentius v. Slovak Republic, UNCITRAL, Final Award dated April 23, 2012 ("*Oostergetel v. Slovakia*"), Annex RLA-110.

Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award dated March 28, 2011 ("*Lemire v. Ukraine*").

Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistán, ICSID Case No. ARB/10/1, Award dated July 2, 2013 ("*Kilic v. Turkmenistán*"), Annex RLA-120.

LFH Neer & Pauline Neer v. United Mexican States, U.S.A.-Mexico Claims Commission, Decision dated October 15, 1926, 4 U.N.R.I.A.A. 60, 21 American Journal of International Law 580 (1927) ("*Neer v. Mexico*"), Annex RLA-002.

LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inv. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Responsibility dated October 3, 2006 ("*LG&E v. Argentina*"), Annex CLA-018.

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Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award dated December 16, 2002 ("*Feldman v. Mexico*"), Annex RLA-041.

M.V.I. Power Group L.V. and New Turbine, Inv. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Award dated July 31, 2007 ("*M.V.I. Power Group v. Ecuador*"), Annex RLA-071.

Metalclad Corporation v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award dated August 30, 2000 ("*Metalclad v. Mexico*"), Annex CLA-027.

Mondev International Ltd v. United States of America, ICSID Case No. ARB(AF)/99/2, Award dated October 11, 2002 ("*Mondev v. United States*"), Annex CLA-054.

Murphy Exploration & Production Company International v. Republic of Ecuador, CPA Case No. 2012-16, Partial Final Award dated May 6, 2016 ("*Murphy v. Ecuador*").

Occidental Exploration and Production Company v. Republic of Ecuador, LCIA Case No. UN3467, Award dated July 1, 2004 ("*Occidental v. Ecuador*"), Annex CLA-059.

Ömer Dede and Serdar Elhüseyni v. Romania, ICSID Case No. ARB/10/22, Award dated September 5, 2013 ("*Dede v. Romania*"), Annex RLA-122.

Pope & Talbot Inv. v. Government of Canada, UNCITRAL, Interim Award dated June 26, 2000 ("*Pope & Talbot v. Canada*"), Annex CLA-028.

Pope & Talbot Inv. v. Government of Canada, UNCITRAL, Award on Damages dated May 31, 2002 ("*Pope & Talbot v. Canada (Award on Damages)*"), Annex CLA-057.

Petrobart Limited v. Kirguisa Republic, Stockoholm Chamber of Commerce Case No. 126/2003, Award dated March 29, 2005 ("*Petrobart v. Kirgizstan*"), Annex CLA-065.

Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23, Award dated June 29, 2012 ("*RDC v. Guatemala*"), Annex CLA-056.

Robert Azinian, Kenneth Davitian and Ellen Baca v. United Mexican States, ICSID Case No. ARB (AF)/97/2, Award dated November 1, 1999 ("*Azinian v. Mexico*"), Annex CLA-067.

Ronald S. Lauder v. Check Republic, UNCITRAL, Award dated September 3, 2001 ("*Lauder v. Check Republic*"), Annex CLA-040.

Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazajistán, ICSID Case No. ARB/05/16, Award dated July 29, 2008 ("*Rumeli v. Kazajistán*"), Annex CLA-023.

S.D. Myers, Inv. v. Government of Canada, UNCITRAL, Partial Award dated November 13, 2000 ("*SD Myers v. Canada*"), Annex CLA-015.

SEDCO, INV., SEDCO International, S.A. and SEDIRAN Drilling Company, Iran-U.S. V.T.R., Award No. ITL 55-129-3 dated October 24, 1985 (Mangard (P), Brower, Ansari) *reprinted in* 9 Iran-U.S.A. Claims Tribunal Rep. No. 248 (1987) ("*Sedco v. Iran*"), Annex CLA-118.

Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award dated September 28, 2007 ("*Sempra v. Argentina*"), Annex RLA-072.

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Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction dated August 3, 2004 ("*Siemens v. Argentina (Decision on Jurisdiction)*"), Annex CLA-133.

Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award dated February 6, 2007 ("*Siemens v. Argentina (Laudo)*"), Annex CLA-013.

Sistem Mühendislik Inşaat Sanayi ve Ticaret A.Ş. v. Kirgizstan Republic ICSID Case No. ARB(AF)/06/1, Award dated September 9, 2009 ("*Sistem v. Kirgizstan*"), Annex RLA-087.

Starrett Housing Corporation, Starrett Systems, Inv., Starrett Housing International, Inv., v. Islamic Republic of Iran, Award No. ITL 32- 24-1 dated December 19, 1983, *reprinted in* 4 Iran-U.S.A. Claims Tribunal Rep. No. 122 ("*Starrett Housing v. Iran*"), RLA-009.

Suez, Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Responsibility dated July 30, 2010 ("*Suez v. Argentina*"), Annex RLA-149.

Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award dated May 29, 2003 ("*Tecmed v. Mexico*"), Annex CLA-014.

The Rompetrol Group N.V. v. Romania, ICSID Case No. ARB/06/3, Decision on Preliminary Objections by Respondent on Jurisdiction dated April 18, 2008 ("*Rompetrol v. Romania*"), Annex CLA-102.

Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran et al, Award No. 141-7-2 dated June 22, 1984, *reprinted in* 6 Iran-U.S.A. Claims Tribunal Rep. No. 219 (1984) ("*Tippetts v. Iran*"), Annex RLA-010.

Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction dated April 29, 2004 ("*Tokios Tokelés v. Ukraine*"), Annex CLA-097.

Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Responsibility dated December 27, 2010 ("*Total v. Argentina*"), Annex CLA-035.

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Venezuela Holdings, B.V. et al v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award dated October 9, 2014 (*Venezuela Holdings v. Venezuela*"), Annex RLA-128.

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Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on the Request by the Arab Republic of Egypt to Set Aside the Arbitral Award dated December 8, 2000, of January 28, 2002 ("*Wena Hotels v. Egypt*"), Annex CLA-109.

I. INTRODUCTION

1. The present case is regarding a dispute filed before the International Centre for Settlement of Investment Disputes ("ICSID" or the "Center") pursuant to the Agreement on Promotion and Reciprocal Protection of Investments between the Kingdom of Spain and the Republic of Venezuela, ("BIT" or the "Treaty") executed on November 2, 1995 and in force as of September 10, 1997.

2. The Claimants, Valores Mundiales, S.L. ("Valores") and Consorcio Andino, S.L. ("Consorcio"), are two *sociedades de responsabilidad limitada* with corporate domicile in Madrid, Spain (the "Claimants").

3. The Respondent is the Bolivarian Republic of Venezuela ("Venezuela", the "Respondent" or the "Republic").

4. The Claimants and the Respondent shall be hereinafter jointly referred to as the "Parties". The complete list of the representatives of the Parties and their corresponding domiciles are included in page (i) of this Award.

5. The Tribunal has analyzed all the arguments, claims, annexes and legal capacity of the Parties. The fact that this Tribunal makes no reference or does not quote an argument or document, does not entail that the Tribunal has failed to consider it.

6. In summary, the Claimants request the Tribunal to declare that Venezuela has violated Articles V (expropriation), IV (fair and equitable treatment), III (arbitrary and discriminatory measures) and VII (transfers) of the BIT, and to determine that such violations have caused them damages and loss of profits. Consequently, the Claimants request the Tribunal to hold the Respondent responsible for paying an indemnification pursuant to the BIT and international law, to order the Respondent from refraining to impose additional liens on the indemnification and to pay all the costs and expenses related with this arbitration.

7. The Respondent contests the claims of the Claimants, and requests the Tribunal to declare that it lacks jurisdiction over those claims, and that such claims are inadmissible. In the event the Tribunal concludes it has jurisdiction, the Respondent requests the Tribunal to declare that Venezuela has not breached its obligations under the BIT and, in the event the Tribunal finds the existence of responsibility, to deny the claim for damages given for lack of evidence under international law. Finally, the Respondent requests the Tribunal to require Claimants to pay the costs and expenses of the arbitration proceedings and to compensate Venezuela for the expenses incurred in its defense.

II. PROCEDURAL HISTORY

8. On May 10, 2013 the Center received a request for arbitration ("Request for Arbitration") from Valores Mundiales, S.L. and Consorcio Andino, S.L., *vis-à-vis*, the Bolivarian Republic of Venezuela.

9. On May 30, 2013, the Center received a communication from the Respondent contesting the registration of the Request for Arbitration pursuant to the effects of the denounce from the Convention on the Settlement of Investment Disputes between States and Nationals or Other States ("ICSID Convention") by Venezuela on January 24, 2012. On May 13, 2013 the General Secretary of ICSID confirmed the reception of such communication.

10. Through a letter dated June 4, 2013, the Claimants rejected the arguments against the registration of the Request of Arbitration submitted by Venezuela. On such date, the General Secretary of ICSID confirmed the reception of such communication

11. On June 6, 2013, the General Secretary of ICSID registered the Request for Arbitration pursuant to Article 36(3) of the ICSID Convention and notified such fact to the Parties.

12. In the Notice of Registration, the General Secretary invited the Parties to inform the Center of any agreement with respect to the number of arbitrators and their appointment mechanism under Rule 7(c) of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "Institution Rules"). Likewise, it invited them to, if possible, integrate an arbitral tribunal pursuant to Articles 37 through 40 of the ICSID Convention.

13. Through a communication dated June 10, 2013, the Respondent reiterated its objection to the registration of the Request for Arbitration, indicating its intent to refraining in the future from all participation in this proceeding. On June 11, 2013, ICSID General Secretary confirmed the reception of such communication and indicated that the registration of the Request for Arbitration was made without prejudice tothe powers and duties of the arbitral tribunal concerning the jurisdiction, venue and merits, as set forth in Articles 41 and 42 of the ICSID Convention.

14. On June 14, 2013, the Claimants proposed a mechanism to integrate the arbitral tribunal to the Respondent. The Center confirmed the reception of such communication on such date. The Center did not receive any communication form the Respondent in connection therewith.

15. On August 8, 2013, after more than sixty (60) days as of the registration of the Request for Arbitration elapsed, without the Parties reaching an agreement regarding the mechanism to constitute the Tribunal, the Claimants appointed Dr. Horacio A. Grigera-Naón, a national from the Republic of Argentina, pursuant to Article 37(2)(b) of the ICSID Convention.

16. Through letter dated August 13, 2013, Dr. Horacio A. Grigera-Naón accepted his appointment as arbitrator of this proceeding.

17. On October 13, 2013, after ninety (90) days as of the registration of the Request of Arbitration elapsed, without theTribunal being constituted, the Claimants requested the Chairman of the Administrative Council of ICSID to appoint the pending arbitrators under Article 38 of the ICSID Convention and Rule 4 of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules").

18. Through letter dated October 21, 2013, the Center acknowledged receipt of the Claimants' request and informed the Parties that, pending compliance of the appointment process under Article 38 of the Convention, the Respondent could appoint an arbitrator and the Parties could reach agreement on the appointment of the Chairman of the Tribunal under Article 37(2)(b) of the Convention.

19. On November 8, 2013 the Center informed the Parties that it intended to propose to the Chairman of the Administrative Council of ICSID, the appointmen of Dr. Yves Derains, a French national, as co-arbitrator, and invited the Parties to submit any comments not later than November 18, 2013.

20. Through a communication dated November 13, 2013, the Claimants informed that they had no objection with respect to the appointment of Dr. Derains as co-arbitrator. The Center did not receive any communication from the Respondent in this regard.

21. On November 20, 2013, the Center informed the Parties that, pursuant to Article 38 of the ICSID Convention and Rule 4(1) of the Arbitration Rules, the Chairman of the Administrative Council of ICSID would appoint Dr. Derains as co-arbitrator.

22. On November 26, 2013, Dr. Derains accepted his appointment.

23. Through letter dated December 19, 2013, the Center informed the Parties that it intended to propose to the Chairman of the Administrative Council of the ICSID, to appoint Dr. Eduardo Zuleta, a Colombian national, as the third arbitrator and as Chairman of the Tribunal, and invited the Parties to submit any comments not later than December 30, 2013.

24. Through a communication dated December 30, 2013, the Claimants informed that they had no objection with respect to the appointment of Dr. Zuleta as Chairman of the Tribunal. The Center did not receive any communication from the Respondent in this regard. On January 2, 2014 the Center informed the Parties that, pursuant to Article 38 of the ICSID Convention and Rule 4(1) of the Arbitration Rules, the Chairman of the Administrative Council of the ICSID would appoint Dr. Zuleta as Chairman of the Tribunal.

25. On January 9, 2014, Dr. Zuleta accepted his appointment.

26. On the same date, ICSID General Secretary notified the Parties that the three arbitrators had accepted their respective appointments, so the proceedings had formally initiated and that Ms. Ann Catherine Kettlewell, ICSID Legal Counsel, would act as Secretary of the Arbitral Tribunal.

27. On January 17, 2014, the Tribunal invited the Parties to indicate, not later than January 22, 2014, whether they were available for the first session via conference call on February 5, 2014 (the "First Session").

28. On January 22, 2014 the Claimants confirmed their availability for holding the First Session on the date proposed by the Tribunal. The Center did not receive any communication from the Respondent in this regard.

29. On January 23, 2014, after trying to consult with the Parties to the extent possible, the Tribunal set February 5, 2014 as the date for the First Session.

30. The First Session of the Tribunal was held on that date via conference call.

31. The following persons were present thereat:

Arbitral Tribunal members

Dr. Eduardo Zuleta, Chairman
Dr. Horacio Grigera-Naón, *Arbitrator*
Dr. Yves Derains, *Arbitrator*

ICSID Secretary

Mrs. Ann Catherine Kettlewell, Secretary of the Tribunal

Representing the Claimants

Mr. Miguel López Forastier, Covington & Burling LLP
Mr. José E. Arvelo, *Covington & Burling LLP*
Ms. Mary T. Hernández, *Covington & Burling LLP*
Engr. Homero Huerta, *Gruma, S.A.B de C.V.*
Salvador Vargas, Esq., *Gruma, S.A.B de C.V.*
Guillermo Elizondo, Esq., *Gruma, S.A.B de C.V.*
Mr. Duane H. Zobrist, *Zobrist Law Group*
Mr. Craig E. Marshall, *Zobrist Law Group*

32. At the beginning of the First Session, the Chairman of the Tribunal recorded in the file that the Respondent was duly summoned to attend the First Session and that, notwithstanding the invitation, the Respondent did not attend.

33. The Claimants confirmed that the Tribunal had been duly incorporated and had no objection in the appointment of Tribunal members. During the First Session, it was agreed, *inter alia*, that the applicable Arbitration Rules would be those in effect as of April 10, 2006, the language of the proceedings would be Spanish and that the seat of arbitration would be Washington, D.C.

34. The minutes of the First Session were included in Procedural Order No. 1, dated February 10, 2014, which was distributed to the Parties on such date.

35. On July 3, 2014, the Claimants requested the Tribunal for an extension of the term established in Section 13.1 of Procedural Order No. 1 for the submission of their memorial indicating that, if the extension was granted by the Tribunal, they would grant their consent for the same extension of the deadline for the presentation of Respondent's counter memorial. On July 7, 2014, the Tribunal asked the Respondent to submit its observations regarding the Claimant's request not later than July 8, 2014. The Tribunal did not receive any communication from the Respondent in this regard.

36. On July 10, 2014, the Tribunal extended the period requested by the Claimants for the submission of their Memorial and granted the same extension to the Respondent.

37. On July 28, 2014, the Claimants submitted their memorial, together with the annexes, legal authorities (*autoridades legales*), witness statements, [and] expert reports (the "Memorial").

38. On August 25, 2014, the Respondent sent a letter to the ICSID General Secretaryinforming that it had designated the firm Foley Hoag LLP for its legal representation in the arbitration.

39. Through a letter dated September 11, 2014, the Respondent stated its intention to submit its Counter Memorial pursuant to Section 13.1 of Procedural Order No. 1. In such communication, the Respondent also requested the bifurcation of the arbitration procedure, so its objection to the ICSID jurisdiction and the competence of the Tribunal could be decided on a first phase. The Respondent set forth its jurisdictional objection regarding the lack of Venezuela's consent to the arbitration, indicating that this objection had been filed promptly after receiving the Request for Arbitration.

40. Furthermore, the Respondent requested that, in the event that the Tribunal decided not to bifurcate the proceeding, it should be granted with a term extension to submit its Counter Memorial.

41. Through a communiaction dated September 17, 2014, the Claimants opposed to the Respondent's bifurcation request and subsequently requested the Tribunal to resolve the jurisdiction objection submitted by the Respondent, jointly with the merits of the dispute. The Claimants also stated that they did not contest the extension requested by the Respondent for submitting its Counter Memorial.

42. On October 1, 2014, the Tribunal issued its Decision on the Bifurcation Request, rejecting the bifurcation request of the Respondent and modifying the proceedings schedule set forth for the submissions of the Parties.

43. On January 17, 2015, the Respondent submitted a request for the exhibition of certain documents referred to in the expert valuation report submitted by the Claimants with their Memorial, and also requested the granting of an additional term for the submission of its Counter Memorial.

44. On January 22, 2015, the Claimants requested the Tribunal to reject the Respondent's request for being groundless and an attempt to delay the proceedings.

45. On January 23, 2015, the Respondent submitted a communication reiterating its request to be granted with an additional term for the submission of its Counter Memorial.

46. On January 23, 2015, the Arbitral Tribunal issued Procedural Order No. 2 requesting the Parties to comply with certain requirements for the presentation of the documents requested by the Respondent.

47. Through a communication dated January 26, 2015, the Respondent submitted the additional information requested by the Arbitral Tribunal in Procedural Order No. 2 and reiterated its request for an extension for submitting its Counter Memorial.

48. On January 28, 2015, the Claimants submitted the information requested by the Arbitral Tribunal in Procedural Order No. 2 in response to the Respondent's communication dated January 26, 2015, and reiterated that the request for a term extension should be rejected.

49. Through a letter dated January 29, 2015, the Center informed the Parties about the appointment of Mrs. Marisa Planells-Valero, ICSID Legal Counsel, as Secretary of the Tribunal, replacing Ms. Kettlewell.

50. On January 30, 2015, the Tribunal issued its Decision on the Request for an Extension and Delivery of Documents, whereby it granted an additional term to the Respondent to submit its Counter Memorial.

51. Through a communication dated March 5, 2015, the Center informed the Parties of the new dates of the proceedings schedule and invited them to submit any observations thereof by March 11, 2015.

52. On March 9, 2015, the Respondent submitted its Counter Memorial on Jurisdiction and Merits ("Counter Memorial") accompanied with annexes, legal authorities (*autoridades legales*), witness statements and expert reports.

53. Through communications dated March 11, 2015, the Respondent informed that it had no observations to the proceedings schedule proposed by the Tribunal, and the Claimants requested an additional period for the submission of their Replication, with an equivalent period for the submission of the Rejoinder by the Respondent.

54. On March 12, 2015, the Respondent confirmed that it had no objection to the Claimants' extension request and requested the same extension for the submission of its Rejoinder. On such date, the Claimants confirmed their agreement with Respondent's extension request.

55. On March 16, 2015, the Tribunal confirmed that the proceedings schedule was amended according to the agreement reached by the Parties.

56. On June 5, 2015, the Tribunal invited the Parties to present their observations on potential dates for a jurisdiction and merits hearing. On June 12, 2015, the Parties informed the Tribunal of their agreement on the dates for the hearing and requested an additional reservation day.

57. On June 29, 2015, the Claimants submitted their Replication ("Replication"), accompanied with their annexes, legal authorities (*autoridades legales*), witness statements and expert reports.

58. On October 19, 2015, the Respondent submitted its Rejoinder on Jurisdiction and Merits ("Rejoinder") accompanied with their annexes, legal authorities (*autoridades legales*), witness statements and expert reports.

59. On January 6, 2016, the Tribunal held a preliminary hearing with the Parties via conference call. The following persons were present thereat:

Tribunal members

Dr. Eduardo Zuleta, *Chairman*

Dr. Horacio Grigera-Naón, *Arbitrator*

Dr. Yves Derains, *Arbitrator*

ICSID Secretary

Mrs. Marisa Planells-Valero, Secretary of the Tribunal

Representing the Claimants
Mr. Miguel López Forastier, Covington & Burling
Mr. José E. Arvelo, *Covington & Burling*
Mr. Duane H. Zobrist, *Zobrist Law Group*
Mr. Craig E. Marshall, *Zobrist Law Group*
Mr. Guillermo Elizondo, *Gruma, S.A.B. de C.V.*
Mr. Salvador Vargas, *Gruma, S.A.B. de C.V.*

Representing the Respondent

Dr. Ronald Goodman, Foley Hoag LLP
Mr. Alberto Wray, *Foley Hoag LLP*
Mr. Luis Parada, *Foley Hoag LLP*
Mr. Diego Cadena, *Foley Hoag LLP*
Ms. Erika Fernández, Attorney General's *Office*

60. On January 11, 2016, the Tribunal issued its Procedural Order No. 3 with respect to the organization of the hearing. Among other matters, the Tribunal, following the Respondent's statement during the preliminary hearing stating that the expert Dr. Antonio Ametrano Vidal, an expert in Venezuelan law offered by the Respondent, would not be available to participate in the hearing, invited Respondent to obtain a written explanation from Dr. Ametrano stating the reasons of his absence.

61. On January 21, 2016, the Respondent sent the Tribunal a communication from Dr. Ametrano explaining the reasons he could not attend the hearing.

62. On January 22 and 29, 2016, the Parties exchanged communications regarding the admission of certain documents in the file of this proceeding and requested a decision by the Tribunal with respect to both requests.

63. On February 1, 2016, the Tribunal issued Procedural Order No. 4, authorizing each Party to submit certain documents whose incorporation into the file had been requested and not rejected by the other Party, as well as two documents submitted by the Respondent and contested by the Claimants. On February 1, 2016, the Claimants submitted comments on Procedural Order No. 4. On the same date, the Respondent requested the inclusion of a new document in the file of the proceedings.

64. On February 2, 2016, the Parties sent two communications to the Tribunal attaching the documents to be included in the file of the proceeding in accordance with Procedural Order No. 4.

65. Through a communication dated February 3, 2016, the Tribunal reiterated its decision included in its Procedural Order No. 4 rejecting the Respondent's request dated February 1, 2016 for the inclusion of an additional document.

66. Between February 8 and 12, 2016, the Tribunal held the hearing (the "Hearing") at the ICSID headquarters at the World Bank in Washington, D.C. The following persons were present thereat:

Tribunal MEMBERS
Dr. Eduardo Zuleta, *Chairman*
Dr. Horacio Grigera-Naón, *Arbitrator*
Dr. Yves Derains, *Arbitrator*

ICSID Secretary

Mrs. Marisa Planells-Valero, *Secretary of the Tribunal*

Representing the Claimants

Attorneys

Mr. Miguel López Forastier	Covington & Burling LLP
Mr. José E. Arvelo	Covington & Burling LLP
Mrs. Mary T. Hernández	Covington & Burling LLP
Mrs. Carolina González	Covington & Burling LLP
Mrs. Clovis Treviño	Covington & Burling LLP
Mr. Duane H. Zobrist	Zobrist Law Group
Mr. Craig E. Marshall	Zobrist Law Group
Mr. Guillermo Elizondo	Gruma, S.A.B. de C.V.
Mr. Salvador Vargas	Gruma, S.A.B. de C.V.
Mr. Alberto Gámiz	Vice President, Gruma LATAM

Paralegal/ Technical/Others

Mr. Patrick Flanigan	Covington & Burling LLP
Mr. David Rodríguez	Covington & Burling LLP
Mr. Michael Bastardo	Covington & Burling LLP
Mrs. Kathryn McGee	Covington & Burling LLP
Mr. Zach Arnson-Serotta	Covington & Burling LLP/Planet Depos, LLC
Mrs. María Pérez Dupuy	Independent counsel

Experts

Mr. Santiago Dellepiane	Compass Lexecon
Prof. Pablo Spiller	Compass Lexecon
Mr. Gustavo De Marco	Compass Lexecon
Mr. Andrés Casserly	Compass Lexecon
Mrs. Nancy Cherashore	Compass Lexecon
Prof. Christoph Schreuer	
Mr. José Roble Flores Fernández	Abogados Mesta, Flores & Asociados
Mr. Antonio Canova	AraqueReyna

Parties

Mr. Homero Huerta	Valores Mundiales, S.L., Consorcio Andino, S.L., Gruma, S.A.B. de C.V.

Representing the Respondent

Attorneys	
Dr. Ronald Goodman	Foley Hoag LLP
Mr. Alberto Wray	Foley Hoag LLP
Mr. Kenneth Figueroa	Foley Hoag LLP
Mr. Luis Parada	Foley Hoag LLP
Mr. Diego Cadena	Foley Hoag LLP
Mrs. Gisela Paris	Foley Hoag LLP
Mrs. Melinda Kuritzky	Foley Hoag LLP
Mr. Ofilio Mayorga	Foley Hoag LLP
Mrs. Manuela de la Helguera	Foley Hoag LLP
Mr. José Rebolledo	Foley Hoag LLP
Mrs. Clara Brillembourg	Foley Hoag LLP
Mrs. Alexandra Kerr Meise	Foley Hoag LLP
Mrs. Kathryn Kalinowski	Foley Hoag LLP
Mrs. Carol Kim	Foley Hoag LLP
Mrs. Elizabeth Glusman	Foley Hoag LLP
Mrs.Megan Doherty	Foley Hoag LLP
Mrs.Angélica Villagrán	Foley Hoag LLP
Mrs. Verónica Suarez	Foley Hoag LLP
Mr. Peter Hakim	Foley Hoag LLP
Miss Rebecca Gerome	Foley Hoag LLP
Parties	
Mr,s Erika Fernández	Attorney General's Office of the Bolivarian Republic of Venezuela
Advisors	
Mr. Raymond McLeod	DOAR
Mr.Danis Brito	DOAR
Mr.José Javiar	DOAR
Mr. Ken Kratovil	Credibility Consulting LLC
Mrs. Laura Smith	Credibility Consulting LLC
Witnesses	
Mr. Nelson Alba	Witness
Mr. Hairo Arellano	Witness
Mr. Johabner Parra	Witness
Experts	
Dr. August Reinisch	Legal Expert
Mr. Alejandro Salas Patrón	Legal Expert
Dr. José Velásquez Bolívar	Legal Expert
Mr. Timothy Hart	Credibility Consulting LLC
Mrs. Rebecca Vélez	Credibility Consulting LLC

67. The following persons were interrogated:

With respect to the Claimants

Experts
Professor Christoph Schreuer
Professor José Roble Flores Fernández
Professor Dr. Antonio Canova
Professor Pablo Spiller
Mr. Santiago Dellepiane

Witness
Engr. Homero Huerta

With respect to the Respondent

Experts
Prof. August Reinisch
Prof. Alejandro Salas Patrón
Dr. José Luis Velásquez Bolívar
Mr. Timothy Hart
Mrs. Rebecca Vélez

Witnesses
Mr. Johabner Parra
Mr. Nelson G.
Mr. Alba Hairo Arellano

68. On February 17, 2016, the Tribunal issued its instructions with respect to the post-Hearing briefs to be submitted by the Parties.

69. On March 9, 2016, the Parties submitted the revisions to the transcripts of the Hearing.

70. On March 21, 2016 the Respondent requested a term extension for the submission of the post-Hearing briefs. On March 22, 2016, the Claimants confirmed that they had no objection to the Respondent's request. On March 23, 2016, the Tribunal granted the requested extension.

71. On March 25, 2016, the Respondent requested the addition of a new document in the proceedings file. On March 31, 2016, the Claimants contested Respondent's request.

72. On April 5, 2016, the Tribunal issued Procedural Order No. 5 accepting the addition of the document submitted by the Respondent and inviting Engineer Homero Huerta Moreno, Claimants' representative and witness, to submit additional comments with respect to the information included in the new document submitted by the Respondent, as well as his observations and corrections to the answers provided during his cross-examination.

73. On April 5, 2016, the Respondent sent a communication to the Tribunal attaching the document to be included in the proceedings file in accordance with Procedural Order No. 5.

74. On April 5, 2016, the Parties submitted their post-Hearing writs.

75. Through a notice dated April 11, 2016, the Claimants sent the Tribunal a letter from Engr. Huerta with his observations and corrections to the answers provided during his cross-examination, as well as to the new document submitted by the Respondent.

76. On April 22, 2016, the Parties submitted their respective costs briefs.

77. On February 22, 2017 the Claimants requested the addition of a new legal authority (*legal authority*) in the proceedings file. On February 27, 2017 the Respondent objected Claimants' request. On March 1, 2017, the Tribunal rejected Claimants' request, considering that there was no reason to justify the addition of a new legal authority (*legal authority*) at this late stage of the proceedings.

78. On June 20, 2017, the Tribunal declared the closure of the proceedings.

III. FACTUAL BACKGROUND

A. THE CLAIMANTS AND THE COMPANIES

79. Valores is a *sociedad mercantil de responsabilidad limitada* incorporated on November 14, 2003 under the laws of the Kingdom of Spain ("Spain")[1].

80. Consorcio is a *sociedad de responsabilidad limitada unipersonal* incorporated on April 20, 2006 under the laws of Spain[2].

81. The Claimants are controlled and managed by Gruma S.A.B. de C.V. ("Gruma"), a commercial Company incorporated under Mexican law[3].

82. Molinos Nacionales, C.A. ("Monaca") and Derivados de Maíz Seleccionado, Demaseca, C.A. ("Demaseca" and, jointly with Monaca, the "Companies") are two Venezuelan companies dedicated to the production and commercialization of corn and wheat flour, among other food products, in Venezuela[4].

83. Gruma is dedicated to food production and has operations in 18 countries[5]. By 2004, Gruma had 95% of the capital stock of Monaca while Archer Daniels Midland Company ("ADM") had the remaining 5%. On June 1, 2004, Gruma transferred all of its shares in Monaca to Valores[6]. Subsequently, on May 10, 2006, Valores acquired the outstanding 5% from ADM[7]. As a result, Valores became the direct owner of 100% of Monaca's capital stock.

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[1] Incorporation Deed of Mercantil Valores Mundiales, S.L., dated November 14, 2003 (Annex C-20).
[2] Incorporation Deed of Mercantil Consorcio Andino, S.L., Sociedad Unipersonal, dated April 20, 2006 (Annex C-21).
[3] Memorial, ¶ 14. *See* Incorporation Deed of Mercantil Valores Mundiales, S.L., dated November 14, 2003 (Annex C-20) and Incorporation Deed of Mercantil Consorcio Andino, S.L., Sociedad Unipersonal, dated April 20, 2006 (Annex C-21).
[4] Memorial, ¶ 2.
[5] Memorial, ¶ 14.
[6] Notarial Instrument No. 10,110 containing the transfer of shares from Monaca to Valores dated June 1, 2004 (Annex C- 29).
[7] Notarial Instrument No. 12,105 containing the transfer of shares from Monaca to Valores dated May 10, 2006 (Annex C-30).

84. On July 24, 2006, the then shareholders of Demaseca - Gruma and Rotch Energy Holdings, N.V. ("Rotch") - transferred all of their shares in such company[8] to Consorcio. Thereafter, Consorcio became the direct owner of 100% of Demaseca's shares.

85. Prior to June 2008, the capital stock of Valores was composed, as follows: (i) Gruma owned 72.86% of the equity interests; (ii) Rotch owned 24.14% of the equity interests; and (iii) ADM owned the outstanding 3%[9]. On other hand, the capital stock of Consorcio was composed, as follows: (i) Gruma owned 57% of theequity interests; (ii) Rotch owned 40% of the equity interests; and (iii) ADM owned the outstanding 3%[10]. Rotch is a company that, allegedly, was or is linked to the Venezuelan businessman Ricardo Fernández Barrueco[11].

86. In June 2008, Rotch carried out the following transactions, whose scope and effects are the subject of discussion between the Parties.

(i) Rotch contributed to RFB Holdings de Mexico, S.A. de C.V., ("RFB Holdings") all of its shares in Valores (24.14%) and in Consorcio (40%). Thereafter, Rotch became the owner of 100% of the shares of RFB Holdings[12].

(ii) Rotch transferred the full legal ownership of 100% of the shares of RFB Holdings to the Trust No. 6459 incorporated under Mexican law[13].

(iii) The Trust No. 6459 executed a credit agreement with Banco Mercantil del Norte, S.A.[14] Simultaneously, such Trust transferred the full legal ownerhip of all the shares in RFB Holdings to a second trust, also incorporated under Mexican law. Rotch was appointed as "Beneficiary in Second Degree"[15].

87. On June 21, 2010, all the shares of RFB Holdings were transferred to Mr. Roberto Alcántara Rojas[16].

B. SEIZURE AND SPECIAL ADMINISTRATION MEASURES

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[8] Notarial Instrument No. 12,333 containing the transfer of shares from Demaseca to Consorcio dated July 24, 2006 (Annex C-30).

[9] *See* Memorial, ¶ 27; Counter Memorial, ¶ 128, Chart 1.

[10] *See* Memorial, ¶ 27; Counter Memorial ¶ 130, Chart 2.

[11] The Claimants argue that Mr. Fernández Barrueco "*[w]as the attorney-in-fact and was recognized as shareholder of ROTCH*" (Memorial, ¶ 24). On other hand, the Respondent states that Rotch is an "*entity controlled*" by Fernández Barrueco (Counter Memorial, ¶ 134).

[12] Notarial Instrument No. 25.445 containing the Minutes of the General Shareholders' Meeting of RFB Holdings de Mexico, S.A. de C.V. dated June 12, 2008 (Annex C-35); Trust Agreement No. 6460 dated June 12, 2008 (Annex C-39).

[13] Trust Agreement No. 6459 dated May 18, 2008 (Annex C-38); Trust Agreement No. 6460 dated June 12, 2008 (Annex C-39); Stock certificate No. 01/01 RFB Holdings dated June 10, 2014 (Annex C-40); Certification of the shareholders' registry book of Valcon Holdings, S.A. dated June 10, 2014 (Annex C-41).

[14] Trust Agreement No. 6459 dated May 18, 2008 (Annex C-38); Credit agreement between Banorte and the Trust No. 6459 dated June 12, 2008 (Annex C-42).

[15] Trust Agreement No. 6460 dated June 12, 2008 (Annex C-39); Stock certificate No. 01/01 RFB Holdings dated June 10, 2014 (Annex C-40).

[16] Certification of the shareholders' registry book of Valcon Holdings, S.A. dated June 10, 2014 (Annex C-41); Accord and satisfaction (*Convenio de dación en pago*) agreement dated September 11, 2013 (Annex C-43). *See* Memorial ¶ 32 and Counter Memorial ¶ 135.

88. On November 25, 2009, the Eleventh Judge of the Judicial Criminal Circuit of the Metropolitan Area of Caracas (the "Eleventh Judge") issued an order of precautionary measures to seize the assets of Mr. Ricardo Fernández Barrueco, at the request of the Public Prosecutor[17]. Mr. Fernández Barrueco had been accused of allegedly committing crimes of appropriation of resources of the savers, improper approval of loans and association to commit crimes[18].

89. On December 4, 2009, at the request of the Public Prosecutor, the Eleventh Judge issued a decision whereby it

> "[RESOLVED] to issue a writ to the Ministry of Finance, requesting instructions to be issued to take the necessary measures for the proper custody, conservation and administration of the Companies linked to RICARDO FERNÁNDEZ BARRUECOS [...] to prevent them to be altered, to disappear, deteriorate or be destroyed [...]"[19].

Within the "companies linked" to Mr. Fernández Barrueco, the order included both, the Companies and the Claimants[20].

90. Through a circular dated December 10, 2009, the Registries and Notaries Autonomous Service ("SAREN") requested the Public Registries, Commercial Registries and Public Notaries to "*refrain from notarizing and/or authenticating any legal act or business whereby, by themselves or through a third party*" the entities listed in the circular, including Monaca, Demaseca and Claimants, intervene[21].

91. On December 22, 2009, the Ministry of Economy and Finance (the "Ministry of Economy and Finance") published Resolution 2.549, whereby six citizens were designated as:

> "Special administrators and representatives on behalf of the Bolivarian Republic of Venezuela, of the shares of RICARDO FERNÁNDEZ BARRUECOS [sic] [...] in the company MOLINOS NACIONALES, C.A. (MONACA) [...] and its corresponding assets, whether related or linked to such company, or to RICARDO FERNÁNDEZ BARRUECOS"[22].

92. Through Resolution 2.628 dated March 1, 2010, the Ministry of Economy and Finance appointed four citizens as special administrators of Demaseca in similar terms than those set forth in Resolution 2.549[23]. These resolutions were replaced in the following years with resolutions

[17] Order to seize assets issued by the Eleventh District Judge on November 25, 2009 (Annex C-46)
[18] *Id.*
[19] Order issued by the Eleventh District Judge dated December 4, 2009, page 12 (Annex C-59).
[20] *See* Order issued by the Eleventh District Judge dated December 4, 2009, pages 10-12 (Annex C-59).
[21] Circular No. 0230-864 of the General Director of Registries and Notaries Autonomous Service addressed to Public Registries, Commercial Registries and Notaries, dated December 10, 2009, page 2 (Annex C-66).
[22] Resolution 2,549 dated December 4, 2009 of the Ministry of Economy and Finance, published in the Official Gazette No. 39,333 dated December 22, 2009, Article 1 (Annex C-10).
[23] Resolution 2,628 dated March 1, 2010 of the Ministry of Economy and Finance, published in the Official Gazette No. 39,377

appointing new special administrators with respect to the Companies[24].

93. On December 23, 2009, the Banks and Other Financial Institutions Agency ("SUDEBAN") notified the corresponding banks and financial institutions that a special administrator of Monaca and other companies had requested "*to FREEZE the checking, savings, participation, and trust accounts, and any other products or financial instruments which the aforementioned companies could have in such bank, savings or credit institution, financial institution or institute*"[25].

94. On February 1, 2010, the Claimants and the Companies initiated a third-party proceeding (*incidente de tercerías*) before the Eleventh Judge to request to lift the seizure and special administration measures imposed on Monaca and Demaseca[26].

95. Through resolution dated November 19, 2010, the Eleventh Judge rejected the request made by the Claimants and the Companies in the third-party proceeding (*incidente de tercerías*) and, consequently, ordered to maintain the seizure measures established on November 25 and 4 December 2009[27]. On December 6, 2010, the Claimants and the Companies filed an appeal against such decision[28]. As of this date, the Tribunal has no knowledge of whether such appeal has been resolved[29].

96. On December 10, 2012, the Ministry of Planning and Finance appointed Messrs. Nelson Alba and Johabner Parra, among others, as special administrators of Monaca[30]. Messrs. Alba and Parra were members of the "Liaison Commission" referred to in paragraph 103 below.

97. Through the Administrative Ordinance No. 004-13 (the "Administrative Ordinance"), published on January 22, 2013, the Ministry of Internal Affairs and Justice appointed four citizens – including among them, Messrs. Nelson Alba and Johabner Parra - as special administrators of the Companies[31]. Pursuant to Article 2 of the Administrative Ordinance, the special administrators "*shall have the broadest administrative powers to guarantee the possession, custody, use, and conservation of movable and real property of [Monaca and Demaseca]*"[32]. The Claimants state

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dated March 2, 2010 (Annex C-11).

[24] *See* Resolution 2,623 dated March 1, 2010 of the Ministry of Economy and Finance, published in the Official Gazette No. 39,377 dated March 2, 2010 (Annex C-60); Resolutions 2,645 and 2,647 dated March 10, 2010 of the Ministry of Economy and Finance, published in the Official Gazette No. 39,383 dated March 10, 2010 (Annex C-61); Resolutions 2,740 and 2,749 dated August 31, 2010 of the Ministry of Economy and Finance, published in the Official Gazette No. 39,499 dated August 31, 2010 (Annex C-62); Resolutions 2,930 and 2,939 dated January 13, 2011 of the Ministry of Economy and Finance, published in the Official Gazette No. 39,594 dated January 14, 2011 (Annex C-63); Resolution 3.268 dated December 10, 2012 of the Ministry of Planning and Finance, published in the Official Gazette No. 40,069 dated December 11, 2012 (Annex C-64).

[25] Writ No. SBIF-DSB-GGCJ-GLO-20304 issued by the Banks and Other Financial Institutions Agency dated December 23, 2009, page 1 (Annex C-69).

[26] Decision issued by the Eleventh District Judge dated November 19, 2010, page 12 (Annex C-70).

[27] Decision issued by the Eleventh District Judge dated November 19, 2010, page 12 (Annex C-70).

[28] Appeal writ of Valores, Consorcio, Monaca and Demaseca dated December 12, 2010 (Annex C-93).

[29] See Counter Memorial ¶ 249. See Supreme Court of Justice, Decision of the Criminal Appelleate Chamber, October 8, 2015 (Annex R-159); Eleventh Circuit Judge, court decision dated October 29, 2014 (Annex R-163); Note No. 1292 of the Eleventh Circuit Judge to the Twenty-Eighth Judge Court dated October 29, 2014 (Annex R-164); Judicial Appelleate Court of the Metropolitan Area of Caracas, Eighth Chamber, Notification Ballot No. 006.8.15, January 8, 2015 (Annex R-167).

[30] Resolution 3,268 dated December 10, 2012 of the Ministry of Planning and Finance, published in the Official Gazette No. 40,069 dated December 11, 2012 (Annex C-64).

[31] Administrative Ordinance No. 004-13 dated January 21, 2013 of the Ministry of Internal Affairs and Justice, published in the Official Gazette No. 40,095 dated January 22, 2013 (the "Administrative Ordinance") (Annex C- 17)

[32] *Id.*

in their Memorial that they lost *de iure* control over the Companies as a result of the Administrative Ordinance[33].

98. On April 30, 2013, Gruma informed the U.S. Securities & Exchange Commission that, as a result of the Administrative Ordinance, it would cease to consolidate the operations of Monaca and Demaseca in its financial statements as of January 22, 2013[34].

99. On May 10, 2013, the Claimants filed their Request for Arbitration.

100. In March 2014, the special administrators requested Monaca "*to make the payment of the allowance we instructed in our notice dated February 12 of this year, to compensate the exercise of our duties granted to us through the Administrative Ordinance No. 004-2013* [...]"[35].

101. On July 30, 2014, the Twenty-Eighth Tribunal of the First Instance ordered the dismissal of the case against Mr. Fernández Barrueco and ordered to lift the precautionary measures imposed on his property[36]. The decision was appealed by the Attorney General's Office on August 6, 2014[37]. As of this date, this Tribunal has no knowledge of whether such appeal has been resolved[38].

C. DECREE No. 7.394

102. On May 12, 2010, Decree No. 7.394 dated April 27, 2010 ("Decree No. 7.394" or "Decree") was published. The Decree was issued by the then President of the Republic, Hugo Chávez Frías. It was thereby ordered:

> "the forced acquisition of personal property, real estate and improvements (*bienhechurías)* constituting or serving for the operation of the company Molinos Nacionales, C.A. (MONACA), or those serving for the production, agro industrial processing and large-scale storage of wheat flour, corn flour, pasta, rice, oil, oats, seafood, marinade (*adobo*) and spices, by said company, for the execution of the "SOCIALIST AGROINDUSTRIAL PROCESSING CAPACITY CONSOLIDATION FOR THE VENEZUELA OF THE XXI CENTURY"" program, which will socially use and exploit the processing of cereals and oilseeds to effectively and efficiently promote the achievement of food assurance and food sovereignty of the Venezuelan population."[39]

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[33] Memorial ¶¶ 185, 235.
[34] Gruma, 20-F Report before the U.S. Securities & Exchange Commission for 2012, April 30, 2013 ("Gruma's 2012 20-F Report") (Annex C-44).
[35] Writ issued by the special administrators to Henrry Castro, Executive Chairman of Monaca, March 5, 2014, p. 1 (Annex C-129). *See* Writ issued by the special administrators to Henrry Castro, Executive Chairman of Monaca, February 12, 2014 (Annex C-130).
[36] Writ of the Ministry of Food to the "Board of Monaca", May 16, 2013 (Annex C-151).
[37] E-mails between Milagros Moreno, Liaison Commission, and Nicolás Constantino, Executive President of Monaca, May 11-12, 2011 (Annex C-152).
[38] *See* Claimants' Post-Hearing Brief, ¶ 82.
[39] Decree No. 7.394 dated April 27, 2010, published in the Official Gazette No. 39.422 dated May 12, 2010, Article 1 ("Decree No. 7.394" or "Decree") (Annex C-12).

103. On May 14, 2010; the first meeting between the Claimants and Venezuela was held in connection with the forced acquisition process[40]. At that meeting, Venezuela would have reported the establishment of an "Official Transition Commission" (hereinafter, the "Liaison Commission")[41]. As of July 29, 2010, the members of the Liaison Commission began acting as "mirrors" in the executive positions of the Companies (President, Vice-presidents, Managers, and Directors)[42]. Mr. Johabner Parra was appointed to act as a "mirror" in the Vice-Presidency of Sales and Foreign Trade[43].

104. On May 26, 2010, a meeting was held among officers of Monaca, the Ministry of Agriculture and Property ("Ministry of Agriculture and Property") and Corporación Venezolana de Alimentos ("CVA") to discuss the clauses of the "Amicable Arrangement Minute"[44]. At the end of the meeting, a new date was set for the execution of the minutes. However, there is no evidence in the file that the minutes were signed.

105. On May 27, 2010, the Attorney General's Office of the Republic (the "Attorney General's Office") published in the VEA Gazette a "Notification Post"[45]. Monaca appeared before the Attorney General's Office on June 23, 2010 "*in order to consign the documentation evidencing the title and ownership right of [Monaca] on the real estate and the improvements (bienhechurías) thereof, on the personal property, et al.*"[46]

106. On May 28, 2010, a representative of the Claimants sent to a legal advisor of the Ministry of Agriculture and Property a "*proposal containing the most important issues of the discussions with you yesterday in order to reach an amicable settlement, all this being consistent with the [BIT]*"[47]. The Parties discuss in this arbitration the purpose and scope of the issues allegedly agreed at said meeting.

107. On June 23, 2010, the Claimants and the Respondent agreed on the formation of an appraisal commission responsible for carrying out the valuation that would serve as the basis for the negotiation of a definitive agreement for the purchase and sale of all or part of the shares or assets of the Companies[48]. The commission would be integrated by two experts, one appointed by each party.

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[40] The Claimants argue that on the date they met with Venezuelan officials, including the Deputy Minister of Agriculture and Property to "*obtain more information about the scope of the Decree and its implementation*" (Memorial, ¶ 53. *See* Homero Huerta's e-mail about the meeting with the Ministry of Agriculture and Property, May 15, 2010, (Annex C-78)). On other hand, the Respondent states that on such date, "*the meetings aimed at reaching an agreement with GRUMA*" begun (Counter Memorial, ¶ 144).

[41] Homero Huerta's e-mail about the meeting with the Ministry of Agriculture and Property, May 15, 2010, (Annex C-78)

[42] E-mail from R. Rodríguez to J.V. Jiménez, July 28, 2010 (Annex R-030); E-mail of Rafael Rodríguez (Liaison Commission) to Nicolás Constantino (Chairman of Monaca and Demaseca), July 29, 2010 (Annex C-191).

[43] E-mail of Rafael Rodríguez (Liaison Commission) to Nicolás Constantino (Chairman of Monaca and Demaseca), July 29, 2010 (Annex C-191).

[44] Meeting's Minute before the Attorney General's Office of the Republic, May 26, 2010 (Annex C-81).

[45] Notification post of the Attorney General's Office of the Republic with respect to Monaca, May 27, 2010 (Annex C-84).

[46] Monaca's writ to the Attorney General's Office of the Republic, June 23, 2010, p. 2 (Annex C-085).

[47] Letter from Roberto González Alcalá addressed to Reinaldo Muñoz, May 28, 2010, p. 2-3 (Annex C-83).

[48] Certificate of valuation completion and negotiation base price determination, September 23, 2010 (Annex C-158); Letter from Roberto González Alcalá, attorney-in-fact of Valores and Consorcio, to Ricardo Fong, Vice-Minister of Agriculture and Property, January 17, 2011, and Protocol of Intent (Annex C-160); Monaca - Demaseca Appraisal Commission, Executive Report, September 23, 2010 (Annex R-031).

108. On August 17, 2010, the Vice-president of the Republic instructed the Attorney General's Office to suspend the expropriation procedure of Monaca[49]. Such communication states

> "[...] I inform you the instruction of the Executive Vice-President, who considering the total or partial sale offer of the Company [Monaca] made by its owners; he deemed it relevant and; therefore, instructed to accept such proposal and, consequently, suspend the expropriation procedure to commence negotiations for the acquisition of the assets covered by Article 1 of said Decree, which allows an amicable acquisition while safekeeping the rights, assets and patrimonial interests of the Republic."[50]

109. On September 23, 2010, the appraisal commission delivered the valuation of the Companies[51]. On the same date, the Parties executed the document "Certificate of Valuation Completion and Negotiation Base Price Determination"[52].

110. On January 17, 2011, the Claimants sent a report on the valuation process of the Companies to the Ministry of Agriculture and Property[53]. The Parties dispute the purpose and scope of this report.

111. On February 1, 2011, the President of the Republic approved transferring the responsibility for the transfer of Monaca from the Ministry of Agriculture and Property to the Ministry of Food ("Ministry of Food")[54].

112. On February 24, 2011, the Claimants submitted a "Protocol of Intent" to the Ministry of Food for the sale of 80% of their shares in the Companies[55]. The Parties dispute the purpose and scope of this "Protocol of Intent".

113. Between March 1, 2011 and May 30, 2012, five members of the Liaison Commission - including Messrs. Nelson Alba and Johabner Parra - were linked to Monaca through "fixed-term employment contracts" executed with a human resources company that rendered services to said company[56].

114. On April 28, 2011, two special administrators of the Companies granted powers of attorney to two members of the Liaison Commission - Messrs. Darwin Ramírez Lobo and Luis Enrique Rivas

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[49] Writ DGCJ / 2010 No. 296 of the General Director, R. Muñoz Pedroza (Vice President of the Republic) to A. Blanco (PGR), August 17, 2010 (Annex R-032).
[50] *Id.*
[51] Certificate of valuation completion and negotiation base price determination, September 23, 2010 (Annex C-158).
[52] *Id.*
[53] Letter from Roberto González Alcalá, attorney-in-fact of Valores and Consorcio, to Ricardo Fong, Vice-Minister of Agriculture and Property, January 17, 2011, and Protocol of Intent (Annex C-160);
[54] *Punto de cuenta* to the President of the Bolivarian Republic of Venezuela No. 031-11, February 1, 2011 (Annex C-116).
[55] Intention Protocol of Valores y Consorcio to the Ministry of Food, February 24, 2011 (Annex C-161).
[56] E-mail from Édgar Rodríguez, Executive Vice-President of Human Resources of Monaca, to Homero Huerta, Corporate Administration Director of Gruma, March 1, 2011 (Annex C-124); Agreements with Liaison Commission members (Nelson Alba, Johabner Parra, Manuel Colmenares, Darwin Ramírez Lobo and Luis Rivas), March 1, 2011 (Annex C-125); Minutes of meeting held by Hairo Arellano, Coordinator of the Liaison Commission, and Alberto Gámiz, Gruma, Monaca and Demaseca representative, July 10, 2013 (Annex C-126).

- to "*formalize petitions, requests or requirements before the National, State or Municipal Public Administration Entities, as well as before the necessary public or private entities.*"[57]

115. On November 30, 2011, the Claimants and the Ministry of Food executed a "Commitment Letter" with the purpose of "*evaluating the feasibility of developing cooperation mechanisms to commence negotiations for the integration, installation and initiation of a strategic alliance in the agro-industrial food sector, in order to incorporate two joint ventures, [...]*"[58] (the "Commitment Letter").

116. Thereafter, in December 2011, the Claimants proposed to Venezuela to execute an "Agreement of Intent" in connection with the creation and development of the strategic alliance provided for in the Commitment Letter dated November 30, 2011[59]. On December 27, 2011, at the request of the Ministry of Food, the Attorney General's Office issued its "observations" on the "Commitment Letter", the "Agreement of Intent" and the "Bylaws Draft" submitted for its consideration[60].

117. On the same date, the Ministry of Food recommended the Presidency of the Republic to (i) authorize the appointment of representatives to negotiate the acquisition of the Companies, and (ii) the creation of two joint venture companies, with Venezuela's participation of 60%[61]. The recommendation appears as "deferred"[62].

118. In January 2012, the President of the Republic entrusted the Ministry of Oil and Mining and the Ministry of Industries to conduct "amicable negotiations" with the owners of the Companies[63].

119. On September 30, 2013, the duties of the Liaison Commission[64] concluded.

120. In December 2013, the President of the Republic approved the appointment of the President of PDVSA to act on behalf of Venezuela in the working meetings and negotiations corresponding to the acquisition process of the Companies, until its consummation[65]. According to the Respondent, since then, the Parties had more than ten negotiation meetings[66]. However, the communications and minutes of these meetings would be subject to a confidentiality agreement executed among

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[57] Writ by the representatives of the special administration to the Executive President of Monaca, May 30, 2011, p. 5 (Annex C-119).
[58] Commitment Letter between the Ministry of Food and Valores and Consorcio, November 30, 2011, p. 1 (Annex C-163).
[59] *See* letter from R. González Alcalá (Valores) to Minister N. Maduro Moros (Ministry of Foreign Affairs) and Minister V. Osorio Zambrano (Ministry of Food), December 7, 2012 (Annex R-061); Agreement of Intent, December 15, 2011 (Annex R-049).
[60] Writ No. 1571 of General Prosecutor V. Escarrá Malavé (PGR) to Minister V. Osorio Zambrano (Ministry of Food), December 27, 2011 (Annex R-052). *See* Official Document No. 002270 of Minister V. Osorio Zambrano (Ministry of Food) to V. Escarrá Malavé (PGR), December 16, 2011 (Annex R-050).
[61] *Punto de Cuenta* No. 050-11 of Minister V. Osorio Zambrano (Ministry of Food) to President H. Chávez Frías (President of the Republic), December 20, 2011 (Annex R-051).
[62] *Id.*
[63] *See* Official Letter No. CJ-000027-2012 of Legal Advisor M. García Urbano (Ministry of Food) to Legal Advisor V. Urdaneta (Ministry of Oil and Mining), January 23, 2012 (Annex R-055); Official Letter No. CJ-000028-2012 of Legal Advisor M. García Urbano (Ministry of Food) to Legal Advisor W. Lugo / Ministry of Industries), January 23, 2012 (Annex R-056).
[64] Minutes of meeting held by Hairo Arellano, Coordinator of the Liaison Commission, and Alberto Gámiz, Gruma, Monaca and Demaseca representative, July 10, 2013 (Annex C-126) and y minutes of meeting held by Liaison Commission members and Monaca representatives, September 11, 2013 (Annex C-127)..
[65] *Punto de Cuenta*
[66] Counter Memorial ¶ 171.

the Parties in October 2013[67]. The Claimants argue that there have been no conversations between the Parties since the end of 2014[68].

D. ARGUMENTS OF THE PARTIES WITH RESPECT OF WHETHER THERE IS A LINK BETWEEN MEASURES PRIOR TO DECREE NO. 7.394 AND MEASURES THEREAFTER.

121. The Claimants have argued throughout this arbitration that there is a link between the measures prior to Decree No. 7.394 and measures thereafter, i.e., between the measures affecting the Companies and arising from and relating to, the criminal process advanced against Mr. Fernández Barrueco and the measures arising from and relating to, the aforementioned Decree. The Respondent denies the existence of such relationship.

122. Through a notice dated February 17, 2016, the Tribunal requested the Parties to submit briefs after the Hearing answering the question of "*whether or not there exists, depending on the position of each Party, a link between the measures prior to* [Decree No. 7.394] *and measures thereafter*"[69]. Both Parties submitted their post-hearing writs on April 5, 2016.

1. Claimants' Position

123. The Claimants argue that there is a close link between measures prior to Decree No. 7.394 and measures thereafter, as well as between those measures and the Decree itself[70]. According to the Claimants, Venezuela would have used these measures to indirectly appropiate the Companies without paying any compensation to the Claimants[71]. Furthermore, the imposition of the measures and the Decree itself resulted in an unfair and inequitable treatment in violation of the BIT.

124. According to the Claimants, the measures prior to Decree No. 7.394 and measures thereafter have the same origin and basis[72].

125. First, the Claimants argue that the imposition of the special administration on the Companies, as well as freezing their bank accounts and the prohibition to register or notarize corporate acts - both prior to Decree No. 7.394 - had their origin in the order issued in December 2009 by the then President Hugo Chávez to "occupy" and take ownership of the companies that were allegedly owned by Mr. Fernández Barrueco[73]. A few months after the imposition of these measures, when, according to the Claimants, it became clear that the Companies were not owned by Mr. Fernández Barrueco, the President signed the Decree No. 7.394[74]. According to the Claimants, one of the basis of the Decree is precisely the imposition of seizure and special administration measures[75].

126. Second, the Claimants suggest that the measures subsequent to the Decree, particularly the

[67] Counter Memorial ¶ 171, footnote 209. *See* Homero Huerta Moreno Witness Statement dated July 25, 2014, ¶ 61.
[68] Claimants' Post-Hearing Brief, ¶ 26.
[69] Notice from the Arbitral Tribunal to the Parties dated February 17, 2016.
[70] Claimants' Post-Hearing Brief, ¶ 2.
[71] *Id.*
[72] Claimants' Post-Hearing Brief, ¶ 34.
[73] Claimants' Post-Hearing Brief, ¶ 35.
[74] Claimants' Post-Hearing Brief, ¶ 36.
[75] Claimants' Post-Hearing Brief, ¶ 37.

creation of the Liaison Commission and the issuance of the Administrative Ordinance, have their origin and foundation on the orders of President Chávez to "occupy" and "recover" the Companies[76]. Indeed, the Claimants point out, that the Liaison Commission originates on Decree No. 7.394 and is based on the seizure and special administration measures. The Administrative Ordinance is based on these measures which, in turn, originate in the orders of President Chávez[77].

127. Third, the Claimants affirm that there is certain identity between the special administration and the Liaison Commission insofar as both (i) were imposed by the Executive Branch pursuant to orders issued by the then President Chávez; (ii) have had the purpose of promoting Venezuela's agro-food security and sovereignty policies; and (iii) they have had to adjust their actions to the guidelines of the Ministry of Food[78].

128. Particularly, the Claimants argue that since May 2011, two "mirrors" of the Liaison Commission were appointed as representatives of the special administration and began acting as special administrators[79]. Subsequently, in December 2012, Venezuela designated two "mirrors" of the Liaison Commission as special administrators whom, to date, continue to hold such positions[80].

129. The Claimants also argue that the Liaison Commission has stated that its purpose is to assure the compliance of the provisions of the special administration, while special administration members have stated that their actions are aimed to promote the agri-food policies of the special administration of the Executive Branch.[81]

130. Finally, the Claimants state that Venezuela indefinitely suspended the expropriation administrative proceeding while maintaining the special administration and the seizure measures in an irregular and indefinite manner[82]. In such manner, Venezuela has progressively increased its interference in the Companies without paying any compensation to the Claimants[83].

2. Respondent's Position

131. The Respondent denies that the measures prior to Decree No. 7.394 and measures thereafter have the relationship argued by the Claimants[84].

132. First, the Respondent argues that the recitals of the Decree merely indicate the factual and legal circumstances justifying the issuance of the Decree. The mention of the seizure measures in said recitals is reasonable, inasmuch it reflects the reality of an existing judicial procedure as of the date of the Decree which could affect the normal functioning and operation of Monaca[85].

133. Second, the Respondent disputes the probative value of the statements of then President Chávez

[76] Claimants' Post-Hearing Brief, ¶ 39.
[77] *Id.*
[78] Claimants' Post-Hearing Brief, ¶ 40.
[79] Claimants' Post-Hearing Brief, ¶ 41.
[80] Claimants' Post-Hearing Brief, ¶ 42.
[81] Claimants' Post-Hearing Brief, ¶ 41-43.
[82] Claimants' Post-Hearing Brief, ¶¶ 44-45.
[83] Claimants' Post-Hearing Brief, ¶ 45.
[84] Respondent's Post-Hearing Brief, ¶ 1.
[85] Respondent's Post-Hearing Brief, ¶ 19.

– who, according to the Claimants, would have ordered the intervention, occupation and expropriation of the Companies-, inasmuch from the video containing such statements presented by the Claimants as evidence (i) it is impossible to be certain about the context of the statements; (ii) it is concluded that these are eminently political and cannot be compared with a decision of the Venezuelan State; and (iii) they do not have the content and effects attributed by the Claimants[86].

134. Third, the Respondent denies that there is an identity between the Liaison Commission and the special administration. On the contrary, it states that these are entities with different legal basis and functions. The Respondent explains that the special administration is one of the judicial measures ordered, which fulfills "*a supervisory and custody task to safeguard the value of companies*"[87]. On other hand, the Liaison Commission was created within the framework of the conversations related with the Decree No. 7.394 with the purpose of obtaining information and knowledge to facilitate the transition after the termination of the expropriation process[88].

135. The Respondent explains that both bodies should act with a certain degree of coordination to fulfill their duties and to avoid duplicating efforts. However, it argues that this coordination responds to the "*logical collaboration between public officers*" and does not evidence a "*conspiracy theory*" as argued by the Claimants[89]. In this sense, Venezuela states that the fact that both bodies have followed the guidelines of the Ministry of Food does not demonstrate a merger of their functions, since all companies in the food sector are obliged to meet the requirements of said entity[90]. Additionally, it states that the Claimants base their thesis of the merger of these bodies on a draft of an internal, which contains errors and was never used[91].

136. Finally, Venezuela argues that the Liaison Commission disappeared on September 30, 2013, therefore it is not explained how the alleged expropriation effect, consisting in the occupation of the companies, could have survived[92].

137. In conclusion, Venezuela denies the alleged relationship argued by the Claimants between the seizure and special administration measures, on the one hand, and Decree No. 7.394, on the other. Venezuela argues that neither the first or the second have deprived the Claimants of their ownership or control of the Companies nor have they voided their value. Thus, there is no expropriation and no violation to the fair and equitable treatment standard under the BIT[93].

IV. JURISDICTION

A. RESPONDENT'S POSITION

[86] Respondent's Post-Hearing Brief, ¶ 20.
[87] Respondent's Post-Hearing Brief, ¶ 21.
[88] *Id.*
[89] Respondent's Post-Hearing Brief, ¶ 22.
[90] Respondent's Post-Hearing Writ, ¶ 23.
[91] Respondent's Post-Hearing Writ, ¶ 24. The Respondent makes reference to the document identified as Annex R-109(bis) (Ministry of Food, Application for Active Currencies as of December 31, 2011 - Application, Status and Product, September 2013).
[92] Respondent's Post-Hearing Writ, ¶ 25.
[93] Respondent's Post-Hearing Writ, ¶ 86.

138. Venezuela presented several jurisdictional objections, three of them related to its denouncement of the ICSID Convention, which, in its view, deprive the Tribunal of jurisdiction to decide the merits of this dispute.

139. In summary, Venezuela contended that (a) there is no formalized mutual consent to submit the dispute to the ICSID since the Claimants were not authorized to formalize the consent before the date of denouncement of the Convention by Venezuela (January 24, 2012), to the extent that the jurisdictional conditions for formalizing the consent had not been met[94]; (b) the expropriation claim did not exist as of the date of the notification and, inasmuch there is no valid expropriation claim notice, such claim cannot be submitted to this arbitration[95]; (c) Venezuela had ceased to be a contracting State to the Convention at the time the Claimants submitted the dispute to ICSID (May 10, 2013) and, therefore, the requirement of Article XI of the BIT requiring the States, parties to the ICSID Convention, are parties thereof when the dispute is submitted to ICSID arbitration, is not met[96]; and (d) the Claimants do not comply with the nationality requirement under Article 25 of the ICSID Convention since the true investor is Gruma, a Mexican company that is not a national of a contracting State[97].

140. Venezuela explained each of the aforesaid jurisdictional objections as summarized in the following paragraphs.

141. First, according to Venezuela, the Parties agree that the interpretation of Article 72 of the Convention requires the formalization of mutual consent[98]. Article 71 of the ICSID Convention allows contracting States to denounce the Convention and be released from any obligation to continue complying with it, after six months of the denouncement date. On other hand, Article 72 of the Convention only preserves the right to initiate arbitration if the consent of the parties exists before the effective date of denouncement of the ICSID Convention[99]. Likewise, Rule 2(3) of the Institution Rules, along with its commentary (Note "M") refer to the date of the granting of the consent as the formalized mutual consent and relate it to Article 72 of the ICSID Convention[100]. The experts appointed by the Parties also agree that when the State has denounced the ICSID Convention, the effective date to establish the existence of the formalized mutual consent, is the date on which the depositary receives the notice of denunciation of the Convention[101]. In this case, the effective date of denouncement of the Convention is January 24, 2012.

142. The Claimants did not formalize the consent to initiate an arbitration when presenting the Dispute Notice dated November 7, 2011, and received on November 9, 2011 (the "Dispute Notice")[102]. Although these are prior to the effective date of the denouncement of the Agreement (January 24,

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[94] Respondent's Post-Hearing Writ, ¶ 4. *See* Hearing, Day 1, Tr. 163:21-179:6.
[95] Respondent's Post-Hearing Writ, ¶ 5. *See* Hearing, Day 1, Tr. 183:3-188:17.

[96] Respondent's Post-Hearing Writ, ¶ 4. *See* Hearing, Day 1, Tr. 179:7-183:2.
[97] Respondent's Post-Hearing Writ, ¶ 8. *See* Hearing, Day 1, Tr. 188:18-200:2.
[98] Rejoinder, ¶¶ 22-23.
[99] Counter Memorial, ¶¶ 34-36.
[100] Rejoinder, ¶¶ 26-27. ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("Institution Rules"), Rule 2(3) (*"Date of consent" means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted."*).
[101] Rejoinder, ¶ 29.
[102] Rejoinder, § II.A.

2012), the acceptance of the offer by the investor, acceptance which formalizes the consent, is subject to the terms of the Treaty, including a series of pre-qualification requirements to choose between local courts and international arbitration[103].

143. In fact, while it is true that the Claimants filed the Dispute Notice on November 7, 2011, this commenced the six-month period to try to amicably solve the dispute through negotiations[104] and such filing could not fulfill the purpose of formalizing the consent, inasmuch the jurisdictional requirements established in Article XI of the BIT[105] had not been met. Venezuela argues that the alleged acceptance of consent by the Claimants of November 7, 2011 is invalid, and, therefore, is legally non-existent[106].

144. Venezuela argues that pursuant to Article XI of the BIT, the contracting States agreed that the following requirements should be met when a dispute arises: (i) the investor has notified the State, in writing, about the existence of the dispute; (ii) the investor and the State have tried, to the extent possible, to settle the dispute through an amicable agreement; (iii) the dispute could not have been settled by an amicable agreement within a six month period as of the notification date[107]. The BIT empowers the investor to choose to submit the dispute to local courts or to international arbitration, only at the end of the above referenced procedure, and if each and every one of the aforementioned requirements are met[108].

145. According to Venezuela "*[t]he decision to submit the dispute to local courts or to an international arbitration court necessarily implies that the investor cannot choose between one and the other, until after the previous requirements have been met. It is only at that moment that the investor can formalize the consent to an ICSID arbitration*"[109]. The Claimants would otherwise be choosing the ICSID arbitration instead of the local courts before being authorized by the BIT to do so, eliminating any useful effect to the mechanism of Article XI[110].

146. Moreover, Venezuela argues that the requirement to attempt to amicably settle the dispute for a six month period as of the notification date is a jurisdictional requirement[111]. Only if the dispute cannot be amicably settled within such period, the investor may, at its discretion, submit the dispute to the jurisdiction of the local courts or to international arbitration[112].

147. Venezuela refers to the opinion submitted in this arbitration by Professor August Reinisch, who states that it is not a waiting period that is equivalent to the mere lapsing of time, but rather, it refers to the need to participate in attempts to reach an amicable agreement[113]. Venezuela further alleges that ICSID tribunals have regularly accepted that the requirements such as those contained in Article XI of the BIT are mandatory and condition the consent of the State, referring to *Kilic v.*

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[103] Counter Memorial, ¶ 39.
[104] Counter Memorial, ¶¶ 44-45.
[105] Rejoinder, ¶ 37
[106] *Id.*
[107] Counter Memorial, ¶ 42.
[108] Counter Memorial, ¶ 43; Rejoinder, ¶¶ 38-43.
[109] Rejoinder, ¶ 44.
[110] Rejoinder, ¶¶ 45-48.
[111] Counter Memorial, ¶ 46.
[112] Counter Memorial, ¶ 48.
[113] Counter Memorial, ¶ 49.

Turkmenistan, Daimler v. Argentina, Dede v. Romania, Tulip v. Turkey and *Enron v. Argentina (Decision on Jurisdiction)*[114]. Although some tribunals have considered that an amicable settlement period is not a jurisdictional requirement, the aforementioned jurisprudence has been disproved by more recent decisions[115]. Furthermore, the language of Article XI of the BIT leaves no doubt that these conditions are mandatory, and, therefore, have a jurisdictional nature[116].

148. According to Venezuela, the necessary consequence of the quoted jurisprudence is that the consent can be formalized solely after the jurisdictional requirements have been met. Since in an arbitration the tribunal's power is based upon the parties' agreement to submit the dispute to arbitration, if the decision-maker has no power – i.e., jurisdiction - to decide the dispute, then the consent is non-existent or legally ineffective[117]. If an investor expresses its acceptance to an arbitration offer before the conditions are met, the acceptance would be non-existent and the investor's communication cannot have the legal effects sought by it[118]. Venezuela argues that in *Holiday Inns v. Morocco* the tribunal clarified that the consent was not granted on the date on which the parties signed the arbitration agreement, but on the date on which the conditions were finally met[119].

149. The Respondent argues that, regardless of the fact that, to this date,there is no decision answering the question submitted to the Tribunal in this arbitration, "*the general principle has direct application: to the extent the jurisdictional requirements in the treaty have not been met, the consent cannot be formalized*"[120]. Furthermore, contrary to Claimants' allegations, it is not necessary for the BIT to include a different text in order for the requirements of Article XI to condition the consent[121]. Venezuela also refutes the interpretation by the Claimants of Rule 2(3) of the Institution Rules in this context, since at no time does it define when the investor has been able to validly express his consent[122]. When conditioned, consent is formalized only when the requirements above have been met, and not when the other party expresses its consent[123].

150. It is undisputed that the effective date to establish the existence of the formalized mutual consent is January 24, 2012 (notification date of the denouncement of the ICSID Convention by Venezuela). The six-month period of negotiations set forth in Article XI of the BIT - one of the jurisdictional requirements according to Venezuela - expired on May 8, 2012, three and a half months after the effective date to formalize the consent. Consequently, the Claimants were never authorized by the BIT to formalize the consent[124] and any attempt by the Claimants to formalize the consent with respect to future disputes in their Dispute Notice is ineffective[125].

151. Venezuela also argues that the principle of consent irrevocability set forth in Article 25(1) of the

[114] Counter Memorial, ¶¶ 50-55.
[115] Counter Memorial, ¶¶ 56-58
[116] Counter Memorial, ¶ 60.
[117] Counter Memorial, ¶ 62.
[118] Counter Memorial, ¶ 63.
[119] Counter Memorial, ¶¶ 65-69.
[120] Counter Memorial, ¶ 72.
[121] Rejoinder, ¶¶ 52-57.
[122] Rejoinder, ¶¶ 58-59.
[123] Rejoinder, ¶ 60.
[124] Rejoinder, ¶ 49.
[125] Counter Memorial, ¶ 76.

ICSID Convention solely protects the formalized mutual consent, which did not exist in the present dispute[126]. Moreover, Venezuela argues that it is not avoiding its international obligations by demanding compliance with Article XI of the BIT. The Treaty provides for other alternatives of international arbitration, so Venezuela would not evade its international obligations by avoiding arbitration under the ICSID Convention[127]. Furthermore, if the Claimants' logic were true as to Venezuela's intention to evade its obligations through its interpretation of the jurisdictional requirements, Venezuela would have denounced the ICSID Convention in any of the 21 ICSID arbitrations where it had been previously involved[128].

152. Now, therefore, with respect to future disputes, Venezuela states that the dispute did not exist, much less its notification, nor did the other two requirements had been fulfilled before the Claimants could be authorized to choose to submit the dispute to local courts or to international arbitration[129].

153. Second, Venezuela claims that no jurisdiction exists for the Tribunal to rule over the indirect expropriation claim, insofar as such claim did not exist on January 24, 2012, the effective date of denouncement of the ICSID Convention[130]. The Dispute Notice was premature given that, as of the date of its delivery, an administrative proceeding existed on its early stages, which, if finalized, it would eventually have resulted in a direct expropriation[131]. In the Dispute Notice, the Claimants made reference to Decree No. 7.394 and to the negotiations with Venezuela in connection with such Decree. In accordance with the ordinary meaning of Article XI (1) of the BIT, a valid notice of an expropriation claim assumes that the alleged breach by Venezuela existed prior to the date notice[132].

154. Also, Claimants did not include an expropriation claim in their Request for Arbitration[133]. Claimants submitted claims under Articles III, IV and VII of the BIT. Additionally, the Claimants' reservation of rights indicates that the events that occurred until the date of the Request for Arbitration, were not sufficient to substantiate an expropriation claim. The Administrative Ordinance was only described as an aggravating event creating uncertainty, but not as the measure that materialized in the expropriation[134].

155. According to Venezuela, the expropriation was mentioned for the first time in the Memorial, due to the alleged breach of obligations under Article V of the BIT, using the Administrative Ordinance as a justification thereof[135]. The Claimants indicate January 21, 2013, as their valuation date for their damages in this arbitration ("Valuation Date")[136], which is the date immediately prior to the publication of the Administrative Ordinance dated January 22, 2013. The Claimants alleged their loss of control on January 22, 2013, when Gruma would have been forced to stop

[126] Rejoinder, ¶¶ 62-64.
[127] Rejoinder, ¶¶ 67-68.
[128] Rejoinder, ¶¶ 66, 69-72.
[129] Counter Memorial, ¶ 73. *See* Rejoinder, ¶ 94.
[130] Counter Memorial, ¶¶ 78-91; Rejoinder, ¶¶ 100-103.
[131] Rejoinder, ¶ 93.
[132] Rejoinder ¶ 97.
[133] Respondent's Post-Hearing Writ, ¶ 7.
[134] Counter Memorial, ¶ 80.
[135] Counter Memorial, ¶¶ 80-82, making reference to the Request for Arbitration, ¶¶ 82, 86.
[136] Counter Memorial, ¶¶ 82-83.

consolidating its operations in its financial statements[137]. Even the Claimants' lawyers repeated at the Hearing that the Administrative Ordinance was the tipping point in the expropriation *iter* implemented by Venezuela[138].

156. According to Venezuela, Claimants' arguments are the best statement to indicate that the cumulative events occurred before January 22, 2013, had not represented the loss of control of Monaca and Demaseca. Therefore, a formalized consent on an expropriation claim could not have existed. The dispute regarding an indirect expropriation did not exist on the effective date of Venezuela's denouncement of the ICSID Convention. Any arguments by the Claimants to formalize the consent after such date cannot be used to grant jurisdiction to ICSID. Furthermore, this dispute over the alleged total loss of control of Gruma over Monaca and Demaseca has not been notified to Venezuela as required by Article XI(1) of the BIT[139].

157. Venezuela also alleges that the lack of jurisdiction on the expropriation claim is evident because there is no relationship between the seizure measures and Decree No. 7.394[140].

158. Third, Venezuela claims that the BIT requires both States to be contracting States of the ICSID Convention at the time an ICSID arbitration has begun.[141]. However, the Request for Arbitration was filed on May 10, 2013, nine months after the denouncement became effective[142]. Under Article 72 of the ICSID Convention, this dispute could not have been brought before a tribunal under the ICSID Convention since Venezuela denounced the ICSID Convention before it was possible for the Claimants to formalize consent[143].

159. Article XI (2)(b) of the BIT allows the investor to choose the ICSID arbitration to the extent that "*each State party to this Agreement is a party [*to the Convention*]*"[144]. If one of the States has not joined the Convention, then an arbitration would solely be available under the rules of the Supplementary Mechanism, and not under an arbitration as per the ICSID Convention[145].

160. Venezuela criticizes the Claimants' argument which states that this clause implies that the ICSID arbitration is available when both States party to the BIT have been contracting States of the Convention, but it does not apply when a State party to the BIT is no longer a contracting State of the Convention[146]. Venezuela argues that this interpretation is groundless since Spain and Venezuela had already joined the ICSID Convention when the BIT was signed by both States, when it became effective, and because it would also eliminate the possibility of arbitration under the ICSID Supplementary Mechanism[147]. This statement of Article XI of the BIT can only be construed as a requirement that each State shall be a contracting party of the ICSID Convention

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[137] Counter Memorial, ¶¶ 84-85.
[138] Respondent's Post-Hearing Writ, ¶ 7.
[139] Counter Memorial, ¶ 91.
[140] Respondent's Post-Hearing Writ, ¶ 6.
[141] Rejoinder, ¶¶ 73-90.
[142] Rejoinder, ¶ 87.
[143] Counter Memorial, ¶ 92.
[144] *See* Rejoinder, ¶ 74.
[145] Counter Memorial ¶ 94.
[146] Rejoinder, ¶ 75.

so the dispute may be submitted to an ICSID arbitration when filing a Request for Arbitration[148]. Venezuela argues that this as an additional alternative grounds for the Tribunal to conclude that it has no jurisdiction[149]. The Respondent argues that Article XI (2)(b) of the BIT also includes as international arbitration options, an arbitration under the Supplementary Mechanism of the ICSID Supplementary Mechanism or under the Arbitration Rules of the United Nations Commission for International Trade Law, ("UNCITRAL"). Therefore, there is no reason for the Claimants to insist on maintaining an ICSID arbitration when there is no jurisdiction given the denouncement of the ICSID Convention by Venezuela. Venezuela states that there are alternatives in the BIT to submit disputes to an international arbitration after the ICSID Convention has been denounced[150].

161. Fourth, Venezuela states that the true investor in this arbitration is Gruma, a Mexican company that has no right to benefit from the ICSID Convention, since it is not a national of a contracting State of the Convention[151].

162. Gruma, through the Claimants, wants to make the Tribunal believe that Valores and Consorcio are investors in Venezuela and, therefore, the investments are Spanish[152]. The Claimants were vehicles used to make Mexican investments look Spanish[153].

163. Venezuela claims that Valores and Consorcio are paper companies (which is confirmed by their financial information) who could not have invested in Venezuela[154]. Gruma was the sole administrator of Monaca and Demaseca until 2014[155]. In addition, the Claimants have no employees, offices, telephone numbers or e-mail addresses[156]. The alleged attorneys-in-fact of the Claimants, who advanced the negotiations with Venezuela, are Gruma employees[157]. For example, the Dispute Notice of Claimants had Gruma's logo[158]. Venezuela refers to the definition of investors under the BIT and argues that "*despite the fact that the Claimants take for granted that they meet the definition of Article I.1 of the [BIT] to be considered as 'investors' and that this would be sufficient to undergo an arbitration under the ICSID Convention, this assertion is questionable*"[159].

164. Furthermore, even though the Claimants own the shares in Monaca and Demaseca[160], there is no doubt that the investments were made by Gruma and not by the Claimants[161]. Gruma incorporated Valores in Spain in 2003, and in 2004 it contributed 95% of its shares in Monaca. Gruma incorporated Consorcio in 2006 and transferred to Consorcio the shares it had in Demaseca[162]. Moreover, Gruma controls Valores and Consorcio from their date of incorporation. Engineer

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[148] Counter Memorial, ¶¶ 95-96.
[149] Counter Memorial ¶ 98.
[150] Counter Memorial, ¶¶ 104-140.
[151] Counter Memorial, ¶ 104.
[152] Counter Memorial, ¶ 104.
[153] Rejoinder, ¶ 106.
[154] Rejoinder, ¶¶ 122-123; Respondent's Post-Hearing Writ, ¶ 8.
[155] Rejoinder, ¶¶ 108-113.
[156] Rejoinder, ¶¶ 114, 117-121.
[157] Rejoinder, ¶¶ 115-116.
[158] Counter Memorial, ¶ 108.
[159] Rejoinder, ¶ 127.
[160] Rejoinder, ¶ 134.
[161] Rejoinder, ¶¶ 129-138.
[162] Counter Memorial, ¶ 114.

Huerta confirmed that the board of directors of Valores and Consorcio have no activity in Spain and that they only execute minutes as if they had been held in such country[163]. Additionally, the alleged investments of Valores in Monaca and of Consorcio in Demaseca, have not been evidenced by the Claimants. The Claimants only rely on the Statements of Engr. Huerta to evidence their status as investors in this case[164]. The foreign investment records do not show that these investments had been made with foreign capital injection, because in reality they were reinvestments of Venezuelan companies within Venezuela[165]. Venezuela also claims that the reality of this investment is evidenced by the intervention of the Mexican government in favour of Gruma.[166].

165. Venezuela argues that the ICSID Convention exists for the Contracting States and their nationals, but it does not exist for an improper use by companies such as Gruma, who is not a national of a contracting State[167], but rather a Mexican company. It was Gruma who authorized the commencement of this arbitration under the ICSID Convention, as it evidenced by copies of Gruma's resolutions[168]. This arbitration is unheard of since it is an ICSID arbitration initiated with the authorization of a Mexican company[169]. Venezuela thus concludes that "*this arbitration has begun by the authorization of a legal entity that is not a national of a Contracting State, using paper companies dully incorporated in Spain but without any employees and without a real domicile in Spain, trying to invalidly formalize consent before been enabled by the Agreement to do so, through a premature notice of a dispute with no grounds to substantiate an expropriation claim, by initiating an ICSID arbitration when Venezuela was not a Contracting State to the Convention, eventhough the Convention includes other options of international arbitration*"[170].

166. The scope and purpose of the ICSID Convention is to resolve differences between contracting States and nationals of other contracting States[171]. Gruma is a Mexican company which cannot be benefited from the Agreement and, therefore, has tried to do so through paper companies. The compliance with the nationality requirement set forth in Article 25 of the ICSID Convention is has precedence over the "investor" term of the BIT. Additionally, to be a Spanish "investor" protected under the BIT, the "investor" must be a Spanish "national" under Spanish law[172]. However, the Claimants do not comply with the domicile requirements to be considered Spanish nationals[173]. Finally, Venezuela argues that accepting the jurisdiction under the conditions of this case would have a negative impact on the ICSID arbitration system[174].

B. CLAIMANTS' POSITION

[163] Respondent's Post-Hearing Writ, ¶ 8.
[164] Rejoinder, ¶¶ 122-123; Counter Memorial, ¶ 116.
[165] Rejoinder, ¶ 131.
[166] Counter Memorial, ¶ 107; Rejoinder, ¶¶ 139-140.
[167] Rejoinder, ¶¶ 141 *et seq*.
[168] Rejoinder, ¶¶ 141-149, making reference to the notarized and apostille certification of the sole manager's resolutions of Valores, May 7, 2013 (Annex C-1) and the the sole manager's resolutions of Consorcio, May 7, 2013 (Annex C-2).
[169] Rejoinder, ¶ 148.
[170] Rejoinder, ¶ 149.
[171] Rejoinder, ¶¶ 150-154.
[172] Rejoinder, ¶ 158
[173] Rejoinder, ¶¶ 158-159.
[174] Rejoinder, ¶¶ 161-164.

167. ICSID has jurisdiction over the present dispute since all the conditions for the Center's jurisdiction set forth in the ICSID Convention and in the BIT have been met.

168. Per Article 25 (1) of the ICSID Convention, the Center's jurisdiction is subject to three conditions: (i) the dispute has a legal nature and directly arises from an investment (*ratione materiae*); (ii) the claimant shall be a national of a contracting State and does not have the same nationality as the other contracting State (*ratione personae*); and (iii) the parties have granted their consent to submit the dispute to the Center (*ratione voluntatis*)[175].

169. The Claimants maintain that in this case both *ratione materiae* jurisdiction conditions are met, since there is a legal dispute between the Claimants and Venezuela, which arises from acts affecting the Claimants' investments, attributable to Venezuela [176].

170. Additionally, according to the Claimants, the *ratione personae* jurisdiction conditions are met. Venezuela was a contracting State of the ICSID Convention when the Parties gave their consent to submit this dispute to the ICSID jurisdiction[177]. The ICSID Convention became effective on June 1, 1995, for Venezuela. The depositary received notification of the denouncement of the Agreement on January 24, 2012, which became effective six months later, i.e., on July 25, 2012.

171. The consent of the Parties to ICSID jurisdiction was formalized on November 9, 2011, with the Dispute Notice, prior to Venezuela notifying the denouncement of the Convention[178]. The denouncement does not affect the obligations of Venezuela with respect to the dispute since the Parties expressed their consent to submit this dispute to ICSID jurisdiction before the denouncement was communicated to the depositary of the Convention[179]. The latter is confirmed by Article 72 of the ICSID Convention. The subsequent denouncement of the Convention by Venezuela does not affect the rights and obligations arising from the consent previously granted by Venezuela to the ICSID jurisdiction [180]. Venezuela granted its consent to the ICSID jurisdiction in the BIT, which became effective as of September 10, 1997. On the other hand, the Claimants granted their consent through the Dispute Notice received by Venezuela on November 9, 2011[181].

172. In the opinion of the Claimants, the conclusion of the waiting period set forth in the BIT, is not a condition for the investor to accept Venezuela's offer to submit the disputes to an ICSID arbitration[182]. In accordance with the ordinary meaning of the terms of Article XI of BIT, this rule only establishes as a requirement to submit a dispute to arbitration, that the parties try to amicably settle the dispute within a period of six months after the dispute notice,[183]. This Article refers to the submission of the dispute to arbitration, meaning, the authority to commence an arbitration. Nothing prevents the investor from accepting Venezuela's offer to submit the dispute to ICSID arbitration prior to the conclusion of the six-month waiting period[184]. Venezuela's offer in the BIT

[175] Memorial, ¶ 125.
[176] Memorial, ¶¶ 129-134.
[177] Memorial, ¶¶ 136-138; Hearing, Day 1, Tr. 54:14-59:22
[178] Brief, ¶ 120.
[179] Memorial, ¶¶ 153-157.
[180] Memorial, ¶¶ 137-138.
[181] Memorial, ¶ 138.
[182] Brief, ¶¶ 121-128.
[183] Brief, ¶ 122.
[184] Brief, ¶ 123.

solely conditions the investors authority to commence (a) a litigation in the courts of Venezuela or (b) an ICSID arbitration, whenthe following requirements are complied with: (i) that the investor notifies Venezuela in writing of the existence of the dispute (ii) that to the extent possible, Venezuela and the investor try to reachan amicablesettlement of the dispute, and (iii) that a six month period elapses counted as of the notice date[185]. The conclusion of the waiting period does not postpone the formalization of the consent, but it is rather a requirement that must be met to commence arbitration[186].

173. The Claimants also argue that the attempt to unilaterally withdraw its consent after its written accepntace by the Claimants, Venezuela breached Articles 25(1)(b) and 72 of the ICSID Convention, which state that once consent is granted, neither party can, directly or indirectly, withdraw it[187].

174. The decisions quoted by Venezuela to support its argument on the nature of the waiting period are inapplicable[188]. Venezuela cites nine cases where the central argument was whether the claimants could initiate an arbitration before complying with the requirements set forth in the investment treaty. None of the decisions offered by Venezuela explain when its consent formalized if the claimants accept the offer of consent before initiating the arbitration, nor do they explain if the submission of the dispute to arbitration is conditioned by the offer to fulfillment of a waiting period[189]. Even if the waiting period is considered to have a jurisdictional nature, it does not determine the moment of consent and nothing prevents the waiting period requirement from being fulfilled after the parties have consented to the jurisdiction of the ICSID[190].

175. According to the Claimants, none of the cases cited by Venezuela supports the argument stating that the consent of the parties is invalid for being subject to a procedural requirement which must be fulfilled before commencing the arbitration[191]. Venezuela relies on certain arbitration decisions which refer to essential applicability requirements of the ICSID Convention, but which cannot be compared with the requirements that must be fulfilled before commencing an arbitration[192].

176. The Claimants refer to the arbitrations of *Tokios Tokelés v. Ukraine* and *Abaclat v. Argentina* to argue that, in other arbitral decisions it has been accepted that an investor of a contracting state can accept the consent offer of a treaty before the waiting period set forth in the treaty elapses[193].

177. Furthermore, the Claimants are nationals of another contracting State pursuant to Article 25(2)(b) of the ICSID Convention. Valores and Consorcio are Spanish because they are legal entities which have been incorporated and exist under Spanish laws[194]. The ICSID Convention became effective for Spain on September 17, 1994.

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[185] Brief, ¶ 124.
[186] Brief, ¶ 126.
[187] Brief, ¶¶ 132-134.
[188] Brief, ¶ 135.
[189] Brief, ¶ 143.
[190] Brief, ¶ 143.
[191] Brief, ¶ 150.
[192] *See* Brief, ¶¶ 145-150.
[193] Brief, ¶¶ 152-155. *See* Brief, footnotes 286 and 288.
[194] Memorial, ¶ 141.

178. Pursuant to the investments definition under Article I(2) of the BIT, Valores and Consorcio would be considered to have investments. There is no factual[195] or legal basis to support that the Tribunal lacks jurisdiction because the real investor in this arbitration is Gruma, as Venezuela claims[196]. Venezuela ignores the definition of "investor" in the BIT and tries to establish nationality requirements in addition to those provided for in the Treaty, while ignoring the legal status of Valores and Consorcio[197]. The incorporation of a legal entity under Spanish law is sufficient for said legal entity to enjoy the protection of the BIT[198]. Arbitral tribunals have refused to ignore the legal status of investors when the applicable treaties define the nationality of the investor with the criterion of incorporation or formation[199]. Furthermore, it is not true, as Venezuela alleges, that Valores and Consorcio are not Spanish companies under Spanish law[200]. In any case, the definition of investors of the Agreement, and not Spanish law, determines whether the nationality requirements have been met in accordance with Article 25(2) (b) of the ICSID Convention[201].

179. Furthermore, it is not true that Claimants have their administration and management center outside of Spain[202]. Both Valores and Consorcio submit their tax returns in Spain and comply with the formalities set forth in Spanish laws[203]. Valores and Consorcio are entities holding foreign securities (or holding companies), thus they require a reduced administrative structure and their most relevant decisions are taken in Madrid by the respective management bodies. Venezuela's argument that the arbitration was initiated through a Gruma's resolution[204] is also false.

180. The Claimants also argue that *ratione voluntatis* jurisdiction exists. Venezuela's consent is granted in Article XI of the BIT[205], and the requirements of Article XI are met in this case. Each of the Claimants is a Spanish "investor" in accordance with Article I(1)(b) of the BIT. Their claims arise from the breach by Venezuela of its obligations under the BIT.

181. The Claimants allege that on November 9, 2011, they notified in writing this dispute in accordance with Article XI(1) of the BIT. In such communication, the Claimants informed Venezuela that a dispute had arisen under the BIT "*as a result of the measures [...] described, among others*". The Claimants describe the dispute in detail, and invited Venezuela to hold conversations seeking an amicable dispute resolution[206]. The Claimants made reference, among other measures, to "*Decree [No. 7.394], to the intervention measures imposed by the Republic on [the Companies], and to the failed attempts to find a negotiated dispute resolution*"[207].

182. The Claimants also argue that the expropriation dispute existed long before Venezuela denounced the ICSID Convention, and it was this dispute that the Claimants communicated to Venezuela in

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[195] Hearing, Day 1, Tr. 45:1-46:10.
[196] Brief, ¶¶ 186-214.
[197] Brief, ¶¶ 186-187.
[198] Brief, ¶ 201.
[199] Brief, ¶¶ 204-212.
[200] Hearing, Day 1, Tr. 49:7-51:7.
[201] Hearing, Day 1, Tr. 51:8-52:21.
[202] Hearing, Day 1, Tr. 52:22-54:13.
[203] Hearing, Day 1, Tr. 54:7-12.
[204] Hearing, Day 1, Tr. 53:3-19.
[205] Memorial, ¶ 143.
[206] Memorial, ¶ 144.
[207] Memorial, ¶ 147.

the Dispute Notice[208]. The Administrative Ordinance did not create a new controversy but, instead, aggravated the existing controversy and culminated an expropriation proceeding that was in the process of being executed when Venezuela denounced the ICSID Convention[209]. According to the Claimants, there is sufficient evidence on the relationship between Decree No. 7.394 and the Administrative Ordinance. It is a single controversy over the creeping expropriation of Monaca and Demaseca, which was launched and began to be implemented years before Venezuela denounced the Convention[210]. In addition, Decree No. 7.394 and the measures before and after it are part of the same dispute[211].

183. The dispute was duly notified as per the BIT[212]. In November 2011, the Claimants expressly notified in writing their disagreement regarding the expropriation measures taken by Venezuela:

> "On May 12, 2010, the Republic [...] published [...] the Presidential Decree No. 7.394 [...] ordering the 'forced acquisition' and/or 'expropriation' of [MONACA and DEMASECA]. [...]
>
> Due to the Decree, in June 2010, the Republic created a Liaison Commission to monitor the administration and operations of MONACA and DEMASECA. The Republic has demanded that VALORES and CONSORCIO, through MONACA and DEMASECA, pay the salaries and expenses of the current 20 (twenty) members of the Liaison Commission, which exceed US$1 million per year. The members of the Liaison Commission, are located in the facilities of MONACA and DEMASECA, and they use of the computers and offices of MONACA and DEMASECA and, generally, hinder the free direction and management of MONACA and DEMASECA by imposing controls and authorizations for the management and payments of taxes, payrolls, purchases of raw materials and suppliers in general, as well as by delaying the issuance of the annual update certificates of the investments registries in Venezuela prepared by the Investors and filed before the Foreign Investments Agency (SIEX) in spite of complying with the applicable regulations, among others. Due to Decree 7.394, MONACA and DEMASECA are unable, *inter alia*, to pay royalties, repatriate capital and capital investments, as well as to send profits abroad, and to make dispositions of assets outside their ordinary course of business. For the same reasons, VALORES and CONSORCIO are prevented, *inter alia*, from transferring their shares in MONACA and DEMASECA to third parties. [...]
>
> In accordance with the foregoing, and for the purposes of Article XI(1) of the Convention, we respectfully inform You that the Investors consider that a dispute regarding investments has arisen between the Republic and the Investors as a result of, *inter alia*, the aforementioned measures, which contravene and are incompatible with the obligations assumed by the Republic in the Convention. Specifically, the mentioned measures contravene, *inter alia*, the following obligations of the Republic set forth in the Convention: (i) investments made in a Contracting Party's territory by Investors of the other Contracting Party shall not be subject to nationalizations, expropriations, or

[208] Brief, ¶ 168; Hearing, Day 1, Tr. 62:15-65:8. Claimants' Post-Hearing Writ, ¶¶ 58-67.
[209] Brief, ¶ 168
[210] Brief, ¶ 172
[211] Claimants' Post-Hearing Writ, ¶¶ 48-53.
[212] Claimants' Post-Hearing Writ, ¶¶ 54-57.

> any other measure of similar features or effects unless they are made exclusively for reasons of public interest, in accordance with legal provisions, and in a non-discriminatory manner and with a compensation paid to the investor (Article V. Nationalization and expropriation) [...]
>
> The Investors hereby, and for the purposes of the resolution of all the previously mentioned disputes related to the investments, as well as all those disputes which may arise in the future between the Investors and the Republic, accept the consent granted by the Republic in the aforementioned Article XI, and, in turn, the Investors express their consent to ICSID jurisdiction to resolve such disputes through ICSID arbitration(s)."[213]

184. The Claimants contend that the term "dispute" is a "*disagreement on a legal or factual matter, a conflict of legal points of view or of interests between the parties*" *requiring a minimum of communication, i.e., at least one of the parties must have raised the issue with the other party.*"[214] The Claimants notified their "disagreement" on Venezuela's measures in their Dispute Notice , identified how the measures violated the BIT, and objected them months before Venezuela denounced the ICSID Convention[215].

185. If Venezuela's argument were to be accepted, it would mean that Venezuela could evade its international responsibility simply by denouncing the ICSID Convention and adopting a subsequent measure that would aggravate the already notified dispute[216]. This interpretation would negatively affect the fundamental principle of the ICSID Convention which states that the consent of the Parties cannot be unilaterally withdrawn through direct or indirect means[217]. In the Request for Arbitration, the Claimants expressly reserved the right to submit additional claims, including an expropriation claim,[218] and in the Dispute Notice they granted their consent to ICSID jurisdiction regarding disputes "which have arisen as well as all those disputes which may arise in the future"[219]. There is no doubt that consent to ICSID jurisdiction can refer to existing or future disputes[220].

186. Venezuela's argument stating that the Claimants could not have formalized the consent with respect to the direct expropriation dispute, nor that they could have notified such dispute because it did not exist when the Claimants sent their Dispute Notice, fails to acknowledge the facts and should be rejected. The distinction Venezuela is trying to make between a dispute over a direct and indirect expropriation is artificial and deficient since Venezuela had already stated, through a Decree, that it would necessarily acquire Monaca and Demaseca and had taken measures to indirectly achieve this purpose[221]. There is no factual or legal basis for Venezuela's argument that a dispute exists and can be validly notified only when events supporting a claim of an indirect expropriation exist. Venezuela did not cite cases supporting this position and argued to the

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[213] Claimants' letter to the Executive Vice-president of the Bolivarian Republic of Venezuela, November 7, 2011 (the "Dispute Notice") (Annex C-5) [emphasis added]. *See* Brief, ¶ 174.
[214] Claimants' Post-Hearing Writ, ¶ 61.
[215] *Id.*
[216] Brief, ¶ 175.
[217] Claimants' Post-Hearing Writ, ¶ 62.
[218] Brief, ¶ 175.
[219] Brief, ¶ 180.
[220] Brief, ¶ 181.
[221] Claimants' Post-Hearing Writ, ¶ 59.

contrary in the arbitration of *Venezuela Holdings v. Venezuela*[222].

187. Furthermore, neither the ICSID Convention nor the BIT require an existing dispute at the time of formalizing the consent to ICSID[223] arbitration, nor does the BIT require that the Claimants notify each of the measures which form part of or which aggravate or continue, an already notified dispute[224].

188. There is no doubt that the dispute was notified on November 9, 2011, when Venezuela had already expressed its intention to appropriate Claimants' investments and when it had adopted the vast majority of measures to achieve such purpose. That notification is sufficient under Article XI of the BIT and, therefore, it is irrelevant that the Dispute Notice did not make reference to the Administrative Ordinance[225].

189. Likewise, according to the Claimants, the BIT does not require that both States, Venezuela and Spain, be contracting states to the Convention at the time of commencement of an ICSID arbitration[226]. The Respondent argues that Article XI(2)(b) of the BIT allows the investor to choose an arbitration before ICSID subject to the condition that "*each State party to this Agreement has joined [the Convention]*" [227]. However, the Claimants argue that Venezuela's reading of this Article is contrary to the ordinary meaning of the terms of the BIT, and that Venezuela intends to add the following text to the BIT: "*and when no State party has ceased to be a Contracting State or has denounced the ICSID Convention*"[228]. According to the text of the BIT, the fact that a State has joined the ICSID Convention determines the application or not of the ICSID Convention or the ICSID Supplementary Mechanism [229]. Article XI of the BIT makes no reference to the eventual denouncement of the ICSID Convention by any of the States.

190. The interpretation of Venezuela is also contrary to the scope and purpose of the BIT and the ICSID Convention, inasmuch, as explained by Professor Schreuer, such an interpretation would eliminate the protection granted by Article 72 of the ICSID Convention, given that it would allow States to evade their international obligations under the ICSID Convention through their simple denouncement [230]. The Claimants propose as an example, the Agreement between the Republic of Venezuela and the Republic of Costa Rica for the Promotion and Reciprocal Protection of Investments, executed on March 17, 1997, where such States expressly agreed that the ICSID arbitration would not be available if the Respondent would have denounced the ICSID Convention at the time an arbitration had commenced[231].

191. Likewise, Venezuela is trying to confuse the offer made by Venezuela to submit the disputes under the BIT, to ICSID arbitration (provided that Venezuela has joined the ICSID Convention),

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[222] Claimants' Post-Hearing Writ, ¶ 60.
[223] Claimants' Post-Hearing Writ, ¶ 63.
[224] Claimants' Post-Hearing Writ, ¶ 64.
[225] Claimants' Post-Hearing Writ, ¶ 65.
[226] Brief, ¶¶ 157-166; Hearing, Day 1, Tr. 60:1-62:14.
[227] Counter Memorial, ¶¶ 92-98.
[228] Brief, ¶ 159.
[229] Brief, ¶ 160.
[230] Brief, ¶ 161.
[231] Brief, ¶ 162 *See* Agreement between the Republic of Venezuela and the Republic of Costa Rica for the Promotion and Reciprocal Protection of Investments, executed on March 17, 1997 and effective as of May 2, 2001 (Annex C-207).

with the submission of a dispute[232]. The Claimants propose as an example *Venoklim v. Venezuela*, where the tribunal concluded that the consent had been formalized before the denouncement of the ICSID Convention became effective, rejecting the Respondent's objection, and mentioning that the date on which the last of the parties granted its consent to ICSID arbitration "*Is the effective date as of when the consent consequences become effective*"[233]. The consent of the Parties was formalized on November 9, 2011, even before Venezuela denounced the ICSID Convention, and when, at such time, Venezuela was still a contracting State of the ICSID Convention[234]. Although Spain and Venezuela were already parties to the ICSID Convention when they signed the BIT in 1995, Venezuela ignores that when the BIT was negotiated, Venezuela had not yet ratified the ICSID Convention and there was no certainty that it would do so[235].

192. The Claimants indubitably and unambiguously appointed the ICSID as the means for dispute resolution[236]. Moreover, the Claimants have not submitted this dispute to the courts of Venezuela nor have they agreed with Venezuela to submit the dispute to another dispute resolution mechanism[237].

C. ANALYSIS BY THE TRIBUNAL

193. Below, the Tribunal will analyze each of the four objections presented by Venezuela, in the order in which they were raised in its Counter Memorial. In analyzing each of these matters, the Tribunal has considered all the arguments presented by the Parties, both written and oral. The fact that a claim has not been quoted or summarized does not mean that it was not considered by the Tribunal when reaching its decision. Specifically, the Court emphasizes that its conclusions are limited to the requirements of this particular case and to the scope of the arguments presented by the Parties.

1. First jurisdictional objection

194. Venezuela argues that the Dispute Notice did not formalize, nor could it have formalized the consent to ICSID arbitration since such consent is only formalized once all the requirements set forth in Article XI of the BIT have been met. On the other hand, the Claimants argue that the Parties had formalized their consent on November 9, 2011, upon receipt of the Notification of the Dispute, prior to the denouncement notification of the Convention by Venezuela on January 24, 2012.

195. The Tribunal will first state the facts that are most relevant to the undisputed jurisdictional objection of Venezuela invoked by the Parties:

(i) On November 9, 2011, Venezuela received the Dispute Notice.

(ii) On January 24, 2012, the ICSID Convention depositary received a written denouncement notice of the Convention by Venezuela.

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[232] Brief, ¶ 163.
[233] Brief, ¶ 164 quoting *Venoklim v. Venezuela*, ¶¶ 50, 53, y 69..
[234] Brief, ¶ 165.
[235] Hearing, Day 1, Tr. 61:11-62:12.
[236] Memorial, ¶¶ 158-159.
[237] Memorial, ¶ 148.

(iii) On May 9, 2012, the six-month period of Article XI(1) of the BIT, counted as of the receipt of the Dispute Notice by Venezuela, concluded.

(iv) As of July 25, 2012, having complied with the six-month period set forth in Article 71 of the ICSID Convention, the denouncement of the ICSID Convention by Venezuela became effective.

(v) On May 10, 2013 the Center received the Request for Arbitration.

196. The first jurisdictional objection of Venezuela is based on its interpretation of Article XI of the BIT and Articles 71 and 72 of the ICSID Convention.

197. Article XI of the BIT establishes:

> "1. Any dispute arising between an investor of one Contracting Party and the other Contracting Party with respect to its compliance with the obligations set forth in this Agreement shall be notified in writing, providing detail information thereof, by the investor to the Contracting Party receiving the investment. To the extent possible, the parties to the dispute will try to settle these differences amicably.
>
> 2. If the dispute cannot be resolved in such manner within a six month period, as of the date of the written notification referred to in paragraph 1, it will be submitted, at the investor's choice:
>
> a) To the competent courts of the Contracting Party in whose territory the investment was made in, or
>
> b) To the International Centre for Settlement of Investment Disputes (ICSID) created by the Convention on the Settlement of Investment Disputes between States and Nationals or Other States, opened for its signature in Washington on March 18, 1965, when each State party to this Agreement has joined it. In the event that one of the Contracting Parties has not joined the aforementioned Agreement, the Supplementary Mechanism for Conciliation, Arbitration and Fact Finding shall be resorted to by the ICSID Secretariat;
>
> 3. If for any reason the arbitration bodies referred to in point 2 b) of this Article are unavailable, or if both parties agree so, the dispute shall be submitted to an *ad hoc* arbitration tribunal established pursuant to the UNCITRAL Arbitration Rules [...]"[238]

198. Articles 71 and 72 of the ICSID Convention read, as follows:

> "Article 71
> Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denouncement shall take effect six months after receipt of such notice.
>
> Article 72
>
> Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect

[238] Agreement on Promotion and Reciprocal Protection of Investments among the Kingdom of Spain and the Republic of Venezuela, dated November 2, 1995 ("BIT" or the "Treaty"), Article XI (Annex C-3).

> the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary".

199. The Parties do not seem to dispute that, for interpreting the terms of the BIT and the ICSID Convention, it is necessary to refer to the general rule of interpretation included in Article 31(1) of the Vienna Convention on the Law of Treaties ("Vienna Convention") which establishes that "*[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and taking into account its scope and purpose*"[239]. The Tribunal considers that these elements of Article 31(1) of the Vienna Convention form a single rule of interpretation and should not be taken in isolation. The function of the Tribunal is to determine the meaning of what was agreed in the BIT rather than establishing interpretation lines applicable to other treaties with similar texts.

200. The Tribunal considers the description of the tribunal in *Aguas del Tunari v. Bolivia* on the interpretation process in accordance with Article 31(1) of the Vienna Convention:

> "The interpretation provided in Article 31 of the Vienna Convention is a process of concentric circles, in which the interpreter begins to consider, within the framework of the general rule 1) the ordinary meaning of the treaty's terms, 2) in its context, and 3) in light of the scope and purpose of the treaty, and going through such hermeneutic three steps path, it advances towards the appropriate interpretation. [...]"[240]

201. The Tribunal will rely on the general rule of treaty interpretation, and also on the complementary rule provided in Article 32 of the Vienna Convention, insofar as it considers its application to be necessary[241].

202. The Claimants and Venezuela seem to agree in an important part of the interpretation of Articles 71 and 72 of the ICSID Convention. Indeed, the Respondent argues, and the Claimants seem to accept, that Article 72 of the Convention applies if the mutual consent to ICSID jurisdiction is formalized before the denouncement of the Convention[242]. The discussion of the Parties focuses on whether, in this case, the mutual consent to the ICSID jurisdiction was formalized before the denouncement of the Convention.

203. The Claimants argue that the consent of the Parties was formalized through the Dispute Notice, received on November 9, 2011, where they expressly stated that "*The Investors hereby accept the consent granted by the Republic in the aforementioned Article XI, and, in turn, the Investors express their consent to ICSID jurisdiction to resolve such disputes through ICSID arbitration(s)*"[243]. Such Dispute Notice was sent before the denouncement of the ICSID Convention by Venezuela, on January 24, 2012. Although the Respondent does not agree that the Dispute Notice formalized the consent, it does not deny that the Claimants' intention was precisely

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[239] The Tribunal notes that Venezuela is not a party to the Vienna Convention. However, it is a peaceful fact that the interpretation rules set forth in such Convention, reflect the international law and, as already mentioned, the Parties do not dispute that these rules apply for interpreting the Treaty.

[240] *Aguas del Tunari v. Bolivia*, ¶ 91.

[241] Vienna Convention, Article 32 ("*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (i) Leaves the meaning ambiguous or obscure; or (ii) Leads to a result which is manifestly absurd or unreasonable.*").

[242] *See* Counter Memorial, ¶¶ 35-37; Brief, ¶¶ 129-130. *See also* Prof. Schreuer's Report, ¶ 23; Hearing, Day 3, Tr. 681:15-682:3

[243] Dispute Notice (Annex C-5)

to grant their consent to ICSID arbitration.

204. The Parties agree on the three steps that must be sequentially followed according to Article XI of the BIT: (i) the written notification of the existence of the dispute delivered by the investor; (ii) that the investor and the host State attempt to amicably settle the dispute; and (iii) a six months period elapses as of the notification date without reaching an agreement[244].

205. However, supported by the expert opinions of Professors Christoph Schreuer (the Claimants) and August Reinisch (the Respondent), the Parties discuss whether the consent by the investor can be granted in step (i) or only when steps (i), (ii) and (iii) have concluded[245]. The Respondent argues that it is only after the three requirements have been met, that the BIT "*authorizes the investor to choose between submitting the dispute to the competent courts of the host State or to an international arbitration*"[246].

206. Professor Schreuer and Professor Reinisch agree that the BIT imposes as a requirement that the investor negotiate during six months as of the date of the Dispute Notice, before the investor can submit the corresponding claim before the national or arbitral jurisdiction. Their discrepancy refers to the time when the investor can opt for the arbitration forum and formalize their consent to arbitration.

207. According to Professor Schreuer, Claimants could opt for arbitration at any time, even before the commencement of the six-month negotiation period in the BIT[247]. On other hand, Professor Reinisch considers that the Claimants could not opt for arbitration, at which time they would grant their consent, until they had exhausted the six months of negotiations set forth in the BIT[248].

208. In summary, for Venezuela, the Claimants did not formalize the consent with the Dispute Notice since, in accordance with Article XI of the BIT, solely once the dispute is notified and after the six months period is exhausted, the investor can grant its consent and submit the dispute to the chosen forum. According to Venezuela, the text of Article XI(2) of the BIT, specifically the expression "will be submitted, at the investor's choice", shows that only after the amicably negotiation period has elapsed, the investor's choice can be made with respect to the dispute's forum.

209. Venezuela understands that the requirement to attempt to amicably settle the dispute within a six month period has a jurisdictional nature.

210. The Tribunal accepts that it is a complex matter, in which each position is supported by the opinion of well-known international law experts on foreign investments, and after a careful analysis has concluded that, in the circumstances of the specific case and in light of the arguments presented by the Parties, it does not agree with Venezuela's interpretation of Article XI of the BIT.

211. In the first place, the ordinary meaning of the terms in the BIT in its context does not condition the possibility of the investor granting its consent to the fulfillment of the three previous stages.

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[244] Counter Memorial, ¶ 42; Rejoinder, ¶ 42; Brief, ¶ 124

[245] *See* Prof. Reinisch's Second Report, ¶ 42 ("*Article XI of the Spain and Venezuela BIT includes three steps: 1) the Dispute Notice, 2) the six months period to reach an amicably settlement, and then 3) the investor's choice between local courts and international arbitration*"); Prof. Schreuer's Report, ¶ 70 ("*Professor Reinisch's three-step approach would require the following adjustment to faithfully reflect Article XI of the BIT: First, a dispute notice. At this stage, the investor will accept the ICSID arbitration offer, thus, preserving the possibility of establishing ICSID arbitration in the event that the second step fails, Second, a mandatory six-month consultation period, Third, at the investor's choice, the effective submission of the dispute to the local courts of the state in whose territory the investment was made or ICSID arbitration.*")

[246] Counter Memorial, ¶ 43 [emphasis added].

[247] Prof. Schreuer's Report, ¶¶ 56-58.

[248] Prof. Reinisch's Second Report, ¶¶ 42-44 y 48.

The Treaty solely states that once the six-month stage has been exhausted, a dispute may be "submitted" to "the investor's choice" to arbitration or to the courts of the hosting State. The Treaty does not require that the consent to arbitration ICSID and the submission of the dispute be given through the same document.

212. It does not follow from the text of the BIT, nor does it conceptually result from its context, that the investor's right to consent to ICSID arbitration must be equated with the investor's right to "submit" the dispute to national courts or to international arbitration upon the investor's election. The submission of the dispute is the first procedural step triggering the forum the investor has chosen. The Parties agree that, in the case at hand, the submission of the dispute occurred with the submission of the Request for Arbitration.

213. The Parties do not seem to dispute that, upon signing the BIT, Venezuela granted its consent to arbitration (Article XI of the BIT)[249]. With respect to the consent of the investor, the text of Article XI does not subject it to any condition. If item 2 of Article XI contains a condition, it could only refer to the submission of the dispute, i.e., at the commencement of the procedure before the local courts or before the arbitral tribunal.

214. Similarly, nothing in the text suggests that such a choice can solely be made after the negotiation period has expired.

215. In fact, Article XI of BIT refers to the dispute notification:

> "1. Any dispute arising between an investor of one Contracting Party and the other Contracting Party with respect to its compliance with the obligations set forth in this Agreement shall be notified in writing, providing detail information thereof, by the investor to the Contracting Party receiving the investment. To the extent possible, the parties to the dispute will try to settle these differences amicably.
>
> 2. If the dispute cannot be resolved in such manner within a six months period, as of the date of the written notification referred to in paragraph 1, it will be submitted, at the investor's choice". [emphasis added]

216. The Tribunal considers that the text does not refer - as appears to be inferred from Venezuela's interpretation - that, only after six months have elapsed, the investor can make his forum election. The reference to "the" investor's choice means a specific choice: "*at the investor's choice*", which could be both, a choice made after six months, and an election - the choice - made prior to that period. Once the "choice" is made, the dispute shall be submitted to the dispute resolution mechanism chosen by the investor, provided that six months have elapsed since the Dispute Notice without the parties having been able to amicably settle the dispute.

217. The States parties to BIT granted to the investors of the other party with the authority, in Article XI of the BIT, to choose to submit themselves to the national courts of the host State of the investment or to international arbitration. For the Tribunal, the terms and context of Article XI(2) do not imply that the election can solely be made at the time of submitting the dispute to arbitration. The investor is free to exercise this right under the terms of the BIT and nothing prevents the investor from making such election in advance.

218. The Tribunal considers that with the Dispute Notice, the Claimants granted their consent to ICSID jurisdiction. In the case at hand, the Claimants also made their election on the mechanisms offered by Venezuela in Article XI(2) of the BIT.

[249] *See* Hearing, Day 3, Tr. 690:9-692-5; 696:9-22.

219. Generally, the text of the BIT allows an investor to notify a dispute, that the investor and the State party to the BIT attempt to amicably settle the dispute within a six months period, and that, after this period, the investor, for through the same act, grants its consent to ICSID arbitration and submits the dispute, at the investor's choice, to national courts or investment arbitration. However, the Tribunal does not agree with Venezuela that Article XI of the BIT, which allows the consent and submission of the dispute to be simultaneous, imposes the obligation that said consent and submission of the dispute to ICSID arbitration, have simultaneous effects.

220. The Tribunal does not find in the text or in the context of the BIT a provision prohibiting or limiting the possibility for the investor, at the time of the dispute notification, to grant its consent and opt for the arbitration forum. In the opinion of the Tribunal, the expression of the BIT, according to which the parties should try to amicably settle the dispute "*to the extent possible*", does not suggest that the negotiations are a prerequisite for the validity of the consent.

221. Finally, an interpretation such as the one proposed by Venezuela could promote, as Professor Schreuer points out, an eventual unfair behavior from the States and a violation of their international commitments. Once the controversy has been notified and knowing the need to exhaust the six-month period for the investor to express its consent, the State could denounce the Convention to escape from its commitments[250].

222. For the Tribunal, there is no doubt that the three steps identified by the Parties[251] and aforementioned were met. The Claimants submitted a written notification of the existence of a dispute with Venezuela, the Parties tried to amicably settle the dispute and the six months period before the Claimants submitted the dispute to arbitration, i.e., before the procedure commenced with the submission of the Request for Arbitration. To the extent that the BIT did not subject the formalization of the consent to conditions precedent, which in the case at hand, the consent was granted with the Dispute Notice and that the requirements were met before submitting the dispute, the arguments of the Respondent do not prosper.

223. Finally, with respect to the cases mentioned by Venezuela in reference to the waiting period and to the fact of whether such period has a jurisdictional or procedural nature, the Tribunal agrees with Professor Schreuer's conclusion,[252] establishing that this difference between the Parties is not relevant, inasmuch that the period was actually observed and the Parties conducted negotiations to try to reach an agreement before submitting the dispute to international arbitration by submitting the Request for Arbitration.

224. The Tribunal then rejects Venezuela's first jurisdictional challenge, insofar as Venezuela gave its consent to ICSID jurisdiction in Article XI of the BIT, which became effective as of September 10, 1997, and the Claimants validly granted their consent in the Dispute Notice received on November 9, 2011. There was mutual consent by the Parties prior to Venezuela's denouncement of the ICSID Convention and, therefore, such denouncement does not affect the jurisdiction of this Tribunal.

2. Second jurisdictional objection

225. The Respondent argues that the Tribunal lacks jurisdiction over the indirect expropriation claim

[250] *See* Hearing, Day 3, Tr. 666:16-667:7.
[251] *See supra* ¶ 204.
[252] *See* Prof. Schreuer's Report, ¶¶ 27-29.

for two different independent reasons[253]. First, Venezuela alleges that "*the Claimants could not have formalized the consent on an indirect expropriation claim which did not exist prior to the denouncement of the Convention by the Republic*" [254]. The Respondent alleges that, according to the arguments of the Claimants themselves, the dispute over the indirect expropriation could not have existed until January 22, 2013, the publication date of the Administrative Ordinance which, according to the Claimants, crystallized the alleged expropriation[255] . The Respondent warns that on the date of receipt of the Dispute Notice (November 9, 2011) and on the date of denouncement of the Agreement by Venezuela (January 24, 2012), "events that could support a claim of indirect expropriation were not present at the time." [256] Therefore, it concludes that the Dispute Notice was premature and, consequently, invalid with respect to the expropriation claim[257].

226. Second, Venezuela argues that "*the controversy over the alleged total loss of control by GRUMA on MONACA and DEMASECA - which the Claimants argue in their Memorial that it constitutes an indirect expropriation - has not been notified to the Republic as required by the Article XI.1 of the Agreement.*"[258] To the extent that there had been no notification regarding the Administrative Ordinance and its effects, then, the six-month negotiation period provided for in the Treaty would not have commenced either[259].

227. On other hand, the Claimants argue that the Administrative Ordinance did not generate a new dispute, but that it rather (i) aggravated a dispute which existed as of the publication of Decree No. 7.394 in May 2010, and (ii) concluded an expropriation process that had begun with such Decree and was in process of being executed when the Respondent denounced the Convention[260]. In such sense, the Claimants argue that they have no obligation to notify each measure adopted by Venezuela solely having as purpose aggravating or continuing an already notified existent dispute[261].

228. The Tribunal will successively analyze Venezuela's arguments supporting this objection to the Tribunal's jurisdiction.

229. The Tribunal has already concluded that the Claimants consented to ICSID jurisdiction through the Dispute Notice. Therefore, the first question that the Court must answer in connection with this second jurisdictional objection is whether the consent granted through said notification covers the indirect expropriation claim filed by the Claimants in this arbitration.

230. Article XI(1) of the BIT establishes that the investor must notify in writing the existence of a dispute to the State receiving the investment, as follows:

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[253] Counter Memorial, ¶ 91.
[254] Counter Memorial, ¶ 90.
[255] *See* Counter Memorial, ¶¶ 86-89. The Tribunal notes that references to the "crystallization" of an indirect expropriation were introduced by the Respondent. The Claimants have not used this term, but have argued that the alleged progressive interference by Venezuela in the Companies had its "climax" with the Administrative Ordinance. (*See*, e.g., Memorial, ¶¶ 6, 107, 181 and 258).
[256] Rejoinder, ¶ 101.
[257] Rejoinder, ¶¶ 101-103.
[258] Counter Memorial, ¶ 91.
[259] *Id.*
[260] Brief, ¶ 168.
[261] Brief, ¶ 178.

> "Any dispute arising between an investor of one Contracting Party and the other Contracting Party with respect to its compliance with the obligations set forth in this Agreement shall be notified in writing, providing detail information thereof, by the investor to the Contracting Party receiving the investment. To the extent possible, the parties to the dispute will try to settle these differences amicably." [emphasis added]

231. In accordance with the ordinary meaning of its terms, Article XI(1) of BIT requires (i) the existence of a dispute and (ii) that the dispute should be over the compliance of the obligations by the State receiving the investment under the Treaty. A dispute is "*disagreement on a legal or factual matter, a conflict of legal points of view or of interests between the parties.*"[262] As Professor Schreuer observes, the existence of a dispute requires, at least, that one of the parties has raised the issue with the other party[263].

232. In the Dispute Notice, the Claimants referred, *inter alia*, to the effects of Decree No. 7.394, the acts carried out by the Liaison Commission, the imposition of controls and authorizations in the management of the companies, and the delay in the issuance of the annual update of the investment register before the Foreign Investments Agency (SIEX)[264]. The Claimants also stated that they were unable to pay royalties, repatriate capital and investment income, send profits abroad, carry out an asset disposal outside their ordinary course of business and transfer their shares in Monaca and Demaseca to third parties[265].

233. Consequently, the Claimants reported that a dispute with Venezuela arose as a result, *inter alia*, of the measures and actions described in the Dispute Notice, and that said measures, and that such actions contravened Article V of BIT, relating to expropriation[266]. In such respect, the Dispute Notice establishes:

> "[I]n accordance with the foregoing, and for the purposes of Article XI(1) of the Agreement, we respectfully inform You that the Investors consider that a dispute regarding investments has arisen between the Republic and the Investors as a result of, *inter alia*, the aforementioned measures, which contravene and are incompatible with the obligations assumed by the Republic in the Agreement. Specifically, the aforementioned measures contravene, *inter alia*, the following obligations of the Republic set forth in the Agreement: (i) investments in the territory of a Contracting Party made by Investors of the other Contracting Party shall not be subject to nationalizations, expropriations,

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[262] *See Mavrommatis Case (Greece v. United Kingdom)*; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Stage)*, p. 74; *Cases Concerning South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, p. 328; *Case Concerning Septentrional Cameroon (Camerún v. United Kingdom)*, pp. 27-28; *Applicability of the Obligation to Arbitrate under Section 21 of the Agreement of June 26, 1947*, p. 27; *Case Concerning Timor Oriental (Portugal v. Australia)*, ¶ 22. *See, e.g., Maffezini v. Spain*, ¶¶ 93-94; *Tokios Tokelés v. Ukraine*, ¶¶ 106-107; *Siemens v. Argentina (Decision on Jurisdiction)*, ¶ 159; *Lucchetti v. Peru*, ¶ 48.

[263] Prof. Schreuer's Report, ¶ 44.

[264] Dispute Notice, p. 2 (Annex C-5).

[265] Dispute Noticefication, p. 2 (Annex C-5). ("*Due to Decree 7.394, MONACA and DEMASECA are unable, inter alia, to pay royalties, repatriate capital and capital investments, as well as to send profits abroad, and to make dispositions of assets outside their ordinary course of business. For the same reasons, VALORES and CONSORCIO are prevented, inter alia, from transferring their shares in MONACA and DEMASECA to third parties*")

[266] Dispute Notice, p. 3 (Annex C-5).

> or any other measure of similar features or effects unless they are made exclusively for reasons of public interest, in accordance with legal provisions, and in a non-discriminatory manner and with a compensation paid to the investor (Article V. Nationalization and expropriation)" [emphasis added]

234. According to the Respondent, the notification claim for the breach of obligations under the BIT with respect to the expropriation is invalid inasmuch Venezuela had not breached its obligations under the Treaty[267]. The Respondent alleges that "*[s]olely after the expropriation occurred, and only if the requirements of Article V are not met [...] a breach by the Republic to its obligations under the Agreement which could be subject to a Dispute Notice, could exist*" [268]. The Tribunal does not agree with this statement: the notification referred to in Article XI(1) of BIT refers to the existence of a "dispute" – i.e., a disagreement on a point of law or fact - regarding to compliance with Treaty obligations.

235. Whether or not there was a breach of the BIT, including Article V – expropriation - of the Treaty, is precisely the subject of the dispute and, therefore, a matter submitted to the Tribunal's decision. From the content of the Dispute Notice, it follows that, at least since November 9, 2011, a dispute existed between the Parties with respect to the alleged breach of Respondent's obligations under the Treaty with respect to expropriation issues.

236. Now, therefore, the Respondent suggests that the Administrative Ordinance caused an expropriation dispute different than the one arising from Decree No. 7.394[269]. Venezuela's position seems to be based on the fact that the Claimants "*tried to notify a direct expropriation in their Dispute Notice*" based on the publication of the Decree No. 7.394[270], and it was until they filed their Memorial that, for the first time, they presented a claim for an indirect expropriation that would have been triggered with the publication of the Administrative Ordinance on January 22, 2013[271].

237. However, there is nothing in the Dispute Notice supporting this conclusion. The Claimants expressly stated that the measures described in the Dispute Notice are contrary to Venezuela's obligations under Article V of the BIT which refers, both, to direct expropriations and to "*any other measure of similar features or effects*" to an expropriation. Neither the Claimants qualify the expropriation as direct or indirect, nor does it follow from the text of the Dispute Notice that their intention was to qualify the measures as a direct expropriation.

238. Furthermore, the circumstances referred to by the Claimants in their Dispute Notice - interference in the management of Monaca and Demaseca, the impossibility of paying royalties, repatriating capital and disposing their shares in the Companies, *inter alia* - are the same as, according to them pursuant to their writs submitted to this Tribunal, they amount to an indirect expropriation of their investments in Venezuela. In other words, the alleged effects of the Venezuela's measures and actions, which were expressly denounced by the Claimants in their Dispute Notice, are essentially the same as those discussed during the arbitration.

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[267] Rejoinder, ¶ 97.
[268] Rejoinder, ¶ 98.
[269] *See* Rejoinder, ¶ 99.
[270] Rejoinder, ¶¶ 93-99.
[271] Rejoinder, ¶¶ 100-101.

239. The Claimants have attributed these effects mainly to Decree No. 7.394 and to the seizure and special administration measures. In effect, the position held by the Claimants in this arbitration is that through a series of measures - including Decree No. 7.394 and the actions carried out by the Liaison Commission, *inter alia* - the State has submitted its investments to an indirect and progressive expropriation concluding with the publication of the Administrative Ordinance.

240. One part of the dispute that has been submitted to the Tribunal is precisely whether Decree No. 7.394, the seizure and special administration measures and the Administrative Ordinance are related or not in the terms indicated by the Claimants. Also, the dispute lies in whether such measures caused a loss of economic benefits or the investment control equivalent to an expropriation. The Parties dispute the effects of the Administrative Ordinance and its relationship with Decree No. 7.394 and with the measures described by the Claimants in their Dispute Notice. The Claimants argue, in part, as a measure which concluded in the expropriation process[272] and as Venezuela's decision which aggravated an existing dispute since the publication of Decree No. 7.394 in May 2010[273]. Venezuela denies the effects the Claimants attribute to the Administrative Ordinance and denies their connection with the Decree No. 7.394 and the measures derived from it to which the Claimants attribute expropriation effects.

241. With respect to the Administrative Ordinance, the Tribunal could only accept the jurisdictional exception proposed by Venezuela if it were clear that a second dispute was generated from the measures arising from the criminal proceedings. As it will be explained in further detail below, the Tribunal has found that the seizure and special administration measures on the Companies, whose foundation is the alleged participation of Mr. Fernández Barrueco in the capital of Monaca and Demaseca, were executed by Venezuelan officials in confusion with the purpose being pursued and the provisions of Decree No. 7.394 and those arising from Venezuela's food policies[274]. During the term of the Liaison Commission at the Monaca and Demaseca facilities, there was convergence and confusion between the functions of the Liaison Commission members and those exercised by the special administrators. Even after the withdrawal of the Liaison Commission and when the special administrators were the only remaining at Monaca and Demaseca facilities, there was no clarity as to the origin of the decisions made by the Respondent's officials, as to whether they were based on the seizure and special administration measures, the Decree No. 7.394 or the compulsory acquisition process. Furthermore, the Liaison Commission members created in the framework of the compulsory acquisition process, were then appointed as special administrators in the Administrative Ordinance. The Tribunal concludes that there has been a *de facto* relationship between Decree No. 7.394 and the seizure and special administration measures, including the Administrative Ordinance, and that they are all part of the same dispute notified by the Claimants in their Dispute Notice.

242. It is undisputed that, as of the date on which the Claimants expressed their consent to arbitration, the Administrative Ordinance, a consequence of this criminal proceeding, had not been issued. If the Administrative Ordinance is part of the same dispute and the Claimants could not have known it on the date of their consent - since it had not been issued - the Claimants could not be required to include it in the notice. They could not have been required to notify each new measure related with the dispute, nor to initiate a new negotiation period to commence the arbitration.

243. The Tribunal finds that the expropriation dispute existed at least as of November 9, 2011. In its Dispute Notice, the Claimants validly notified the existence of a dispute regarding compliance of Venezuela's obligations under Article V of the Treaty and, in turn, they formalized the consent to arbitration with respect to the case at hand in relation to the expropriation prior to the

[272] *See, e.g,* Memorial, ¶¶ 6, 107 y 181
[273] Rejoinder, ¶ 168
[274] *See infra,* ¶¶ 583-585.

denouncement of the Treaty by Venezuela. Therefore, the Tribunal has jurisdiction over the expropriation claim in the terms set forth by the Claimants in this arbitration.

244. Based on the foregoing, the Tribunal rejects the second jurisdictional objection of Venezuela.

3. Third jurisdictional objection

245. The Respondent argues that, regardless of the effects of the application of Article 72 of the Convention, the BIT requires that both States - Spain and Venezuela - be contracting States of the Convention at the time the investor submits the dispute to ICSID arbitration[275]. Such requirement would not be met in this case, because by the time the Claimants filed their Request for Arbitration (May 10, 2013), six months had already elapsed since the denouncement notification (January 24, 2012) and, therefore, Venezuela had ceased to be a contracting State of the ICSID Convention[276].

246. The third jurisdictional objection by Venezuela is based on its interpretation of Article XI(2)(b) of the BIT. This Article provides the following:

> 2. If the dispute cannot be resolved in such manner within a six months period, as of the date of the written notification referred to in paragraph 1, it will be submitted, at the investor's choice:
>
> a) To the competent courts of the Contracting Party in whose territory the investment was made, or
>
> b) To the International Centre for Settlement of Investment Disputes (ICSID) created by the Convention on the Settlement of Investment Disputes between States and Nationals or Other States, opened for its signature in Washington on March 18, 1965, when each State party to this Agreement has joined it. In the event that one of the Contracting Parties has not joined the aforementioned Convention, the Supplementary Mechanism for Conciliation, Arbitration and Fact Finding shall be resorted to by the ICSID Secretariat [emphasis added];

247. According to Venezuela, the term "*joined*" used by Article XI(2)(b) of the BIT "*not only means that the two States have initially joined to the Convention, but both States continue to be a party to the Convention at the time of submitting a controversy to arbitration.*"[277]

248. The Respondent argues that Spain and Venezuela were contracting States to the ICSID Convention before signing the BIT. Therefore, the interpretation of Article XI(2)(b) proposed by the Claimants - according to which what it is required that both States have initially adhered to the Convention - would deprive the meaning and utility of this provision. Furthermore, this interpretation would eliminate the possibility of commencing an arbitration under the Supplementary Mechanism of the ICSID when the ICSID arbitration is unavailable[278].

249. The Tribunal does not share Venezuela's interpretation. On the contrary, it finds that the interpretation of Article XI (2)(b) of the BIT proposed by the Claimants is adequate according to

[275] Counter Memorial, ¶ 92 and ss.; Rejoinder, ¶ 73 and ss.
[276] Counter Memorial, ¶ 96.
[277] Hearing, Day 1, Tr. 182:1-5.
[278] Rejoinder, ¶ 76.

the ordinary meaning of the terms of the Treaty in its context and considering its scope and purpose, as required by Article 31 of the Vienna Convention.

250. In international law, "join" is one of the acts through which a State may grant its consent to be bound by a treaty[279]. The Tribunal considers that the term "joined it" in Article XI(2)(b) of the BIT should be understood, in a broad sense, as having granted the consent to become a contracting State to the ICSID Convention[280].

251. Respondent's interpretation would imply equating the expression "*when each State party to this Agreement has joined the* [ICSID Convention]" [emphasis added] with the expression "*if each State party to this Agreement is a party to the ICSID Convention*". Being a party of a treaty means having expressed consent to be bound by it. "Accession" is an act by which the State manifests such consent; being a party to the treaty is the consequence of that accession. Thus, these are different concepts which cannot simply be exchanged in the context of Article XI of the Treaty, as proposed by Venezuela.

252. Likewise, Venezuela's interpretation would imply accepting that the expression *"[i] n the event that one of the Contracting Parties has not joined it*" refers to the event in which one of the States has denounced the ICSID Convention. In the opinion of the Tribunal, these expressions are not, and cannot be, equivalent. "Accession" and "denouncment" are different acts, with different objectives and opposite effects, and are regulated by different rules within the Vienna Convention. Even, as Professor Schreuer observes, they are diametrically opposed[281]. Therefore, the transcribed text cannot have the meaning attributed to it by Venezuela.

253. The context of the term "*joined*" confirms Claimants' interpretation, according to which the requirement is that both States have initially acceded to the Convention. For the Tribunal, Article XI(2)(b) contemplates two hypotheses: the first is that both States have become parties to the Convention, in which case the arbitration will be available under the ICSID Convention. The second hypothesis is that one of the States has not become a party to the Convention. In this case, arbitration may be resorted to, under the Supplemental Mechanism of the ICSID.

254. The tense used in Article XI(2)(b) of the BIT, i.e., "*has joined* " implies that accession occurs at a single moment when the State Party expresses its consent to be bound by the ICSID Convention and, consequently, it becomes a contracting State thereof.

255. The Tribunal agrees with the explanation presented in the arbitration by Professor Schreuer: pursuant to Article XI(2)(b), if a State has joined or not to the ICSID Convention, it determines whether arbitration is available under the ICSID Convention or the Supplemental Mechanism of

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[279] Vienna Convention, Articles 2(1)(b) and 15. United Nations, United Nations Treaty Collection, Glossary, available at https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml ("*'Accession' is the act whereby a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force.* [...]").

[280] The Tribunal notes that Venezuela signed the ICSID Convention on August 18, 1993, that it deposited its ratification instrument on May 2, 1995, and that the Convention became effective for Venezuela as of June 1, 1995.

[281] Hearing, Day 3, Tr. 719:18-22.

the ICSID[282]. If none of these two mechanisms were available, then the dispute would be submitted to an *ad hoc* tribunal under the UNCITRAL Arbitration Rules.

256. The Tribunal finds that the interpretation of Article XI(2)(b) set forth herein is consistent with the object and purpose of the Treaty, and the Respondent has not convincingly argued otherwise.

257. Furthermore, Article 32 of the Vienna Convention indicates that the interpreter may resort to supplementary interpretation methods, among other purposes, to "*confirm the meaning resulting from the application of Article 31*". Within the supplementary interpretation methods, Article 32 of the Vienna Convention expressly includes the circumstances of the execution of the treaty. Both, Claimants and Professor Schreuer, have referred to the circumstances of the BIT negotiation to explain why Article XI(2)(b) of the BIT was drafted in that way despite the fact that, at the time of its *execution*, both Spain and Venezuela were already parties of the ICSID Convention.

258. The explanation offered by the Claimants - which has not been contested by the Respondent - confirms the Tribunal's interpretation. The BIT negotiation concluded in approximately January 1995.[283] By that time, Venezuela had signed the ICSID Convention, but had not yet ratified it. In effect, Venezuela signed the ICSID Convention in August 1993, but ratified it almost two years later, in May 1995. The ICSID Convention became effective, with respect to Venezuela, on June 1, 1995. By the time Venezuela ratified the ICSID Convention, the BIT had already been negotiated and Spain was in the middle of an internal approval process of the Treaty in order to sign it[284].

259. In this context, it makes sense that Spain and Venezuela had negotiated a dispute resolution system that provided for one of the States not being party to the ICSID Convention. This is precisely the second hypothesis of Article XI(2)(b), according to which the Supplemental Mechanism would be resorted in case one of the States "*has not joined*" to the ICSID Convention.

260. Based on the foregoing, the Tribunal concludes that Article XI(2)(b) cannot be interpreted as requiring both States to be parties of, or, according to the Respondent, "*continue to be joined*" to the Convention at the moment in which the investor submits the dispute to ICSID arbitration. This interpretation would be contrary to the ordinary meaning of the terms of the Treaty and would ignore the context and the circumstances of its negotiation and execution.

261. In the case at hand, the consent to the ICSID jurisdiction was formalized before Venezuela denounced the ICSID Convention. The BIT does not impose an additional requirement that both States parties to the BIT should continue to be parties to the ICSID Convention at the time the investor submits a dispute to an ICSID tribunal.

262. For the aforementioned reasons, the Tribunal rejects the third jurisdictional objection of the Respondent.

4. Fourth jurisdictional objection

[282] Prof. Schreuer's Report, ¶ 77. Professor Reinisch agrees that, under Article XI(2), "*there is a genuine option among the different international arbitration systems [...]is or the ICSID or the UNCITRAL complementary mechanism.*" (*See* Hearing, Day 3, Tr. 720:16-19) [Tribunal's Translation].
[283] Hearing, Day 1, Tr. 61:15-62:12
[284] *Id.*

263. The Respondent alleges that this Tribunal lacks jurisdiction, inasmuch the true investor in Venezuela is Gruma, a Mexican company which has no right to benefit from the ICSID Convention because it is not a national of a contracting State.

264. Venezuela bases this objection on two main arguments. First, it argues that the Claimants are paper companies acting as holding companies of the Gruma shares in the Companies to give a Spanish appearance to the investments[285]. According to Venezuela, the Claimants merely "*inherited direct foreign investment*" from Gruma through a transfer of "*paper*" shares[286].

265. Second, the Respondent argues that even if the Claimants qualified as "investors" under the definition of Article I(1)(b) of the BIT, they could not be considered nationals of another contracting State for purposes of the ICSID Convention[287]. According to Venezuela, "*being a 'Spanish investor' under the Agreement is not automatically equivalent to being a 'national' Spanish to comply with the requirement to be 'a national of another contracting State' of Article 25 of the ICSID Convention.*" [288] Claimants must also qualify as nationals from Spain under Spanish law; however, they do not meet the requirements to do so[289].

266. For methodological reasons, the Tribunal will begin its analysis with this second argument.

267. In accordance with Article 25(1) of the Convention, the *ratione personae* jurisdiction of the ICSID extends to disputes between a Contracting State and a national of another Contracting State:

> "[T]he 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 Center by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Center. When the parties have given their consent, no party may withdraw its consent unilaterally." [emphasis added]

268. Further, Article 25(2)(b) of the Convention establishes what is meant by "a national of another Contracting State":

> "[A]ny juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention." [emphasis added]

269. Article 25(2)(b) contains two hypotheses to determine whether a juridical person constitutes a "*national of another Contracting State*" for the purposes of Article 25(1) of the Convention. The first hypothesis is that the juridical person has the nationality of a Contracting State other than the State receiving the investment. The second hypothesis admits that the juridical person has the same nationality of the State receiving the investment, provided that the parties have agreed to attribute the status of "*national of another Contracting State*" inasmuch it is subject to foreign

[285] Rejoinder, ¶ 106, 125 y 137.
[286] Rejoinder, ¶¶ 131-133.
[287] *See* Rejoinder, ¶ 160.
[288] Rejoinder, ¶ 157.
[289] Rejoinder, ¶ 160.

control.

270. In the second hypothesis, "foreign control" is the criterion for establishing the nationality to be attributed to a juridical person under the Convention when it already has the nationality of the receiving State. In contrast, in the first hypothesis - which is relevant for purposes of this arbitration - the Convention does not establish any criteria to determine that a juridical person has the nationality of a Contracting State other than the State receiving the investment. Therefore, this task corresponds to the States.

271. As noted by several ICSID tribunals, the drafters of the Convention chose not to incorporate a definition of nationality under Article 25(2)(b) of the Convention, granting wide latitude to States to agree on the criteria that would determine the nationality of legal persons for purposes of ICSID jurisdiction[290].

272. In this regard, the *Rompetrol court v. Romania* indicated that

> "The latitude granted to define nationality for purposes of Article 25 must be at its greatest in the context of corporate nationality under a BIT, where, by definition, it is the Contracting Parties to the BIT themselves, having under international law the sole power to determine national status under their own law, who decide by mutual and reciprocal agreement which persons or entities will be treated as their 'nationals' for the purposes of enjoying the benefits the BIT is intended to confer" [291]

273. The Tribunal agrees with the reasoning of the R*ompetrol court v. Romania.* Article 25 (2)(b) does not define the manner of determining the nationality of legal persons for the purposes of Article 25 of the Convention. Therefore, it is up to the States to establish the requirements that a legal person must meet to consider that it has *"the nationality of a Contracting State other than the State party to the dispute"*. Generally, the States establish these requirements in the instruments that contain the offer of consent to the jurisdiction of the ICSID. When entering into international agreements for the protection of investments, it is the States that, in exercise of their sovereignty, negotiate and agree to which natural or legal persons will grant the benefits of the agreement. Consequently, the Tribunal must grant deference to the definition of nationality of legal persons established in the corresponding agreement.

274. In the words of Professor Schreuer:

> "[T]he definitions of corporate nationality included in national laws or treaties providing ICSID jurisdiction are directly relevant to determining whether the nationality requirements of Article 25(2)(b) have been met. They are part of the legal framework for submission to the Center by the State. Upon written acceptance of the investor, they become part of the consent agreement of the parties. Therefore, any reasonable determination of the nationality of legal persons contained in national laws or treaties must be accepted by ICSID commissions or tribunals."[292]

275. For the aforementioned reasons, the Tribunal finds that the definition of "investor" established in the BIT is conclusive for purposes of establishing its jurisdiction under the Treaty and under the Convention. The definition of the investor's nationality is given by the Treaty. In this case, the

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[290] *Tokios Tokelés v. Ukraine*, ¶ 25; *Rompetrol v. Romania*, ¶ 80

[291] *Rompetrol v. Romania*, ¶ 81 [traducción del Tribunal]. *See also, Tokios Tokelés v. Ukraine*, ¶ 39.

[292] Christoph Schreuer, *The ICSID Convention: A Commentary* (2009) (Annex CLA-143), ¶ 723 [Tribunal's translation; cross references and footnotes omitted].

BIT requires the Claimants to be incorporated under the laws of Spain, a matter that is not subject to controversy between the Parties. Therefore, it is not necessary for the Tribunal to analyze Spanish law in order to verify whether or not the Claimants have the nationality of that country, in accordance to additional criteria as to those established in the Treaty.

276. Article XI(1) of the BIT, which contains the offer of the State's consent to arbitration, provides as follows:

> "Any dispute arising between an investor of one Contracting Party and the other Contracting Party with respect to its compliance with the obligations set forth in this Agreement, shall be notified in writing, providing detailed information thereof, by the investor to the Contracting Party receiving the investment. To the extent possible, the parties to the dispute will try to settle these differences amicably." [emphasis added]

277. The term "investor" is defined in Article I(1) of the BIT, which reads as follows:

> "[Legal] persons, including companies, joint ventures, business corporations, branches and other organizations incorporated or, in any event, duly organized pursuant to the laws of the Contracting State, as well as those incorporated in one of the Contracting Parties and are effectively controlled by the investors of the other Contracting Party." [emphasis added]

278. In the case of legal entities incorporated outside of Venezuela, Article I(1)(b) of the BIT establishes as the *only* requirement to determine whether entities are investors under the Treaty is for them to be incorporated or duly organized under Spanish law. In other words, the BIT adopts the incorporation criterion to establish whether a legal person qualifies as an "investor" under the Treaty.

279. This Tribunal finds that, within the framework of Article 25(2)(b) of the Convention, the Contracting States may adopt the incorporation criterion under their own law as a necessary and sufficient nationality criterion for purposes of the ICSID jurisdiction[293]. As other courts have observed, the place of incorporation is a criterion widely used at the international level to establish the nationality of legal persons and, together with the criterion of the registered office, is the generally accepted method for determining the corporate nationality of the claiming party under Article 25 (2)(b)[294].

280. In exercising their authority to define consent to ICSID jurisdiction, States may, for example, establish a control or "effective connection" test of the investor with the other State, or reserve the right to deny protection to claimants that they could otherwise resort to the respective treaty. However, once consent is defined, the Tribunal shall follow it[295]. Therefore, when the nationality test established in the corresponding treaty is that of "incorporation" - and not one of genuine control or connection, for example - the court should not go beyond the provisions of the treaty, unless that some form of abuse has occurred[296], for example, if the investor is a company incorporated in a particular State after the dispute arose, in order to benefit from a treaty concluded by that State[297].

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[293] *Rompetrol v. Romania*, ¶ 83.
[294] *See Rompetrol v. Romania*, ¶ 83; *Tokios Tokelés v. Ukraine*, ¶ 42; Christoph Schreuer, *The ICSID Convention: A Commentary* (2009) (Annex CLA-143), ¶ 707.
[295] *See Tokios Tokelés v. Ukraine*, ¶ 39.
[296] *Gold Reserve v. Venezuela*, ¶ 252.
[297] *Id.*

281. In this case, it is duly proven - and, in any case, it is undisputed by the Parties - that Valores and Consorcio are business corporations incorporated in Spain[298]. Similarly, is it also undisputed by the Parties that the "shares" are investments protected under the BIT and that the Claimants have owned the shares in Monaca and Demaseca for several years before the controversy arose[299].

282. The Respondent has not invoked any reason that justifies disregarding the legal status of the Claimants or investigating the fulfillment of the nationality requirements in furtherance to those expressly established in Article XI(1)(b) of the BIT. The Tribunal also finds no reason to do so.

283. As explained by the Tribunal, the "incorporation" criterion established in the BIT is the only relevant and sufficient criterion to establish its *ratione personae* jurisdiction, and the Claimants comply with that requirement. Therefore, it is not necessary for the Tribunal to evaluate the factual allegations raised by the Respondent in connection with this jurisdictional objection.

284. In conclusion, this Tribunal has jurisdiction over the Claimants under Article 25(1) of the ICSID Convention and Article XI(1) of the Treaty. Thus, the fourth jurisdictional objection presented by Venezuela is rejected.

V. BIT VIOLATION CLAIMS

A. EXPROPIATION CLAIM

1. Claimants' Position

285. The Claimants argue that Venezuela expropriated its investments in violation of Article V of the BIT. Specifically, they claim that the measures imposed by Venezuela on Monaca and Demaseca constitute "*measure[s] of similar features or effects*" to an expropriation in terms of Article V(1) of the BIT, i.e., constituting an indirect expropriation[300].

286. In this case, the expropriation would have occurred progressively through a series of measures that, cumulatively, have features and effects equivalent to an expropriation[301]. These measures are: (i) the imposition of seizure and special administration measures on Monaca and Demaseca derived from the criminal proceedings, *vis-à-vis* Mr. Fernandez Barrueco; (ii) the issuance of Decree No. 7.394 - whose effects extend to Demaseca - and the "invasion" of the company facilities by the Liaison Commission members who, acting on their own behalf or jointly with the special administrators, they would have begun to gradually control the companies; and (iii) the issuance of the Administrative Ordinance granting the special administrators – previously [the] Liaison Commission members - the "broadest administrative authorities" on both Companies and, in addition, orders them to adjust their actions to the agri-food policies of Venezuela and present financial statements of its management at the close of each fiscal year[302].

287. According to the Claimants, the Administrative Ordinance constitutes the "*culminating point of a series of measures attributable to the Respondent interfering with Claimants' property rights with*

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[298] Valores Incorporation Deed dated November 14, 2003 (Annex C-20) and Consorcio Incorporation Deed dated April 20, 2006 (Annex C-21). *See also* Counter Memorial, ¶¶ 113-114. Further, the Respondent acknowledges that "*theoretically VALORES and CONSORCIO may qualify as 'investors' under the definition of Article 1.1 of the Agreement*". (Counter Memorial, ¶111)

[299] *Id.*

[300] Memorial, ¶¶ 171-172.

[301] Memorial, ¶¶ 173-176.

[302] Memorial, ¶ 170 y ¶¶ 177-179; Hearing, Tr. 67:6-68:12.

such intensity that they 'have no content and shall be considered expropriated'."[303] These successive measures would have substantially deprived Claimants of the use, enjoyment that any investor would expect to have on their investments[304].

288. The Claimants argue that indirect expropriation requires a "substantial deprivation" of the economic benefits of the investment[305]. Following the standard proposed by the *AES v. Hungría* tribunal, there would be expropriation when (a) the investor is totally or significantly deprived of the ownership or effective control of its investment or (b) the investment is totally or significantly deprived of its value[306]. In this case, both hypotheses would concur since, as a consequence of the measures imposed by Venezuela, the Claimants (i) have lost the control over the Companies and (ii) the value of their shares is "virtually zero"[307].

289. *First*, the Claimants argue that the Venezuelan State, acting through several entities and agencies, has exerted an interference of such magnitude on the Companies that it has substantially deprived them of the control on their investments[308]. This interference would have resulted in an effective deprivation of the fundamental rights of the Claimants as shareholders of the Companies in a manner that "*has been deprived from its essence, and lacks content to the point that they are practically useless*"[309].

290. According to the Claimants, the following situations would reflect the substantial loss of control of the Claimants on their investments, as recognized by several international tribunals[310].

291. First, the loss of *de iure* control over Monaca and Demaseca arising from the Administrative Ordinance granting the special administrators "*the broadest administration authorities*" over the Companies and, furthermore, obliging them to adjust their actions to public policies issued by the Ministry of Food with respect to agri food activity[311].

292. Based on several decisions of the Iran-USA Claims Tribunal, the Claimants state that "the *appointment of government administrators in a company can be considered as a measure of similar features or effects to the indirect expropriation.*"[312] As in those cases, the Claimants argue that in the case at hand there is no realistic perspective of revering their rights. In effect, the measures have been in force for more than six years, there are no indications that they will cease and, at any moment, Venezuela will acquire the formal ownership of the Companies[313].

293. Second, the impossibility of (i) distributing or receiving dividends and transferring capital; (ii) freely dispose their shares; (iii) appoint new board members; (iv) approve balance sheets and financial statements; (v) decide on the sale of assets; and (vi) amend or modify the bylaws of the Companies. According to the Claimants, these restrictions arise from the prohibition of notarizing or certifying acts whereby Monaca, Demaseca or the Claimants participate, and the freeze of the bank accounts of the Companies[314]. The distribution of dividends would also be hampered by the SIEX rejection - presumably ordered by the Liaison Commission- to update Monaca's registry as

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[303] Memorial, ¶ 181.
[304] Memorial, ¶ 182.
[305] *Id.*
[306] Memorial, ¶ 182, quoting *AES v. Hungría*, ¶ 14.3.1.
[307] Memorial, ¶ 171.
[308] Memorial, ¶ 185.
[309] Brief, ¶ 232.
[310] Memorial, ¶¶ 184-185.
[311] Memorial, ¶ 185.
[312] Brief, ¶ 228. The Claimants particularly refer to the cases *Sedco v. Iran*, *Tippetts v. Iran* and *Starrett Housing v. Iran*.
[313] Hearing, Day 1, Tr. 69:22-70:16.
[314] Memorial, ¶ 185; Brief, ¶ 234

a foreign investment[315].

294. Third, the limitations on property rights imposed through Decree No. 7.394, The Claimants argue that Decree No. 7.394 remains in force with all its effects, including the restriction on transferring the assets of the Companies[316]. The Respondent would have admitted that closing plants without state authorization would entail a violation of the Decree, while the special administrators would have declared that, by virtue of said Decree, the assets of the Companies cannot be subject to any negotiation[317].

295. Fourth, the interference in the daily decisions of the Companies reflected, e.g., the need to request authorization from Venezuelan officials to make any payment or transfer of their bank accounts and in the obstruction of certain commercial decisions[318].

296. Fifth, the duty to submit periodic reports to the Liaison Commission and special administrators on financial, commercial and operational matters of the Companies[319].

297. Sixth, the obligation to pay fees and compensations to the Liaison Commission members and special administrators[320].

298. Seventh, the occupation of different offices and spaces in the administrative headquarters and other facilities of Monaca and Demaseca by the Liaison Commission and the special administrators[321].

299. Eighth, the disposal of the Companies assets, particularly the obligation to lend thousands of tons of corn to competing companies without accruing interest and selling corn flour to the so-called "Socialist Bakeries"[322].

300. Ninth, the restriction on appointing representatives in judicial matters, authority which, pursuant to the law, corresponds to the board of directors of Monaca. According to the Claimants, this limitation was confirmed by the Attorney General's Office, which, in the context of a judicial proceeding, *vis-à-vis,* Monaca, stated that the company has an "intervening board" which may exercise the defense of the company in the proceeding[323].

301. Tenth, the fact that the Companies are under a special administration regime which, under Venezuelan law, solely applies to confiscated assets that have become the State's property. According to the Claimants, Venezuela has acted as if the Companies were its property; it has imposed special administrators acting as their owners and has referred to them publicly as "*recovered and nationalized*" companies, "*acquired by the Venezuelan State*"[324]. The Claimants emphasize that the highest court of administrative litigation confirmed that it had jurisdiction over Monaca because it is a company in which the State exercises "decisive and permanent control with respect to its management or administration".[325]

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[315] Memorial, ¶ 185.
[316] Brief, ¶ 225.
[317] *Id.*
[318] Memorial, ¶ 185.
[319] Memorial, ¶ 185.
[320] *Id.*
[321] *Id.*
[322] *Id.*
[323] Hearing, Day 1, Tr. 73:22-75:18.
[324] Brief, ¶ 226.
[325] Hearing, Day 1, Tr. 76:20-78:18.

302. *Second*, the Claimants argue that, in furtherance of to having been stripped the control of the Companies, the measures imposed by Venezuela have had the effect of destroying the value of their investments. Following the decision in *Tecmed v. Mexico*, the Claimants explain that the measures adopted by a State constitute indirect expropriation if, in such regard, the investor "*was radically deprived of the economic utility of its investment, as if the rights related to such investments [...] would have ceased*"[326].

303. In this regard, the Claimants first state that Decree No. 7.394 covers all of the Companies' assets and it is uncertain when the transfer of ownership over said assets will be formalized[327]; and, second, that the Companies are under an intervention regime preventing them from receiving the "basic benefits" from their investments.

304. Specifically, the Claimants state that they cannot perform the following acts with respect to the Companies: (i) register the minutes of the shareholders' meeting in the Commercial Registry; (ii) effectively appoint board members; (iii) distribute dividends; (iv) manage the payment of premiums for the subscription of shares; (v) sell or transfer their equity interests; (vi) manage and withdrawn from their bank accounts; (vii) freely manage transfer their assets; and (viii) freely manage them according to their criteria[328]. Furthermore, the Venezuelan measures have had the effect of subjecting the managers of the Companies to the instructions of the special administrators subject to civil and criminal penalties in the event of a non-compliance[329].

305. Consequently, the actions by the Claimants in the Companies would have no economic value, since the Claimants, or a hypothetical buyer in their place, cannot enjoy the rights and benefits inherent to this type of investment[330]. This conclusion is based on three main reasons: (i) during more than five years, the Companies have been prevented from distributing profits and there are no indications that such prohibition will be lifted in the mid-term; (ii) the fact that the Companies must adjust their actions to Venezuela's food policies limits their ability to generate profits and make investment decisions maximizing their net present value, since the special administrators have the authority to impose measures on the Companies affecting their ability to generate funds; and (iii) since the publication of Decree No. 7.934, and as a result thereof, the Claimants, or a potential buyer, are certain that at any time the ability to receive the future dividends flows will be formally transferred to the Respondent[331].

306. Claimants emphasize that a company prevented from paying dividends or profits to its shareholders has no value for them or for a potential buyer. In this regard, they emphasize, first, that the shareholders have not received the payment corresponding to the share subscription premium decreed in December 2008, as representatives of Venezuela prevent Monaca from obtaining the record of direct investment which is necessary for making the payment. The foregoing would evidence that the Claimants have been deprived from receiving the payment of approved profits and that decreeing more profits would be useless[332]. Second, they explain that the "short-term assets" of the Companies are assets subject to the Decree No. 7.394 and, consequently, Claimants cannot transfer them without authorization from Venezuela. The argument of the Respondent stating that there is no restriction for Companies to declare dividends is tricky, since it is not the same to have a loan to receive a dividend in an uncertain future, than

[326] Memorial, ¶ 188, quoting *Tecmed v. Mexico*, ¶ 115.
[327] Memorial, ¶ 190.
[328] Memorial, ¶ 191 and Brief ¶ 238.
[329] Brief, ¶ 238.
[330] Memorial, ¶ 192.
[331] Brief, ¶ 240.
[332] Hearing, Day 1, Tr. 82:19-83:14.

to receive the dividend itself [333]. Third, the Claimants indicate that paying dividends would alter the assets of the Company, which is prohibited by Decree No. 7.934 and the seizure and special administration measures. Furthermore, the accounts of the Companies are frozen and withdrawls could only be made with the authorization of the special administrators. According to the Claimants, "it would be naive to believe that they would authorize the Claimants to make millionaire payments of dividends." [334] Finally, they state that, for the payment of dividends, the Venezuelan law requires the presentation of a certified copy of the meetings' minutes approving such payment. As the registration of the act is prohibited, the dividends approvals could not be paid[335].

307. Finally, the Claimants indicate that Venezuela's argument that Companies cannot have a zero value inasmuch they exist, continue to operate and are profitable and have a surplus, is irrelevant, inasmuch *"companies continue to operate, but for the benefit of the Republic - not for the benefit of their formal shareholders"*[336]. In effect, Claimants cannot receive dividends from their investments in the Companies and all the assets and rights subject to Decree No. 7.934, including financial assets, *"will be transferred, free of encumbrances or limitations in favor of the Republic"*[337].

308. *Third*, the Claimants argue that the measures adopted by Venezuela are permanent and not merely temporary, as the Respondent argues.

309. On the one hand, they claim that Decree No. 7.934 has permanent and irreversible effects, inasmuch it affects all of the Company's assets and obliges its owners to transfer, on a definitive manner, said assets to Venezuela and it, likewise, obliges Venezuela to acquire them[338]. The Claimants state that Respondent's argument that Decree No. 7.394 is not irreversible given that the process is suspended for the parties to negotiate an amicably settlement is fallacious, inasmuch, on the one hand, the negotiations have not continued and, for the other, the suspension of the expropriation process does not imply the cessation of the effects of the Decree[339].

310. Likewise, they also note that Venezuela's analysis of the dissolution of the Liaison Commission is superficial, since it fails to mention that two of its main members are special administrators under the Administrative Ordinance and continue to exercise essentially the same functions which they performed in the Liaison Commission[340].

311. On the other hand, the Claimants argue that *"the extensive duration of the seizure and special administration measures and the state of the appeal filed, vis-à-vis, said measures demonstrate that the measures adopted by the Republic are not temporary"*[341]. The Claimants argue that the doctrine recognizes that the extensive duration of the measures is a factor confirming the existence of an indirect expropriation[342]. According to the Claimants, a measure ceases to be temporary when an objective observer would conclude that there is no immediate possibility for the owner to recover the enjoyment of its investments[343].

312. In the case at hand, an objective observer would conclude that the measures are not merely

[333] Hearing, Day 1, Tr. 83:15-84:10
[334] Hearing, Day 1, Tr. 84:19-85:
[335] Audiencia, Día 1, Tr. 85:4-13.
[336] Brief, ¶ 241
[337] *Id.*
[338] Hearing, Day 1, Tr. 87:8-18. *See also*, Brief, ¶ 245.
[339] Hearing, Day 1, Tr. 87:19-88:11.
[340] Brief, ¶ 246.
[341] Brief, ¶ 247.
[342] Brief, ¶ 248.
[343] Hearing, Day 1, Tr. 89:14-17. *See also*, Brief, ¶ 251

transient or temporary, inasmuch (i) the Respondent implemented the special administration in December 2009, after President Chávez ordered the occupation of the companies allegedly owned by Mr. Fernández Barrueco "*to convert them into socialist companies*"; (ii) the legal basis of the special administration over the Companies (Article 22 of the *Ley contra la Delincuencia Organizada*) applies to seized or confiscated property, which, under Venezuelan law, means that such property has become the State's property; (iii) several state officials and entities have confirmed that the Companies "*were acquired by the State*", "*are owned by the Bolivarian Government*" and were "*recovered*"; and (iv) Venezuela has preserved the measures in an irregular manner and has even refused to decide whether or not to accept the appeal filed more than four years ago by the Claimants, *vis-à-vis*, the decision confirming said measures, and there is no evidence to reasonably conclude that the appeal will be resolved in the short or mid-term[344].

313. Contrary to Venezuela's arguments, the Claimants state that, if it is concluded that they did not include an expropriation claim in their Request for Arbitration, this does not constitute an admission or recognition regarding the non-existence of an expropriation[345]. The argument of the Respondent undermines the nature and function of the reservation of rights, insofar it would lead to the conclusion that its effect is to preclude a claim, instead of preserving it[346].

314. In any event, the Claimants note that (i) they formally notified the existence of an expropriation claim under Article V of the BIT from their Dispute Notice, and (ii) in April 2013, also prior to the Request for Arbitration, Gruma publicly announce the de-consolidation of the Companies' operations as a result of the Administrative Ordinance[347]. According to the Claimants, the foregoing evidences that: (i) the measures adopted by Venezuela did have "sufficient grounds" to be presented in the arbitration; (ii) there was already an expropriation claim formally notified under the BIT, and (iii) the Claimants reserved the right to file such claim later as they did in fact[348].

315. *Finally*, the Claimants argue that Venezuela not only indirectly expropriated its investments, but that it has also subjected them to an illegal expropriation process[349]. According to the Claimants, the expropriation of their investments is illegal under the BIT inasmuch (i) it was made without compensating the Claimants; (ii) it was contrary to the legal provisions governing expropriation under Venezuelan law, and (iii) it was discriminatory[350].

316. With respect to the first point, the Claimants state that, in the event of expropriation, the BIT demands the payment of a prompt, adequate and effective compensation. It also establishes that the compensation must be "e*quivalent to the real value of the investment immediately before the measures were taken or before they were announced or published, if this occurs prior [to the expropriation.*]"[351] According to the Claimants, "*the real value of the investment*" referred to by the BIT is equivalent to its fair market value[352].

317. Although it has been more than five years since Venezuela issued Decree No. 7.934 and imposed the seizure and special administration measures, the Respondent has not compensated the Claimants in any manner, nor has it paid the fair market value of the Companies nor has it offered a credible justification or explanation regarding the delay in the payment of the compensation

[344] Brief, ¶¶ 247 y 251.
[345] Brief, ¶ 260.
[346] Brief, ¶¶ 253-256.
[347] Brief, ¶¶ 257-258.
[348] Brief, ¶ 259.
[349] Brief, ¶ 261.
[350] Memorial, ¶ 195.
[351] Memorial, ¶ 196, quoting Article V(2) of the Treaty.
[352] Memorial, ¶ 196.

thereof[353]. This lack of payment, by itself, makes the expropriation carried out by Venezuela, illegal[354].

318. The Claimants point out that Respondent's argument, according to which the existence of a negotiation process would comply with the requirement of legality, ignores the fact that Venezuela has repeatedly hampered the Claimants' attempts to resolve the dispute and has preferred to maintain the status quo instead of negotiating in good faith, thus avoiding having to pay compensation to the Claimants[355].

319. According to the Claimants, the facts would show that Venezuela has not had a real will to negotiate an amicable settlement regarding the expropriation of the Companies and has even acted in bad faith throughout the process[356]. Particularly, the fact that the Respondent ignored all the sale proposals made by the Claimants as per Venezuela's request, and that the latter would have never submitted a counterproposal and it would have not made an offer based on an available valuation for more than three years. Therefore, it would be valid to conclude that Respondent has not negotiated in good faith, in accordance with the standards followed by the tribunals of *ConocoPhillips v. Venezuela* and *Venezuela Holdings v. Venezuela*[357].

320. With respect to the second point, the Claimants allege that under Venezuelan law the State cannot occupy the assets of the company subject to expropriation without first obtaining a final judgment from a competent judge and paying a fair compensation thereof [358]. Respondent contravened this provision by imposing the Liaison Commission - which, contrary to Venezuela's arguments, was never agreed by Claimants - and the special administration over the Companies[359]. They also argue that the expropriation process was unilaterally suspended by Venezuela to maintain the *status quo* in an irregular and indefinite manner, to Claimants' detriment[360]. In this regard, they argue that although the Venezuelan law does not establish a term for the direct settlement phase, it cannot be used to "indefinitely perpetuate" an injurious status of Claimants' property rights[361].

321. With respect to the third point, the Claimants argue that the expropriation was discriminatory inasmuch Venezuela has treated other food companies similar to the Companies in a different way - including Alimentos Polar, C.A. and Cargill Venezuela, C.A.- who also compete in the Venezuelan wheat and corn flour market. In fact, the Venezuelan State has not issued an expropriation decree with respect to such companies obligating them to forcefully sell all of their assets - but only a few of their assets - for the execution of the "*Socialist Agroindustrial Processing Capacity Consolidation for the Venezuela of the XXI century* " program or any other public program[362]. On the contrary, the Respondent has benefited other companies to the detriment of the Companies by ordering Monaca and Demaseca to transfer corn to them[363].

322. Finally, and contrary to Venezuela's arguments, the Claimants affirm that any violation of the Venezuelan legal system regarding expropriation constitutes, in turn, a violation of the BIT[364]. Likewise, they also state that the Treaty does not require exhausting domestic remedies or filing

[353] Memorial, ¶ 197 and Brief, ¶ 269.
[354] Memorial, ¶ 197.
[355] Brief, ¶ 268.
[356] Brief, ¶ 270.
[357] Brief, ¶¶ 271-272.
[358] Memorial, ¶ 198.
[359] Memorial, ¶ 199 y Brief, ¶ 279.
[360] Brief, ¶ 277; Hearing, Day 1, Tr. 15:8-12.
[361] Brief, ¶ 278.
[362] Brief, ¶¶ 282-283.
[363] Memorial, ¶ 202.
[364] Brief, ¶ 280.

claims before domestic courts. In this case, the Claimants opted to resort to an ICSID arbitration, inasmuch going to the Venezuelan courts would be useless, as evidenced by the *third-party proceeding (incidente de tercerías)*[365].

323. In summary, the Claimants allege that Venezuela progressively expropriated its investments in the Companies through a series of permanent and irreversible measures which had the effect of depriving control of the Claimants on their investments and destroying their value. Moreover, this expropriation measures are illegal since they do not comply with the requirements set forth in the BIT.

2. Respondent's position

324. The Respondent denies that there has been a direct or indirect expropriation of Claimants' investments. On the contrary, it maintains that the owners of Monaca and Demaseca hold the ownership and control of the Companies and that the corresponding measures have not caused a significant reduction or loss in the value of their investments[366].

325. As an introductory manner, Venezuela states that the Claimants intentionally confuse the expropriation procedure initiated by Venezuela - which was suspended before the expropriation took effect -, on one hand, and the measures adopted in the context of the criminal proceeding, *vis-à-vis*, Mr. Fernández Barrueco - which are of a precautionary and temporary nature.-, on the other[367]. However, these are completely different and independent procedures and none of them has resulted in expropriation[368].

326. Respondent also questions Claimants' argument that the Administrative Ordinance was the culminating point of the alleged creeping expropriation. The Administrative Ordinance was issued before the Claimants filed their Request for Arbitration. Therefore, the Claimants should have included an expropriation claim in their Request for Arbitration; however, they did not. On the contrary, the Claimants reserved the right to submit additional claims in the event that Venezuela "*otherwise seizes the investments of the Claimants, or takes or continues to take interference measures on such investments*"[369]. The foregoing would evidence the lack of support for the expropriation claim now argued by the Claimants.

327. According to Venezuela, the Claimants have not evidenced that an expropriation occurred on their respective investments, inasmuch the measures: (i) are not permanent nor have irreversible consequences; (ii) they have neither resulted in the deprivation of their property, nor in the total reduction of the value of their investment, nor in the loss of control of their investment; and (iii) cumulatively and gradually have not led to the effective denial of the owner's interest on its property[370].

328. *First*, Respondent argues that, for the invoked measures to constitute expropriation, they must be definitive and permanent[371]. According to Venezuela, none of the measures alleged by the Claimants meet such features.

329. Respondent argues that the seizure measures issued within the framework of the criminal

[365] Brief, ¶ 281
[366] Counter Memorial, ¶ 284.
[367] Counter Memorial, ¶ 285.
[368] Counter Memorial, ¶ 286.
[369] Counter Memorial, ¶ 292.
[370] Counter Memorial, ¶ 296.
[371] Counter Memorial, ¶¶ 297-299. To Support this argument, Venezuela makes references to de decisions of the tribunals in *Tecmed v. Mexico*, *SD Meyers v. Canada*, y *LG&E v. Argentina*, among others.

proceeding, *vis-à-vis*, Fernández Barrueco are precautionary measures which, by definition, are provisional and temporary. It also explains that the seizure measures follow the fate of the criminal process, and could be modified, revoked or annulled by the competent authority *motu proprio* or at per the request of the interested party[372].

330. With respect to the Iran-United States Claims Tribunal cases cited by the Claimants, Venezuela notes that these cases are substantially different from the case at hand, given that in those cases, the government administration was established by law to replace the administrators and there was no realistic perspective of investors regaining control of their investment[373].

331. Regarding the duration of the measures, the Respondent states that the Court must consider the circumstances of the case at hand. In this case, the Court must consider that the measures issued by the criminal judge (i) are reasonable and procedurally justified; (ii) they directly depend on the fate of the criminal process; (iii) its control is in charge of an independent judicial authority, and (iv) the reasonableness of its duration must be analyzed in the context of the Venezuelan judicial system and with respect to its objective of protecting [Venezuela] against organized crime and terrorism[374].

332. With respect to Decree No. 7.394, Venezuela alleges that the Liaison Commission, established within the framework of the expropriation process, was also temporary, as confirmed by the fact that it was dissolved in September 2013[375].

333. *Second*, Venezuela asserts that the Claimants have not evidenced that the measures have reached the high investment threshold established by the law and jurisprudence to demonstrate that they have an expropriation effect[376].

334. According to Venezuela, international jurisprudence agrees that *"a measure amounts to an expropriation if the claimant was substantially or radically deprived from the economic use and enjoyment of its investments or if its investment has been effectively neutralized, in whole or in its entirety"*[377]. In that sense, the Claimants must evidence that the measure destroyed either all or practically all, the economic value of the investment, or interfered with or limited it to such a degree as to conclude that the property was taken from the owner[378].

335. In such regard, Venezuela argues that the mere decrease in the value of the investment or of the profits is insufficient to support the existence of an indirect expropriation[379]. Similarly, there would be no expropriation if, despite experiencing a decrease in profits, the company's business remains operational[380]. It also states that for the loss of control of an investment to be considered an expropriation, the investor should not be allowed to use or dispose of his investment[381].

336. In this case, the Claimants have neither proved that their shares have lost all their value as a result of the measures adopted by Venezuela, nor that a "hypothetical voluntary buyer" would grant a zero value to the shares[382].

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372 Counter Memorial, ¶¶ 300-301.
373 Rejoinder, ¶¶ 378 y 390.
374 Rejoinder, ¶ 389.
375 Counter Memorial, ¶ 302.
376 Counter Memorial, ¶ 304.
377 Counter Memorial, ¶ 306, citations omitted.
378 Counter Memorial, ¶ 308.
379 Counter Memorial, ¶ 309.
380 Counter Memorial, ¶ 312, haciendo referencia a los laudos de *Grand River v. United States* and *LG&E v. Argentina.*
381 Counter Memorial, ¶ 313.
382 Counter Memorial, ¶ 319.

337. Venezuela denies that the seizure measures have caused a loss of Claimants' rights as shareholders of the Companies; and it argues that, even if there had been a loss of rights and benefits, this would not entail the total loss of the shares' value[383].

338. In effect, the Claimants have not even proved that the measures have had a negative impact or have diminished the value of their investment. On the contrary, as of 2010 the utilization levels of the Companies increased, to the point that, to the Valuation Date, their performance was higher than they had before the implementation of Decree No. 7.394 and the seizure and special administration measures[384]. Likewise, in its 2012 Annual Report, Gruma acknowledged not having identified any indication of impairment in the value of its net investment in the Companies, so that even a decrease in the value of the investment would be ruled out[385].

339. Venezuela notes that the Claimants have not evidenced that they have been deprived of the economic benefit of their investment. On the contrary, the Companies have remained operative and ongoing, and continue to produce profits which have been used in the ordinary course of business[386].

340. With respect to the reasons that, according to the Claimants, would lead to the conclusion that their shares in the Companies have no value, Venezuela states the following:

341. First, it is untrue that Decree No. 7.394 prevents the distribution of dividends in the Companies. The Decree only concerns to the necessary goods for the production, storage and distribution of food and, hence, excludes the profits that corporate governance bodies would have allocated for other purposes[387]. Regarding the alleged restriction to carry out corporate acts arising from the seizure measures, Venezuela notes that the Claimants have not requested authorization from a judge for the registration of certain acts nor they object that such possibility exists. Similarly, the Claimants have failed to demonstrate that the failure to register a specific act "*would have prevented the execution of their eventual resolution to distribute dividends*"[388].

342. Second, it is "more than evident" that a company dedicated to the production of food in Venezuela shall comply with the country's food policies, which is why the Claimants argument stating that the Companies' ability to generate profits, investing or divesting in a manner maximizing its net present value would be limited for this reason should be disregarded[389]. In this regard, the Respondent refers to the *Ley de Seguridad y Soberania Agroalimentaria.*

343. Third, expropriation process is suspended to allow the Parties to seek a consensual solution, other than expropriation, so it is untrue that the goods and rights subject to Decree No. 7.394 would necessarily be transferred to the Respondent's assets as a result of the process[390].

344. Finally, Venezuela indicates that the Claimants have not evidenced that the Venezuelan State has received any benefit or profits from the Companies, so their argument stating that the companies are still in operation, but for the benefit of the Respondent, is groundless[391].

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[383] Counter Memorial, ¶¶ 320-321.
[384] Counter Memorial, ¶ 321; Rejoinder, ¶ 398.
[385] Rejoinder, ¶ 397, quoting the GRUMA 2012 Annual Report, 2012, p. 117 (Annex R-053).
[386] Counter Memorial, ¶¶ 324-325.
[387] Rejoinder, ¶ 400
[388] Rejoinder, ¶ 401.
[389] Rejoinder, ¶¶ 402-403.
[390] Rejoinder, ¶¶ 404 y 407.
[391] Rejoinder, ¶ 405.

345. Respondent also denies that the Claimants have lost control on their investment. It argues that, on the contrary, they have always maintained the daily management and control of the Companies, which continue producing and distributing their products[392].

346. Specifically, Venezuela asserts that the Claimants have not established, for each of the facts allegedly demonstrating that they have lost control over the Companies, "*if such interference [in business activities] is sufficiently restrictive to support the conclusion that the property has been 'taken' from its owner*"[393]. In this regard, Venezuela explains the following:

347. First, the special administrators have not taken out Claimants' control over the Companies, they have not replaced the administration and management of the Companies, they have not interfered with the Companies' operations or displaced the Claimants from their Companies. Shareholder position. On the contrary, the Companies' representatives have kept their offices and no action taken by, or attributable to, Venezuela has ignored or prevented the statutory bodies of the Companies from exercising their functions[394].

348. The special administration has conservatory and temporary administration, supervisory and custody features to prevent corporate assets from unduly deteriorating. None of the resolutions by means of which the special administrators have been appointed, including the Administrative Ordinance, have granted them management or administration authorities over the Companies[395].

349. Furthermore, the Claimants have not indicated *"[not even] a single case in which the special administrators have undertaken management authorities or have unauthorized management acts carried out by the managers appointed by Gruma; thus, it can be said that the statutory bodies have remained permanently or have been completely displaced or subjected to executing foreign decisions*"[396].

350. Second, it is not true that, in consequence of the seizure measures, the Claimants would not have been able to freely transfer their shares, receive dividends, appoint new board members, approve balance sheets and financial statements, decide on the sale of assets or amend the Companies' bylaws[397].

351. No legal provision or judicial or administrative order, including Decree No. 7.394 nor the seizure measures, has prohibited or prevented the performance of the corporate acts referred to by the Claimants. In fact, the acts not contrary, *vis-à-vis*, the objective of preserving the integrity of the Companies' estate, should not be understood included within the prohibition to transfer assets subject to registration; and, in any case, the interested party may request authorization from the judge who issued the measure in order carry out such acts[398].

352. In the case at hand, the Claimants have not evidenced the existence of corporate acts whose effectiveness would have been limited by the seizure measures and have not evidenced that any request for judicial authorization to register or certify a specific act had been submitted and denied[399]. Specifically, Venezuela emphasizes that the Claimants have not evidenced that they had attempted to declare and distribute dividends nor to request a judicial authorization to register

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[392] Counter Memorial, ¶¶ 328-329.
[393] Counter Memorial, ¶ 332, quoting *Pope & Talbot v. Canada*, ¶ 102 [Respondent's translation].
[394] Counter Memorial, ¶¶ 330-331; Rejoinder, ¶ 354
[395] Counter Memorial, ¶¶ 333-335; Rejoinder, ¶¶ 352-353.
[396] Audiencia, Día 1, Tr. 217:2-18.
[397] Rejoinder, ¶ 355
[398] Rejoinder, ¶ 356; Counter Memorial, ¶ 336.
[399] Rejoinder, ¶ 356.

any act related therewith[400]. There is also no evidence that the measures have prevented the Claimants from selling their shares in the Companies[401].

353. Third, it is untrue that the special administration is an institution exclusively applicable to property that, due to seizure or confiscation, has become the State's property. In Venezuela, the criminal judge has broad powers to issue complementary precautionary measures that best meet the security objective pursued. It was in use of these powers that the judge decided to apply the of the special administration figure to the Companies, without implying that there was property seizure or confiscation[402].

354. Fourth, it is also untrue that the Liaison Commission and the administrators had invaded or occupied the offices and facilities of the Companies. The Liaison Commission has used the offices with Gruma's consent and the special administrators never had a permanent physical presence at the Companies' plants[403]. Expropriation by "occupation" occurs when the State substitutes, replaces or physically expels the owner of the property to which it was the owner; which situation has not occurred in the case at hand[404].

355. Respondent also establishes that, almost two years after the alleged occupation, Gruma stated the following in its Annual Report, dated April 30, 2012:

> "The Venezuelan government has not taken physical control on MONACA's or DEMASECA's assets, nor has it taken control of their operations. Consequently, GRUMA can validly and legally affirm that, to date, Valores Mundiales and Consorcio Andino have full legal ownership over the rights, interests, shares and assets of MONACA and DEMASECA, respectively, and that they also have complete control on all types of decisions, operations and directives in [the Companies]"[405].

356. Fifth, the requests for information made by the Liaison Commission and the administrators have been necessary for these agencies to perform their duties, and do not constitute or imply a loss of control[406].

357. Sixth, the redirection of corn is legally permitted for agri-food safety reasons; it is also done between private companies and is a common practice in the industry[407].

358. Seventh, the payment of fees to the Liaison Commission members was agreed with Monaca's representatives and their compensation was made in accordance with Venezuelan law. Further, the special administrators receive an amount in bolivars from Monaca as a right (*dieta*), different from the one indicated by Engr. Huerta[408].

359. In summary, Venezuela argues that neither the seizure measures arising from the criminal proceedings, *vis-à-vis*, Fernández Barrueco nor the activities deployed by the Liaison Commission under Decree No. 7.394 have directly or indirectly interfered in the internal operations of the

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[400] Rejoinder, ¶ 484.
[401] Rejoinder, ¶ 303.
[402] Rejoinder, ¶¶ 348-349.
[403] Counter Memorial, ¶ 338.
[404] Hearing, Day 1, Tr. 204:6:18.
[405] Rejoinder, ¶ 221, quoting the GRUMA 2011 Annual Report, 2011, April 30, 2012, p. 15 (Annex R-059). *See also*, Hearing, Day 1, Tr. 205:4-17.
[406] Counter Memorial, ¶ 337.
[407] Counter Memorial, ¶ 339.
[408] Counter Memorial, ¶ 340.

Companies, nor have they affected, in any manner, the property and administration rights of the Companies. On the contrary, the Companies "*continue to be profitable and to have a surplus, and are in operation, under GRUMA's control.*"[409]

360. *Third*, Venezuela states that the Claimants have not complied with their burden of evidencing how Decree No. 7.394, the seizure measures and the Administrative Ordinance have had the impact of an expropriation[410]. Specifically, it alleges that the Claimants "*have failed to carry out a coherent, concatenated and causal analysis of the measures they complain about to justify the* [sic] *existence of a* [sic] *'creeping expropriation'*"[411].

361. Contrary to Claimants' arguments, Decree No. 7394 and the seizure measures are completely different and independent from each other. The Decree and the seizure measures have a different origin and objective, different recipients and do not respond to a coordinated plan or pattern[412]. In effect, it would not make sense to use precautionary measures, since the alleged purpose of expropriating the Companies could be achieved with the issuance of Decree No. 7.394 and the implementation of the expropriation process[413].

362. Respondent states that, between the expropriation process and the precautionary measures there is a mere chronological relationship rather than the cause-effect relationship attributed to them by the Claimants. The Claimants have neither evidenced that the measures are concatenated nor that they have resulted in substantial interference with their business activities[414].

363. On the other hand, Venezuela argues that if the Administrative Ordinance, Decree No. 7394 or the seizure measures were to had the expropriation effects now attributed to them by the Claimants, then they would have filed an expropriation claim with their Request for Arbitration[415]. In the words of Venezuela, the fact that the Claimants had not included an expropriation claim in the Request for Arbitration - when the Administrative Ordinance already existed - shows that this claim has no legal and factual grounds and, furthermore, that the Valuation Date of the alleged expropriation, from the day prior to the publication of the Administrative Ordinance, is arbitrary[416].

364. *Fourth*, Venezuela arguments that Decree No. 7.394 has not resulted in expropriation of Claimants' investments in the Companies. The Respondent asserts that the Decree "*has not had the effect of depriving the holders of the ownership of the assets or preventing the owners from transferring them*" and explains that, pursuant to Article 5 of the Decree, the transfer of the ownership right on all the assets would only occur with the completion of the expropriation process set forth in the law. The procedure has not been completed, since it is suspended at the request of the Claimants[417]. In any event, the process has complied with Article V of the BIT and Venezuelan law.

365. According to Venezuela, the BIT does not prohibit expropriation, but rather regulates the manner of exercising the right to expropriate or nationalize[418]. Respondent alleges that, although there has been no expropriation, the process initiated by Decree No. 7.394 fully complies with the requirements of the BIT and Venezuelan law, for the following reasons:

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[409] Counter Memorial, ¶¶ 341-342.
[410] Counter Memorial, ¶ 343.
[411] Counter Memorial, ¶ 345.
[412] Counter Memorial, ¶¶ 286 and 347.
[413] Rejoinder, ¶ 345.
[414] Memorial de Contestación, ¶ 347.
[415] Memorial de Contestación, ¶ 291.
[416] Memorial de Contestación, ¶ 294.
[417] Rejoinder, ¶¶ 358-359 y ¶ 375.
[418] Counter Memorial, ¶ 349.

366. First, the Decree No. 7.394 is based on a public utility or social interest purpose, established in Venezuelan law and protected by the Constitution, since its objective is the "*availability and timely access to quality food and in sufficient quantity to the population*"[419].

367. Second, Venezuela has complied with the fundamental due process rules under international law and Venezuelan law, since (i) the Claimants received a notification prior the expropriation in accordance with Venezuelan law; (ii) they have been entitled to be heard during the multiple negotiations between the Parties; and (iii) they have had the possibility of submitting the decisions affecting them to a jurisdictional court to enforce their rights.

368. Furthermore, the expropriation process is suspended in the administrative phase and the amicably settlement phase remains open without the expropriation having taken place[420]. In fact, after submitting its Request for Arbitration, the Claimants represented that negotiations with the Venezuelan government were ongoing[421]. Regarding the Liaison Commission, it is incomprehensible that the Claimants label it as illegal when they, themselves, agreed to its creation[422].

369. Third, the process has not been a discriminatory process, inasmuch Venezuela has issued 24 expropriation decrees with respect to other food companies under the *Ley de Seguridad y Soberanía Alimentaria*, for the execution of a specific work for each of them[423]. Moreover, the Claimants have not demonstrated compliance with international law requirements to evidence the alleged discrimination, namely, (i) that the Companies are in similar circumstances to other companies; (ii) that these companies have received less severe treatment; (iii) that they were discriminated because of their nationality or another category protected by international law, or that the Decree No. 7.394 unreasonable[424].

370. With respect to Demaseca, Venezuela clarifies that Decree No. 7394 does not affect such company and that it is not subject to any expropriation process. In effect, the Decree solely mentions Monaca and its assets. Demaseca is a legal entity completely different from Monaca and it is inadmissible pretending that it should be considered as a property of the latter for the simple fact that both share industrial facilities[425]. According to Respondent, the decision to include Demaseca within the valuation process was taken by mutual agreement between the Parties, and does not imply that it is subject to an expropriation process[426].

371. *Fifth*, Respondent argues that even if during the expropriation process of Monaca there had been some illegality or breach of formal requirements required by Venezuelan law, such non-compliance does not constitute an international illegality[427].

372. Based on the decisions of the tribunals of *Feldman v. Mexico, Generation Ukraine v. Ukraine* and *EnCana v. Ecuador*, Venezuela argues that "*an expropriation cannot be considered illegal from the international law point of view, when the investor intentionally ignores the remedies that local law has in place to solve and correct the violations argued by the investor*"[428]. This omission

[419] Counter Memorial, ¶ 353; Rejoinder, ¶ 411.
[420] Counter Memorial, ¶¶ 354-355.
[421] Hearing, Day 1, Tr. 156:8:257:9
[422] Hearing, Day 1, Tr. 154:20-155:17
[423] Counter Memorial, ¶ 358 y Rejoinder, ¶ 416.
[424] Rejoinder, ¶ 414.
[425] Rejoinder, ¶ 360
[426] Counter Memorial, ¶¶ 362-363; Rejoinder, ¶ 457.
[427] Rejoinder, ¶¶ 444-454.
[428] Counter Memorial, ¶¶ 368-373.

would result in the disqualification of the corresponding claim and would demonstrate the negligence, lack of seriousness and credibility of the Claimants' argument[429].

373. In the case at hand, the Claimants had at their disposal all applicable domestic remedies. Through using such remedies the Claimants would have been able to overcome the alleged violations they now argue, including the alleged delay in concluding the negotiations and its harmful effects. However, the Claimants decided not to use such remedies[430]. Consequently, they cannot now claim that an expropriation took place under the BIT[431].

374. To contradict this Claimants' argument, Venezuela states that the subjective assessments of an investor regarding the possibility to use domestic remedies are insufficient to justify their omission. Moreover, the Claimants have not evidenced the alleged irregularities in the third party proceeding (*incidente de tercerías*)and have not demonstrated that there is a connection between such irregularities and the domestic remedies that they could have used to address their situation[432].

375. *Finally*, Venezuela argues that, insofar an expropriation has not yet taken place, the obligation to pay by the Respondent and the corresponding right of the Claimants to receive a compensation thereof, has not arisen. In other words, Claimants' claim for compensation is groundless.

376. In this regard, the Respondent reiterates, on one hand, that the expropriation process is suspended and that, even after the commencement of the arbitration, the Parties have continue discussing in order to agree on the fair price or to achieve some other type of amicable settlement, different to expropriation[433]. On the other hand, it argues that, in the event of an indirect expropriation claim, there would be no obligation to compensate without the court having previously resolved that, in effect, such expropriation took place[434].

377. Respondent also alleges that, even in the event of an expropriation, the lack of payment of the compensation does not in itself constitute an international law violation. Citing the tribunals of *ConocoPhillips v. Venezuela* and *Venezuela Holdings v. Venezuela, inter alia*, the Respondent maintains that the negotiation process meets the requirement of legality[435]. In the case at hand, the Parties began negotiations shortly after the issuance of Decree No. 7.394 and, in this context, Venezuela has made and discussed proposals and generated discussions regarding the valuation of the Companies[436].

378. In summary, Venezuela submits that there has been no expropriation of the Claimants' investments since: (i) the Claimants have not been deprived of their investment in the Companies; (ii) the seizure measures ordered by a judge in the framework of the criminal proceeding, *vis-à-vis*, Fernández Barrueco are temporary and may be rendered null and void; and (iii) the Parties are in an amicably settlement phase and Decree No. 7.394 has not resulted in the expropriation of the Companies[437].

3. Analysis of the Tribunal

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[429] Rejoinder, ¶ 424.
[430] Counter Memorial, ¶¶ 364-366; Rejoinder, ¶¶ 423-424.
[431] Rejoinder, ¶ 424.
[432] Rejoinder, ¶¶ 451-452.
[433] Counter Memorial, ¶¶ 374-376.; Rejoinder, ¶¶ 429-434.
[434] Rejoinder, ¶¶ 435-436.
[435] Counter Memorial, ¶¶ 377-379.
[436] Counter Memorial, ¶¶ 380-382.
[437] Counter Memorial, ¶ 384.

379. Claimants allege that Venezuela expropriated their investments in breach of Article V of the BIT. Expropriation would have occurred progressively through a series of measures that, cumulatively, have "features and effects equivalent" to an expropriation[438]. These measures are (i) the seizure and special administration measures arising from the criminal proceedings against Mr. Fernández Barrueco – including the SAREN and SUDEBAN circulars -; (ii) Decree No. 7.394 and the imposition of the Liaison Commission; and (iii) the Administrative Ordinance that, according to the Claimants, is the "climax" of the expropriation.[439]

380. Claimants contend that these measures are intrinsically related[440] and that, accordingly, they have lost *de iure* control of the Companies and the value of their shares is "virtually zero".[441] They also argue that the expropriation was unlawful because it failed to abide by the terms of the Treaty. In particular, they allege that they have not received compensation, that the expropriation was contrary to Venezuelan law and that it was discriminatory.[442]

381. Venezuela rejects Claimants' allegations and explains that the seizure and special administration measures – including the Administrative Ordinance, and Decree No. 7.394 are completely different and independent procedures, and that none of these measures, individually or cumulatively considered, has resulted in a total or substantial loss of Claimants' control over their investments or destroyed their value. In addition, Respondent holds that the request for compensation is without cause because there has been no expropriation and that, in any event, the expropriation process has complied with the requirements under Venezuelan and international law.

382. As a starting point, the Tribunal notes that Claimants have not alleged that Venezuela directly expropriated their investments in the country.[443] Their argument has focused on demonstrating that the measures imposed by Venezuela are an indirect expropriation that occurred progressively.[444] It further notes that the focus of the Claimants' expropriation allegation seeks to demonstrate that it lost control of the Companies and that its investment therein is "worth zero". Therefore, the Tribunal shall examine, on the basis of the factual and legal arguments put forward by the Parties in this arbitration, whether Venezuela subjected Claimants' investments to an indirect expropriation in breach of Article V of the BIT and whether the foregoing items proposed by Claimants have been demonstrated.

383. The Tribunal shall begin by establishing the standard of indirect expropriation under the Treaty and, in particular, that of creeping expropriation.

384. Article V of the BIT provides that *"investments [...] shall not be subject to nationalizations, expropriations, or any other measure of similar features or effects* [...][445]. Claimants allege – and Venezuela does not reject- that the highlighted expression corresponds to the concept of "indirect expropriation" which, unlike direct expropriation, does not entail a formal transfer of title to the affected goods or rights.[446] It is not disputed then that the BIT covers indirect expropriations.

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[438] Memorial, ¶ 176.
[439] Memorial, ¶107.
[440] *See* Brief, §, B.
[441] Memorial, ¶ 171.
[442] Memorial, § IV, B, 2.
[443] *See, for example,* Memorial ¶ 171 *("While Claimants still retain formal ownership of their shares in MONACA and DEMASECA, Claimants have lost de jure control of those companies and the value of their shares in those companies is practically zero as a result of the measures imposed by the Republic. Respondent's actions, therefore, amount to an indirect expropriation of its investments".* [emphasis added]). Venezuela also points out that Claimants have not expressly alleged that there is a direct expropriation. *See also* Counter memorial, ¶ 348; Rejoinder, ¶ 92; Hearing, Day 1, 186:18-187:3.
[444] Memorial, ¶ 176.
[445] Treaty, Article V (Exhibit C-3) [emphasis added].
[446] *See* Memorial, ¶ 173; Counter memorial, ¶¶ 295 and 495.

385. With respect to the applicable standard, Claimants note that *"the fundamental characteristic of indirect expropriation is the adverse effect that the measure has on the use, exploitation and enjoyment inherent in the investor's property right"*.[447] However, Claimants themselves specify that the adverse effect is not sufficient, but that there must be a "substantial deprivation" of the investor's use, exploitation and enjoyment of its investment.[448] In this sense, they maintain that there is expropriation if the investor is totally or significantly deprived of the ownership or effective control of its investment, or if the investment is totally or significantly deprived of its value.[449]

386. Respondent states that *"a measure amounts to an expropriation if the claimant was substantially or radically deprived of the economic use and enjoyment of its investments or if the investment has been effectively neutralized, in its entirety or almost in its entirety"*.[450] Respondent also points out that the expropriation measures must be definitive or permanent.[451]

387. Venezuela concedes that the loss of control could amount to an expropriation; however, it specifies that for this to be the case, the investor should not be allowed to use or dispose of its investment.[452] In order for there to be an expropriation for the loss of value of the investment, Respondent submits that the claimant must prove that the measure destroyed all, or virtually all, the economic value of the investment.[453]

388. In relation to creeping expropriation, Claimants explain that it *"entails a gradual but cumulative invasion of property rights to the point where the measures at issue lead to the effective denial of the owner's interest in its property"*.[454] Venezuela adds that a creeping expropriation claim requires the claimant to present a *"coherent, concatenated and causal analysis of the measures of which they complain"*.[455] Namely, that it demonstrates that the measures are related and respond to a pattern of conduct of the State. Claimants do not contest this standard and insist that the Decree and the seizure and special administration measures are indisputably related.[456]

389. The Tribunal notes that the Parties seem to agree on several aspects of the standard applicable to an indirect expropriation.[457] The underlying principle of their propositions is that a measure or series of measures attributable to a State constitutes an expropriation if it entails total or substantial deprivation of the investor's essential property rights over its investment, in particular its economic use and enjoyment. The Parties also seem to agree that expropriation would occur if the investor is wholly or significantly deprived from the ownership or effective control of its investment, or if the investment is totally or significantly deprived of its value.

390. The Tribunal considers that, in the context of an indirect expropriation, the deprivation of those fundamental rights musts be of such magnitude that the Tribunal concludes that maintaining the title to the investment does not represent any benefit to the investor. Only in such scenario, and considering all the circumstances of the case, could the measure or measures at issue be considered

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[447] Memorial, ¶ 173.
[448] *See* Memorial, ¶ 182.
[449] See Memorial, ¶¶ 182-183; Hearing, Tr. 1, 68:15-69:1. *("The parties to this arbitration agree that an indirect expropriation occurs when a State substantially deprives an investor of the economic benefits of its investment. They also agree that substantial deprivation occurs when the investor loses effective control of its investment or the investment significantly losses its value as a result of State measures").*
[450] Counter memorial, ¶ 306.
[451] Counter memorial, ¶ 297.
[452] Counter memorial, ¶ 313.
[453] Counter memorial, ¶ 308.
[454] Memorial, ¶ 175, making reference to UNCTAD, World Investment Report (2003) (Exhibit CLA-024).
[455] See Counter memorial, ¶¶ 345-346.
[456] See Brief, ¶ 39; Memorial, ¶ 182.
[457] *See* Counter memorial, ¶ 317; Brief, ¶ 237; Hearing, Day 1, Tr. 18:15-69:1.

to have "similar characteristics and effects" to an expropriation within the meaning of Article V of the BIT.

391. This approach coincides with that of the several arbitral tribunals that the Parties quoted. For example, the tribunal of *Pope & Talbot v. Canada (Damages Award)* determined that the *test* of whether interference with business activities constitutes expropriation lies in establishing *"whether such interference is sufficiently restrictive to support the conclusion that property has been 'taken' from its owner"*.[458]

392. In *Tecmed v. Mexico,* the tribunal explained that under international law is deemed to be a deprivation of property *"when there is dispossession of its use or of the enjoyment of its benefits, or interference with such use or enjoyment of equivalent effects or magnitude* [...]".[459]

393. The tribunal in *Vivendi v. Argentina II,* referring to the Iran-United States Claims Tribunal in *Starrett Housing v. Iran* stated that *"it is admitted in international law that measures taken by a state may interfere with property rights to such extent that these rights are devoid of content and are to be considered as expropriated* [...]"[460].

394. In the light of the facts proven in the arbitration, the Tribunal must examine whether the measures attributable to Venezuela have interfered with the economic use and enjoyment of Claimants' investment to such extent that Claimants are to be considered stripped of their property. Such would be the case if, as a result of such measures, Claimants lost control of their investments or the value of their shares was destroyed, as they alleged happened.

395. Having established the standard of indirect expropriation, it is useful to clarify the concept of "creeping expropriation". Arbitral tribunals that have resolved investor-State disputes agree that creeping expropriation is a form of indirect expropriation resulting from a series of measures adopted by the state over a period of time, which, taken together, have the effects of an expropriation.

396. For example, the Tribunal in *LG&E v. Argentina* described creeping expropriation as an indirect expropriation that manifests itself gradually and increasingly.[461] Also, the tribunal of *Generation Ukraine v. Ukraine* noted that:

> "Creeping expropriation is a form of indirect expropriation with a temporarily distinctive quality in the sense that it encapsulates the situation in which a series of acts attributable to a State over a period of time culminate in the expropriation of such property".[462]

397. In the same vein, the Tribunal of *Siemens v. Argentina,* invoked by Claimants, noted that:

> "By definition, a gradual expropriation refers to a process, to the steps that ultimately have the effect of an expropriation. If the process stops before reaching that point, then the expropriation does not happen. This does not necessarily mean that there are no adverse effects. Obviously, each step must have an adverse effect that may not be important in itself or be considered and unlawful act. The last step of a gradual expropriation that tilts the balance is similar to the drop that fills the glass. The previous drops may not have had

[458] *Pope & Talbot v. Canada,* ¶ 102 [translation of the Tribunal].
[459] *Tecmed v. Mexico,* ¶ 114.
[460] *Vivendi v. Argentina II,* ¶ 7.5.16.
[461] *LG&E v. Argentina,* ¶ 188.
[462] *Generation Ukraine v. Ukraine,* ¶ 263 [translation of the Tribunal].

a perceptible effect, but they are part of the process that provokes the overflow"[463].

398. The Tribunal agrees with these definitions of the concept of creeping expropriation which [464]are also accepted by the Parties. In short, a gradual or progressive indirect expropriation (creeping expropriation) results from a series of actions or measures attributable to the State which, taken together, have the effects of an expropriation, but which alone or separately do not give rise to an expropriation.

399. As noted above, in the Memorial and the Replication, the Claimants contended that Venezuela had subjected its investments to a creeping expropriation that would have culminated or would have been consummated with the publication of the Administrative Ordinance on January 22, 2013.[465] Claimants further pointed out that it was the *cumulative* effect of the measures imposed by Venezuela, ending with the Administrative Ordinance, which shaped the indirect expropriation.[466] Claimants also referred to specific facts or situations that, according to them, denote the loss of control over their investments and would have meant the destruction of the value of their respective shares in the Companies.[467] Finally, in their Post-Hearing Brief, Claimants argued for the first time in the arbitration that Decree No. 7.394, by itself, constitutes an indirect expropriation.[468]

400. For methodological reasons, the Tribunal shall begin by analyzing this last allegation, namely, the alleged indirect expropriation arisen from Decree No. 7.394. Subsequently, the Tribunal shall analyze the allegation of a creeping expropriation that would have culminated with the Administrative Ordinance. Finally, the Tribunal shall refer to the Parties' arguments concerning the alleged loss of control and destruction of value of their investments.

a. The alleged indirect expropriation arisen from Decree No. 7.394.

401. In their Post-Hearing Brief, Claimants, in contrast to what they argued in their earlier briefs and during the Hearing, [they] argued that Decree No. 7.394 itself constitutes an indirect expropriation.[469] Claimants have also seemed to suggest that the Administrative Ordinance itself may have expropriatory effects.[470] However, the Tribunal finds that neither the allegations nor the evidence submitted by Claimants support these claims.

402. First, because consistently in their allegations of both jurisdiction and merit, Claimants have emphasized that it is the relationship between all measures – whether related to or arisen from Decree No. 7.394, as well as the seizure and special administration measures – that results in a creeping expropriation of their investments in Venezuela. This new allegation in the Post-Hearing Brief is surprising in light of the approach made by Claimant throughout the arbitration.

403. Second, because even if this late allegation was to be received, the Tribunal does not find that Claimants have proved that Decree No. 7.394, alone or in conjunction with one or more of the measures said to be related thereto, and without regard to the measures adopted in the framework of the criminal proceedings against Mr. Fernández Barrueco, contains such a limitation on the essential property rights of the Claimants in their investments as to lead to the conclusion that it gave rise to an indirect expropriation. In particular, and as explained below, the Tribunal does not

[463] *Siemens v. Argentina (Award)*, ¶ 263 [translation of the Tribunal; emphasis added].
[464] *See supra* ¶ 388.
[465] *See* Memorial, ¶¶ 6, 107, 179-182, 244, 258; Brief, ¶¶ 168 and 175; footnote 846.
[466] *See, for example,* Memorial, ¶ 176 ("In different stages, the Republic has been imposing a series of measures on Claimants' investments, which cumulatively have 'characteristics and effects equivalent' to an expropriation". [emphasis added]).
[467] *See* Memorial, ¶¶ 184-186 and ¶¶ 190-192; Brief ¶¶ 225-235 and ¶¶ 238-242.
[468] Claimant's Post-Hearing Writ, § IV, B.
[469] *Id.*
[470] *See, for example,* Claimants' Post-Hearing Writ, ¶ 72.

consider that at the Hearing had been proved, as Claimants asserted in their Post-Hearing Brief, that Decree No. 7.394 prevented them or prevents them from receiving dividends or profits from Monaca and Demaseca.[471]

404. It is clear from the Claimants' allegations prior to their Post-Hearing Brief that neither Decree No. 7.394 nor the measures that might have resulted from that decree, alone, had the sufficient entity to configure the alleged indirect expropriation.[472] According to the same Claimants throughout this arbitration, it is the actions of SAREN, of SUDEBAN and, particularly the actions of the special administrators, culminating in the Administrative Ordinance, that are decisive for the alleged destruction of value of the investment.[473] These measures were issued as a consequence of the process initiated against Mr. Fernández Barrueco and not of Decree No. 7.394. Accordingly, beyond the allegation in their Post-Hearing brief, Claimants have not proven that by eliminating the measures originating in the process against Mr. Fernández Barrueco – which Claimants have qualified as determinative -, and relying solely on Decree No. 7.394, an indirect expropriation occurs.

405. In summary, both in their briefs and at the Hearing, Claimants contended that the alleged expropriation is a consequence of the combined effect of the seizure and special administration measures and Decree No. 7.394[474] and that this creeping expropriation would have been consummated with the issuance of the Administrative Ordinance in January 2013. The Tribunal then proceeds analyze that allegation.

b. The alleged creeping expropriation that culminated in the Administrative Ordinance.

406. The Tribunal has already concluded that there has been a *de facto* relationship between Decree No. 7.394 and the seizure and special administration measures, including the Administrative Ordinance and that they all form part of the same dispute notified by Claimants in their Notice of Dispute.[475] The Tribunal shall then proceed to analyze Claimants' allegation that Venezuela subjected their investments to a creeping expropriation that culminated in the Administrative Ordinance.

407. Claimants allege that the Administrative Ordinance, published on January 22, 2013, was the *"climax"* of the indirect expropriation.[476] Claimants claim to have lost *de iure* control over Monaca and Demaseca as a result of this ordinance that gives special administrators the *"broadest powers of administration"* over the Companies, and orders them to adjust their performance to the agrifood policies of Venezuela and to submit financial statements of their management at the close of each fiscal year.[477]

408. The Tribunal considers that neither the text of the Administrative Ordinance, nor its comparison with the resolutions prior to its issuance that relate to the same subject matter, nor the evidence in the file regarding the actions of the special administrators after its entry into force support the

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[471] *See infra*, ¶¶ 442-445.
[472] *See infra*, ¶¶ V.A.3.b.
[473] *See* Memorial, ¶ 191.
[474] *See, for example,* Memorial, ¶ 176 *("In different stages, the Republic has been imposing a series of measures on Claimants' investments, which cumulatively have 'characteristics and effects equivalent' to an expropriation").* [emphasis added]; Brief, ¶ 232 *("Regardless of the qualification that Respondent intends to assign to the function and nature of the special administrators in this case, the designation thereof – coupled with the work of the Liaison Commission, the permanent effects of the Decree of Forced Acquisition and other measures imposed by the Republic – has constituted an interference of such magnitude that it has effectively deprived VALORES and CONSORCIO of their fundamental rights as shareholders of MONACA and DEMASECA, respectively. Accordingly, those rights have been deprived of their essence and they lack content to the point that they are practically useless")* [emphasis added].
[475] *Supra* ¶ 241.
[476] Memorial, ¶ 181. *See also* Memorial, ¶ 244 and 256.
[477] *See* Administrative Ordinance (Exhibit C-17).

Claimants' allegations regarding the scope and effects of that Ordinance.

409. Claimants have emphasized that, unlike the previous resolutions, the Administrative Ordinance gives administrators *"the broadest powers of administration"* over the Companies and, in that sense, grants them the power to control them.[478] The Tribunal does not agree with this construction. In order to determine its scope, the discussed expression must be read in context. Article 2 of the Administrative Ordinance provides as follows:

> "The aforementioned Special Administrators shall have the broadest powers of administration to guarantee the possession, custody, safekeeping, use and conservation of the movable and immovable property of the limited companies listed in article 1 of this Administrative Ordinance, in such sense, they shall guard the assets, property and rights that are part of the referred Companies, aimed at their operation". [emphasis added]

410. The transcribed text indicates that the *"broadest powers of administration"* are linked to the specific purpose of protecting the movable and immovable property of the Companies in the development of the precautionary measures ordered in the criminal proceedings against Mr. Fernández Barrueco. In that sense, the Administrative Ordinance does not entail a general power to direct the Companies nor does it confer on special administrators the broader powers than those they had by virtue of resolutions issued by the Ministry of Economy and Finance between December 2009 and December 2012. Indeed, such resolutions gave special administrators the power to *"take all necessary measures for the custody, conservation and management of the company and its corresponding assets, in order to prevent them from being altered, disappearing, deteriorating or destroying* [...]"[479].

411. It follows from the foregoing that, from a purely textual point of view, the Administrative Ordinance did not extend the powers of the administrators in such a way as to give them the full and unlimited management of the Companies. Both resolutions prior to the Administrative Ordinance and the latter refer to administrative powers related to and necessary to maintain the company and the assets that are the subject of the precautionary measures issued in the criminal proceedings against Mr. Fernández Barrueco.

412. In addition to the text of the Administrative Ordinance itself, it is necessary to analyze the effects of the measure to determine whether it had the impact attributed to it by Claimants and, in particular, whether its issuance resulted in different and broader actions than those performed by the special administrators prior to its effective date. The Tribunal has examined the evidence in the file relating to the actions of special administrators prior to and after January 22, 2013 – the issuance date of the Administrative Ordinance – and finds no evidence that there has been, *de iure or de facto,* a material change between the functions exercised by special administrators prior to the Administrative Ordinance and after its publication.[480]

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[478] *See* Brief, ¶ 21.

[479] *See for example,* Resolution 2.549 of December 4, 2009 of the Ministry of People's Power for Economy and Finance *(Ministerio del Poder Popular para la Economía y Finanzas),* published in the Official Gazette No. 39.333 of December 22, 2009, Article 2 (Exhibit C-10); Resolution 2.628 of March 1, 2010 of the Ministry of People's Power for Economy and Finance, published in the Official Gazette No. 39.377 of March 2, 2010, Article 2 (Exhibit C-11); Resolution 2.623 of the Ministry of People's Power for Economy and Finance of March 1, 2010, published in the Official Gazette No. 39.377 of March 2, 2010, Article 2 (Exhibit C-60); Resolution No. 3.268 of the Ministry of People's Power of Planning and Finance *(Ministerio del Poder Popular de Planificación y Finanzas),* of December 10, 2012, published in the Official Gazette No. 40.069 of December 11, 2012, Article 2 (Exhibit C-64).

[480] In this context, the Tribunal notes that on April 30, 2013, Gruma informed the U.S. Securities & Exchange Commission that it has lost control over Monaca and Demaseca and, accordingly, would cease to consolidate the operations of the Companies in its financial statements as of January 22, 2013 (Gruma's 2012 20-F Report (Exhibit C-44)). However, on April 29, 2013, when the Administrative Ordinance came into force, a Gruma spokesman told the media that *"although officially and legally control was granted to these special administrators back in Venezuela, in fact Gruma continues to operate the companies as we had been doing since the expropriation took place".* (A. Martínez, "Mexican Gruma says it continues to operate plants in Venezuela, it

413. Moreover, in the communications subsequent to January 2013, and in response to requests from the Companies to carry out certain acts, the special administrators pointed out that they could not perform tasks of management and representation of the Companies, since, according to the Administrative Ordinance, their mandate is limited to *"what is related or linked"* to Mr. Fernández Barrueco.[481]

414. In view of the foregoing, the Tribunal concludes that there is no evidence that the Administrative Ordinance entailed a formal or material change in the powers and functions of the special administrators in relation to those they exercised prior to the publication and entry into force of such Administrative Ordinance.

415. In the Tribunal's view, this conclusion would be sufficient to dismiss the claim of creeping expropriation as alleged in this arbitration. Indeed, Claimants held that the expropriation occurred progressively and that the Administrative Ordinance was *"the measure that consummated the indirect expropriation"*.[482] Claimants reaffirm this criterion upon setting the Valuation Date on the day immediately preceding the application of this measure[483] and not on the issuance date of Decree No. 7.394 – which they attempted to give by itself the effect of a measure of indirect expropriation in the Post-Hearing Brief -, nor of the administrative resolutions prior to the Administrative Ordinance. The foregoing would entail that, according to Claimants' own judgment in the generality of their arguments, the actions attributable to Venezuela, prior to the Administrative Ordinance, were not sufficient to conclude that they had lost the control over their investments to the extent that they should be considered expropriated.

416. The reports issued by Gruma prior to the publication of the Administrative Ordinance confirm this conclusion. Indeed, in its 2011 Annual Report, submitted on April 30, 2012,[484] Gruma confirmed that *Valores and Consorcio* maintained control over the Companies, despite the fact that the other measures discussed in this arbitration – in particular, Decree No. 7.394, the Liaison Commission, the SAREN and SUDEBAN circulars and the appointment of special administrators – had already been implemented and were still in force after two years.[485] As of the date of that Annual Report, Claimants had already filed the Notice of Dispute.

417. In the section on "Financial Information – Legal Proceedings", the 2011 Annual Report states as follows:

> "On May 12, 2010, the Bolivarian Republic of Venezuela (the "Republic") published decree number 7.394 in the Official Gazette of Venezuela (the "Expropriation Decree"),

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negotiates expropriation", Reuters, April 29, 2013 (Exhibit R-073) and "Gruma points out that it keeps operating its plants in Venezuela", *El Universal*, April 29, 2013 (Exhibit R-076). This statement points out that Claimants themselves had at least serious doubts as to whether after the publication of the Administrative Ordinance they had lost control of the Companies' operations.

[481] *See, for example,* Letter from Special Administrators to H. Castro (Monaca), April 25, 2013 (Exhibit R-073); Letter from Special Administrators to G. Ríos (Valores and Consorcio), April 29, 2013 (Exhibit R-075); Letter from Special Administrators to H. Castro (Monaca), May 22, 2013, (Exhibit R-086); Letter from Special Administrators to H. Castro (Monaca), May 30, 2013 (Exhibit R-091).

[482] Memorial, ¶ 244.

[483] *Id.*

[484] The Tribunal notes that this report is presented *"in accordance with the general provisions applicable to securities issuers and other participants in the securities market for the year ended on December 31, 2011"*. The document corresponds to the Spanish version of the annual report submitted by Gruma to the U.S. Securities and Exchange Commission and contains supplementary information in accordance with the requirements of the aforementioned provisions. *(See GRUMA,* 2011 Annual Report, April 30, 2012 (Exhibit R-059)).

[485] The Tribunal notes that in the notes to the consolidated financial statements as of December 31, 2009 and 2010, included in Gruma's 2010 Annual Report, such company included statements substantially equal to those of the 2011 Annual Report with respect to the description of the measures on Monaca and Demaseca, and the maintenance of ownership and control over those Companies. *(See GRUMA,* 2010 Annual Report, pages 53-55 (Exhibit R-06)).

> in which it announced the forced acquisition of all movable and immovable property of the Company's subsidiary in Venezuela, *Molinos Nacionales, C.A.* ("MONACA"). The Republic has stated to GRUMA's representatives that the Expropriation Decree extends to our subsidiary *Derivados de Maíz Seleccionado, DEMASECA, C.A.* ("DEMASECA").
>
> [...]
>
> The Venezuelan government has not taken physical control on MONACA's or DEMASECA's assets, nor has it taken control of their operations. Consequently, GRUMA can validly and legally affirm that, to date, *Valores Mundiales* and *Consorcio Andino* have full legal ownership over the rights, interests, shares and assets of MONACA and DEMASECA, respectively, and that they also have complete control on all types of decisions, operations and directives in [the Companies], which shall not cease until Gruma, through *Valores Mundiales* and *Consorcio Andino,* finally agrees with the Venezuelan government the terms and conditions of the transfer of such assets, in accordance with the legal and business schemes currently being negotiated with the Venezuelan government".[486]

418. In the same section, the report refers to seizure and special administration measures issued by virtue of the criminal proceedings against Mr. Fernández Barrueco, to the first instance decision in the third party proceeding (*incidente de tercerías*) and to the fact that the appeal against such decision had not been resolved. However, the report does not mention any negative consequences arisen from the imposition of such measures.[487]

419. Gruma's contemporaneous statements point out that even two years after the adoption of the seizure and special administration measures, and the issuance of Decree No. 7.394 and the imposition of the Liaison Commission, Claimants considered that they still maintained ownership and control over the Companies. As the Tribunal pointed out earlier, the Administrative Ordinance did not entail a substantial change in the powers and authorizations of the special administrators by virtue of the resolutions in effect when Gruma filed the referred reports. In terms of the tribunal of *Siemens v. Argentina (Award),* in this case the measure that would have represented the last step in the expropriation did not have the entity to *"provoke the overspill"*.[488]

420. As the Tribunal already noted, this analysis would suffice to reject Claimants' specific allegation that Venezuela subjected their investments to a creeping expropriation that would have culminated in the Administrative Ordinance.[489] However, in order to fully address the Parties' allegations, the Tribunal shall examine the other arguments offered by them in relation to the alleged indirect expropriation.

c. The alleged loss of control.

421. In their various briefs, Claimants have pointed out to various events that would demonstrate that Venezuela has substantially deprived them of control over their investments.[490] The Tribunal notes that Claimants have not referred to the same events in all of their briefs as facts giving rise to the alleged indirect expropriation. However, they have consistently maintained that the following events denote a total or substantial loss of control over their investments: (i) Claimants may not

[486] GRUMA, 2011 Annual Report, April 30, 2012, pages 74-75 (Exhibit R-059) [emphasis added]. The same statements can be found on pages 14 and 15 of the 2011 Annual Report in a section "Key Information – Risk Factors". *See also,* GRUMA, 2010 Annual Report, 2010, page 54 (Exhibit R-016).
[487] *See* GRUMA, 2010 Annual Report, 2010, pages 55 and 56 (Exhibit R-016); GRUMA; 2011 Annual Report, April 30, 2012, pages 73 and 74 (Exhibit R-059).
[488] *See* supra ¶ 397.
[489] *See* supra ¶ 415.
[490] Memorial, ¶ 185; Brief, ¶ 224; Claimants' Post-Hearing Brief, ¶ 69.

enter into corporate acts requiring registration; (ii) Claimants may not distribute dividends and transfer capital; (iii) Venezuelan officers intervene in the day-to-day decisions of Companies; (iv) Claimants cannot dispose of the Companies' assets, and (v) Claimants have lost *de iure* control of their investments as a result of the Administrative Ordinance.

422. Claimants attribute this total or substantial loss of control, on one hand, to the effects of Decree No. 7.394 and, on the other hand, to the alleged prohibition on notarizing or authenticating acts involving Monaca, Demaseca or the Claimants – a prohibition arisen from the SAREN circular -, the immobilization of the Companies' bank accounts, in accordance with the SUDEBAN circular, and the need to have the authorization of the special administrators to carry out transfer of funds.[491]

423. Below, The Tribunal shall refer to each of the events invoked by Claimants and noted in paragraph 421 above.

424. First, Claimants argue that as a consequence of the SAREN circular they cannot appoint members of the board of directors of the Companies or formalize other corporate acts subject to registration.[492] It is not a controversial fact in this arbitration that this measure arises from the criminal proceedings brought against Mr. Fernández Barrueco.

425. By circular dated December 10, 2009, SAREN requested Public Registrations, Commercial Registries and Public Notaries to refrain from notarizing or authenticating any legal act or business in which *Monaca, Demaseca, Valores and Consorcio, inter alia,* intervened.[493] This circular, however, does not prohibit – as Claimants argue – that they enter into the corporate acts at issue. Nor is there any evidence that this act had the effect of substantially depriving Claimants of control over their investments.

426. First, it is not proven in this arbitration that the meeting of boards of directors or other management bodies of the Companies was prevented or prohibited by virtue of the SAREN circular or any other measure attributable to Venezuela.

427. Second, it is neither proven that the SAREN circular had prevented or prohibited the *holding* of the corporate acts to which Claimants refer, in particular, the approval of financial statements, the appointment of managers or the declaration of dividends. On the contrary, it has been proven that the corporate governance bodies of Monaca and Demaseca met after the adoption of the measures at issue and entered into corporate acts. Indeed, a communication issued by the Claimants points out that the shareholders' meeting of the Companies met during 2010, 2011 and 2012, to approve financial statements and appoint or ratify managers.[494] Therefore, no impediment has been proven for the shareholders' meeting or the corresponding corporate body to meet and make decisions.

428. Third, the Venezuelan law experts of both Parties agree that the failure to register these acts would affect their enforceability and effects against third parties, but not their validity.[495] In any case, as it is a measure arisen from a judicial decision in criminal proceedings, Claimants could request authorization from the judge who issued the measure to formalize or register the corresponding act.[496] Claimants did not contest this explanation from Venezuela nor did they submit evidence

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[491] *See* Memorial, ¶ 78.
[492] Memorial, ¶ 185.
[493] Circular No. 0230-864 from the Director General of the Autonomous Service of Registries and Notaries to Public Registries, Commercial Registries and Public Notaries, December 10, 2009 (Exhibit C-66).
[494] Letter from H. Huerta (Attorney-in-fact, Valores Mundiales, S.L. and Consorcio Andino, S.L.) to Dr. H. Arellano (National Liaison Coordinator, Molinos Nacionales, C.A.), June 5, 2013 (Exhibit R-186). *See also* Memorandum from Feo, *La Cruz & Asociados* to Monaca, July 25, 2013 (Exhibit C-95) and Letter from Oswaldo Moreno to Demaseca, June 27, 2013 (Exhibit C-96).
[495] *See* Dr. Canova's Second Report, ¶¶ 23-25; Dr. Velazquez's Report, ¶¶ 61-64.
[496] Counter memorial, ¶ 240.

that they had even attempted to request authorization to notarize or register any corporate act, nor have they claimed or proven damages directly arising from the inability to register a specific corporate act.

429. The SAREN circular may then result, as shall be analyzed upon reviewing the other claims filed by Claimants, in interference with the operation of the Companies or the management thereof by Claimants, but not in a loss of control by inability to assemble the corporate bodies or by inability of the corporate bodies to make decisions or eventually make them effective.

430. Claimants have also alleged that, as a result of the SAREN circular, they are unable to sell their shares in the Companies.[497] For the same reasons set out in the preceding paragraphs, the Tribunal cannot accept this conclusion. Indeed, the SAREN circular does not restrict or prevent the sale of Claimants' shares in Monaca and Demaseca. This is, as demonstrated in the arbitration, an seizure measure issued in the framework of criminal proceedings against Mr. Fernández Barrueco, whereby SAREN prevents entities that have notarization or registration functions to refrain from notarizing acts of companies with respect to which the seizure arisen from the aforementioned criminal proceedings operate. In addition, according to Dr. Velázquez's expert report – not disputed by Claimants on this item, both the ownership and the assignment of the shares are proven by registration in the company's shares ledger[498] and not in the records referred to in the SAREN circular. It has not been demonstrated that the sale of shares is one of those acts that, according to Venezuelan law, must be notarized or registered for purposes of validity or enforceability before third parties. Therefore, the SAREN measure in no way affects the ability of Claimants to dispose of their shares in the Companies.

431. The fact that the measures taken in the criminal proceedings to secure the custody and preservation of property entails the compliance of additional formalities, authorizations or requirements does not entail, as Claimants seem to suggest, that control has been lost of Claimants' shares of Monaca and Demaseca or that the possibility of selling them has been lost.

432. Based on the foregoing considerations, the Tribunal concludes that it has not been proven that the measure with respect to the registration of acts involving Claimants or Companies entails that they or those are unable to enter into the corresponding acts or that Claimants have lost total or substantial control of the Companies.

433. Second, Claimants assert that, as a result of the measures imposed by Venezuela, they lost control because they cannot receive dividends or profits. Claimants attribute this impediment, first, to the restriction to register minutes of meeting arisen from the SAREN circular and, second, to the immobilization of the Companies' bank accounts ordered by SUDEBAN and to the fact that any transfer would require the authorization of the special administrators.

434. Likewise, they allege that the distribution of dividends would be hindered by SIEX's refusal – allegedly ordered by the Liaison Commission – to update the Companies' foreign investment register. Finally, in their Post-Hearing Brief, Claimants explained that Decree No. 7.394 prevents them from receiving dividends or profits from the Companies.[499] Based on the foregoing, Claimants contended, for the first time in this arbitration, that the Decree, by itself, would be sufficient to constitute an indirect expropriation of their investments.[500] The Tribunal shall refer to each of these arguments.

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[497] *See* Brief, ¶¶ 234 and 387.
[498] Dr. Velázquez's Report, ¶ 63.
[499] Claimants' Post-Hearing Writ, ¶ 84.
[500] Claimants' Post-Hearing Writ, ¶ 83.

435. As a preliminary matter, the Tribunal notes that, in general terms, the procedure for declaring dividends is, as follows: the competent corporate governance body meets and approves the balance sheet. If there are liquid and collected profits,[501] this body may decide whether to distribute them as dividends to shareholders or to use them for other purposes. If it chooses to declare dividends, it automatically generates a liability to be borne by the company and an asset – credit right – for shareholders.

436. From the foregoing arises an elementary remark made by Respondent and with which the Tribunal agrees: in order to be able to pay dividends, it is necessary to have declared them.[502] Claimants admit that they have not declared dividends since 2009 and explain that they have not declared dividends because it would be futile to do so.[503] Beyond Claimants' assertion on the alleged "futility" of having declared dividends, there is no evidence in the arbitration that if there are profits in the Companies, Claimants have stopped declaring dividends as a consequence of measures taken by Venezuela or that, having considered the dividend decree by the corporate body, it has been unable to do so because of the measures adopted by Respondent and, specifically, because of the SAREN circular or the failure of SIEX to update the registries. Claimants have not alleged, much less proved, that Venezuelan officers improperly interfered with the decisions of the corresponding corporate body regarding the use of the profits generated by the Companies.

437. Claimants have not contributed acts of the administrative bodies or of the meeting that even suggest the possibility of declaring dividends or reflect the futility of declaring them as alleged by Claimants.

438. In addition, the Tribunal reaffirms that the SAREN circular does not prevent the shareholders of the Companies from declaring dividends, but rather regulates the registration of corporate acts. Claimants do not dispute that under Venezuelan law the act of declaring dividends constitutes rights and, therefore, it is not necessary to record the corresponding minute for the right to be enforceable.[504] Besides, if the SAREN circular imposes an additional requirement or authorization under the seizure, Claimants did not prove that they had even attempted to request concept or authorization to record the respective minute.

439. On the other hand, Claimants assert that paying dividends would entail altering the Companies' equity, which would be prohibited by the seizure and special administration measures and Decree No. 7.394.[505] However, they have not explained how this situation would be outlawed by the aforementioned measures. To state that *"it would be naïve to believe that [managers] would authorize claimants to pay millions of dividends"*[506] is not sufficient to satisfy their burden of proof.

440. Regarding the conduct of SIEX – not to process the update of the foreign investment register, required to transfer foreign currency abroad -, the Tribunal remarks that the Parties do not agree on what is the basis for their action, if an order of the Liaison Commission or measures arising from the criminal proceedings against Mr. Fernández Barrueco. Indeed, Claimants contend that SIEX has not processed the requests to update Monaca's foreign investment registry by order of the Liaison Committee.[507] Their assertion is based on the statement of their witness, Engineer Homero Huerta,[508] and on a SIEX official notice in which that entity, referring to Decree No. 7.394,

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[501] Dr. Canova's Second Report, Exhibit 54: Code of Commerce *(Código de Comercio)* of Venezuela, Article 307.
[502] Rejoinder, ¶ 542.
[503] Memorial, ¶ 80 *("Because of these restrictions, Claimants, as shareholders of MONACA and DEMASECA have not declared dividends or other capital transfers since 2009, as it would be futile to do so").*
[504] *See* Rejoinder, ¶ 542.
[505] Hearing, Day 1, Tr. 84:11-18.
[506] Hearing, Day 1, Tr. 84:19-85:3.
[507] *See, for example,* Memorial, ¶¶ 79 and 185.
[508] Witness statement of Homero Huerta Moreno, July 25, 2014, ¶¶ 52 and 53.

required Monaca to present *"the authorization duly issued by the corresponding intervening board"* to request the registration of a sub-license contract for the use of a trademark entered into by and between Monaca and a Swiss company.[509] On the other hand, Venezuela points out that the SIEX measure arises from the seizure issued within the criminal proceedings against Mr. Fernández Barrueco.[510]

441. Regardless of the basis for its action, The Tribunal considers that the conduct of SIEX does not constitute a prohibition on declaring or paying dividends, but an obstacle to transferring investment-related payments abroad. In this sense, Venezuela's conduct could represent a breach of the obligation set forth in Article VII of the BIT or other standards of protection stated in the Treaty,[511] but the provided evidence does not prove that such action entails a loss of control, use or enjoyment of the investment equivalent to expropriation.

442. Finally, the Tribunal does not consider that at the Hearing had been proven, as Claimants stated in their Post-Hearing Brief,[512] that Decree No. 7.394 prevented them or prevents them from receiving dividends or profits from Monaca and Demaseca.[513]

443. Claimants base their conclusion exclusively on a particular construction of Mr. Nelson Alba's assertion during the Hearing. Indeed, Respondent's witness confirmed that disposing of the assets covered by the Decree would be a breach thereof.[514] However, he never asserted, as Claimants suggest, that the Decree covers current assets of the Companies.[515]

444. The issue of whether or not the profits of Companies are affected by Decree No. 7.394 has been widely debated by the Parties in this arbitration. Respondent has indicated that the goods affected by the Decree are exclusively those used for the operation of Monaca or for the large-scale production, agro-industrial processing and storage of certain products, including machinery, equipment and work implements. In that regard, Respondent submits that the money of the Companies, including the dividends declared, would not be affected by the Decree, as it does not comply with the purpose stated therein.[516] This issue was confirmed by the Venezuelan expert during his cross-examination at the Hearing:

"**Q:** You couldn't get the current assets out of Venezuela. Right? **A:** Current assets are their property. **Q:** Current assets are money. Right? **A:** Of course, they are their property. I'm not interested in money, I'm interested in goods to produce food. […]"[517].

445. Accordingly, the Tribunal does not find it possible to conclude, from Claimants' particular construction of Mr. Nelson Alba's words at the Hearing, that Decree No. 7.394 prevents Claimants from receiving profits or distributing dividends. There is also no evidence that Claimants, as shareholders of the Companies, have even discussed at meetings or other management meetings of the Companies about the profit decree or sharing and the simple assertion in this arbitration that it would have been futile is no more than a mere appreciation of Claimants.

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[509] *See* Official Notice of the Superintendency of Foreign Investment *(Superintendencia de Inversiones Extranjeras, SIEX)*, to *Nicolás Constantino*, Executive President of Monaca, November 21, 2011 (Exhibit C-102).
[510] Counter memorial, ¶ 469; Rejoinder, footnote 1013.
[511] The Tribunal refers to these breaches in sections V.C.3 and V.D.3 *infra*.
[512] Claimants' Post-Hearing Writ, ¶ 84.
[513] *See, also, supra* § V.A.3.a.
[514] Hearing, Day 2, Tr. 486:20-487:2.
[515] *See* Claimants' Post-Hearing Writ, ¶ 84.
[516] *See* Rejoinder, ¶¶ 176-184.
[517] Hearing, Day 4, Tr. 959:9-15.

446. Third, Claimants contend that, through the de facto merger between the Liaison Commission and the special administration, Venezuela has interfered in the administration of Monaca and Demaseca. This interference would be reflected, for example, in the need to seek authorization from government officers for any disbursement or transfer of their bank accounts and in the hampering of certain business decisions. In addition, Venezuelan officials would have occupied the offices and facilities of the Companies and requested information of a different nature.[518]

447. The Tribunal considers that the intervention of Venezuelan officials in Monaca and Demaseca affected and affects the ordinary functioning and operation of the Companies and imposes on the administration appointed by Claimants difficulties in the administration of the Companies. This intervention, its context, its scope and the alleged juxtaposition of functions between the Liaison Commission and the special administration, not only creates confusion, but also has effects for the analysis of the Claimants' claim for breach of fair and equitable treatment as discussed in Section V.B.3 of this Award.

448. However, for purposes of the alleged indirect expropriation, the Tribunal does not find evidence that such confusion between the functions of the Liaison Committee and the special administrators was sufficient to displace, substitute or remove the shareholders or managers or employees of the Companies designated by the shareholders. There is also no evidence that the members of the Liaison Commission or the special administrators exercised functions of administration or management of the Companies to such extent that the Claimants lost control over their investment in a total or substantial manner.

449. As examples of the intervention of the special administrators and the Liaison Committee in the day-to-day decisions of the companies, Claimants indicate that these officers warned that they would not recognize expenses associated with a corporate event;[519] refused to authorize payments corresponding to the lease fee of a new distribution center;[520] vetoed the termination of a lease agreement of a pasta plant[521] and rejected an application to transfer vehicles owned by that company.[522]

450. However, Claimants themselves acknowledged that the payments for the corporate event and the lease fee for the new distribution center, as well as the termination of the agreement and closure of the pasta plant were eventually authorized.[523] In other words, they were acts whose execution was initially rejected by Respondent's officers, but were subsequently authorized by those same officers. However, besides, they are acts whose entity and significance is not sufficient to hold that they result in a loss of the investment control of the Claimants, to such extent that none of these acts, as a whole or individually, were subject of a statement of loss control. Nor is there any evidence in the file that as a result of such acts the Claimants or the Companies have been seriously affected in their operation, or in their ability to manage and control, or that the Companies have suffered financial loss. In short, these were prior authorization or control measures that generated difficulty and discomfort in the execution of certain acts, and even confusion as to their origin or legal basis, but which were not sufficiently significant to indicate a loss of control over the investment.

451. Fourth, Claimants allege that both the seizure and special administration measures and Decree No.

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[518] Memorial, ¶¶ 92-102.
[519] Memorial, ¶¶ 98 and 185.
[520] Memorial, ¶¶ 99 and 815.
[521] Memorial, ¶¶ 101 and 185.
[522] Memorial, ¶ 185.
[523] Memorial, footnote 207; ¶ 99; Rejoinder, ¶ 29.

7.394, prevent them from freely disposing of the Companies' movable property.[524] In their Replication, Claimants attributed this restriction mainly to the Decree.[525]

452. The evidence submitted to this arbitration indicates that Decree No. 7.394 imposes certain limitations as to the disposition of the goods covered by Article 1 thereof.[526] According to the Venezuelan expert, such limitations are reduced to preventing the owner from destroying or altering the property affected by the Decree to the extent where *"it becomes impossible for the use for which it is intended to be expropriated"*.[527] On the other hand, Claimants have delivered some communications signed by the special administrators in which they state that the assets covered by the Decree may not be disposed of until the negotiations between the State and the investors are concluded.[528] The communications correspond to concepts issued by special administrators specifically in connection with the transfer of certain vehicles and the termination of lease agreements on immovable property referred to by the Tribunal in paragraphs 449 and 450 above.

453. Based on the evidence presented in this arbitration and, in particular, taking into account the specific examples of the alleged impossibility of disposing of the Companies' assets – which refer to mere consultations with special administrators on the possibility of transferring vehicles – the Tribunal cannot conclude that there is a restriction on disposing of the Companies' assets of such an entity to the conclusion that the Claimants lost substantial control over their investments. A different matter is the construction made by the Respondent's officers, who considered that while the negotiations were suspended and the criminal process was in force authorizations – administrative or judicial – were required to dispose of the movable or immovable property, generating confusion in the administration of the Companies.[529]

454. Finally, Claimants contend that with the publication of the Administrative Ordinance they lost *de iure* control over the Companies. On this item, the Tribunal refers to the provisions of Section V.A.3.b of this Award.

455. In short, as it was not proven that the SAREN circular had prevented or prevents the corporate governance bodies of the Companies from meeting and holding corporate acts, including declaring dividends or deciding on the sale of shares. It is also not proven that the SUDEBAN circular or the fact that the special administrators must approve banking movements of the Companies has affected the power of statutory administrators to enter into these acts. Finally, it is not proven that the conduct of the SIEX prevents the exercise of the power of corporate bodies to declare dividends and distribute profits.

456. As for Decree No. 7.394, the Tribunal did not find that it prevented the distribution of profits. Nor

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[524] Memorial, ¶ 87.

[525] *See* Rejoinder, ¶ 225.

[526] Article 1 of the Decree No. 7.394 decrees *"The compulsory acquisition of movable and immovable property that constitute or serve for the operation of the Limited Company Molinos Nacionales, C.A. or serve for the production, agro-industrial processing and large-scale storage of wheat flour, corn flour, pasta, rice, oil, oats, sea products, marinade and spices by such Limited Company, for the execution of the 'SOCIALIST AGROINDUSTRIAL PROCESSING CAPACITY CONSOLIDATION FOR THE VENEZUELA OF THE XXI CENTURY' program* [...]. *The compulsory acquisition declared in this article includes any other movable or immovable property, machinery, industrial and office equipment, work implements and other materials necessary to carry out the "SOCIALIST AGROINDUSTRIAL PROCESSING CAPACITY CONSOLIDATION FOR THE VENEZUELA OF THE XXI CENTURY" program.* (Decree No. 7.394, Article 1 (Exhibit C-12)).

[527] Hearing, Tr. Day 4, 908:16-18 and 958:10-13. According to the Venezuelan expert, Decree No. 7.394 would prevent the following acts: (i) change the corporate purpose of Companies; (ii) change or eliminate a line of business; (ii) stop making investments to keep their factories and equipment running, and (iv) to take out their machinery and equipment from Venezuela.

[528] *See, for example,* Official Notice AEM No. 2012-00002 from special administrators to Henry Castro, Director of Monaca, December 20, 2012 (Exhibit C-016); Official Notice AE-2013-00030 of special administrators to Henry Castro, Executive President of Monaca, July 9, 2013 (Exhibit C-115); Official notice from special administrators to Henry Castro, Executive President of Monaca, July 29, 2013 (Exhibit C-142).

[529] The Tribunal refers to these matters in Section V.B.3 of this Award. *See infra* ¶¶ 548 and 585-587.

did it conclude that the limitations arising from this Decree – the impossibility of destroying or altering the property to the extent that it cannot meet the purpose for which it was appropriated – and which fall exclusively on the property described in Article 1 of the Decree, are of such entity to conclude that they amount to a total or substantial loss of the control by the Complainants over their investments. Nor does the Tribunal find any evidence that as a result of Decree No. 7.394 Claimants are prevented from selling their shares in the Companies. A different matter, as shall be discussed later, would be the loss of value of the shares of the companies as a consequence of the measures adopted by Venezuela and which are the subject of the dispute.

457. Finally, the Tribunal concluded that the interference of Venezuelan civil servants in the Companies – either through the Liaison Commission, the special administrators or a merger between two concepts – did not have the effect of displacing, substituting or removing shareholders, managers or employees of the Companies, and that their actions did not have the sufficient entity to affirm that they are indicative of a loss of control over the investment. The Administrative Ordinance did not mean a material change, *de facto* or *de iure,* in the powers that could be exercised by the special administrators and therefore, does not modify the Tribunal's conclusions regarding the scope of their performance in the Companies.

458. In conclusion, none of the actions alleged by Claimants had the scope and effect that Claimants attribute to them with respect to the control of the investment. Nor was there a measure of an entity such as to lead the Tribunal to conclude that, by taking this measure together with the others, there is a total or substantial loss by Claimants over their investments, so that they are to be considered expropriated.

d. The alleged destruction of the value of the investments.

459. Claimants contend that, in addition to having substantially deprived them of control over the Companies, the Venezuelan measures have had the effect of destroying the value of their investments.[530] Indeed, they allege that their shares in the Companies have no economic value as a result of the measures imposed by Venezuela.[531] This thesis is based on the assertion of their experts, according to which:

> "As a consequence of the expropriation and management hindrance measures, the shareholders of Monaca and Demaseca (namely, Valores and Consorcio) are deprived of any economic benefits that the companies generate or could generate in the future. Therefore, companies have zero value for their shareholders (or, instead, a hypothetical buyer)."[532]

460. First, the Tribunal notes that the Claimants' experts on valuation of damages ("Dellepiane/Spiller") have concluded that the shares *"have zero value"* because the measures at issue prevent their shareholders from receiving or disposing of their shares at a positive value.[533]

461. This statement is based, *inter alia,* on the following assumptions: (i) since the issuance of Decree No. 7.394 in May 2010, Claimants – or a potential purchaser instead – face the *"threat"* that their assets are transferred to Venezuela;[534] (ii) Respondent maintains an intervention regime and

[530] Memorial, ¶ 187.
[531] Memorial, ¶ 192.
[532] Dellepiane/Spiller First Report, ¶ 6 [emphasis added]. The footnote accompanying this paragraph reads as follows: *"The only source that Monaca and Demaseca could have for their shareholders is represented by the possible compensation that Venezuela could grant (in time, currency and form) for the goods or business subject to the expropriation process, whose execution began in 2010 and whose completion is uncertain".*
[533] Dellepiane/Spiller First Report, ¶ 66.
[534] Dellepiane/Spiller First Report, ¶ 65.

management hindering of the Companies through the Liaison Commission and the special administrators who, together, form a parallel administration;[535] (iii) the Administrative Ordinance grants *"the broadest powers of administration"* to the special administrators and binds the Companies to pursue the State's public policy purposes in food matters;[536] and (iv) Claimants may not distribute dividends as a consequence of the SAREN circular and SIEX's refusal to update the Securities registry or Monaca as foreign investment.[537]

462. The Tribunal has already concluded that there was no loss of control resulting from the same behaviors. In any event, the Tribunal shall examine whether the measures had the effect of destroying the share value of the Companies, under the assumption from which Dellepiane/Spiller depart, namely that Claimants were right from the point of view of facts and law. Before entering into the announced analysis, the Tribunal shall briefly refer to the premises which, according to Claimants, would lead to the conclusion that their share in Monaca and Demaseca are worthless.

463. Dellepiane/Spiller seem to assume that Decree No. 7.394 has irreversible effects. The Tribunal does not consider that this hypothesis has been proven in the arbitration. It is not disputed that the expropriation process initiated by virtue of the aforementioned decree has been suspended since August 2010, and that there is uncertainty about the duration of the expropriation process. In that sense the process that could ultimately lead to the assets affected by the Decree being definitively transferred to Venezuela – or to the Decree being revoked through courts at the request of the Claimants, according to the possibility posed by Venezuela – has not yet been completed. A different matter is that the Decree remains in force, that the duration of its validity is uncertain and that with it remain the limitations to the right to dispose of the affected assets that were discussed in paragraphs 452 and 453 of this Award.

464. The Tribunal has already noted in paragraphs 446 to 450 of this Award the reasons why it considers that it has not been proven that Decree No. 7.394 alone, or the measures arisen from the criminal process, alone, or the aforementioned Decree and measures as a whole, resulted in such interference by the Venezuelan officers in the management of the Companies to conclude that the directors of the Companies appointed by shareholders were relegated to their functions or that the Claimants lost substantial control over the day-to-day management of the Companies.

465. It is worth remembering in this item that the Liaison Commission, to which Claimants attribute a substantial part of the alleged loss of control, was withdrawn in September 2013, and that the Administrative Ordinance, issued in connection with the criminal proceeding and which Claimants consider to be the culminating event of the alleged expropriation, did not result in a material change, *de facto* or *de iure,* in the functions of the special administrators as compared to whose they had when the Claimants still maintained that they continued to exercise control over the Companies.

466. In addition, although Claimants and their experts allege that the Administrative Ordinance, upon stating that special administrators must adjust their actions to the public policies issued by the Ministry of Food in agrifood matters, *"limits [the][Companies'] ability to generate profits and make investment decisions that maximize their net present value"*,[538] they have not proven that the limitation on the ability to produce profits is such that it entails a total destruction of the value of the Companies.

467. On the other hand, the Tribunal agrees with Respondent that the State has the power to require

[535] Dellepiane/Spiller First Report, ¶ 36.
[536] Dellepiane/Spiller First Report, ¶¶ 38-39.
[537] Dellepiane/Spiller First Report, ¶ 40.
[538] Brief Réplica, 379.

companies, regardless of whether their shareholders are private, to comply with public policies essential for the compliance of the State's purposes, as would be the case with food policies.[539] On the other hand, the limitation on the ability to make *"investment decisions that maximize* [the] *net present value"* of the Companies would potentially result in the value of the Companies not increasing or decreasing, but not being completely destroyed, as alleged by Claimants.

468. With respect to the distribution of profits, the Tribunal reaffirms that it was also not proved that Claimants could not declare and distribute dividends as a consequence of Decree No. 7.394, the special administration regime, the SAREN circular or the conduct of the SIEX, as explained in paragraphs 435 to 445 of this Award.

469. The Tribunal has no doubt that the measures imposed by Venezuela affected the value of Claimants' shares in the Companies.[540] However, in support of their claim for expropriation, Claimants have alleged that, because of these measures, their shares in the Companies have no economic value; in other words, that their value is zero.[541]

470. Based on the evidence submitted in the arbitration, the Tribunal cannot conclude that, as Claimants assert, the value of the Companies has been destroyed or equals zero. On the contrary, the evidence on record, and specifically acts performed by or involving the Claimants, indicates that, despite the measures, the shares of Monaca and Demaseca did not lose their full value and maintain a market value. Particularly relevant to this conclusion are (i) Gruma's acquisition of ADM's shares in Valores and Consorcio in 2012; (ii) Gruma's annual reports; and (iii) the relevant information submitted to the U.S. Securities & Exchange Commission where companies should truthfully inform the public and stock market regulatory authorities of events that may affect the value of a specific company's shares.[542]

471. With respect to the sale of ADM's shares, it is proven that, in December 2012, Gruma acquired all of ADM's shares in Valores and Consorcio for a total amount of USD$8 million[543] (the "ADM Transaction"). From this transaction, the Venezuelan experts inferred that the total value of Monaca and Demaseca at the date of the transaction was USD$266.7 million.[544] According to these experts, the implied value of the Companies on the basis of the ADM Transaction is the best indication of the value of Monaca and Demaseca in the current scenario as of the Valuation Date selected by Claimants (January 21,2013).[545]

472. Dellepiane/Spiller remark that the ADM Transaction was not about the Companies, but about 3% of Valores and Consorcio. In addition, they contend that the ADM Transaction only represents Claimants' ability to seek compensation from Venezuela for the measures or for the expropriation.[546]

473. The Tribunal considers that the ADM Transaction is indicative that the share value of Monaca and Demaseca is not zero. By the date of the ADM Transaction, all of the measures discussed in this arbitration – save and except for the Administrative Ordinance, which, as stated, did not have the

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[539] Rejoinder Dúplica, ¶ 403.
[540] *See infra* § VI.C.1.
[541] *See, for example* Memorial, ¶ 189.
[542] *See infra*
[543] Local Equity Interests Purchase Agreement by and between Archer-Daniels-Midland Company and GRUMA S.A.B de C.V. of Valores, December 14, 2012 ("Valores Purchase Agreement") (Exhibit CLEX-071); Local Equity Interests Purchase Agreement by and between Archer-Daniels-Midland Company and GRUMA S.A.B. de C.V. of Consorcio, December 14, 2012 ("Consorcio Purchase Agreement") (Exhibit CLEX-072).
[544] Hart/Vélez Second Report, ¶ 10.
[545] Hart/Vélez Second Report, § 6.
[546] Hearing, Day 5, Tr. 1007:9-1008:2.

impact ascribed to it by Claimants – had already been adopted. Therefore, the ADM Transaction indicates that Claimants' shares in Monaca and Demaseca retained value despite of the seizure and special administration measures and Decree No. 7.394.

474. On the other hand, Gruma's own valuation reports did not reveal a destruction of the value of its investment, through Claimants, in Monaca and Demaseca as a result of the measures. Indeed, in its 2010, 2011 and 2012, annual reports, Gruma referred to the Decree, the negotiations with the Venezuelan government and the Notification of Dispute and indicated that there were no indications of impairment of the value of its net investment in the Companies.[547]

475. In the 2012 Gruma Annual Report presented in 2013 ("2012 Gruma Annual Report"), Gruma stated that it had lost control of Monaca and Demaseca on January 22, 2013, and that, as a result of that loss of control, it would cease to consolidate the financial information of the Companies in its financial statements.[548] This statement is also found in the in Gruma's 20-F report filed with the U.S. Securities & Exchange Commission on April 30, 2013, for the fiscal year ended on December 31, 2012[549] (the "Gruma's 2012 20-F Report"), which mentions the existence of the Administrative Ordinance.

476. Also in the 2012 Annual Report, Gruma indicated that, based on preliminary fair value calculations, there was no indication of impairment of the value of Gruma's net investment in the Companies.[550] Indeed, the report states the following:

> "Pending resolution of this matter, based on preliminary fair value calculations, no indication of impairment of the value of GRUMA's net investment in MONACA and DEMASECA has been identified. The Company cannot estimate the value of any future impairment charges, if any. The Company's net investment in the historical value of MONACA and DEMASECA as of December 31, 2012, is $2,901,726 and $188,563, respectively. The Company does not maintain any insurance covering the risk of expropriation of its investments".[551]

477. This report does not allow us to conclude that on that date there was a total loss of control – which Gruma only declared as a consequence of the Administrative Ordinance – or an impairment of the investments that brought them to "zero " value. However, according to the aforementioned report, it is concluded that, based on calculations that qualify as "preliminary", there were not yet "identified" that there were "indications" of impairment in the value of Claimants' net investment in Monaca and Demaseca, which would not allow us to estimate the possible future charge for

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[547] GRUMA, *2010 Annual Report*, 2010, page 54 (Exhibit R-016) *("At the end of 2010, the valuation committee received the respective non-binding appraisals that are currently under discussion and subject to further approval by the highest level authorities of each of the parties. Based on these preliminary reports, no indication of impairment of the value of Gruma's net investment in MONACA has been identified. The carrying value of Gruma's net investment in MONACA as of December 31, 2010 was $1,231,217");* GRUMA, 2011 Annual Report, April 30, 2012, page 15 (Exhibit R-059) *("Pending resolution of this matter, based on preliminary appraisal reports, no indication of impairment of the value of GRUMA's net investment in MONACA and DEMASECA has been identified. The Company also cannot estimate the value of any future impairment charges, if any, or the determination of whether MONACA and DEMASECA shall need to be recorded as a discontinued operation* [...]; *GRUMA*, 2012 Annual Report, 2012, page 117 (Exhibit R-053).

[548] GRUMA, 2012 GRUMA Annual Report, 2012, page 123 (Exhibit R-053) (*"Taking into account the facts and circumstances described above and in Note 27 and following the provisions set forth in IFRS, the Company concludes that it has been divested of control of MONACA and DEMASECA on January 22, 2013. Accordingly, and as a result of such loss of control, the Company will cease consolidating the financial information of MONACA and DEMASECA as of January 22, 2013 and shall present the net investment and results of operation of these companies until that date as discontinued operations").*

[549] Gruma's 2012 20-F Report (Exhibit C-44) *("In accordance with IFRS, we concluded that we lost control of our Venezuelan subsidiaries, Molinos Nacionales, C.A. ("MONACA") and Derivados de Maíz Seleccionado, C.A. ("DEMASECA") on January 22, 2013. As a result of such loss of control, we will cease the consolidation of the financial information of MONACA and DEMASECA starting January 22, 2013, and consequently we will present the net investment and results of operations of these companies as of such date as a discontinued operation").*

[550] GRUMA, Gruma's 2012 Annual Report, 2012, page 117 (Exhibit R-053).

[551] *Id* [emphasis added].

such impairment. Gruma considered then that there was a possibility of a deterioration in the investment but that it had not been identified and that it was not possible to estimate it at that time.

478. In the Tribunal's opinion, Gruma's statements prior to the one declaring the loss of control by the Administrative Ordinance, together with the ADM Transaction, prove that Claimants' investment in the Companies did not have a "zero" value resulting from the seizure and special administration measures or from Decree No. 7.394. This alleged "zero value" results in large part from a legal analysis of the Claimants in this arbitration that their experts accept as true, and not from the contemporary evidence – Gruma's statements and ADM Transaction – mentioned above. As for the Administrative Ordinance, it did not have the determining entity and scope attributed to it by Claimants, and in the balance of evidence the Tribunal considers that the set of statements on the situation of the Companies added to the ADM Transaction allow it to conclude that the value of the Companies is not "zero" as claimed by Claimants.

479. In summary, the Tribunal finds that there is no evidence that, as a result of the seizure and special administration measures – including the SAREN and SUDEBAN circulars – and Decree No. 7.394, the Claimants have lost total or substantial control over the Companies. Nor is it proven that the value their investments has been "wiped out or destroyed". Therefore, the Tribunal concludes that there has been no indirect expropriation of Claimants' investments in Venezuela.

480. In view of the foregoing, the Tribunal does not consider it necessary to rule on the alleged unlawfulness of the expropriation. The Tribunal shall refer to the alleged irregularities in the expropriation process upon analyzing the claim for unfair and unequitable treatment.

B. THE CLAIM FOR UNFAIR AND UNEQUITABLE TREATMENT

1. Claimants' Position

481. Claimants allege that Venezuela has breached its obligation to treat Claimants' investments fairly and equitably.

482. Article IV of the BIT establishes Venezuela's obligation to provide Valores and Consorcio with fair and equitable treatment in accordance with (i) international law, (ii) other investment treaties ratified by Venezuela, applicable by virtue of the most-favored-nation clause, and (iii) the national treatment as a floor for the application of the standard.[552]

483. According to Claimants, the standard of fair and equitable treatment requires Venezuela not to impose measures preventing the investor from enjoying the fruits of its investment, not to act in an arbitrary, unfair, idiosyncratic or discriminatory manner, abide by due process, act in good faith, act in a consistent and transparent manner, respect the legitimate expectations of the investor and refrain from coercing or harassing the investor.[553] Valores and Consorcio contend that nothing prevents a claimant from asserting its claim for fair and equitable treatment on the same facts on which their claim of expropriation is based, provided that the standard of fair and equitable treatment is met.[554]

484. Claimants allege that Article IV of the BIT, according to which Venezuela must grant *"fair and equitable treatment under international law"*, cannot be equated with the minimum standard of treatment.[555] In this context, they argue that Venezuela misconstrues the standard of fair and

[552] Memorial, ¶ 204.
[553] Memorial, ¶ 205. *See* Memorial, footnotes 386-392.
[554] Brief, ¶ 288; Hearing, Day 1, Tr. 94:22-96:9.
[555] Memorial, ¶¶ 208-209.

equitable treatment, ignoring the language of the Treaty. The BIT does not refer to the minimum level of treatment, and the construction of the Treaty according to the common sense of its terms, supports the construction that this is an autonomous standard.[556]

485. In addition, Venezuela ignores the decisions quoted by Claimants in *Vivendi v. Argentina II, Suez vs. Argentina and Total v. Argentina.* In *Vivendi v. Argentina II,* the court rejected the respondent's construction that the standard of *"fair and equitable treatment, in accordance with the principles of international law"* was equivalent to the minimum standard of treatment under general international law, formulated in the case *Neer.*[557] This tribunal held that the reference to *"principles of international law"* in the treaty requires *"consideration of a margin of principles of international law broader than just the minimum standard"*, adding that *"fair and equitable treatment must be in accordance with the principles of international law, but this requirement of conformity may serve as both a minimum and maximum limit of the standard of fair and equitable treatment of the treaty".*[558] Venezuela quotes the "doctrine" of the North American Free Trade Agreement ("NAFTA") ignoring that Article 1105 of this treaty is entitled "minimum standard of treatment" and that its note of interpretation establishes that the article reflects the minimum standard of treatment.[559]

486. In the event that the Tribunal determines that the standard of fair and equitable treatment equals to the minimum standard of treatment, it has evolved in such a way that it must now be considered comparable to the independent standard of fair and equitable treatment.[560] The tribunals of *Mondev v. United States* and *Pope & Talbot v.* Canada *(Damages Award), inter alia,* have acknowledged that this.[561] Claimants argue that *Glamis Gold v. United States* is inapplicable because it is a NAFTA case and in this case the State parties to the BIT have not issued a similar construction.[562]

487. Likewise, according to paragraph 2 of Article IV of the BIT, Venezuela must provide the same treatment as that guaranteed to investors from a third State, if such treatment is more favorable. Claimants contend that the simple reading of Article IV of the BIT shows that the most-favored-nation clause in paragraph 2 qualifies the standard of fair and equitable treatment in paragraph 1 and, therefore, the function of the most-favored-nation clause is to "limit" the scope to the standard of fair and equitable treatment.[563] Claimants also consider ungrounded Venezuela's argument that the most-favored-nation clause cannot be sued to incorporate the fair and equitable treatment of another treaty because Article IV, paragraph 1 (which includes the protection of fair and equitable treatment) was specifically negotiated.[564] Claimants rely on the legislative history of the BIT Approval Bill. They argue that the purpose of the most-favored-nation clause is precisely to override the provisions of the base treaty, regardless of whether those provisions were negotiated with any level of specificity.[565] Finally, Claimants argue that importing a fair and equitable treatment provision from another investment treaty does not require a comparison with an investor in similar circumstances.[566]

488. Under the most-favored-nation clause of the BIT, Claimants invoke the application of the text of the fair and equitable treatment clauses without reference to general international law, included in

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[556] Brief, ¶ 290.
[557] Memorial, ¶ 208.
[558] Memorial, ¶ 208, quoting *Vivendi v. Argentina II,* ¶ 7.4.7, footnote 324.
[559] Brief, ¶¶ 290-292.
[560] Memorial, ¶ 210; Hearing, Day 1, Tr. 96:19-97-5.
[561] Memorial, ¶ 210, footnotes 400-402.
[562] Brief, ¶ 295.
[563] Brief, ¶ 297; *see* Brief, ¶ 298.
[564] Brief, ¶ 299.
[565] *Id.*
[566] Brief, ¶¶ 301-302.

bilateral investment treaties in force at the time Venezuela adopted the measures against Claimants.[567] They mention the Agreement between the Bolivarian Republic of Venezuela and the Government of the Republic of Belarus on the Reciprocal Promotion and Protection of Investments, executed on December 8, 2007 ("Venezuela-Belarus BIT"), the Agreement between the Government of the Bolivarian Republic of Venezuela and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments, executed on November 20, 2008 ("Venezuela-Vietnam BIT"), and the Agreement between the Government of the Bolivarian Republic of Venezuela and the Government of the Russian Federation on the Reciprocal Promotion and Protection of Investments, executed on November 7, 2008 ("Venezuela-Russia BIT"),[568] which entered into force after the BIT became effective.[569] For example, paragraph 2 of Article 2 of the Venezuela-Belarus BIT states that investors' investments *"shall at all times be accorded fair and equitable treatment and enjoy protection and security"*.[570] Therefore, in any case, Venezuela is bound to guarantee fair and equitable treatment independent of any reference to general international law, without any limitation.[571]

489. Claimants contend that Venezuela provided unfair and unequitable treatment by implementing and maintaining a series of measures on Monaca and Demaseca that deprived the Claimants from the use and enjoyment thereof for more than for years without any compensation.[572] It relies on *Achmea v. Slovakia* to argue that the seizure and special management measures and Decree No. 7.394 have prevented Claimants from receiving the basic benefits of their investments, including the power to distribute dividends and dispose of their shareholding in the Companies.[573] As a result of the measures, Claimants have been unable to approve balance sheets and financial statements, approve management or approve new board members, accept directors' resignations, sell their shares in the Companies or dispose of their assets.[574]

490. Claimants also allege that Venezuela has acted in a manner that is discriminatory, arbitrary, contrary to due process and the principle of good faith, in breach of the protection of fair and equitable treatment.[575]

491. Claimants contend that the State action is arbitrary if it has no factual or legal basis, if it acts on a whim, it is not based on legal provisions, but on discretion, prejudice or personal preference, taking action for reasons other than those presented or deliberately ignoring due process.[576]

492. According to Claimants, the imposition of the seizure and special administration measures are arbitrary because they have no factual or legal basis.[577] They were based on Mr. Fernández Barrueco's alleged shareholding in Monaca and Demaseca, and have been maintained, despite the fact that Claimants proved before the judge that he had no equity interests in the Companies since 2008, but he ignored the evidence in the record.[578] Venezuela admits that between May and June 2008, Rotch had already transferred its shares in Monaca and Demaseca to a trust.[579] However, in its November 2010 decision, the judge confirmed measures with respect to Monaca and Demaseca

[567] Memorial, ¶¶ 212-214; Hearing, Day 1, Tr. 97:6-99:12.
[568] Memorial, ¶ 213, footnote 404.
[569] Brief, ¶ 300.
[570] Agreement between the Bolivarian Republic of Venezuela and the Government of the Republic of Belarus on the Reciprocal Promotion and Protection of Investments, December 8, 2007 ("Venezuela-Belarus BIT"), Article 2 (Exhibit C-169).
[571] Memorial, ¶¶ 213-214.
[572] Memorial, ¶ 216.
[573] Memorial, ¶¶ 217-219; Brief, ¶¶ 305-306.
[574] Brief, ¶ 304.
[575] Memorial, ¶¶ 220-225.
[576] Brief, ¶ 309; Memorial, ¶ 221.
[577] Brief, ¶¶ 311-312.
[578] *Id.*
[579] Hearing, Day 1, Tr. 100:12-19.

as a whole, and not only with respect to the fictitious interest of Mr. Fernández Barrueco.[580] It applied the regime of Article 22 of the Law against Organized Crime *(Ley contra Delincuencia Organizada)*, which is applicable only to seized property and presupposes a final criminal conviction, which does not exist in this case.[581] In addition, the seizure and special administration measures are of a permanent nature as they were established indefinitely and have been in force irregularly since December 2009.[582] Venezuela has prevented the admission of the appeal against the decision upholding the measures.[583]

493. Claimants also contend that Decree No. 7.394 was issued arbitrarily, with the aim of taking Monaca and Demaseca *"one way or another"* and is of a permanent nature.[584] One of the reasons for arbitrariness is that it is based on seizure and special administration measures, in the context already described. It adds that *"despite the fact that the Republic denies the connection between Decree No. 7.394 and the seizure and special administration measures, the expert absent from the Republic recognizes this in his report"*.[585] It is also arbitrary, because it was imposed to execute the "*Socialist Agroindustrial Processing Capacity Consolidation for the Venezuela of the XXI century*" program, although this program does not really exist.[586] Finally, Decree No. 7.394 is arbitrary because it is contrary to due process.[587]

494. Claimants allege that Venezuela engaged in discriminatory conducts in breach of the standard of fair and equitable treatment. Although Venezuela claims that it adopted these measures to respond to the food crisis and that they were imposed on the entire sector, the measures imposed on *Alimentos Polar C.A.* and *Cargill Venezuela S.A.* – companies competing with Monaca and Demaseca – have not had the scope of those imposed on the Companies.[588] *Alimentos Polar C.A.* and *Cargill Venezuela S.A.* were expropriated only one warehouse and one rice plant, respectively, and have not been forced to transfer all their assets for the performance of a public work, while Decree No. 7.394 subjected the Companies to an expropriation process that affects all of their assets.[589]

495. According to Claimants, Venezuela also engaged in conduct contrary to due process, breaching the standard of fair and equitable treatment. Claimants mention the similarities of this dispute with *Petrobart v. Kyrgyzstan.* They allege that Venezuela intervened irregularly in the third party proceeding (*incidente de tercerías*) initiated by the Companies and Claimants and in the appeal filed by the same parties against the decision in the third party proceeding (*incidente de tercerías*) confirming the seizure and special administration measures.[590] In addition, they allege that Venezuela has indefinitely suspended the expropriation proceedings with the aim of not paying the compensation due, but maintaining the effects of Decree No. 7.394.[591]

496. Venezuela would also have incurred a denial of justice since Claimants filed an appeal against the decision rendered in the third party proceeding (*incidente de tercerías*) more than five years ago, but the appeal has not yet been admitted.[592] According to Dr. Canova, the admission of an appeal

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[580] Brief, ¶ 311 and footnote 565. According to Claimants, Venezuela fails to explain why a measure directed solely against the alleged shareholding of Mr. Fernández Barrueco would not be effective.
[581] Brief, ¶ 312.
[582] Brief, ¶ 313.
[583] *Id.*
[584] Brief, ¶¶ 314, 316.
[585] Hearing, Day 1, Tr. 103:1-6.
[586] Brief, ¶ 315.
[587] *Id.*
[588] Brief, ¶ 319.
[589] Brief, ¶¶ 319-320.
[590] Brief, ¶¶ 322-324.
[591] Brief, ¶ 108.
[592] Memorial, ¶ 224; Brief ¶¶ 324-327; Hearing, Day 1, Tr. 101:16-102:18.

is a mere administrative step in which only verification that the appeal was filed on time is required.[593] In this context, and taking into account the case of *Oostergetel v. Slovakia,* a claim for denial of justice based on unjustified procedural delay does not require to use up internal remedies.

497. In addition, under Venezuelan law, a final court judgment is required and the timely payment of fair indemnity to occupy the Companies, or in the case of prior occupation, the initiation of an expropriation suit, including the deposit of the amount of compensation.[594]

498. Venezuela would also have acted contrary to good faith. Respondent has obstructed and delayed the resolution of the dispute by changing Venezuela's representatives in the negotiations, imposing additional requirements in order to create false expectations of good faith negotiation, the unjustified failure to comply with the conditions agreed upon in the "Commitment Deed" and failure to respond to Claimants' continuing invitations to resume the dialogue.[595] It has not acted in a consistent and transparent manner in its discussions with Claimants, nor has it had adequate communication with Claimants during the process.[596]

499. Based on *El Paso v. Argentina*, Claimants argue that the standard of fair and equitable treatment also encompasses reasonableness and proportionality. The seizure and special administration measures have not been proportional because they affect the whole property of the companies, despite the fact that, if anything, as Venezuela admits, Mr. Fernández Barrueco never had more than a minority and indirect percentage in the Companies.[597].

500. In addition, Claimants contend that Venezuela treated its investments unfairly and inequitably by harassing the staff of the Companies by Venezuelan officials, especially the members of the Liaison Commission. This harassment was carried out through threats through threats of dismissal and the taking of operations by force; pressure for the dismissal of employees who did not sympathize with the government; the submission of Companies' managers to a regime that exposes them to criminal and civil sanctions if they act against the mandates of the Liaison Commission; threats to disallow payments and to redirect raw materials from the Companies in order to ensure that their actions conform to the interests of Venezuela; and threats to take the companies by the Venezuelan National Guard.[598] Likewise, Venezuelan officials have occupied the offices of the Companies, requested thousands of requests for information, obligated to pay indemnity payments to members of the Liaison Commission and to the special administrators and the requirement to notify decisions on operational and labor matters, interfering in these decisions.[599]

2. Respondent's Position

501. Venezuela maintains that it has not breached the provisions of Article IV of the BIT on fair and equitable treatment.

502. Venezuela first argues that Claimants have failed to make a claim for *prima facie* fair and equitable treatment.[600] They have failed to explain which acts or measures, in addition to those constituting an expropriation, have independently breached the standard of fair and equitable treatment.[601] The basis for the two claims must be different, and Claimants cannot simply mechanically repeat the

[593] Hearing, Day 1, Tr. 101:20-102:4.
[594] Memorial, ¶ 226.
[595] Memorial, ¶ 226; Brief, ¶¶ 329-333.
[596] Memorial, ¶¶ 331-332.
[597] Hearing, Day 1, Tr. 101:4-101:15.
[598] Memorial, ¶ 229; Brief, ¶ 334.
[599] Memorial, ¶ 229.
[600] Counter memorial, ¶ 386.
[601] Rejoinder, ¶ 460.

facts supporting their expropriation claims.[602]

503. According to Venezuela, BIT requires that the standard of fair and equitable treatment be dispensed *"in accordance with international law"*, which is the minimum standard of treatment.[603] Tribunals continue to apply this minimum standard of treatment, and while it has evolved, the threshold for establishing a breach of the standard of fair and equitable treatment remains high.[604] Venezuela maintains that it must be shown that there was a clear breach of the minimum standard of treatment accorded to foreigners and their assets under international law.

504. Venezuela refers to *Glamis Gold v. United States* to define the minimum standard of treatment under customary international law.[605] It also quotes *Neer v. Mexico* to argue that the minimum standard of treatment has been breached if there is conduct amounting to *an outrage, in bad faith, a deliberate disregard for duty, or an insufficiency of governmental action so far from international standards that any reasonable and impartial man could easily acknowledge as insufficient"*.[606] Claimants argue that the common sense of the terms of the BIT does not refer to the minimum standard of treatment. However, Venezuela maintains that nothing in the BIT links the fair and equitable standard of treatment with a "stand-alone" standard or the components that Claimants seek to incorporate.[607]

505. Venezuela also argues that Claimants cannot qualify NAFTA cases as irrelevant because their analysis of the minimum standard of treatment reflects international law.[608] It quotes Professor Paparinskis, according to whom *"[the] ordinary meaning of 'fair and equitable treatment' refers directly to the minimum standard provided by customary international law, even if the process or object of reference is not explicitly specific in the treaty at issue. However, even if that assertion was not entirely persuasive, the minimum standard must nevertheless 'be taken into account' as a 'relevant rule of international law' in accordance with Article 31(3)(c) of the* [Vienna Convention], *which plays an important role in the construction process ('together with the context', under the heading of Article 31(3))"*.[609]

506. It also highlights that Professor Schreuer, Claimants' expert in responding to Venezuela's jurisdictional objections, considers that when treaties refer to international law in their fair and equitable treatment clauses, customary law must be taken into account upon construing those clauses.[610] Professor Schreuer agreed with the NAFTA Free Trade's Commission construction because the heading of Article 1105(1) is "minimum standard of treatment", but also because the text of the clause established an explicit relationship between fair and equitable treatment and international law. Although Professor Schreuer indicates that the conclusion reached in the NAFTA context would not necessarily be applicable in the context of other treaties lacking these features, the treaty at issue before the tribunal does have the important characteristic pointed out by Professor Schreuer: there is a direct link between fair and equitable treatment and international

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[602] *Id.*

[603] Counter memorial, ¶ 390; Rejoinder, ¶ 471.

[604] Rejoinder, ¶ 463.

[605] Rejoinder, ¶ 463; *Glamis Gold v. United States*, ¶¶ 616 ("[…] *in order to breach the minimum standard of treatment under customary international law* […], *an action must be sufficiently flagrant and outrageous – a flagrant denial of justice, manifest arbitrariness, manifest injustice, absolute lack of due process, manifest discrimination or manifest lack of reason* […]").

[606] *See Neer v. Mexico. See* Counter memorial, ¶ 391; Rejoinder, ¶ 464.

[607] Counter memorial, ¶¶ 393-395; Rejoinder, ¶ 465.

[608] Rejoinder, ¶ 466.

[609] Rejoinder, ¶ 466, quoting Martins Paparinskis, COMMENTARY ON THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT, EJIL Talk, August 12, 2013, page 1 [Respondent's translation] (Exhibit RLA-155).

[610] Rejoinder, ¶ 467. *See* Christoph Schreuer, FAIR AND EQUITABLE TREATMENT, BIICL, Investment Treaty Forum September 9, 2005 (Exhibit RLA-140).

law, specified in the very sentence of this clause.[611]

507. Venezuela points out that Claimants minimize the important contribution of the jurisprudence quoted by Venezuela that is not from NAFTA[612] and refers to *Genin v. Estonia* and *M.C.I. Power Group v. Ecuador* in support of its argument that the standard of fair and equitable treatment necessarily incorporates the minimum standard of treatment provided by customary international law.

508. Furthermore, the minimum standards of treatment is not comparable to the autonomous standards of fair and equitable treatment. Claimants do not define with specificity what "autonomous standard" means.[613] In any case, the minimum level of treatment is a minimum, not a maximum, and especially not a potpourri of standards arranged and selectively chosen to obtain the desired result.[614]

509. Venezuela also argues that the import of one standards of fair and equitable treatment from another treaty is not appropriate. To the extent that the standard of fair and equitable treatment corresponds to the minimum standard of treatment under international law, and even if the Agreement did not specifically include an express reference to international law, the meaning of standard would not change, even if the tribunal could and would decide to import the text of another treaty.[615] Venezuela contends, however, that Claimants' arguments about "importing" a treaty with more favorable terms are ungrounded. International tribunals have taken the view that provisions specifically negotiated by the contracting parties cannot be circumvented by a most-favored-nation clause.[616] In addition, the legislative history of the BIT Approval Bill does not provide any additional support for this argument, since it only states that the most-favored-nation clause *"reinforces the standard of fair and equitable treatment"*.[617] Claimants have also failed to prove that Venezuela has accorded other foreign investors in similar circumstances more favorable treatment than Claimants, which is a requirement for filing a claim under the most-favored-nation clause.[618]

510. However, even if an autonomous standard were applied in this case, Claimants have not proven that Venezuela's measures have deprived Claimants of the benefits of their investments, that Venezuela has treated Claimants in a manner that is discriminatory, arbitrary, contrary to due process or the principle of good faith, or that Venezuela has exercised coercion and harassment.

511. Venezuela argues that in no case have the owners been deprived of the ownership of their investment, nor have they diminished its commercial value or impeded its operation. No Venezuelan authority has prohibited the distribution of dividends, the approval of balance sheets and financial statements, and the performance of other acts mentioned by Claimants.[619] Unlike the case of *Achmea v. Slovakia,* invoked by Claimants, what happened in this case was that due to the restrictions on the seizure imposed in the criminal proceedings against Mr. Fernández Barrueco (where the State exercises its police power), on a temporary basis, certain acts at law cannot be formalized and authenticated, without judicial authorization. Claimants have not disputed that the

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[611] Rejoinder, ¶ 468; Christoph Schreuer, FAIR AND EQUITABLE TREATMENT, BIICL, Investment Treaty Forum, September 9, 2005, page 3 (Exhibit RLA-140). *See* Christoph Schreuer, FAIR AND EQUITABLE TREATMENT IN ARBITRAL PRACTICE, 6 The Journal of World Investment and Trade 357-386 (2005), page 359 (Exhibit CLA-069).
[612] Rejoinder, ¶ 470.
[613] Rejoinder, ¶ 473.
[614] Rejoinder, ¶ 474.
[615] Rejoinder, ¶ 475.
[616] Rejoinder, ¶ 476.
[617] Rejoinder, ¶ 477.
[618] Rejoinder, ¶ 478.
[619] Counter memorial, ¶¶ 404-405; Rejoinder, ¶ 482. *See* Rejoinder, Part III, Section B.2 and Part III, Section B.7.

judge may modify the measures or authorize the formalization of specific acts at the request of the interested parties.[620] Claimants have not demonstrated that they attempted to declare dividends or seek a judicial authorization to register any act relating to them.[621]

512. According to Venezuela, arbitrary conduct is *"intentional contempt of due process of law, an action that outrages or at least surprises, a sense of legal correctness"*[622] or *"voluntary departure from due process, an act that impresses, or at least surprises, the notion of what is legally appropriate"*.[623]

513. Venezuela maintains that the seizure and special administration measures were not arbitrary because they do have factual and juridical basis.[624] They have factual basis because the evidence submitted by the prosecutor's office to the judge at their request, because of the evidence of the link between Mr. Fernández Barrueco and RFB Holdings in November and December 2009,[625] and because the State exercised the judicial power to adopt precautionary measures in a criminal proceeding, being expressly empowered by law. The judge concluded that the only way in which it was possible to safeguard the value of Mr. Fernández Barrueco's shares was to protect and safeguard the equity and value of the Companies as a whole.[626] Furthermore, it is justified that the measures have been applied to the companies as a whole and not only to the fraction of the shareholding of the defendant. Also, Mr. Fernández Barrueco's right, through Rotch, to recover Claimants' shares – a right that was in effect at the time the measures were issued – provides a reasonable basis for validly ordering the seizure.[627]

514. Claimants' arguments are formally inadmissible because in substance they constitute a claim of denial of justice, which has sought to be presented simply as common breach of the standard of fair and equitable treatment, when the requirement of use up of local remedies has not been met.[628] Venezuela has demonstrated that Claimants could have used suitable domestic remedies to nullify or amend the allegedly arbitrary or unjustified effects of the measures.[629] On the other hand, Claimants have not proven that the remedies available to them were futile.

515. Regarding the origin and basis of the measures, and the reasons why they are not discriminatory, Venezuela reiterates the arguments it used to respond the claim of expropriation.[630]

516. Venezuela also argues that Decree No. 7.394 was not arbitrary and that Claimants overlook the context in which it was formulated.[631] Venezuela has refuted Claimants' history that Venezuela created the situation that made necessary the expropriation of the companies.[632] Measures taken by the Government to address the food crisis were imposed on the entire sector.[633] In addition, there is no obligation to treat every company operating in the country in exactly the same way, and international law allows for justified government actions, as in this case.[634] With respect to the

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[620] Rejoinder, ¶ 484.
[621] Rejoinder, ¶ 484.
[622] Counter memorial, ¶ 406, quoting the *ELSI Case (United States v. Italy)*, page 15, ¶ 128.
[623] Rejoinder, ¶ 485, quoting, *El Paso v. Argentina*, ¶ 319, which likewise quotes the *ELSI Case (United States v. Italy)*, page 15, ¶ 128.
[624] Rejoinder, ¶ 486.
[625] Respondent's Post-Hearing Writ, ¶¶ 27, 50-52. *See* Counter memorial,
[626] Respondent's Post-Hearing Writ, ¶ 27.
[627] Respondent's Post-Hearing Writ, ¶¶ 30-31.
[628] Respondent's Post-Hearing Writ, ¶ 32.
[629] Respondent's Post-Hearing Writ, ¶ 33; Rejoinder, ¶¶ 444-454.
[630] Rejoinder, ¶ 487; *See* Rejoinder, Part IV, Section B.2.
[631] Rejoinder, ¶ 488.
[632] Rejoinder, Part III, Section A.
[633] Counter memorial, ¶ 419.
[634] Rejoinder, ¶ 490.

alleged discrimination that Claimants have suffered with respect to their investment in the Companies, as compared to the conduct with respect to *Alimentos Polar, C.A.* and *Cargill Venezuela, S.A.*, Venezuela argues that Claimants must first demonstrate that investors are in "similar circumstances" and a concrete analysis with facts that establish different treatment on the basis of an element protected by international law, such as nationality.[635]

517. To the extent that there has been no expropriation, Claimants have not been obligated to forcefully transfer all of their assets. There mere issuance of Decree No. 7.394 did not have the effect of depriving the ownership or impose a substantial limitation.[636]

518. In addition, Venezuela has not breached the standard of fair and equitable treatment for conduct contrary to due process. Venezuela emphasizes that arbitral tribunals are not appeal tribunals for any administrative irregularity,[637] and quotes the tribunal in *AES v. Hungary* to argue that: *"not all failures of imperfections in a process shall prevent fair and equitable treatment. The rule is not perfect. It can be said that the rule has been breached only when the procedural acts or omissions of a state are manifestly unfair or unreasonable in relation to the facts and context before the judge (in such a way as to shock or at least surprise the sense of legal correctness)".*[638]

519. It has not been proven that there has been improper intervention by any body of the Venezuelan State in the third party proceedings (*incidente de tercerías*). Claimants quote the account of their witness, Homero Huerta, of information he received from his lawyers in a referential, speculative and ungrounded manner.[639] Besides, the judge did not ignore any evidence in the procedure.[640] With respect to the claim of denial of justice, Venezuela argues that there is no fundamentally unfair procedure or blatantly wrong decisions in this case that can be considered a breach.[641] Within criminal proceedings, the only decision so far issued was in favor of the accused, and is under appeal, while the duration of the appeal proceedings in the third party proceeding (*incidente de tercerías*) is reasonable.[642] Furthermore, the use up of internal remedies is a general principle in any case of denial of procedural justice.[643]

520. Regarding the negotiation process, Venezuela maintains that since the publication of Decree No. 7.394, the Parties have developed uninterrupted negotiations in which they have analyzed and discussed various scenarios for a potential agreement; that the suspension of the expropriation process was by common agreement precisely to allow for the development of the negotiations; that Claimants' account ignores the complexity of the negotiations and is false when it refers to the alleged threats of coercion; that, in addition, it should be taken into account that at the end of 2011, the essence and nature of the negotiations between the Parties changed, as the possibility of creating two joint ventures began to be considered; that Gruma's contemporary communications contradict the position of Claimants in this arbitration on the state of the negotiation between the Parties; and that in October 2013, the Parties agreed to continue the conversations in a confidential manner and that, indeed, they were continuing as of the date of their Rejoinder.[644] Venezuela also argues that it has not exercised coercion or harassment, and so Claimants' statements to that effect are denied by witnesses Nelson Alba, Johabner Parra and Hairo Arellano.[645]

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[635] Rejoinder, ¶ 490. *See* Respondent's Post-Hearing Writ, ¶ 48.
[636] Rejoinder, ¶ 491.
[637] Counter memorial, ¶ 413.
[638] Counter memorial, ¶ 414, quoting *AES v. Hungary*, ¶ 9.3.40 [Respondent's translation].
[639] Rejoinder, ¶ 492.
[640] Rejoinder, ¶ 492; Rejoinder, Part III, Section B.3.
[641] Rejoinder, ¶ 493.
[642] *Id.*
[643] Respondent's Post-Hearing Writ, ¶ 35.
[644] Rejoinder, ¶¶ 215-244.
[645] Rejoinder, ¶ 495; Rejoinder, Part III, Section A.2.a.

3. Analysis of the Tribunal

521. As a preliminary matter, the Tribunal notes that there is no objection to its jurisdiction specifically referring to the claim of breach of Article IV of the BIT.

522. Claimants contend that Venezuelan measures constitute unfair and equitable treatment of their investments in breach of Article IV of the BIT. On the other hand, Venezuela alleges that Claimants have not made a claim for fair and equitable treatment *prima facie;* it disputes the standard proposed by Claimants and, in any event, denies that their actions are contrary to the obligation to provide fair and equitable treatment under the Treaty. The Tribunal shall refer to the arguments of the Parties in that order.

523. First, the Tribunal does not share Venezuela's position that Claimants cannot base their claim for fair and equitable treatment on the same facts on which they base their claim for expropriation. None of the authorities quoted by the Respondent backs its position. On the contrary, international tribunals have accepted that the same facts that constitute an expropriation may entail breaches of other standards of protection under the respective treaty.[646]

524. For example, the tribunal of *BCB v. Belize* noted:

> "As an initial issue, the Tribunal does not accept that a behavior that breaches one of the protections of the Treaty, cannot breach other provisions of the same treaty. The Treaty addresses the general objective of 'creating favorable conditions for greater investment' among States parties through the protection of investments by articulating a set of standards of protection in more or less general terms. The protection established in this way is intended to be cumulative. Nothing in the Treaty supports Respondent's claim that the standards of the Treaty are alternative to each other, so that a breach of any would prevent the breach of another. Rather, each of the standards set out in the Treaty expresses a particular aspect of the general purpose of investment protection. Its potentially overlapping application reflects this complementarity".[647]

525. The Tribunal considers that the same analysis applies to the Treaty on which Claimants' claims in this arbitration are based. To the extent that the same conduct may breach several provisions of the Treaty, nothing prevents Claimants from basing their remaining claims on the same facts invoked in connection with their expropriation claim.

526. Although this is not the case before this Tribunal, accepting Venezuela's position would lead to the conclusion that an investor cannot file a subsidiary claim for breach of the standard of fair and equitable treatment in the vent that the corresponding tribunal does not find evidence of expropriation. In this hypothetical scenario, if the investor errs in the legal qualification of the facts subject of the process in his main claim, he would be devoid of redress even if the acts of the State are contrary to some standard of protection under the treaty over which the investor also submits a claim.

527. The same fact or situation may constitute a breach of different provisions of a treaty, and unless otherwise provided, the corresponding tribunal may exercise its jurisdiction to examine and decide on the breaches invoked provided they have been duly alleged. In this case, Claimants provided an independent analysis of the reasons why they believe Venezuela's measures breach Article IV(1) of the Treaty on Fair and Equitable Treatment. Therefore, the Tribunal cannot accept Venezuela's defense that Claimants failed to articulate a claim for fair and equitable treatment *prima facie.*

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[646] *See, for example, CME v. Czech Republic,* ¶¶ 610-612; *Metalclad v. Mexico,* ¶ 104; *Tecmed v. Mexico,* ¶¶ 173-174.
[647] *BCB v Belize,* ¶ 280 [Tribunal's translation].

528. Second, the Parties discuss the standard of fair and equitable treatment under the Treaty. Specifically, they discuss whether the reference to "International Law" in Article IV(1) of the BIT points out that the obligation to provide fair and equitable treatment equals the minimum standard of treatment under customary international law.

529. Article IV(1) of the Treaty provides that *"each Contracting Party shall ensure in its territory fair and equitable treatment, in accordance with International Law, to investments made by investors of the other Contracting Party"*.

530. The Tribunal considers that the standard of fair and equitable treatment enshrined in this treaty cannot be equated with the minimum standard of treatment under customary international law. Indeed, BIT makes no reference to the "minimum standard of treatment" and the Tribunal finds no reason to construe the reference to "International Law" in that sense either.

531. Other international investment tribunals that have construed similar clauses in treaties other than NAFTA[648] have reached the same conclusion. For example, the tribunal of *Vivendi v. Argentina II,* upon construing the expression *"in accordance with the principles of international law"* in Article 3 of the bilateral investment treaty between France and Argentina – noted the following:

> "The Tribunal finds no basis for equating the principles of international law with the minimum standard of treatment. First, the reference to the principles of international law supports a broader construction that entails considering a margin of principles of international law broader than just the minimum standard. Second, according to the wording of Article 3, fair and equitable treatment must be in accordance with the principles of international law, but this requirement of conformity can serve both as a minimum and maximum limit to the fair and equitable treatment standard of the Treaty. Third, the words of the provision indicate that contemporary principles of international law must also be taken into account, not just the principle of almost a century ago".[649]

532. The tribunal of *Total v. Argentina* also reached the same conclusion:

> "In the Tribunal's view, the phrase 'fair and equitable treatment in accordance with the principles of international law' cannot be read as 'treatment required by the minimum standard of treatment of foreigners/investors under international law'. This is irrespective of the issue of whether there really exists today a difference between this traditional minimum standard and what international law generally requires in terms of the treatment of foreign investors and their investments".[650]

533. In any event, the Tribunal notes that the concept of "minimum standard of treatment" under international law has developed significantly since its earliest definitions. For example, the tribunal of *RDC v. Guatemala* noted that *"the minimum standard of treatment is 'constantly in a process of development' form its formulation in Neer"*.[651]

534. In a similar sense, the tribunal of *Pope & Talbot v. Canada (Damages Award)* recognized that *"the range of actions subject to the international arena has expanded beyond the international breaches considered in Neer to include the concept of fair and equitable treatment"*.[652]

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[648] The Tribunal notes that NAFTA expressly includes the minimum standard of treatment and, therefore, other tribunals' constructions of the "fair and equitable treatment" clause of that treaty cannot automatically extend to this BIT.
[649] *Vivendi v. Argentina II,* ¶ 7.4.7.
[650] *Total v. Argentina,* ¶ 125 [Tribunal's translation].
[651] *RDC v. Guatemala,* ¶ 218 [Tribunal's translation].
[652] *Pope & Talbot v. Canada (Damages Award),* ¶¶ 58-60 [Tribunal's translation].

535. Thus, based on the remarks of different tribunals regarding the evolution of the minimum standard of treatment in international law, the tribunal of *Azurix v. Argentina* noted that:

> "The minimum requirements to meet this [minimum] standard have varied, and the Tribunal understands that its content is substantially similar, whether the terms are construed according to their current meaning, as required by the Vienna Convention or under customary international law".[653]

536. The Tribunal agrees with the opinion of this tribunal and of other tribunals that have reached the same conclusion.[654] Indeed, the concept of "minimum standard of treatment" has been expanded to such an extent that it now provides protection very similar to that accorded under the standard of fair and equitable treatment. Accordingly, the discussion raised lacks practical effect in this case, since the level of protection afforded to investments protected under the Treaty is substantially the same, regardless of how the reference to "International Law" contained in Article IV(1) of the BIT is construed.

537. In light of the foregoing, the Tribunal does not consider it necessary to refer to Claimants' alternative argument that the provisions on fair and equitable treatment of other bilateral investment treaties entered into by Venezuela which do not refer to "International Law" in relation to that obligation should be applied through the most-favored-nation clause.

538. Article IV(1) of the Treaty is to be construed in accordance with the rule of construction of Article 31(1) of the Vienna Convention. In its current sense, the terms "fair" and "equitable" mean "according to justice and reason"[655] and "having equity"[656], namely, having "equality of mind".[657] In their context, the terms "fair and equitable" refer to the treatment that the Contracting States undertook to guarantee to the investments of the investors of the other Contracting State. According to numeral 2 of the same Article IV, such treatment may not be less favorable than that granted to the investments of its own investors or those of third States. In view of the purpose and aim of the Treaty, as arisen from its preamble, this treatment should be aimed at creating favorable conditions for protected investments.

539. From the construction and application that different arbitral tribunals have given to the obligation to grant fair and equitable treatment, some elements commonly accepted as part of the standard arise. These components include, *inter alia,* the obligation not to act in an arbitrary or discriminatory manner,[658] abide by due process[659] and to act in a consistent and transparent manner.[660] It has also been understood that *"the guarantee of fair and equitable treatment* [...] *is an expression and constitutive part of the principle of good faith recognized by international law"* and must therefore be construed in light of such principle.[661] In any case, as established by the tribunal of *Mondev. v. USA,* the decision of what is fair and equitable shall depend on the facts of each specific case.[662]

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[653] *Azurix v. Argentina,* ¶ 361.
[654] *See, for example, Mondev v. United States,* ¶ 123; *Azurix v. Argentina,* ¶ 361. *See also, CMS v. Argentina,* ¶ 284; *Occidental v. Ecuador,* ¶ 190.
[655] Royal Spanish Academy, Dictionary of Spanish Language, 23rd edition, Available at: http://dle.rae.es/?id=MfO65xY
[656] Royal Spanish Academy, Dictionary of Spanish Language, 23rd edition, Available at: http://dle.rae.es/?id=MfO65xY
[657] Royal Spanish Academy, Dictionary of Spanish Language, 23rd edition, Available at: http://dle.rae.es/?id=MfO65xY
[658] *Bayindir v. Pakistan,* ¶ 178; *Rumeli v. Kazakhstan,* ¶ 609; *Deutsche Bank v. Sri Lanka,* ¶ 420; *Tecmed v. Mexico,* ¶ 154.
[659] *Rumeli v. Kazakhstan,* ¶ 609; *Deutsche Bank v. Sri Lanka,* ¶ 420.
[660] *Bayindir v. Pakistan,* ¶ 178; *Rumeli v. Kazakhstan,* ¶ 609.
[661] *Tecmed v. Mexico,* ¶¶ 153-154.
[662] *Mondev v. United States,* ¶ 118. *See also Waste Management v. Mexico,* ¶ 99.

540. To the necessary extent, the Tribunal shall refer to the elements identified above for the purpose of assessing Claimants' claim. However, the Tribunal shall not proceed to determine, on a case-by-case basis, whether the State breached one or more components of the standard. On the contrary, the Tribunal shall examine all the facts and circumstances submitted to their consideration in order to establish whether or not the action of the State, taken as a whole, conforms to the standard of conduct required by Article IV(1) of the Treaty. This, insofar as Claimants' allegation would appear to point out that it was the aggregate of measures adopted by Venezuela that resulted in the breach of Article IV(1) of the Treaty.[663]

541. Indeed, Claimants contend that Venezuela unfairly and inequitably treated their investments by implementing and maintaining a series of measures on Monaca and Demaseca that have deprived them of the basic benefits of their investments.[664] Specifically, the complain that, as a result of the seizure and special administration measures and Decree No. 7.394, Claimants are unable to distribute dividends, approve financial statements, to appoint or remove directors or managers, to sell their shares in the Companies or to dispose of their assets.[665]

542. Based on the decision of *Achmea v. Slovakia,* Claimants allege that the adverse effect of the measures – that is, the impediment to receiving the basic benefits of their investments – would be sufficient to conclude that Venezuela breached its obligation to provide fair and equitable treatment under the Treaty. In any case, they claim that the measures are also contrary to this standard of protection.

543. The Tribunal considers that the adverse effect of a measure or series of measures is not sufficient to conclude that the State failed to comply with its obligation to ensure fair and equitable treatment of investments protected under the Treaty. To reach this conclusion, the Tribunal shall have to find evidence that the measures themselves or viewed in conjunction with the other circumstances of the cases, are contrary to the standard of fair and equitable treatment.

544. In this case, it is proven that, as of 2009, Venezuela imposed seizure and special administration measures on Monaca and Demaseca arisen from the criminal proceedings against Mr. Fernández Barrueco, alleged shareholder of the Companies. These measures include the SAREN circular – which ordered the Public Registries, Mercantile Registries and Notaries to refrain from formalizing or authenticating acts or legal affairs in which the Claimants or the Companies[666] - and the appointment of special administrators empowered, in general, to exercise actions tending to guarantee the possession, safeguard, custody, use and conservation of the assets of the Companies and, in particular, to guard their banking assets.[667] Under this regime, bank movements of Companies must be approved by special administrators.[668]

545. The third party proceeding (*incidente de tercerías*) initiated by Claimants to request the lifting of the measures was denied in the first instance in November 2010 and, at the date of the last submission of the Parties before this Tribunal, Claimants' appeal against that decision had not yet been admitted. Accordingly, the seizure and special administration measures remain in force.

546. On the other hand, in May 2010, Venezuela issued Decree No. 7.394 by which it ordered the initiation of an expropriation process of certain assets of Monaca. After the issuance of the Decree, Venezuela imposed a Liaison Commission on Monaca and Demaseca. Although Venezuela alleges

[663] *See* Memorial, ¶¶ 216-217; 226-227 and 230.
[664] Memorial, ¶ 217.
[665] Brief, ¶ 304.
[666] Circular No. 0230-864 from the Director General of the Autonomous Service of Registries and Notaries to Public Registries, Commercial Registries and Public Notaries, December 10, 2009 (Exhibit C-66).
[667] *See* Administrative Ordinance, Articles 2 and 7 (Exhibit C-17).
[668] *See* Table of selected official notices from special administrators from 2010 to 2014 and attached official notices (Exhibit C-108).

that the Liaison Commission resulted from an agreement between the Parties, there is no reliable evidence of such agreement on the record. The expropriation process was suspended in August 2010 to give rise to "friendly negotiations" between the Parties which, however, have not made significant progress and whose interlocutor, as far as Venezuela is concerned, has change several times without further explanation.

547. In spite of the suspension of the expropriation process – which, according to Respondent- is barely at the outset – Respondent has understood and made known to the Companies, that Decree No. 7.394 imposes conservation obligations and certain restrictions on the goods covered by Decree,[669] namely, those used for the operation of Monaca or for the large-scale production, agro-industrial processing and storage of certain goods. For example, Respondent has pointed out that Claimants may not perform acts that entail that the Companies' property is destroyed or become *"unable to comply with the purpose for which it is being appropriated"*.[670] According to Venezuela's own expert, these acts would include (i) changing its corporate purpose; (ii) changing or eliminating a line of business; (iii) ceasing to make investments to keep its factories and equipment operating; and (iv) removing its machinery and equipment from Venezuela.[671] According to the same expert, Claimants may transfer the property, but the "decree of affectation" shall pursue it wherever it is.[672] These restrictions would be maintained until there is a definitive agreement regarding the acquisition of all or part of the Companies or until Venezuela directly expropriates the assets subject to Decree.[673]

548. In the meantime, it has been demonstrated that SIEX did not process the applications for registration or updating of foreign investment filed by Monaca and Valores between 2000 and 2013,[674] a situation that prevents Claimants from complying with one of the requirements demanded by the laws of that State to transfer money abroad. In addition. Venezuela has ordered the redirection of raw material owned by the Companies to other companies in the sector.

549. Having established the scope of the measures imposed on Monaca and Demaseca, the Tribunal shall now determine whether, as Claimants have argued, these measures or their implementation are contrary to the State's duty to ensure fair and equitable treatment of the investments protected under the Treaty.

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[669] *See for example,* Official Notice AEM No. 2012-00002 of special administrators to Henry Castro, Director of Monaca, December 20, 2012 (Exhibits C-016); Official Notice AE-2013-00030 of special administrators to Henry Castro, Executive Chairman of Monaca, July 9, 2013 (Exhibit C-115); Official Notice of special administrators to Henry Castro, Executive Chairman of Monaca, July 29, 2013 (Exhibit C-142).

[670] Hearing, Day 4, Tr. 958:12-13.

[671] Hearing, Day 4, Tr. 953:14-960:15.

[672] Hearing, Day 4, Tr. 956:2-5.

[673] Venezuelan legal experts of both Parties confirmed that the Decree would be effective until the transfer of the affected assets to Venezuela. *See* Dr. Canova's Second Report, ¶ 49; Hearing, Day 4, Tr. 960:3-15 *("**Q**: That is to say, Dr. Velázquez, you state that the owner of a good that is subject to a Decree of Forced Acquisition then has the obligation to administer that good, to keep it in good condition, to keep if functioning so that the end for which it was affected is not rendered impossible. Is that correct? **A**: Yes, civilists would say, so that he acts as a good pater familias. **Q. And he has to do this until the formal transfer of the title to the administration occurs? Correct?**"* [emphasis added]). Likewise, after the suspension of the expropriation process, members of the special administration informed the directors of Monaca that Decree No. 7.394 *"is in full force and effect"* and that the company's personal property may not be subject to any negotiation until the negotiation process with the State is completed. *See, for example,* Official Notice AEM No. 2012-00002 from special administrators to Henry Castro, Director of Monaca, December 20, 2012 (Exhibit C-016); Official Notice AE-2013-00030 from special administrators to Henry Castro, Executive President of Monaca, July 9, 2013 (Exhibit C-115); Official notice from special administrators to Henry Castro, Executive President of Monaca, July 29, 2013 (Exhibit C-142).

[674] Application for Updating of Registration of Existing Foreign Investment (Monaca, year 2009), April 30, 2010 (Exhibit C-98); Application for Registration or Updating of Foreign Investment (Monaca, year 2010), May 19, 2011 (Exhibit C-99); Application for Registration or Updating of Foreign Investment (Monaca, year 2011), May 17, 2012 (Exhibit C-100); Application for Registration or Updating of Foreign Investment (Monaca, year 2012), May 14, 2013 (Exhibit C-101).

550. Claimants contend that the seizure and special administration measures are arbitrary and disproportionate. It is then for the Tribunal to determine whether in their genesis or in their execution, or both, the aforementioned measures meet the standard of arbitrariness and disproportion alleged by Claimants.

551. Claimants complain that, when the seizure and special administration measures were decreed, the judge who heard the third party proceedings (*incidente de tercerías*) brought by them to revoke them, ignored evidence that would demonstrate that Mr. Fernández Barrueco had no interest in Monaca and Demaseca, and furthermore, confirmed the measures over all of the Companies despite the fact that the interest of the accused party therein was minority and indirect. They also allege that Venezuela's action in relation to the third party proceeding (*incidente de tercerías*) was contrary to the guarantee of due process and constitutes a denial of procedural justice.

552. With regard to the first item, the Tribunal notes that, in its decision of November 19, 2011 – which upheld the judgment of December 4, 2009 that underlies the seizure and special administration measures imposed on Monaca and Demaseca – the criminal judge concluded that by the date on which the precautionary measures were issued, Mr. Fernández Barrueco had shareholdings in Monaca and Demaseca, and that the only way to safeguard the value of his interest in these companies was to extend the precautionary measures to all of the Companies.[675]

553. The first thing to note is that it is not for this Tribunal to serve as appellate judge of the Venezuelan judge's decision, nor to reassess the evidence submitted in the third party proceeding (*incidente de tercerías*) brought by Claimants to determine whether, under applicable law, a different construction of the law or a different assessment of the evidence would apply. It is a peaceful issue investment tribunals that these are not appellate tribunals and, in that sense, the commission of an error of fact or law by a domestic tribunal is not, *per se,* a breach of the standard of fair and equitable treatment.[676] What happens in this case is Claimants' disagreement with the Respondent's judge's assessment of the evidence and construction of the law under Venezuelan law, a disagreement that is not for this Tribunal to resolve.

554. A different matter is the performance of the Venezuelan judicial system from the point of view of the process itself. Issued the seizure by the criminal judge, which was initially referred to the shares of Mr. Fernández Berrueco in the Companies, the prosecutor's office requested on December 3, 2009 the extension of the precautionary measures to the Companies and the appointment of managers.[677] The judge resolved the request one day later, on December 4, 2009, granting the petition.

555. The third party proceeding (*incidente de tercerías*) was initiated by Claimants on February 1, 2010 and resolved in the first instance, unfavorably to Claimants, on November 19, 2010, that is, ten months after the filing date of the application. Claimants filed an appeal against that decision on December 6, 2010.

556. At this point, the Tribunal should note, and the Parties' experts accepted that what followed for the admission of the appeal was a simple procedure that does not require further legal or evidentiary analysis.[678] It was simply a matter of issuing an order as to whether or not the appeal was admissible or not. The decision did not entail resolving the merits of the appeal or reviewing the alleged errors of the trial judge, but simply determine whether the appeal met the formalities and requirements

[675] Decision of the Eleventh Trial Court in Functions of Control, November 19, 2010, pages 124-128 (Exhibit C-70).
[676] *Oostergetel v. Slovakia,* ¶ 291; *Azinian v. Mexico,* ¶ 99; *Mondev v. United States,* ¶ 127.
[677] *See* Decision of the Eleventh Trial Court in Functions of Control, December 4, 2009 (Exhibit C-59).
[678] Dr. Canova's Second Report, ¶ 99; Hearing, Day 4, Tr. 983-20-984:1.

for admission. Venezuelan law provides for a short term – between three and five days[679] - for the judge to decide on the admissibility of the appeal. However, more than six years have lapsed since the filing of the appeal and there is no evidence that the appeal has been admitted.

557. Respondent has sought to justify the delay in the complexity of the matter and the congestion of the Venezuelan judicial system[680] and the fact that a conflict of jurisdiction arose that had to be resolved previously.[681] The tribunal cannot accept these justifications. First, as noted above, it was not a question of resolving the appeal, but simply of deciding whether the appeal was admissible. The Venezuelan legal experts of both parties distort the complexity alleged by Venezuela. The allegation of congestion in the Venezuelan judicial system is also unsatisfactory. It is sufficient to note that, within the same procedure, resolutions of other more complex issues such as the extension of the measures to the Companies or the first instance decision of the third party proceeding (*incidente de tercerías*) took substantially less time (one day and about ten months, respectively).

558. As for the conflict of jurisdiction, the term provided for in Venezuelan law to resolve it is not only short (24 hours) but must be decided *"in preference to any other matter"*.[682] The decision on the conflict of jurisdiction took almost four years. Indeed, the conflict was raised by the trial judge on January 17, 2011 and was declared non-existent on October 8, 2014.[683] As of the date of this Award, that is, more than six years after the filing of the appeal on December 6, 2010, and more than two years from the decision of the alleged conflict of jurisdiction, it is not proven there is a decision on its admission, let alone that it has been resolved.

559. In the meantime, seizure on Monaca and Demaseca, based on the alleged interest of Mr. Fernández Barrueco in the capital of the Companies, continued to be executed by Venezuelan officials, through confusing contractions and applications that indistinctly involved precautionary measures, the provisions of the Decree and those arising out of food policies, as discussed below.

560. Finally, the Tribunal notes that the restriction on leaving the country was lifted by the judge without the prosecutor's office objecting such decision. A few days later, the criminal case against Mr. Fernández Barrueco was dismissed by the judge, to which the prosecutor's office filed an appeal.[684] As a consequence, the precautionary measures affecting the Companies remain in force and, in principle, would not be lifted until the prosecutor's office's appeal against the act declaring the dismissal of the case is resolved.[685]

561. Based on the allegations of the Parties on this item, and in particular taking into account the testimony of Dr. Velázquez at the Hearing,[686] the Tribunal finds that there is at least a serious doubt that the criminal process – and accordingly – the determination on the validity of the precautionary measures – could continue in case of Mr. Fernández Barrueco is definitively absent from the country.

562. In short, as mentioned above and as shall be discussed below, the actions of officers of the executive and judiciary power of the Respondent have caused the seizure measures– which according to Venezuela have a transitory nature and constitute the legitimate basis of the situation

[679] *See* Dr. Canova's Second Report, footnote 137.
[680] *See* Rejoinder, ¶ 493, quoting Dr. Velázquez Bolívar's Expert Report, ¶¶ 88-92.
[681] *See* Counter memorial, ¶ 211.
[682] Dr. Canova's First Report, ¶ 110.
[683] Supreme Court of Justice, Decision of the Criminal Court of Appeal, October 8, 2014 (Exhibit R-159).
[684] Decision of the Twenty-eighth Trial Judge in Functions of Control, Judicial Circumscription of the Metropolitan Area of Caracas, July 30, 2014 (Exhibit R-151). *See also,* Brief, ¶ 66 and Rejoinder, ¶ 282.
[685] Rejoinder, ¶ 283, quoting Dr. Velázquez Bolívar's Expert Report, ¶¶ 97-98 and Article 430 of the Organic Criminal Procedural Code *(Código Orgánico Procesal Penal),* published in *Official Gazette* No. 5,558, November 14, 2001 (Exhibit RLA-037).
[686] Hearing, Day 4, Tr. 984:2-991:3.

to which the Companies and Claimants have been exposed – (i) to be confused with those arising from the ongoing expropriation process and those relating to food policy, despite the formal separation alleged by Respondent; (ii) to have an unacceptable indetermination as to their duration; (iii) to interfere with the normal operation of the Companies without clear rules as to the applicable provisions and scope of functions of those who were and who are permanently located on the premises of the Companies; and (iv) to deny the Claimants a real possibility of disputing the merits of the seizure before a judge other than the one who ordered them.

563. Under these circumstances and for the reasons noted above, Venezuela's action with respect to the precautionary measures, becomes incompatible with the State's obligation to provide fair and equitable treatment to Claimants' investments.

564. Claimants also allege that Decree No. 7.394 is arbitrary and discriminatory, that its execution is also arbitrary, and that Venezuela acted in bad faith in the negotiations that followed the suspension of the expropriation proceedings.

565. The Tribunal has already determined that Decree No. 7.394 – whether analyzed as a single measure or as part of the set of measures complained by Claimants – did not result in an expropriation. This is a legal provision that initiates the expropriation process under Venezuelan law. With respect to Decree No. 7.394 the Tribunal shall proceed to determine whether, in the conduct of Venezuela subsequent to the issuance of the Decree, acts of Venezuela that qualify as breaches to the standard of fair and equitable treatment provided for in the BIT arose, as Claimants allege.

566. As a starting point, the Tribunal notes that Decree No. 7.394 only refers to Monaca. The Parties dispute whether or not Demaseca is included in the scope of the Decree. Evidence shows that Monaca and Demaseca are different legal entities but that they functioned as the same economic unit[687] and that certain Venezuelan actions arisen from the Decree were extended to Demaseca.[688]

567. It is not in dispute that on August 17, 2010, the Vice President of the Republic instructed the Attorney General's Office to suspend the procedure of expropriation of Monaca to begin negotiations for the amicable acquisition of assets affected by Decree No. 7.394.[689] Nor is it disputed that the negotiations conducted between the Parties since the issuance of the Decree also included Demaseca.[690]

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[687] Gruma's documents point out that Monaca absorbed Demaseca's production in 2007 (*See* GRUMA, Situation of Monaca and Demaseca (2014) (Exhibit R-120)). Indeed, the evidence in the file indicates that in August 2006 Monaca and Demaseca entered into a "Temporary Association Agreement" as part of a *"progressive operational integration process"* prior to the projected merger between both Companies *(See* MONACA-DEMASECA Temporary Association Agreement, August 1, 2006 (Exhibit C-26)). Johabner Parra, Respondent's witness, pointed out that *"[...] administratively and operationally, DEMASECA functions as one more MONACA plant"*. "Testimony of Johabner Parra of March 4, 2015, ¶ 11. *See also,* Day 2, Tr. 390:4-20).

[688] Venezuelan officers understood that Decree No. 7.394 extends to Demaseca's property *(See* Directive No. 050-11 from Minister C. Osorio Zambrano (Ministry of Food) to President H. Chávez Frías (Presidency of the Republic), December 20, 2011 (Exhibit R-051)). Venezuela named "mirrors" of the Liaison Commission of both Monaca and Demaseca *(See* Exhibit C-191). At the Hearing, one of Respondent's witnesses confirmed that the members of the Liaison Commission were present at Demaseca's premises (Hearing, Day 2, Tr. 390:4-7). All of the above is consistent with Gruma's assertions in its Annual Reports regarding the scope of the Demaseca Decree. *(See, for example,* GRUMA, 2012 GRUMA Annual Report, 2012, page 117 (Exhibit R-053); GRUMA, 2011 Annual Report, April 30, 2012, page 14 (Exhibit R-059)).

[689] Official Notice DGCJ/2010 No. 296 of the Managing Director R. Muñoz Pedroza (Vice-presidency of the Republic) to A. Blanco (Attorney General's Office), August 17, 2010 (Exhibit R-032).

[690] *See, for example,* Monaca-Demaseca Appraisal Commission, Executive Report, September 23, 2010 (Exhibit R-031), Letter from Roberto González Alcalá to Reinaldo Muñoz, May 28, 2010 (Exhibit C-83); Certificate of Completion of Appraisal and Determination of Base Negotiation Price, September 23, 2010 (Exhibit C-158); Letter from Roberto González Alcalá, Attorney-in-fact of Valores and Consorcio, to the Vice minister of Food and Land, Ricardo Fong, January 17, 2011, and Protocol of Intent Exhibit (Exhibit C-160); Protocol of Intent of Valores and Consorcio to the Minister of Food, February 24, 2011 (Exhibit C-161); Letter from Roberto González Alcalá, attorney-in-fact of Valores and Consorcio to the Minister of Food, June 8, 2011, (Exhibit C-162).

568. The Parties discuss whether Venezuela unilaterally decided to suspend the proceedings or whether it did so at the request of the Claimants. Claimants complain that Venezuela has delayed and hindered negotiations within the amicable settlement process, to the detriment of investors.

569. In the Tribunal's view, the discussion of how the proceedings were suspended is not decisive in this context. Regardless of who made this decision and whether or not the suspension of the expropriation is valid under Venezuelan law, it was demonstrated in this arbitration that Venezuelan officials have construed and construe that the expropriation process is suspended, but that Decree No. 7.394 continues to apply and that it imposes certain limitations on the disposal of the Companies' assets by Claimants, but allows the use of other assets not subject to food policy, and that such limitations shall not cease until there is a final agreement regarding the acquisition of all or part of the Companies, or until the effects of the Decree cease as a result of a court decision, or until Venezuela resumes the expropriation process and directly expropriates the assets subject to the Decree.[691]

570. In this context, the Tribunal considers it essential to examine the manner in which the expropriation process has proceeded, the negotiations leading to the transfer of the Companies to Respondent and the application of Decree No. 7.394 in the meantime.

571. With regard to negotiations, the Tribunal notes that the Appraisal Commission appointed by mutual agreement of the Parties delivered the appraisal of the assets and property rights of both Companies on September 23, 2010.[692] On that date, the Parties agreed on a "negotiation price" to finalize a definitive agreement for the purchase of all the shares of Monaca and Demaseca.[693] Subsequently, a review of the financial statements of the Companies as of October 31, 2010 was requested by a firm of public accountants;[694] however, none of the Parties submitted the result of such review to this arbitration.

572. Following that first appraisal, the Claimants submitted three proposals for the acquisition of all or part of their shareholding in the Companies.[695] However, there is no evidence on the record to indicate that Venezuela responded to the first two proposals. Indeed, Mr. Hairo Arellano, Respondent's witness, confirmed at the Hearing that Venezuela had not responded to these offers nor made a counteroffer.[696] The third proposal, which took the form of a "Commitment Deed", became ineffective due to the expiration of the provided term, without any significant progress in the negotiations.

573. The Tribunal also notes that the negotiations have come to a halt on a number of occasions without substantial progress in defining the situation. Indeed, the evidence indicates that the negotiations

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[691] *See* footnote 673 of this Award.

[692] Certificate of Completion of Appraisal and Determination of Base Negotiation Price, September 23, 2010 (Exhibit C-158).

[693] Certificate of Completion of Appraisal and Determination of Base Negotiation Price, September 23, 2010 (Exhibit C-158), Fourth Agreement (*"Considering the previous agreements, for the corresponding purposes, the Bolivarian Republic of Venezuela and the companies VALORES MUNDIALES, S.L. and CONSORCIO ANDINO, S.L. determine that the negotiation price for both of them to amicably reach a definitive and binding agreement for the purchase and sale of all shares of MONACA and DEMASECA, is the amount of* ***BsF 2,763,184,729.00*** [...] *When the parties determine the proportion of the shareholding of each of them and/or the proportion of the shares subject matter of the purchase, the price of the transaction shall be fixed on a proportional basis using the value that would correspond to the trading price agreed upon by one hundred percent (100%) of the shares").* According to the Ninth Agreement, the Parties had to inform their corresponding superior authorities of the agreements in relation to the process of valuation of the Companies and they had to ratify the terms of the negotiation.

[694] Letter from *López Alegría y Asociados* to Monaca, November 16, 2010 (Exhibit C-159).

[695] Letter from *Roberto González Alcalá,* Attorney-in-fact of Valores and Consorcio, to the Vice minister of Agriculture and Land, Ricardo Fong, January 17, 2011 and Intention Protocol Exhibit (Exhibit C-160); Intention Protocol of Valores and Consorcio to the Ministry of Food, January 24, 2011 (Exhibit C-161); Minute of Commitment (Exhibit C-163).

[696] Hearing, Day 2, Tr. 567:21-568:7; 571:10-21.

were halted in early 2012, resumed at the end of 2013 and continued at least until 2014.[697] Claimants assert that negotiations have not progressed since then[698] and Respondent has not provided evidence to the contrary.

574. In summary, having discussed, but not agreed upon, possible acquisition amounts of the Companies, Claimants have attempted to advance the negotiation process on several occasions and have not received a response from Venezuela.[699] In addition, Respondent has transferred responsibility for negotiations with Claimants from one official to another and from one state agency to another, at least four times, without further justification, thereby creating additional interruptions and delays in the process.[700]

575. Venezuela has argued that Claimants should have exercised the judicial or administrative remedies available under Venezuelan law to demand resumption of the expropriation process or to request the revocation of the Decree if they considered the continuation of the negotiations to be contrary to their interests. The Tribunal does not share that view.

576. It is not in dispute that the Treaty does not impose an obligation to investors to exhaust domestic remedies before resorting to an international tribunal to settle their disputes with the State. In addition, taking into account the particular circumstances of this case, Respondent cannot claim that interferences are made or consequences arise contrary to the position held by Claimants in this arbitration for not having initiated judicial or administrative actions in Venezuela in relation to the suspension of the expropriation process.

577. Decree No. 7.394 provides that the Attorney General's Office is the entity in charge of processing the expropriation procedure provided for in the Expropriation Law *(Ley de Expropiación)* until the affected property is transferred to the State.[701] In addition, this law establishes that the responsibility for initiating the judicial expropriation process corresponds to the Administration.[702] In this sense, Respondent's own Venezuelan legal expert confirmed at the Hearing that it is the State[703] that determines when the negotiation process *"has reached an impasse"*. Besides, the referred expert acknowledged that the suspension of the expropriation procedure would not be justified in the absence of negotiations between the Parties.[704]

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[697] *See* Claimants' Letter to the Executive Vice-president of the Bolivarian Republic of Venezuela, June 25, 2012 (Exhibit C-7); Claimants' Letter from the Executive Vice-president of the Bolivarian Republic of Venezuela, November 26, 2012 (Exhibit C-8); Directive No. VE-025-13 of the Minister R. Ramírez (Ministry of Oil and Mining) *(Ministerio de Petróleo y Minería)* to President N. Maduro Moros (President of the Republic), December 13, 2013 (Exhibit R-117). Hearing, Day 2, Tr. 286:10-289:5 and 567:21-568:7.

[698] Claimants' Post-Hearing Writ, ¶¶ 26 and 79.

[699] *See, for example* Letter from Claimants to the Executive Vice President of the Bolivarian Republic of Venezuela, March 8, 2012 (Exhibit C-6); Letter from Claimants to the Executive Vice President of the Bolivarian Republic of Venezuela, June 25, 2012 (Exhibit C-7); Letter from Claimants to the Executive Vice President of the Bolivarian Republic of Venezuela, November 26, 2012 (Exhibit C-8); Letter from Roberto González Alcalá, Attorney-in-fact of Valores and Consorcio, to the Minister of Food, June 8, 2011 (Exhibit C-162); Letter from R. González Alcalá (Valores) to Minister N. Maduro Moros (Ministry of Foreign Affairs) *(Ministerio de Relaciones Exteriores)* and Minister C. Osorio Zambrano (Minister of Food), December 7, 2012 (Exhibit R-061); Letters from Claimants to the Attorney General of the Bolivarian Republic of Venezuela, to the Executive Vice President of the Bolivarian Republic of Venezuela and to the Minister of the People's Power of the Secretariat and Follow-up of the Bolivarian Republic of Venezuela, February 21, 2013 (Exhibit C-19).

[700] *See* Directive of the Commander President of the Bolivarian Republic of Venezuela No. 031-11, February 1, 2011 (Exhibit C-116); Official Notice No. CJ-000027-2012 from Legal Consultant M. García Urbano (Ministry of Food) to Legal Consultant C. Urdaneta (ministry of Oil and Mining), January 23, 2012 (Exhibit R-055); Official Notice No. CJ-000028-2012 from Legal Consultant M. García Urbano (Ministry of Food) to Legal Consultant W. Lugo (Ministry of Industry), January 23, 2012 (Exhibit R-056).

[701] Decree No. 7.394, Article 5 (Exhibit C-12).

[702] *See* Expropriation Law for reasons of public or social utility, published in Official Gazette No. 37.475, July 1, 2022 Article 22 (Exhibit RLA-040; Dr. Velázquez' Report, ¶ 122.

[703] Hearing, Day 4, Tr. 939:4-8.

[704] Hearing, Day 4, Tr. 936:16-19, 937:2-7, 14-18, 938:12-15.

578. In the Tribunal's view, Respondent's reasons do not justify a delay of almost ten years in the completion of the expropriation proceedings initiated under Decree No. 7.394, regardless of which act terminates its effects.

579. While it is true that the Venezuelan legal system provides resources to make up for the Administration's lack of activity, Claimants are not bound to initiate an expropriation process against them, especially when this responsibility falls on the State according to its own legislation. The State cannot suspend an expropriation process, apply some of the effects of the decree that initiated the expropriation process, delay the negotiations and simultaneously argue that it was up to the Claimants to promote through legal actions the expropriation process in order to force Venezuela to comply with the obligations that it was unaware of.

580. In any event, it is not true that Claimants have remained unmoved by Venezuela's conduct. As explained, Claimants attempted to put an end to the situation that afflicts them by multiple requests of resumption of the negotiations that were not addressed by Respondent. Indeed, the "Commitment Deed" provided as part of the negotiations between the Parties, Claimants formally requested Venezuela to revoke Decree No. 7.394 and lift the seizure and special administration measures on the Companies.[705] However, Respondent refused to grant such requests.[706]

581. Finally, the Tribunal notes that Decree No. 7.394 qualifies as "urgent" the execution of the *"Agroindustrial Processing Capacity Consolidation for the Venezuela of the XXI Century" program,* through the use of goods affected by Decree that, in addition, would be "essential" for its execution.[707] The delay in the acquisition of goods by Venezuela – whether through purchase and sale or through direct expropriation and indemnification – is not compatible with the urgency invoked in the Decree and denotes a lack of coherence between the reasons expressed in said rule and the consequent action of the State.

582. In conclusion, Venezuela initiated a process of expropriation, considered that it imposed limitations on the operation of the Companies by Claimants, and subsequently suspended the process and has maintained it suspended for several years, while State officials execute acts and apply measures based on the construction that the Decree imposes certain restrictions or prior authorization requirements for the operation of the Companies. Claimants are, thus, in a situation of uncertainty with respect to scenarios ranging from the eventual revocation of the Decree to the culmination of the expropriation process, and they maintain that indetermination with support in negotiations that they refuse to pursue.

583. The Tribunal finds that Venezuela by this conduct breached its obligation to ensure fair and equitable treatment of Claimants' investments by keeping the expropriation process suspended for nearly ten years, without making decisive progress in the negotiations and, at the same time, understanding that it applies those effects of Decree No. 7.394 that impose limitations on the Companies, including restrictions on disposing of certain assets (the assets that according to Venezuela are covered by the Decree) or performing certain acts (which Venezuela claims are limited by the application of the Decree).[708] To this is added the indefinite situation of Demaseca, with respect to whom Venezuela maintains that it is a different legal entity, but to whom in fact measures arisen from the Decree have been applied.

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[705] Commitment Letter (Exhibit C-163).
[706] Official Notice No. 1571 of the Attorney General C. Escarrá Malavé (PGR) to the Minister C. Osorio Zambrano (Ministry of Food), December 27, 2011 (Exhibit R-052).
[707] Decree No. 7.394, Article 4 and last whereas (Exhibit C-12).
[708] *See supra* ¶¶ 452 and 547.

584. Finally, Claimants allege that the Liaison Commission and the special administrators merged *de facto,* forming a parallel administration and management regime.[709] In this regard, the Tribunal notes that, as alleged by Venezuela and acknowledged by Claimants, the Liaison Commission was withdrawn from the Companies in September 2013. However, two of its members – who served as Venezuela's "mirrors" on the Liaison Commission – were appointed as special administrators of the Companies and until the date of the Hearing, continued to perform that work.

585. The Tribunal finds that during the stay of the Liaison Commission at the headquarters of the Companies there was convergence and confusion between the functions corresponding to the members of such Commission and those exercised by the special administrators,[710] although according to Venezuela itself, their mandates were completely different.

586. Such confusion persisted after the withdrawal of the Liaison Commission. Indeed, if the same people are initially appointed as members of the Liaison Commission (originating in the Decree), act in parallel with the special administrators (originating in the criminal process) generating confusion about the origin and scope of the powers of each one and interfering in the operation of the Companies and then become special administrators, maintaining in the exercise of their functions the same confusion, the Respondent cannot invoke in its defense the simple formal separation of functions. In addition, Venezuelan officials invoked the State's food policies as additional justification for the measures implemented by the special administrators, despite the formal separation between those policies and the criminal proceedings against Mr. Fernández Barrueco. If the officials really had totally different powers, as Venezuela claims, that difference had to take place in practice and give certainty to the Companies about the limitations to which they might be subject. The mere formal separation, when the practice shows confusion in the powers of the officer and their execution, is not sufficient to justify Respondent's performance. This reflects a lack of coherence and transparency on the part of the State, which is only attributable to the State.

587. As the Tribunal noted in deciding on the expropriation, the Venezuelan measures and conduct did not result in the total or substantial loss of control of the Companies by Claimants. However, the Tribunal considers that there is a breach of the standard of fair and equitable treatment due to the validity of the seizure and special administration measures in the context in which the criminal process against Mr. Fernández Barrueco and the third party proceeding (*incidente de tercerías*) has advanced, added to the restrictions that according to Venezuela derive from Decree No. 7.394, while the process of forced acquisition continues to be suspended despite the lack of progress in the negotiations between the Parties, and the confusion generated and maintained as to the origin and effect of the powers of the special administrators and, for a significant period of time, between the special administrators and the Liaison Commission. These measures, in the form in which they have been executed, created an unjustified burden on the Companies and imposed restrictions on Claimants in the free exercise of their rights as shareholders of those Companies.

588. For the reasons stated above, the Tribunal considers that Venezuela has breached its obligation to ensure fair and equitable treatment of Claimants' investments.

C. THE CLAIM FOR ARBITRARY AND DISCRIMINATORY MEASURES HINDERING CLAIMANTS' INVESTMENTS

[709] *See* Memorial, ¶ 235.

[710] *See, for example,* Official Notice AEM No. 2012-00002 of Special Administrators to Henry Castro, Director of Monaca, December 20, 2012 (Exhibit C-16); Official notice of representatives of the special administration to thee Executive President of Monaca, May 30, 2011 (Exhibit C-119); Official Notice of Darwin Ramírez and Luis Rivas, Liaison Commission, to the Executive President of Monaca, October 7, 2011 (Exhibit C-131); Official Notice of Hairo Arellano, Liaison Commission, to the Executive President of Monaca May 24, 2012 (Exhibit C-133); E-mail of Luis Rivas, July 25, 2011 (Exhibit C-262).

1. Claimants' Position

589. According to Claimants, Venezuela has imposed arbitrary and discriminatory measures contrary to Article III(1) of the BIT.

590. Claimants allege that in order for this breach to arise, it is only necessary that the hindering measures are arbitrary or discriminatory.[711] They also consider that the assessment of Venezuela's breach of this standard and that of the fair and equitable treatment should be done independently.[712]

591. Claimants define an arbitrary act as one that has no factual or legal basis, contrary to the rule of law or due process.[713] They quote the *ELSI* case before the International Court of Justice to define arbitrary conduct as a *"deliberate failure to abide by the due process of law"*.[714] They also consider an act to be arbitrary if it is *"contrary to justice, reason or the law,* [or is] *dictated by shall or whim"* or if *"is not based on reason facts or law"*.[715]

592. According to Claimants, Venezuela has implemented measures that breach the obligation described in Article III(1) of the BIT because they are arbitrary, lacking a legitimate factual or legal basis or discriminatory in that they have been applied exclusively to Companies and not to similar companies, and have hindered or prevented the management, maintenance, development, use, enjoyment, extension, sale and liquidation of Claimants' investments.[716]

593. Claimants contend that Venezuela has taken arbitrary, capricious, unlawful and factually and legally unsupported measures by maintaining a "special administration" and other interference measures in the service of the expropriatory purposes proclaimed in Decree No. 7.394. The appeal filed by Claimants and Companies against the judge's decision in the third party proceeding (*incidente de tercerías*) has not yet been admitted, although it was filed in December 2010.[717] Also, Venezuela has applied Article 22 of the Law against Organized Crime *(Ley contra la Delincuencia Organizada),* which is applicable to seized or forfeited assets and presupposes the existence of a final criminal conviction, non-existent in this case.[718]

594. After proving that Mr. Fernández Barrueco did not hold shares in the Companies, the representatives of the Republic stated that they were indifferent to who the owners of the companies were and Venezuela adopted Decree No. 7.394.[719] The imposition of Decree No. 7.394 was also arbitrary because it is not intended to satisfy an end of public utility or social interest, but rather the singular expropriation of the Companies.[720]

595. The execution of Decree No. 7.394 has been arbitrary for breaching due process, as Venezuelan law demands that a final judgment be obtained in an expropriation trial and that a fair compensation be paid to Claimants in order to occupy the Companies. The expropriation process has been suspended since August 2010. The Liaison Commission is not provided for in the current Expropriation Law or in Decree No. 7.394.[721]

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[711] Memorial, ¶ 232.
[712] Brief, ¶ 338.
[713] Memorial, ¶ 233.
[714] Brief, ¶ 340.
[715] *Id.*
[716] Memorial, ¶¶ 232-234, 236.
[717] Brief, ¶ 344.
[718] *Id.*
[719] Memorial, ¶ 235.
[720] Brief, ¶ 345.
[721] Brief, ¶ 346.

596. Officials belonging to the Liaison Commission invaded the premises of the Companies and have progressively obstructed and interfered with them. Venezuela, through SAREN, ordered its notaries and commercial registries to refrain from authenticating and formalizing minutes of shareholders' meetings of the Companies, including those where they appoint members of boards of directors.[722] Likewise, the Liaison Commission and the special administrators have prevented the free development, management and administration of the Companies by the dismissal orders of certain employees, interfered in planning and training workshops to incorporate the vision of Venezuelan politics, interfered in the decision to change one of the distribution centers of Monaca in Maracaibo and blocked the authorization of lease payments of the new distribution center, pressuring Monaca to accept all labor claims of certain unions, interfered in a decision to close an unprofitable pasta factory and ordered the sale and distribution of corn flour at preferential prices to "Socialist Bakeries", *inter alia.*[723]

597. Venezuela invokes the decisions in *Enron v. Argentina (Award), Sempra v. Argentina* and *El Paso v. Argentina,* arguing that these courts determined that the measures that the State considers necessary to address sudden crisis or changing economic circumstances are not arbitrary. However, Venezuela does not explain the sudden crisis or changing economic circumstance that justifies the adoption of the drastic measures adopted in this case.[724]

598. According to Claimants, a measure is discriminatory if the State treats differently, investors in similar circumstances and without reasonable justification.[725] Venezuela would have treated the Companies differently by imposing Decree No. 7.394, subjecting them to a process of expropriation that affected all of their assets. These measures have only affected Monaca and Demaseca, whereas they have not been extended to national competitors such as *Alimentos Polar, C.A.* and *Cargill Venezuela, S.A.* Respondent has also benefited these competitors by giving them access to Monaca's raw material through an order to reassign more than 86,000 metric tons of white corn, owned by the Companies.[726]

599. Claimants contend that Venezuela does not dispute that *Alimentos Polar, C.A.* and *Cargill Venezuela, S.A.* constitute the universe of companies with which the Companies must be compared, since they are in the same line of business.[727] There is also no reasonable justification for treating the Companies differently, and Venezuela does not argue otherwise.[728]

2. Respondent's Position

600. Venezuela alleges that it has not breached the provisions of Article III of the BIT regarding arbitrary or discriminatory measures.

601. According to Venezuela, the jurisprudence of courts in investment arbitrations requires a high standard of proof to demonstrate that a State acted arbitrarily.[729] It requires that it be shown that the action *"was completely irrational, devoid of any coherent grounds"* or that it *"was developed with reckless disregard for the investor's right".*[730] Misconduct must be largely self-evident,[731] so as to reflect the absence of legitimate purpose, whim, bad faith or a serious absence of due

[722] Memorial, ¶ 235.
[723] Memorial, ¶ 235; Brief, ¶ 348.
[724] Brief, ¶ 342.
[725] Brief, ¶ 350.
[726] Memorial, ¶ 235.
[727] Brief, ¶ 351.
[728] *Id.*
[729] Rejoinder, ¶ 500.
[730] *Id.*
[731] Rejoinder, ¶ 501, footnote 967.

process.[732] This standard is consistent with the provisions in the *ELSI* case before the International Court of Justice.[733]

602. Arbitral tribunals have determine that actions are not arbitrary when carried out in compliance with local laws or when the State deems them necessary to respond to a sudden crisis or changing economic circumstances.[734] Claimants unduly assimilate the measures adopted in the framework of a criminal proceeding with regulatory acts, alleging that Venezuela does not explain the sudden crisis or changing circumstance that justifies the adoption of these measures adopted in this case.[735] The special management of the Companies has a legitimate legal basis by virtue of the preventive measures of securing assets decreed by the Eleventh Court on the companies of Mr. Fernández Barrueco.[736] Likewise, Decree No. 7.394 is not arbitrary, since it is based on a purpose of public utility or social interest, in accordance with the *Ley de Seguridad y Soberanía Agroalimentaria,* and that all applicable provisions have been respected.[737] Claimants have only submitted the opinion of their expert, Dr. Canova, which has been contested by Dr. Velázquez Bolivar. Claimants have therefore failed to meet the burden in accordance with the requirements of the *ELSI* standard for conduct to be considered arbitrary.

603. Venezuela admits that *"the parties agree that a measure is discriminatory when the State provides (i) different treatment, (ii) to investors in similar circumstance and (iii) without reasonable justification".*[738] Claimants do not explain in what the companies *Alimentos Polar, C.A.* and *Cargill Venezuela, S.A.* would be comparable to Monaca and Demaseca. The Republic has never admitted that such companies may be compared within the meaning of Article III(1) of the BIT. The mere fact that they are competitors, because they belong to the food branch, does not place them in similar circumstances. In any case, they have been the object of governmental measures, and even expropriation, proving that there is no individualization or persecution of the Companies.[739] Claimants do not answer the argument that Article 3 of the Food Law *(Ley Alimentaria)* has been used as the basis for 24 other expropriation decrees affecting 24 other food companies, or that Venezuela also ordered the redirection of products belonging to other companies, such as, for example, CAPRI.[740] Claimants have therefore not proven that the companies were in similar circumstances or that Venezuela treated the Companies differently.

604. Finally, Venezuela argues that the analysis of the claim on the alleged breach of the standard of fair and equitable treatment renders unnecessary a separate analysis of the claim on the alleged arbitrary or discriminatory measures.[741] Because Claimants have been unable to prove a breach of fair and equitable treatment, a claim for arbitrary or discriminatory measures should not be admitted. In any event, Claimants have failed to prove that their alleged investment was affected by Venezuela through arbitrary or discriminatory measures.[742]

3. Analysis of the Tribunal

605. Claimants allege that Venezuela also breached its obligation under Article III(1) of the BIT by imposing arbitrary and discriminatory measures, which *"prevent Claimants to freely enjoy the*

[732] Rejoinder, ¶ 501, footnote 968.
[733] Counter memorial, ¶¶ 433-437.
[734] Rejoinder, ¶ 502.
[735] Rejoinder, ¶ 504.
[736] Rejoinder, ¶ 505.
[737] Rejoinder, ¶ 506.
[738] Rejoinder, ¶ 510; Brief, ¶ 350.
[739] Rejoinder, ¶ 514.
[740] Counter memorial, ¶ 458; Rejoinder, ¶ 515.
[741] Counter memorial, ¶¶ 449-455; Rejoinder, ¶¶ 517-520.
[742] Rejoinder, ¶ 522.

benefits of their investments and have impeded the free development, management and administration of MONACA and DEMASECA in various ways".[743]

606. Venezuela denies that the measures invoked by Claimants are arbitrary or discriminatory and, in any event, contends that Claimants failed to prove that the measures *"have actually prevented the management, maintenance, development, use, enjoyment, extension, sale and liquidation of the investment"* in the sense of proving that *"the real possibility for the exercise of the right at issue diminished by reason of the measure".*[744]

607. Article III(1) of the BIT establishes that:

> "Each Contracting Party shall afford full protection and security under international law to investments made in its territory by investors of the other Contracting Party and shall not hinder, by arbitrary or discriminatory measures, the management, maintenance, development, use, enjoyment, extension, sale or, as the case may be, liquidation of such investments." [emphasis added]

608. In order for a breach of the host State's obligation under this provision to occur, there must be one or more measures attributable to the State that are arbitrary *or* discriminatory and whose effect is to hinder – namely, preventing or obstructing – the performance of one or more of the actions set forth in Article III(1) of the BIT in relation to investments protected under the Treaty.

609. As a preliminary mater, the Tribunal agrees with Claimants' general approach that the obligation to ensure fair and equitable treatment of investments, enshrined in Article IV(1) of the Treaty, is different from the obligation not to hinder, through arbitrary or discriminatory measures, the performance of certain actions with respect to investments, as set forth in Article III(1) of the BIT. However, Claimants have not explained how and to what extent the protection afforded by the fair and equitable treatment clause differs from the obligation under Article III(1) of the Treaty.

610. The Tribunal notes that Claimants qualify as arbitrary and discriminatory the same facts and conduct invoked in their allegation of unfair and inequitable treatment, applying the same standard of "arbitrariness" and "discrimination". In particular, Claimants contend that (i) the seizure and special administration measures; (ii) the imposition of Decree No. 7.394; and (iii) the execution of the Decree are arbitrary. They also claim that the imposition of the Decree – which, according to them, covers all the assets of both Companies – is discriminatory.

611. Upon analyzing the claim for unfair and inequitable treatment, the Tribunal examined the set of facts and circumstances related to the seizure and special administration measures and Decree No. 7.394 and concluded that Venezuela's performance as a whole does not conform to the standard of conduct required by Article IV(1) of the Treaty of the Contracting States, recipients of the investment. The Tribunal finds that some of the measures or conduct attributable to Venezuela alleged by Claimants in the context of the claim for fair and equitable treatment are in themselves arbitrary, namely, not supported by reason, fact or law.[745] As the Tribunal has concluded, the same conduct by the State may constitute a breach of different obligations under the BIT. The Tribunal shall now focus on Claimants' allegations of conduct that they classify as arbitrary and discriminatory, and in breach of the protection contained in Article III of the Treaty.

612. In particular, the Tribunal finds that the conduct of SIEX – which consists of not processing requests to update the foreign investment register of Companies and Claimants – is arbitrary, as it

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[743] Brief, ¶¶ 347-348.

[744] Counter memorial, ¶ 460, quoting A. Newcombe & L. Paradell, MINIMUM STANDARD OF TREATMENT, in Law and Practice of Investment Treaties: Standards of Treatment (2009), page 300 (Exhibit RLA-083).

[745] *See, for example, Azurix v. Argentina,* ¶ 392; *Lauder v. Czech Republic,* ¶ 232.

is ungrounded. Indeed, SIEX has refused to process these requests without even offering a justification or explaining the reason for its conduct.

613. Venezuela suggests that SIEX's conduct arises from the criminal process against Mr. Fernández Barrueco but fails to indicate its basis under the court order that ordered the measures. As noted in paragraph 440 of this Award, it is not clear to the Tribunal, because it is not proven in the file, what the basis for this conduct is, or whether it is related to Decree No. 7.394, as alleged by Claimants, or whether it arises from the criminal proceeding against Mr. Fernández Barrueco, as Venezuela suggest.[746] In any event, this is conduct attributable to Venezuela that has prevented Claimants from complying with one of the requirements under the laws of that State to transfer monies abroad. Besides, the ambiguity regarding the origin and legal framework of this conduct is exclusively attributable to the State, which cannot avoid its international responsibility under confusing situations that it has created itself.

614. The Tribunal also finds that the imposition of the Liaison Commission was arbitrary. The Parties dispute whether the Venezuelan Liaison Commission "occupied" the Companies without complying with the requirements established in the Expropriation Law. Regardless of whether or not there was an occupation under Venezuelan law, Respondent itself admits - and the Tribunal so has ascertained - that the concept of a "liaison commission", such as the one established for the Companies after the issuance of Decree No. 7.394 and until September 2013, is not provided for in the Decree or in the Expropriation Law. The Tribunal is also not convinced that the Liaison Commission had been established by agreement between the Parties, *inter alia,* because no instrument was provided to the arbitration to account for its creation, legal or conventional, and to establish precisely the scope of its functions.

615. The conduct already analyzed by the Tribunal of maintaining indefinitely the stay of the expropriation process and simultaneously applying some of the effects of Decree No. 7.394 and the absence of a decision – more than six years later – on the admissibility or not of the remedy with which Claimants seek to contest precautory measures that are maintained indefinitely, although they are alleged to be temporary, are also arbitrary.

616. Finally, the Tribunal also finds that the redirection of raw materials ordered by Venezuela in 2012 was arbitrary insofar as it has no clear basis. Respondent explained in its pleadings that the power of the State to order the redirection of products and the conditions for its exercise are provided for in the *Ley de Seguridad y Soberanía Agroalimentaria* of 2008.[747] Specifically, it stated that *"the redirection or reassignment of products, under certain circumstances, is a clearly regulated process in Venezuela".*[748] The Tribunal does not share this conclusion.

617. In their respective expert reports, the two experts offered by Venezuela stated that the power of the Executive to order the redirection of raw materials was considered in the *Ley de Seguridad y Soberanía Agroalimentaria* in force in 2012.[749] However, each expert invoked different provisions to support its conclusion. At the hearing, Dr. Velázquez accepted that he did not share Dr. Ametrano's analysis as to the specific legal basis of the Executive's power to order the redirection of raw materials and, finally, he admitted that such power was not expressly stated in the applicable law.[750]

618. The Tribunal considers that the statements of Respondent's Venezuelan legal expert indicate that, contrary to Venezuela's assertion, the reallocation of goods is not a "clearly regulated" process

[746] *See* Counter memorial, ¶ 469 and Rejoinder, footnote 1013.
[747] *See* Counter memorial, ¶¶ 271 and 339; Rejoinder, ¶¶ 335 and 600.
[748] Rejoinder, ¶ 600 [emphasis added].
[749] Dr. Ametrano's Report, ¶¶ 65-67; Dr. Velázquez' Report, footnote 148.
[750] *See* Hearing, Day 4, Tr. 926:5-930:12.

and, furthermore, raise serious doubts as to whether the Administration acted in accordance with its powers.

619. In conclusion, SIEX's conduct, the imposition of the Liaison Commission and the order to redirect raw materials are, in themselves, arbitrary, as they lack of factual or legal basis. These actions by the State have hindered the management and development of Claimants' investments in Venezuela.

D. THE CLAIM FOR RESTRICTIONS ON PAYMENT TRANSFERS

1. Claimants' Position

620. Claimants allege that Venezuela breached Article VII of the BIT, and specifically, (i) paragraph 1(a), by prevention the repatriation of capital and the payment of dividends to Claimants; (ii) paragraph 1(f), by preventing payments related to the acquisition of raw materials and other products necessary for investment; and (iii) paragraphs 2, 3 and 4, by preventing the obtaining of the foreign currency necessary to make the transfers referred to in the preceding subparagraphs, as well as making these transfers without delay or restriction.[751]

621. According to Claimants, Venezuela has prohibited the repatriation of capital and the payment of dividends in contravention of Article VII(1)(a), by prohibiting the formalization and authentication of acts and legal affairs of Claimants, Monaca or Demaseca. Venezuela has prevented the formalization of minutes of shareholders' meetings of the Companies before the Commercial Registry, including those where dividends are declared, or capital repatriations are provided to Claimants.[752] Respondent would have prohibited Valores and Consorcio from transferring more than USD$163.5 million in dividends for the period 2009-2014.[753]

622. Also, Venezuela would have breached its obligations under Article VII(1)(a) of the BIT by preventing Monaca from paying Valores a USD$31.9 million share subscription premium for not allowing Monaca's registration as a foreign investment in Valores to be updated. This request from Monaca has been pending since December 2008 (although restrictions were imposed as of December 2009, Venezuela has extended them to previously approved and processed payments).

623. According to Claimants, Venezuela argues that it has not breached Article VII of the BIT because it has not expressly and directly prohibited such transfers, but has done so indirectly, through measures that make it impossible to formalize minutes of meetings where dividends are declared and registration as a foreign investment necessary to request foreign exchange for payment thereof.[754] This construction of Article VII of the BIT would render its content ineffective *(effet utile)*; Contracting States could the, under some normative pretext implicitly restrict transfers.[755]

624. Venezuela has also prevented the acquisition of foreign currency in a discriminatory manner, contrary to Article VII(2) of the BIT. Unlike other companies in the Venezuelan food sector, it has prohibited the formalization of minutes before the Commercial Registry and the updating of its status as a foreign investment before SIEX. *Alimentos Polar, C.A.* and *Cargill Venezuela, S.A.* have not been effectively prevented from transferring all of their bank accounts without government approval, from formalizing the minutes of shareholders' meetings that declare the payment of dividends, and in the case of *Cargill Venezuela, S.A.*, from registering with SIEX its

[751] Memorial, ¶ 240.
[752] Memorial, ¶ 239.
[753] Brief, ¶ 354.
[754] *Id.*
[755] Brief, ¶ 355.

condition as a foreign investment, an essential requirement to have the possibility of acquiring the foreign currency necessary for the repatriation of dividends or capital.[756] In addition, the Companies are not part of the assets of Mr. Fernández Barrueco, therefore, Venezuelan restrictions are discriminatory with respect to Claimants.[757]

625. The above restrictions are also a breach of paragraphs 3 and 4 of Article VII of the BIT, which require that transfers be made without delay, in the convertible currency decided by the investor and at the exchange rate on the day of the transfer, and that the procedures for making transfers of payments related to investments are facilitated.[758] Although Article VII(4) of the BIT requires that no more than three months elapse from filing of the request to make the transfer, Monaca has requested the purchase of foreign currency for payment to Valores of more than USD$30 million per share subscription premium (declared in December 2008) and the request to update the registration as a foreign investment are pending approval since April 2010.[759]

626. The measures have been in force since 2009, and Venezuela's actions to maintain the status quo indefinitely do not allow us to conclude that they are truly "temporary".[760] The transfers that Venezuela has restricted are *"payments related to [investments]"* by Claimants.[761] Also, the measures taken by the State have made it impossible for Claimants to follow the procedure for the payment of dividends and other investment income in the convertible currency decided by them, and in the case of the share subscription premium, Venezuela has frustrated such transfer despite the fact that Claimants have followed the procedures established for that purpose by the State itself.[762]

2. Respondent's Position

627. Venezuela argues that it has not breached the obligation to guarantee the free transfer of funds under Article VII of the BIT. Venezuela contends that there is no act of Venezuelan authority by which Claimants were prohibited from transferring or making payments abroad.[763]

628. According to Venezuela, Claimants have not filed a claim for *prima facie* transfers, as they simply repeat the facts to which they refer with respect to their claim for expropriation.[764] In addition, it argues that it is the responsibility of the investor to comply with the appropriate procedure to obtain the necessary authorization to request a transfer.[765]

629. There is no prohibition on the transfer of payments abroad. The measures at issue are justified by the property preventive measures issued on November 25, 2009 under the Code of Civil Procedure *(Código de Procedimiento Civil),* as a result of criminal proceedings of Mr. Fernández Barrueco. However, the measure at issue does not consist of prohibiting the execution of corporate acts; it only prohibits the formalization of such acts, as they are not indefinite restrictions.[766] In addition, the tribunal has the power to modify or lift a measure if necessary, at the request of the interested party.[767] Therefore, there is no legal impediment for the management of the Companies to declare

[756] Brief, ¶ 357.
[757] Brief, ¶ 358.
[758] Memorial, ¶ 239.
[759] *Id.*
[760] Brief, ¶ 356.
[761] Brief, ¶ 361.
[762] Brief, ¶ 362.
[763] Rejoinder, ¶ 524.
[764] Counter memorial, ¶ 467.
[765] Counter memorial, ¶ 465.
[766] Counter memorial, ¶ 469; Rejoinder, ¶ 527.
[767] Rejoinder, ¶ 527.

or transfer dividends in accordance with Venezuelan law.

630. Claimants do not meet their burden of proof. Although shareholders meeting have been held during 2010 through 2012, Claimants have not filed any documents proving the intention of the Companies to declare dividends in these years.[768] They have not submitted any evidence indicating that the corporate acts have occurred, that the registry refused to register them under the measures and that these acts involved a transfer abroad. Nor have they shown that they asked the judge who ordered the measures to authorize the registration of specific acts.[769]

631. With respect to Article VII(2), Claimants confuse the concepts, since in this case there are no regulatory measures, but the exercise of police power by means of a judicial authority. The universe of companies to determine if there is a breach of Article VII of the BIT corresponds to those that had a connection with Mr. Fernández Barrueco in 2009.[770] Therefore, it is not appropriate to compare the Companies with Alimentos Polar, C.A. and Cargill Venezuela, S.A.

632. Claimants allege that Venezuela has paralyzed for more than five years an application for foreign exchange for the payment of more than USD$31 million in the form of a share subscription premium. However, they do not explain how this allegation is linked to the Government's actions, since it has nothing to do with Decree No. 7.394 or with the criminal proceedings against Mr. Fernández Barrueco.[771] Venezuela has maintained a regime of exchange control for many years, and this alleged application is only for one of many that Claimants have filed and received in recent years. Free transfer is not "unlimited" and the measures that allegedly breach this provision are justified by the indirect and temporary measures adopted in the criminal case against Mr. Fernández Barrueco.

3. Analysis of the Tribunal

633. In accordance with Article VII of the BIT:

> "1. Each Contracting Party shall guarantee to investors of the other Contracting Party, with respect to investments made in its territory, the unrestricted transfer of payments relating thereto and, in particular, but not exclusively, the following:
>
> a) Investment income as defined in Article I; [...]
>
> f) Sums necessary for the acquisition of raw or auxiliary materials, semi-finished or finished products or for the replacement of capital goods or any other sum necessary for the maintenance and development of the investment; [...]
>
> 2. The Contracting Party receiving the investment shall guarantee to the investor of the other Contracting Party, on a non-discriminatory basis, the possibility of acquiring the currency necessary to make the transfers covered by this article.
>
> 3. Transfers under this Agreement shall be made without delay in the convertible currency decided by the investor and at the exchange rate applicable on the day of the transfer.
>
> 4. The Contracting Parties undertake to facilitate procedures, where necessary, to effect such transfers without delay or restriction, in accordance with the practices of international financial centers. In particular, no more than three months shall elapse from the date on which the investor

[768] Rejoinder, ¶ 528.
[769] *Id.*
[770] Rejoinder, ¶ 529. *See* Counter memorial, ¶ 470.
[771] Rejoinder, ¶ 530.

has duly submitted the necessary requests to effect the transfer until the time when the transfer actually takes place".

634. On other hand, Article I(3) of the BIT defines "investment income" as *"income arisen from an investment* [...] *and includes in particular, but not exclusively, profits, dividends, interest, capital gains and royalties".*[772]

635. The payments covered by Article VII of the BIT include, *inter alia,* accrued investment income, the compensation provided for in Article V on expropriation, and the sums necessary for the maintenance and development of the investment, including those for the acquisition of raw or auxiliary materials or for the substitution of capital goods. Venezuela has not denied that the sums in respect of which Claimants allege a breach of Article VII of the BIT are payments related to Claimants' investments, as required by paragraph 1 of such article.

636. The Tribunal reiterates that Claimants may base claims of breaches of different BIT obligations on the same facts. In this case, the Tribunal considers that the conduct of Venezuela in connection with a transfer of foreign currency of the share subscription premium is a breach of Article II on restrictions on payment transfers.

637. The share subscription premium corresponds to a return on an investment under Article I(3) of the BIT and covered by transfer protection.

638. It has been proven that SIEX has not processed the applications to update the foreign investment registry filed by Monaca and Valores between 2010 and 2013, necessary for the acquisition of foreign currency corresponding to the transfer of USD$31.9 million share subscription premium declared in 2008. The Venezuelan government entity responsible for assessing and authorizing foreign exchange purchase requests under the national exchange control regime – formerly, the Foreign Exchange Administration Commission *(Comisión de Administración de Divisas, "CADIVI")* and since early 2014, the National Foreign Trade Center *(Centro Nacional de Comercio Exterior, "CENCOEX")* – has not liquidated the corresponding foreign exchange.

639. The Tribunal has already decided that Venezuela has acted arbitrarily with respect to the updating of the foreign investment registry, necessary to obtain the authorization of the remittance of foreign currency. In so doing, respondent has also breached its obligations under paragraphs 1(1), 3 and 4 of Article VII of the BIT: (i) Venezuela has failed to comply with its obligation to *guarantee* Claimants the unrestricted transfer of this payment related to their investments; (ii) it has also failed to *permit* the transfer to be made without delay in the convertible currency decided by Claimants and at the exchange rate applicable on the day of the transfers; (iii) it has failed to *facilitate* procedures for effecting this transfer without delay or restrictions. Article VII(4) of the BIT further requires that no more than three months elapse from the date on which the investor has submitted the requires necessary to effect the transfer until such time as the transfer takes place. Respondent's *de facto* conduct has prevented Claimants from transferring the USD$31.9 million share subscription premium, after filing the application for registration and authorization of foreign currency acquisition before CADIVI in December 2008.[773]

640. On the other hand, Claimants have not proved that they have ceased to declare dividends as a result of the conduct of Venezuela.[774] Nor have they proven that SAREN's order to the Public Registries, Commercial Registries and Notaries Public to refrain from formalizing or authenticating the minutes of meeting effectively prevents Claimants as shareholders of Monaca and Demaseca from

[772] Treaty, Article I(3) (Exhibit C-3).
[773] Request of Registration and Authorization of Foreign Currency Acquisition devoted to International Investments, December 19, 2008 (Exhibit C-104).
[774] *See supra,* ¶¶ 435-441.

holding corporate acts, including the declaration of dividends. To the extent that such dividends have not been declared, the Tribunal rejects Claimants' arguments with respect to the alleged restriction on transfers of USD$163.5 million in retained earnings for the period 2009-2014.

VI. COMPENSATION

A. CLAIMANTS' POSITION

641. Claimants allege that because of the unlawful measures attributable to Venezuela, Claimants do not control Monaca and Demaseca and the value of their investments in these companies has been annihilated.[775] Accordingly, Claimants would be entitled to receive redress in accordance with the BIT and international law for internationally wrongful acts.[776] According to Claimants, under general international law, the principle of full reparation is applicable in this case, and under the Treaty, the damage caused must be compensated by monetary compensation. Such compensation must then place Claimants in the same economic position that they would have been in had the unlawful measures not been taken by Venezuela. Claimants contend that Venezuela does not dispute that the legal standard of full reparation should govern the analysis of damages applicable in this case.

642. Dellepiane/Spiller explain that the set of unlawful measures imposed by Venezuela on Monaca and Demaseca, including Decree No. 7.394, the prohibition of transfers to its shareholders, the appointment of special administrators with *"the broadest powers of administration"* has deprived Valores and Consorcio of the economic value in those companies.[777] They conclude that under current conditions, *"companies have zero value for their shareholders"*[778] and the damages suffered by Claimants consist of the loss of value of the shares of Valores in Monaca ad Consorcio in Demaseca (hereinafter, the "Investments"), since Claimants cannot derive economic benefit from them due to the Venezuelan measures.[779]

643. According to Dellepiane/Spiller, Venezuela erroneously assumes that the continued operation of Monaca and Demaseca entails that Claimants' shares in the Companies retain their value. On the contrary, Claimants contend that the fact that the companies continue to operate is irrelevant and that what is really relevant is whether Claimants can benefit from those operation. In addition, they clarify that according to Decree No. 7.394 *"expropriated goods and rights shall pass free from encumbrance or limitations to the estate of* [Venezuela]", and the movable goods of the Companies may not be subject to any kind of negotiation.[780] Therefore, the operation and profitability of the companies no longer inure in benefit of Claimants as shareholders, but of Venezuela.

644. Claimants further argue that the measures imposed by Venezuela prevent them freely enjoying and disposing of their investments, breaching the fundamental principle of free ownership by the owner, and have also prevented them from receiving the fruits of their investments, since all the profits generated by the companies and those that continue to be generated are part of the assets affected by Decree No. 7.394. As a result, and contrary to the assertion made by the Venezuelan experts on the appraisal of damages ("Hart/Vélez"), Dellepiane/Spiller did not assume that the Investments have zero value, but reached this conclusion after a detailed analysis of the Venezuelan measures.

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[775] Brief, ¶ 365.
[776] Memorial, ¶ 241.
[777] Dellepiane/Spiller First Report, ¶ 67.
[778] Dellepiane/Spiller First Report, ¶ 6.
[779] Brief, ¶ 366.
[780] Brief, ¶ 377.

645. In light of the foregoing, Claimants allege that they are, at a minimum entitled to receive compensation equal to the fair market value of Monaca and Demaseca calculated as of January 21, 2013 (the Valuation Date), the day immediately prior to the publication of the Administrative Ordinance – the measure that consummated the indirect expropriation.[781] For Claimants, *"the Administrative Ordinance was the last act of Respondent which, in conjunction with the previous unlawful actions, resulted in the expropriation of Claimants' Investments and which, in turn, represented the culmination of the actions that together breached the Republic's obligations to provide fair and equitable treatment, and not to hinder the management, use and enjoyment and sale of Claimants' investments".*[782]

646. Dellepiane/Spiller calculated the fair value of the Investments at the Valuation Date, without taking into account the effects of previous unlawful measures attributable to Venezuela. They concluded that under the principle of full reparation and in order to place Claimants in a position equivalent to that which they would have had if Venezuela had not imposed the measures, the fair market value of the Investments as of the Valuation Date amounts to USD$622.7 million and that the total damages suffered by Claimants as of the same date were USD$629.7 million, excluding interest.

647. According to Claimants, the fair market value of the Investments calculated by Dellepiane/Spiller coincides with: (i) the value recognized in 2010 as "base trading price" guaranteed by Venezuela as a result of an appraisal made by independent experts appointed by Claimants and Venezuela, where it was determined that the fair market value of the Companies' share capital ranged from USD$583.6 million to USD USD$659.1 million; and (ii) the value as "estimated price" for the acquisition of Monaca and Demaseca in December 2011 recommended by the Ministry of Food to the President of the Republic, which is equivalent to at least USD$574 million for the total stock of Monaca and Demaseca.[783]

648. Claimants also request: (i) that the compensation ordered by the Tribunal is not subject to the taxes that Dellepiane/Spiller have already taken into account upon calculating the amount of compensation, otherwise taxes would be deducted in favor of Venezuela two times;[784] (ii) that the amount of compensation be updated, using a compound interest rate, from the Valuation Date to the effective date of payment;[785] and (iii) that all costs and expenses of this arbitration are borne by Respondent, including the fees and expenses of the Tribunal and the costs of legal representation.[786]

649. According to Claimants, the BIT does not determine the standard of compensation applicable in circumstances such as these, and should therefore be governed by general principles of international law. The standard for calculating damages for internationally wrongful acts is that of "full reparation". According to the Permanent Court of International Justice in the *Chorzów Factory* case, *"reparation must, as far as possible, eliminate all consequences of the unlawful act and reestablish the situation that, in all probability, would have existed had the act not been committed".*[787] Under international law, reparation should as far as possible, consist of restitution in kind, but where such restitution is impossible or inapplicable – such as in this case – it should consist of monetary compensation that places the victim of the wrongful act in the same economic position as it would have been had the wrongful act not occurred. Claimants note that various international tribunals that various international tribunals have repeatedly recognized that fair

[781] Memorial, ¶ 244.
[782] Memorial, ¶ 258.
[783] Brief, ¶¶ 368-369.
[784] Memorial, ¶¶ 301-304.
[785] Memorial, ¶¶ 305-309.
[786] Memorial, ¶ 246.
[787] Memorial, ¶ 249 making reference to the *Case regarding the Chorzów Factory (Germany v. Poland)*, page 47.

market value is the standard generally used for the valuation of assets such as going concern. Since the unlawful measure destroyed the value of the Investments, excluding the impact of the unlawful measures, shall put Claimants in the *"situation that, in all likelihood, would have existed had the unlawful acts not been committed.*[788]

650. Claimants argue that this valuation standard, frequently applied in expropriation cases, is also adequate to measure damages caused by Venezuelan measures that breach the standard of fair and equitable treatment and other guarantees over the use and enjoyment of Treaty investments.[789] Claimants contend that if the Tribunal finds that Venezuela has not breached Article V of the BIT, the would be willing to transfer their shares in Monaca and Demaseca to Venezuela once Venezuela pays, in convertible currency and into an account to be designated by Spain, a compensation equivalent to the fair market value of Monaca and Demaseca.[790]

651. In addition, according to Claimants, the standard of compensation provided for in Article V(2) of the BIT for the case of lawful expropriations functions as a floor or minimum of the amount owed on expropriations.[791]

652. Dellepiane/Spiller concluded that the Investments lack value due to Respondent's actions because *"Venezuela has limited in their entirety the usufruct that Claimants (or, instead, a hypothetical purchaser) could receive from the profit-making capacity of Monaca and Demaseca, and thus, their economic value".*[792] According to Dellepiane/Spiller, the only source of value that Monaca and Demaseca could have for their shareholders, or a potential buyer, is exclusively the possible compensation that Venezuela decides to grant for the assets subject to expropriation. They allege that it is a fallacy of Venezuela that Claimants have been unable to dispose of their own investments through their own fault.[793] Claimants add that the profits generated by Monaca and Demaseca have not been used in the normal course of business, as argued by Hart/Vélez. This use was sub-optimal, and responded to the impossibility of distributing dividends, forcing Monaca and Demaseca to accumulate inventories, invest in capital goods and cancel debts in order to reduce losses arisen from inflation and devaluation of the bolivar.[794]

653. Dellepiane/Spiller used two methodologies to calculate the fair market value of the Investments at the Valuation Date: (i) discounted cash flow ("DCF"), as the primary methodology; and (ii) relative valuation, as the secondary method to corroborate the reasonableness of the results obtained from the primary methodology. They explain that the DCF method is appropriate because Monaca and Demaseca are two companies with a long and profitable trajectory in the Venezuelan market. Dellepiane/Spiller concluded that the damages suffered by Claimants as a result of the expropriation and hindrance of the management of their investments amounts to USD$579.5 million, corresponding to the fair market value of the shares of Monaca and Demaseca, as of January 21, 2012. Damages related to the effect of the "redirecting" of white corn on corn flour sales in 2012 have the effect of increasing the fair market value of the shares of Monaca and Demaseca at the Valuation Date by USD$43.2 million, for a total of USD$622.7 million.[795]

654. In addition, the "redirecting" of white corn caused damaged during 2012 of USD$7 million, corresponding to the decrease in the sales volume of corn flour from Monaca and Demaseca in 2012 resulting from Venezuela's order to redirect more than 86.4 thousand metric tons of white

[788] Memorial, ¶ 253 making reference to the *Case regarding the Chorzów Factory (Germany v. Poland),* page 47.
[789] Memorial, ¶ 254; Brief, ¶¶ 382-385.
[790] Brief, footnote 706.
[791] Memorial, ¶ 255.
[792] Memorial, ¶ 257; Dellepiane/Spiller First Report, ¶¶ 5-6.
[793] Brief, ¶¶ 386-395.
[794] Brief, ¶ 394.
[795] Dellepiane/Spiller Second Report, ¶ 14.

corn flour to other companies competing with them.

655. As a result, according to Dellepiane/Spiller's calculations, Claimants' damages amount to USD$629.7 million:[796]

Chart I. Summary of damages caused to Claimants (January 21, 2013) - approach discounted cash flows

Damages to Claimants In million USD as of Jan-21-13		
Value firm Monaca and Demaseca	[a]	653.6
Royalty debt	[b]	74.1
Damages expropriatory measures and intervention (equity value)	**[c] = [a] - [b]**	**579.5**
Losses due to decrease in sales (in 2012)	[d]	7.0
Increase in equity value Claimants (2013 onwards)	[e]	43.2
Damages due to corn redirection	**[f] = [d] + [e]**	**50.2**

Source: Valuation model by discounted cash flows (CLEX-070)

656. Claimants explain that in this case Monaca and Demaseca were valued on a consolidated basis (as a business unit) taking into account that their management and operation is carried out jointly, at least one of them operates in both the corn and wheat segments and both executed a preliminary merger agreement in 2006 that was in the process of execution when Venezuela began to impose the unlawful measures.[797]

657. Dellepiane/Spiller projected the cash flows for 10 years, from January 2013 to December 2012, and for the subsequent period applied a terminal value of the companies. Within the DCF method, the main determinants of the value of Monaca and Demaseca were also applied: sales volumes, selling prices of products, operating costs, capital investments, taxes and discount rate. Claimants argue that Respondent's objections to Dellepiane/Spiller's estimated cash flow projections for Monaca and Demaseca are invalid and in no way call into question Dellepiane/Spiller's analysis of the value of the Investments.[798]

658. To discount the future cash flows of Monaca and Demaseca, Dellepiane/Spiller used the weighted average cost of capital ("WACC") and concluded that the appropriate WACC is 10.12% as of the Valuation Date. Within WACC's cost of equity component, Dellepiane/Spiller used as a measure

[796] Dellepiane/Spiller Second Report, Chart I. *See* Memorial, ¶ 262.
[797] Memorial, ¶ 267.
[798] Brief, ¶¶ 430-442.

of country risk the average yield (above the risk-free rate) of bonds from countries with similar credit rating to Venezuela, estimated by Professor Damodaran in 400 basis points (4.0%).[799] Claimants contend that Hart/Vélez substantially inflate Monaca's and Demaseca's by taking into account a country risk premium of 10.87%, and including the risk of expropriation without compensation, contrary to the principle of integral reparation.[800] In addition, Hart/Vélez unduly apply a size premium of 2.69% (which is inapplicable, according to Dellepiane/Spiller).[801]

659. Dellepiane/Spiller also used the relative valuation method to corroborate whether the conclusions of the DCF method were reasonable. Applying the relative valuation method, they conclude that the share value of Monaca and Demaseca under this methodology was between USD$540.8 and USD$599.4 million, confirming the reasonableness of the fair market value of the Investments obtained through the discounted cash flow analysis performed by Dellepiane/Spiller at USD$579.5 million.[802]

660. Claimants also contend that the valuations recognized by Respondent in 2010 and 2011 confirm the reasonableness of the Dellepiane/Spiller valuation.[803] After Decree No. 7.394 was published, the Parties agreed to conduct an appraisal of Monaca and Demaseca through a commission consisting of two experts, each appointed by a party. This Appraisal Commission fixed the value of the companies as of July 31, 2010 at the equivalent of USD$659.1 million at the exchange rate then applicable. Then, Venezuela would have demanded to adjust the previous figure to reduce it, which Claimants accepted. This September 2010 valuation constituted the base negotiation price agreed by the Parties as a result of the joint valuation and reached USD$583.6 million, also at the exchange rate applicable at that time. Finally, in December 2011, the Minister of Food had informed President Hugo Chávez that no more than USD$520 million should be paid for 80% of Monaca and Demaseca. This entails a value of at least USD$574 million for all Monaca and Demaseca when deducting the royalty debt and financial debt as of December 31, 2011.[804]

661. Claimants allege that Venezuela's and Hart/Vélez's criticisms to Dellepiane/Spiller's valuation and their alternative fair market value calculations are ungrounded. Dellepiane/Spiller used conservative projections and appropriate variables in the DCF model and corroborated the reasonableness of their projections with an analysis of comparable companies and with the valuations endorsed by Venezuela in 2010 and 2011.[805] They maintain that the "historical transactions" referred to by Hart/Vélez are not indicative of the fair market value of the Investments as of the Valuation Date.[806]

662. As to the interest on the compensation due, Claimants argue that since the Treaty does not contain an express provision on the payment of interest, general principles of international law should govern. Therefore, in accordance with the principle of full reparation, Claimants should be compensated by paying pre-award and post-award interest for the loss of opportunity cost that the compensation due would have generated.

Such interest must also be calculated in compound form.[807] Thus, in order to place Claimants in the same position as they would have been if Respondent had not taken the actions discussed and to prevent Respondent from enriching itself by unlawfully withholding compensation due to

[799] Memorial, ¶ 286.
[800] Brief, ¶ 418.
[801] Brief, ¶ 404.
[802] Brief, ¶ 446.
[803] Brief, ¶ 447.
[804] *Id.*
[805] Brief, ¶ 397. *See also* Brief, ¶¶ 398-446.
[806] Brief, ¶¶ 452-457.
[807] Memorial, ¶¶ 305-307.

Claimants, the Tribunal should (i) update the amount of compensation through the compound interest method until the date of the Award, and (ii) also order the payment of compound interest post-Award on the amount of compensation determined therein.[808]

663. Following Claimants' instructions, Dellepiane/Spiller updated the damages using two alternative interest rates: (i) the equivalent to Libor plus a margin of 4% for a pre-award interest rate of 4.48%, and (ii) the capital cost of the grain milling and food processing industry in the United States, which they estimate at 6.29%.[809] Applying these rates, Dellepiane/Spiller calculate that the damages suffered by Claimants excluding white corn redirection damages are between USD$644.8 million and USD$672.3 million as of June 29, 2015, while the damages caused by such redirection represent between USD$53.6 million and USD$55 million.[810]

664. Claimants allege that the short-term or risk-free interest rate proposed by Venezuela is unreasonable and would encourage its unlawful conduct, since the interest rates that Venezuela must offer to cover its capital needs are much higher than the risk-free rates it proposes.[811] In addition, Claimants criticize Venezuela's assertion that the award of compound interest only applies in special circumstances, because it ignores the recent and prevailing practice of investment tribunals.[812]

665. Claimants also assert that, contrary to Venezuela's allegations, it is common practice to award post-award interest, such as in investment arbitrations in which Venezuela has been convicted in the past seven years. A contrary solution would encourage nonpayment of the award in a timely manner and Venezuela's attitude indicates that it shall not recognized the lawfulness of any possible award.[813]

666. Finally, Claimants allege that the principle of full reparation requires that Venezuela does not tax the compensation ordered in this proceeding with taxes that have already been taken into account by Dellepiane/Spiller in the termination of such compensation. In particular, such taxes are: (i) income tax, (ii) science, technology and innovation tax, (iii) the tax of the Organic Law of Drugs *(Ley Orgánica de Drogas)*, and (iv) sports, physical activity and physical education tax. Had these taxes not been applied in their calculations, the fair market value determined by Dellepiane/Spiller would be considerably higher.[814]

667. Thus, any attempt by Respondent to tax the same income at a higher rate or twice would constitute an additional breach of the Treaty and would be inconsistent with the Tribunal's award. According to Claimants, this has been recognized by various tribunal upon recognizing that the value of the expropriated asset should not be influenced by the expropriation itself.[815]

B. RESPONDENT'S POSITION

668. Venezuela rejects the Claimants' right to receive the compensation they seek because they have not proven that the value of Monaca and Demaseca has been annihilated as a result of losing control of their investments, or because Venezuela has prevented them from enjoying the economic benefits of their investments.[816] Even if some of Claimants' alleged breaches other than the

[808] Memorial, ¶¶ 308-309; Brief, ¶ 459.
[809] *See* Letter from Instructions to Dellepiane Spiller (Exhibit CLEX-001); Dellepiane/Spiller First Report, ¶ 13.
[810] Dellepiane/Spiller Second Report, ¶ 15.
[811] Brief, ¶ 460.
[812] Brief, ¶ 461.
[813] Brief, ¶¶ 462-463.
[814] Memorial, ¶ 301; Brief, ¶¶ 464-466.
[815] Memorial, ¶¶ 302-303.
[816] Rejoinder, ¶ 534. *See* Counter memorial, ¶ 474.

expropriation have occurred, their claim that they should be compensated for the full value of the Investments should not be accepted. These objected measures would be of a temporary and limited nature, so that the alleged damage would never be the total loss of the Investments.[817]

669. In its Counter Memorial, Venezuela clarifies that in accordance with the principle of integral reparation, the State is bound to repair only for the damage *caused* by the unlawful conduct. Venezuela adds that Claimants are wrong to assume that full reparation in this case consists of restitution of the total value of the business, as if it had been divested, when Gruma retains ownership and control of Monaca and Demaseca.[818]

670. Now, in its Rejoinder, Venezuela argues that if the Tribunal concludes that there was a legal, indirect or illegal expropriation, the principle of integral reparation under customary international law does not apply in this case.[819] Respondent submits that the applicable standard would be the "actual value of the investment" immediately prior to the expropriation date – which according to Claimants was January 21, 2013 – as set forth in Article V of the Treaty, as *lex specialis*.[820] According to Hart/Vélez, the real value of the companies at that date would in no case be more than USD$266.7 million, as proven by the ADM Transaction. Claimants' assertion that the Treaty only establishes the standard of compensation applicable to lawful expropriation is incorrect.[821]

671. According to Venezuela, Claimants' theory of damages rests on the premise that the value of their Investments was annihilated as a result of Venezuela's alleged expropriatory and discriminatory measures. Dellepiane/Spiller simply assumed that the value of Monaca and Demaseca was zero at the Valuation Date, without first determining the actual impact that Venezuela's allegedly discriminatory and expropriatory measures had on the Companies.[822] In other words, they assume that the value of the companies is zero, falsely alleging that Venezuela stripped them of the control and economic benefits of their Investments. Venezuela argues that this is a financial fiction because Monaca and Demaseca continue to operate and are even performing better after Venezuela's alleged behaviors.[823] It adds that in the 2012 Gruma Annual Report, it expressly recognized that there was no indication of impairment of the value of Gruma's net investment in Monaca and Demaseca.[824] In addition, Venezuela argues that Claimants must prove: (i) that had it not been for the allegedly wrongful act, the harm would have occurred (factual element of causation); and (ii) that such wrongful act was the proximate and direct cause of the harm (legal element of causation).[825]

672. Venezuela maintains that it is not true that the value of Monaca and Demaseca is zero, because neither the seizure nor Decree No. 7.394 prevent Valores and Consorcio from enjoying the economic benefit of their Investments. Claimants have not proved that these measures prevent them from declaring and distributing dividends, or that they have caused the loss of control over their Investments. Contrary to Claimants' allegations, Venezuela has proven that the measures currently affecting Monaca and Demaseca are temporary, and therefore reversible, linked to a criminal proceeding whose sole purpose is the preservation and custody of property or assets linked to Mr. Fernández Barrueco should his liability be established as a result of such proceeding.[826] Claimants retain control and title over Monaca and Demaseca, and the expropriation proceedings

[817] Rejoinder, ¶ 535.
[818] Counter memorial, footnote 850.
[819] Rejoinder, ¶¶ 570-586.
[820] Rejoinder, ¶ 537.
[821] Rejoinder, ¶ 572.
[822] Counter memorial, ¶ 476.
[823] Counter memorial, ¶¶ 477, 481-482; Hart/Vélez First Report, ¶ 40.
[824] Counter memorial, ¶ 482.
[825] Counter memorial, ¶ 485.
[826] Counter memorial, ¶ 487.

are suspended. The Venezuelan set of measures did not replace the statutory administrators or prevent them from exercising their functions in the management and conduct of the business.[827]

673. Venezuela adds that Claimants themselves do not dare to state categorically that there is a prohibition on distributing dividends. Although it is true that the seizure prohibit, through the SAREN, the recording of minutes, nothing prevents the shareholders of the Board of Directors of the Companies from making decisions, including the decision to declare dividends, and put those decisions on the record.[828] Venezuela explains that the act of declaring dividends is a constitutive act of rights and that once declared by the corresponding corporate body, shareholders acquire an irrevocable right of credit.[829] Therefore, it is not necessary to register the minute where they are declared, in order for this right to be enforceable.[830] In any event, once the dividends had been declared, Claimants could have resorted to the judge to authorize the formalization of the minutes.[831] The profits of a company, once declared as dividends, become a debt to be paid to the shareholders and, therefore, would not be "productive assets" affected by Decree No. 7.394.[832] Even if it were true that they could not distribute dividends, Claimants have not suffered damages because historically they have not distributed dividends.[833] Finally, Hart/Vélez note that no damage has been caused by the fact that Monaca and Demaseca have withheld potential dividends, since they were used in the normal course of business.[834]

674. Venezuela also argues that the redirection measures are normal in the food industry, have been requested on other occasions by Monaca and entail a normal contractual relationship with other industry subjects.[835] In addition, it adds that there is no evidence that the Venezuelan measures prevented Claimants from selling their shares in Monaca and Demaseca, and that the link between Gruma and Claimants with Mr. Fernández Barrueco and between Monaca and ADM Latin America ("ADM Latam") could in itself have influenced the alleged impossibility of transferring the shares of the Companies.[836]

675. On the other hand, Venezuela alleges that if Claimants succeed in showing that they suffered damages as a result of Venezuela's unlawful conduct, the circumstances of this case do not deserve an assessment of the fair market value of the business because Gruma was not stripped of its companies.[837] At most, and only for purposes of argumentation, it could be considered as a temporary interference in business. Venezuela explains that Dellepiane/Spiller should not have made an assessment of the total value of the business,[838] but a comparison between an DCF valuation in the scenario of non-existence of the alleged measures *("counterfactual scenario")* and an DCF valuation that considers such measures *("real scenario")*.[839] In cases like this one where Claimants have an indirect investment – through other companies of which they are

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[827] Rejoinder, ¶ 588.
[828] Rejoinder, ¶ 542.
[829] Respondent adds that the failure to provide the minutes of the board of directors and shareholders' meeting of Monaca and Demaseca, the statutory bodies that determine and authorize an eventual distribution of dividends, and which are the only documents that could be subject to the limitation imposed for dividend distribution purposes, entails that Claimants have not complied with their burden of proof. (Rejoinder, ¶ 595).
[830] Rejoinder, ¶ 542.
[831] Rejoinder, ¶ 543.
[832] Rejoinder, ¶ 545.
[833] Rejoinder, ¶¶ 547-551.
[834] *See* Rejoinder, ¶ 594.
[835] Counter memorial, ¶ 501.
[836] Counter memorial, ¶ 489.
[837] Counter-memorial, ¶ 479.
[838] In its Rejoinder Respondent explains that Claimants agree that this is an appropriate approach and they claim to have made it. However, they resort to the fiction that Monaca and Demaseca would have no value in order to rely solely on the value obtained in their counterfactual scenario. Rejoinder, ¶ 588.
[839] Rejoinder, ¶ 588. *See* Counter Memorial, ¶ 479.

shareholders – tribunals have considered that compensation should be measured in relation to the specific impact on the State's conduct on the financial situation of claimants as shareholders.[840] For the event that the Tribunal finds a non-expropriatory breach of the Treaty, the standard of compensation is the actual loss caused to the financial position of Valores and Consorcio as shareholders of Monaca and Demaseca.[841] However, this compensable damage to a shareholder could include, for example, the loss of the value of the shares, but is it not equivalent to the losses suffered by the affiliate through which the investment was made.[842]

676. Also, Venezuela opposes a valuation by a method that presumes a total loss of business. Fair market value, based on the quantification of the total value of the business, is more appropriate for cases of total loss or destruction of the investment. Venezuela argues that when there is temporary interference it is neither practical nor correct to focus on the value of the entire investment, as compensation should only cover the period of interruption. In the event that the measures are reversed, and Claimants succeed in obtaining the compensation they claim, they would receive double compensation: the amount claimed plus the profits of the two companies that would continue to operate under the same conditions prior to the measures.[843] Although *"Claimants argue that the claimed damages consist of the loss of value of their investments due to the Venezuelan measures"*,[844] they expressly exclude from valuation the eventual effect of such measures and assume a loss of value of their shares.[845]

677. According to Venezuela, the ADM Transaction confirms that Monaca and Demaseca had value even after the seizure and Decree No. 7.394[846] were decreed. In December 2012, Gruma decides to exercise its preemptive right and matched a third party offer to purchase all ADM's shares in Valores and Consorcio for USD$8 million. The sole assets representing Valores and Consorcio are their holdings in Monaca and Demaseca.[847] From that transaction, with respect to 3% of ADM's shares in Valores and Consorcio, the Venezuelan experts infer that the total value of Monaca and Demaseca is USD192.6 million after deducing the USD$74.1 million of royalty debts.[848] An appropriate indication of a company's value is given by its historical transactions, such as the ADM Transaction, just one month prior to the Valuation Date chosen by Claimants. Hart/Vélez explained from their first report that the ADM Transaction gives a good indication of the value of the Investments in the current scenario, which serves as the basis for a comparison with the *counterfactual scenario* to the extent that the Tribunal determines that such comparison is necessary.[849]

678. Venezuela also alleges that Dellepiane/Spiller poorly applies DCF's methodology and the method of comparable publicly traded companies, artificially inflating Claimants' alleged damages. Dellepiane/Spiller barely apply, conveniently, the results and financial data of a single fiscal year.[850] Respondent suggests that Dellepiane/Spiller avoid presenting the historical analysis of Monaca's and Demaseca's transactions because it would show that their results are better now than before the measures that allegedly caused them harm.[851] In addition, Dellepiane/Spiller make speculative assumptions that reduce risk, result in an inflated valuation and set aside the effect of

[840] Rejoinder, ¶ 564.
[841] Rejoinder, ¶ 566.
[842] Rejoinder, ¶ 564.
[843] Counter memorial, ¶ 497.
[844] Counter memorial, ¶ 503. *See* Memorial, ¶ 243.
[845] Counter memorial, ¶ 504.
[846] Rejoinder, ¶¶ 552-557.
[847] Rejoinder, ¶ 630.
[848] Rejoinder, ¶ 632.
[849] Rejoinder, ¶ 596.
[850] Counter memorial, ¶ 509.
[851] Rejoinder, ¶ 591.

its own administrative actions that would affect the value in a possible sale to a third party.

679. Respondent also rejects Claimants' argument that their sales were adversely affected by the redirection of corn, which further allegedly would justify additional damage of USD$43.5 million according to Dellepiane/Spiller.[852] Venezuela explains that Dellepiane/Spiller calculate the cost of Monaca's and Demaseca's debt simply by adding the U.S., risk-free rate to their country risk and their industry risk premium, obtaining 7.3%. If, as suggested by Dellepiane/Spiller, a WACC of 10.12% is used for an investment in Monaca and Demaseca, the country risk premium would have to be assumed as negative.[853] Even assuming, not consented to by Venezuela, that Claimants' method was accepted as appropriate, the correct WACC as of January 21, 2013 is really 19.16%.[854] Using the corrected WACC and considering adequately the production and prices of wheat flour, the value of Monaca and Demaseca would be reduced from USD$462.1 million to USD$222.1 million.

680. According to Respondent, in applying the comparable, publicly traded method, Dellepiane/Spiller conveniently use non-comparable examples,[855] and artificially inflate their value by applying a 27% control premium.[856] They forget to standardize the financial statements of comparable companies and the companies under evaluation in order to put them in a comparable situation from an accounting point of view.[857]

681. In addition, Venezuela asserts that Claimants leave without floor their arguments on the referential effects of the 2010 and 2011 valuations when Dellepiane/Spiller indicate in their first report that the eliminated the carrying value methodology because it did not represent the company's ability to generate future cash flows.[858] This also applies to benchmark assets valuations, as they do not measure the capacity to generate these cash flows.

682. Venezuela concludes that Claimants have not complied with their obligation to calculate the alleged damages – which is their procedural burden, therefore, their claim for damages must be rejected in its entirety.

683. In addition, Venezuela argues that Claimants' request for the payment of pre- and post-award compound interest has no basis in the Treaty, is contrary to the principles of international law and fails to stand up to international jurisprudence on investment arbitration.[859] The joint application of the two proposed interest rates by Claimants is incorrect and excessive, since international tribunals have applied interest rates based on short-term U.S. Treasury bonds or similar risk-free rates, rather than speculating on what Claimants hypothetically might have generated. Accordingly, in failing to determine an applicable interest rate in the Treaty, Hart/Vélez apply a 10-year U.S. Treasury bond rate or a six-month Libor rate plus 2%, alleging that the rates requested by Claimants are higher than the rates historically awarded.[860]

684. Venezuela also alleges that, contrary to Claimants' assertions, neither international law nor tribunals, in general, award reparations on a compound interest basis. On the contrary, under international law, compound interest is appropriate only when justified by special circumstances. Claimants have not presented any special circumstances that would justify deviating from the

[852] Rejoinder, ¶¶ 599-603.
[853] Rejoinder, ¶ 621.
[854] Counter memorial, ¶ 530; Rejoinder, ¶¶ 623-624.
[855] Counter memorial, ¶¶ 510, 532-537.
[856] Rejoinder, ¶ 636.
[857] Counter memorial, ¶ 534.
[858] Rejoinder, ¶ 626.
[859] Counter memorial, ¶¶ 550-555; Rejoinder, ¶¶ 640-645.
[860] Counter memorial, ¶¶ 540-542; Rejoinder, ¶ 641; Hart/Vélez First Report, ¶¶ 178-185.

general rule of international law on the application of simple interest and, accordingly, their request to apply a compound interest should be rejected.[861]

685. Similarly, since there is no basis for assuming that Venezuela shall not pay any eventual compensation ordered in the award, the request for post-ward interest is inappropriate and should be rejected.[862] Without demonstration of or history of a non-compliance, requiring post-decision interest is speculative.[863]

686. Finally, Venezuela contends that Claimants cannot request that any compensation ordered by the Tribunal in this arbitration not be taxed.[864] The application of taxes is an instrument of state policy that is beyond the control of the Parties and, consequently, the general rule under international law is that the tax considerations are a natural consequence of any award of damages.[865] Furthermore, Claimants' request with respect to taxes is premature and speculative, since it has even been explained which taxes they would apply and, accordingly, the alleged actual tax risk is not articulated.[866]

687. Claimants find no basis in international law to justify their claim. On the contrary, tribunals have considered that full compensation does not mean that the investor is covered by a situation of tax deduction. Claimants limit themselves simply to an accounting argument, but there is no determination of tax risk they allegedly face, so the claim is purely speculative and impossible to determine.[867]

C. ANALYSIS OF THE TRIBUNAL

688. The Tribunal begins by noting that it shall apply the rules of the Treaty itself and public international law to determine the reparation owed by Venezuela for the breaches of the BIT identified in this Award.

689. The Tribunal recalls that it has not found that in this case the measures taken by Venezuela constitute and expropriation.[868]

690. Article XI(5) of the BIT states that:

> "The arbitral award shall be limited to determining whether there is a breach by the Contracting Party of its obligations under this Agreement, whether such breach of obligations has caused damage to the investor of the other Contracting Party and, if so, to fixing the amount of compensation".

691. Unlike Article V(2) of the BIT, the Treaty does not detail a standard of compensation or a specific methodology of compensation applicable as a result of breaches other than expropriation. However, Article XI(5) of the Treaty clearly and expressly recognizes the Tribunal's power to *"fix the amount of compensation"* linked to a contracting party's failure to comply with the BIT.[869]

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[861] Counter memorial, ¶¶ 543-547; Rejoinder, ¶¶ 642-643.
[862] Counter memorial, ¶¶ 548-549.
[863] Rejoinder, ¶¶ 644-645.
[864] Counter memorial, ¶ 550; Rejoinder, ¶¶ 646-648.
[865] Counter memorial, ¶¶ 550-551; Rejoinder, ¶¶ 646-648.
[866] Counter memorial, ¶¶ 552-554; *See* Hart/Vélez First Report, ¶ 187.
[867] Rejoinder, ¶ 646-647.
[868] *Supra* § V.A.3.
[869] *See SD Myers v. Canada*, ¶ 309 (*"In failing to identify a particular methodology for determining compensation in cases that do not entail expropriation, the Tribunal considers that the drafters of NAFTA intended to leave open the possibility to determine a measure of compensation appropriate to the specific provisions of NAFTA. In some cases* [that do not involve expropriation], *a*

692. Claimants argue that they are *"entitled to redress in accordance with the standards set out in the Agreement and general international law for internationally wrongful acts"*.[870] The Tribunal agrees that the principle of integral reparation under customary international law applies to determine reparation for Venezuela's breaches of the standards of fair and equitable treatment, of hindrance measures and of the obligation with respect to BIT.[871] As established by the Permanent Court of International Justice in the *Chorzów Factory* case:

> "The repair must be, as far as possible, eliminate all the consequences of the illegal act and reestablish the situation that, in all probability, would have existed had the act not been committed".[872]

693. Similarly, the United Nations International Law Commission provided in Article 31 of the Articles on State Responsibility for Internationally Wrongful Acts for the codification of the principle of full reparation.[873] As developed by the tribunal in *Gold Reserve v. Venezuela,* the principle of integral reparation applies to breaches of obligations contained in investment treaties:

> "Returning now to the relevant principles of international law applicable to the award of damages for breach of TJE, the Tribunal begins with an analysis of the principles of the Chorzów Factory. It is true that this was a State-to-state liability case and, as Respondent has rightly pointed out it cannot automatically apply to an investor-state situation. However, it is well accepted in international investment law that the principles adopted in the *Chorzów Factory,* although initially established in a state-to-state context, are the relevant principles of international law that apply when considering compensation for breach of a [bilateral investment treaty]. It is these well-established principles that represent customary international law, even for breach of international obligations under [bilateral investment treaties], which the Tribunal is bound to apply. Even a cursory analysis of previous ICSID cases considering this issue confirms it. As *Impregilo v. Argentina* states: 'With regard to compensation, the basic principle to be applied is that laid down by the Permanent Court of International Justice in its ruling in the *Chorzów Factory* case. According to that principle, reparation should remedy the consequences of the wrongful act to the greatest extent possible and restore the circumstances to the situation that would have probably occurred had it not been committed. In other words, in principle, *Impregilo* should be placed in the same situation as it would be if Argentina had not treated its investment unfairly and inequitably'. [These] principles supplement those contained in the ILC Articles on State Responsibility, specifically Article 31, to make full reparation for damage caused by the breach of an international obligation. This, in turn, reflects customary international law".[874]

694. The Tribunal shall, therefore, proceed to fix the amount of compensation to be paid by Venezuela to the Claimants as a consequence of Treaty breaches found by the Tribunal, applying the principle of full reparation.

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tribunal might think it appropriate to adopt the 'fair market value' standard; in other cases it may not". [Tribunal's translation]

[870] Memorial, ¶ 241.

[871] To the extent that the Tribunal did not find in this case that Venezuelan measures constituted an expropriation, it shall not determine whether Article V(29 of the BIT includes a *lex specialis* on compensation applicable to legal or illegal expropriations, or whether it differs from the principles of full reparation.

[872] *Case regarding the Chorzów Factory (Germany v. Poland),* page 47. [Tribunal's translation]

[873] International Law Commission, Articles on State Responsibility, Article 31 *("1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State").*

[874] *Gold Reserve v. Venezuela,* ¶¶ 678-679 [Tribunal's translation; omitted footnotes].

695. The Tribunal considers that the burden of proving the existence of loss or damage suffered by Claimants lies with them. With respect to the causal link specifically, there must be a "sufficient causal link" between the wrongful act and the loss suffered by claimant to order the corresponding compensation.[875] The Tribunal has broad discretion to determine the evidentiary value of the evidence submitted by the Parties[876] in relation to the existence of injury, the determination of causality between the wrongful conduct and the injury suffered, and the applicable methodology for ordering compensation.[877]

696. However, it is widely recognized that, depending on the circumstances of the specific case, tribunals may choose to apply certain valuation methods, as well as to adapt them after assessing different arguments or opinions of the Parties and the facts proven by them. It could hardly be considered that the amount of compensation corresponding to the breach of an obligation in an investment treaty can be determined with scientific certainty or absolute accuracy,[878] even if there is certainty that the investor has suffered some harm. The process for ordering the payment of damages may entail the use of certain reasonable approximations,[879] considering further that the Tribunal shall seek *"as far as possible, to eliminate all consequences of the unlawful act and to reestablish the situation that would, in all probability, have existed, had the act not been committed"*.[880] Nothing in the foregoing exempts the Tribunal from awarding damages for the damages suffered and proven by Claimants.[881] In the terms presented by the tribunal in *System v. Kyrgyzstan:*

> "The Tribunal is also aware of the fact that all valuations in the absence of an actual sale are estimates and it is aware that the Tribunal has a legal duty to render an award under a process that Respondent has freely agreed to establish, and that Claimant has freely chosen to pursue, and on the basis of the material that the parties have decided to submit to it. This is, necessarily, an exercise in the art of the possible; and the Tribunal has sought to arrive at a rational and fair estimate, in accordance with the [bilateral investment treaty], of the loss suffered by Claimant, rather than seeking the chimera of a sum that is uniquely and indisputably the correct determination of the value lost by Claimant. The Tribunal is comforted by Immanuel Kant's remark that 'From a wood as twisted as that of which man is made nothing entirely straight can be carved'".[882]

697. In this case, the experts of both Parties agree that the methodology to be used to calculate damages to Claimants would be the difference in the value of the share capital of Monaca and Demaseca under a *real scenario,* which includes the effect of the Treaty breaching measures and a *counterfactual scenario*, which reflect the value of Claimants' investments without such measures.[883]

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[875] *SD Myers v. Canada,* ¶ 316; *Duke Energy v. Ecuador,* ¶ 468; *Biwater Gauff v. Tanzania,* ¶ 779.
[876] ICSID Arbitration Rules, Rule 34(1).
[877] *See Wena Hotels v. Egypt,* ¶ 91; *LG&E v. Argentina,* ¶ 40, *Azurix v. Argentina,* ¶¶ 421-422; *Murphy v. Ecuador,* ¶ 481.
[878] *See Gold Reserve v. Venezuela,* ¶ 686.
[879] *See, for example, ADC v. Hungary,* ¶ 521; *Rumeli v. Kazakhstan,* ¶ 804.
[880] *Case regarding the Chorzów Factory (Germany v. Poland),* page 47 [Tribunal's translation].
[881] *Vivendi v. Argentina II,* ¶ 8.3.16 *See Kardassopoulos v. Georgia,* ¶ 594; *Lemire v. Ukraine,* ¶ 248; *Gemplus v. Mexico,* Part XIII, ¶ 91.
[882] *System v. Kyrgyzstan,* ¶ 155 [Tribunal's translation].
[883] *See, for example,* Dellepiane/Spiller Second Report, ¶¶ 2, 16-17; Hart/Vélez Second Report; ¶¶ 5, 20, 42. As explained below, the main difference between the Parties is that, for Dellepiane/Spiller, the value of the Investments in the *real scenario* equals zero. However, the methodology proposed by Dellepiane/Spiller entails a comparison between the value of the Investments in the *counterfactual scenario* and in that hypothetical *real scenario* where the value of the Investments would have been annihilated (zero value). This comparison necessarily leads us consider that the total value of the Investments in the *counterfactual scenario,* measured by Claimants and Dellepiane/Spiller with the DCF method, is equal to the value to be indemnified. Venezuela, for its part, alleges that the value of the Investments in the *real scenario* is not equivalent to zero. The difference then does not lie in the

698. Hart/Vélez argue that:

> "the appropriate method for determining loss of profit would be to calculate the companies' FMV as if the alleged measures had not occurred and then compare the result with the companies' fair market value based on the alleged measures. The difference between the two values would reflect the loss of profit, namely, the damages".[884]

699. For their part, Dellepiane/Spiller state in their Second Report that:

> "Hart/Vélez agree with the methodology we used for the aggregate damages caused to Claimants, in the sense that they should be calculated as the difference in the share value of Monaca and Demaseca under two scenarios: a) A real scenario, which includes the effect of the expropriation and hindrance measures on management adopted by Venezuela. B) A counterfactual scenario, which reflects the value of Claimants' investments without such measures. Contrary to the statements of Hart/Vélez this is precisely the approach to calculating damages in our First Report [...]".[885]

700. The Tribunal considers that this is an appropriate valuation method to be applied in this case, insofar as it would eliminate the consequences of Venezuela's breaches of the BIT and restore the situation that would have existed had such breaches not been committed.

701. However, Claimants' and Venezuela's experts disagree on both the value of the Investments under the *real scenario* and under the *counterfactual scenario.* The Tribunal shall determine first the value of the Investments in the *real scenario* and, second, their value in the *counterfactual scenario.*

1. Value of the Investments in the real scenario

702. Dellepiane/Spiller estimate that in the *real scenario* the value of Monaca and Demaseca to their shareholders, or instead, to a potential buyer, is zero. According to Claimants Dellepiane/Spiller concluded that the Investments have zero value in the *real scenario* based on Claimants' instructions[886] and after analyzing in detail the effect of the measures imposed by Venezuela, based on economic, financial and valuation principles. To the extent that for Claimants the value of the Investments in the *real scenario* is zero, the compensation due would be the total of the Investments in the *counterfactual scenario.* This is equivalent to the fair market value of the Investments.

703. Claimants further assert that this methodology is adequate to quantify damages suffered as a result of measures that breach the standard of fair and equitable treatment and guarantees on the use and enjoyment of investments, which *"preclude any significant return on the investment"*.[887] Claimants refer to the case of *CMS v. Argentina,* where the tribunal found that Argentina had breached the obligation to provide fair and equitable treatment and fixed the amount of damages suffered based on the fair market value of the investment.[888]

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methodology to be used (this, for the Tribunal, is more of a difference in language), but in what each Party considers to be the value of the Investments in the *real scenario* in the *counterfactual scenario.*

[884] Hart/Vélez First Report, ¶ 3. *See* Hart/Vélez Second Report, ¶ 5.

[885] Dellepiane/Spiller Second Report, ¶¶ 16-17.

[886] Letter from Miguel López Forastier (Covington & Burling LLP) for Santiago Dellepiane and Pablo Spiller (Compass Lexecon), July 23, 2013 (hereinafter, "Letter from Instructions to Dellepiane/Spiller") (Exhibit CLEX-001).

[887] Memorial, ¶ 254; Brief, ¶ 382, quoting *Metalclad v. Mexico,* ¶ 113.

[888] *CMS v. Argentina,* ¶ 410.

704. Claimants and Dellepiane/Spiller explain that their estimate of damages would be the same regardless of the legal framework within which Claimants' claim fits, whether in breach of fair and equitable treatment or expropriation as follows:

(i) Although Monaca and Demaseca generate positive cash flows, their *shares* are of no value as a result of the measures imposed by Venezuela, which have fully limited the use, enjoyment and disposition that Claimants (or a potential purchaser) could earn from the profit-generating capacity of Monaca and Demaseca.

(ii) In addition, due to Decree No. 7.394, shareholders may not dispose of their shares in an amount that reflects anything other than the expected value of the compensation that Venezuela shall give for expropriated assets. *"Even in the absence of any impossibility or any restriction on the distribution of dividends, Claimants (or a potential purchaser) are certain, as of May 12, 2010, that at any time such ability to receive the flow of future dividends shall be formally transferred to Venezuela".*[889] Therefore, the value of Monaca's and Demaseca's shareholding for Claimants or a potential purchaser is determined solely by the expectation of the potential compensation that Venezuela may decide to grant for the assets subject to Decree No. 7.394. The value of such compensation does not represent the fair market value of the Investments, nor does it represent their ability to generate profits.[890]

(iii) Accordingly, the estimate of damages caused to Claimants as a result of the measures would be the same regardless of whether the claim is in breach of fair and equitable treatment or expropriation.

(iv) Dellepiane/Spiller propose a hypothetical case in which Claimants attempt to resort to a financial institution to borrow money by pledging the shares of Monaca or Demaseca as security. They contend that no financial institution would accept them as collateral, since *"under the measures imposed by Respondent no longer matters the capacity of the companies themselves to generate funds, but rather the inability of shareholders to access those funds".*[891]

705. For its part, Venezuela argues that Dellepiane/Spiller should have determined the real impact that the measures alleged to be contrary to the BIT had on the Investments. Hart/Vélez contend that Dellepiane/Spiller incurred in a *"financial fiction"* by assuming that the value of the Investments in the *real scenario* is zero, based on false assumptions about the divestment of the control and economic benefits of Claimants' Investments.[892] Hart/Vélez consider that the best indication of the value of Monaca and Demaseca in the *current scenario* at the Valuation Date (selected by Claimants) is the ADM Transaction. They contend that the implied value of the Companies on the on the basis of this transaction is USD$266.7 million, *"which results in a total value of Claimants' investment of [USD]$192.6 million when [USD]$74.1 million is subtracted from the royalty debt".*[893]

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[889] Dellepiane/Spiller Second Report, ¶ 26.
[890] Rejoinder, ¶ 379.
[891] Dellepiane/Spiller Second Report, ¶ 34.
[892] *See, for example,* Rejoinder, ¶¶ 34.
[893] Hart/Vélez Second Report, ¶ 10 [emphasis added].

706. In addition, Hart/Vélez explain that Claimants' argument that the ADM Transaction only represents what was expected to be received from Venezuela in the expropriation process meaningless, since *"if there was protection under the investment treaty, the transaction would not have occurred at a value below the* [fair market value] *guaranteed by the* [BIT]".[894]

707. According to Venezuela, if the Tribunal finds a breach of Treaty protections other than expropriation, it would also be necessary to determine whether, and to what extent, the breach caused harm to the Claimants. Applying this criterion of compensation when the investor invests in shares in a company – as in the case of Claimants – tribunals have considered that compensation should be measured in relation to the specific impact of the State's conduct on the financial situation of Claimants as shareholders.

708. In this case, the Tribunal has decided that the measures taken by Venezuela have not constituted an expropriation. The facts described by Claimants in their letter of instructions to Dellepiane/Spiller also do not amount to a loss of control of the investment or a loss of its value.[895] Although Claimants allege that the profits generated by Monaca and Demaseca were not used in the ordinary course of business, the Tribunal considers it important to mention that there is no evidence in this arbitration from the management bodies or shareholders of the Companies of a profit management or dividend distribution policy, or where the alleged sub-optimal use of profits has been discussed or decided upon.

709. In conclusion, the Tribunal does not consider the premises on which Claimants and Dellepiane/Spiller base their conclusion that the value of Claimants' Investments has been annihilated to be proven.

710. Now, the Tribunal has found that Venezuela has breached Articles III, IV and VII of the BIT. Among others, Respondent has hindered the transfer of dividends abroad in breach of the Treaty through the conduct of SIEX. Venezuela has imposed a series of obstacles to the disposition of assets covered by Decree No. 7.394 and to the management of the Companies based on an expropriation process based on an expropriation process that has been suspended for almost ten years, and a negotiation process that has not been advanced by Respondent's decision, while Venezuelan officials continue to apply measures based on the Decree. Actions by Venezuelan officials have generated confusion between those measures taken under the criminal process involving Mr. Fernández Barrueco and those arisen from the Venezuelan food Decree and policies. The foregoing, among other measures, coupled with the excessive delay (more than six years) in the decision to admit the appeal of the third party proceeding (*incidente de tercerías*) and the decision to dismiss in the criminal case against Mr. Fernández Barrueco have prevented Claimants from challenging the measures imposed by Venezuela to fully resume the normal operation of Monaca and Demaseca.

711. Although the Tribunal has determined that such conduct does not amount to a total or substantial loss of control or value of the Investments, it as unreasonably and unjustifiably hindered the exercise of Claimants' rights as shareholders of Monaca and Demaseca and subjected the future exercise of these rights to a situation of uncertainty. The fact that the Companies continue to operate, and that their sales have behaved satisfactorily during the years in which Respondent

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[894] Hart/Vélez Second Report, ¶ 46.

[895] Letter from Instructions to Dellepiane/Spiller (Exhibit CLEX-001). For example, the Letter from Instructions to Dellepiane/Spiller includes the following facts: the officials of the Republic have *"forced the managers of MONACA and DEMASECA to obtain authorization in writing each time such companies must pay obligations related to the ordinary course of their business"* [emphasis added]; *"the disposition of assets of these companies is prohibited"*; and *"it is impossible for MONACA and DEMASECA to distribute dividends or repatriate capital"*, among others. The Tribunal has not bound the above facts to be proven. Also, the Letter from Instructions to Dellepiane/Spiller mentions the Administrative Ordinance. As stated in paragraphs 408-415 *supra*, the Tribunal has concluded that through the Administrative Ordinance the powers of the directors were not extended as to give them full and unlimited management of the Companies.

engaged in conduct contrary to the BIT, does not reflect the actual value of these Investments, that is, of the shares that Claimants have in Monaca and Demaseca. In the Tribunal's view, the Venezuelan unlawful acts have had an impact on the value of Claimants' Investments, that is, on the value of the shares of Valores and Consorcio in Monaca and Demaseca. Contrary to Respondent's allegations, the Tribunal sees no causal link between Mr. Fernández Barrueco's and ADM Latam's alleged link to the Companies and the possibility or impossibility of transferring the Companies' shares. The Tribunal is convinced that no potential purchaser would pay the same value for Claimants' shares in Monaca and Demaseca if the BIT-breaching measures did not exist.

712. Having said that, the Tribunal considers that in this case it would be inappropriate to apply the *total* fair market value methodology or to take the value of the Investments as zero in the *real scenario.* Claimants have not proved that their shares in Monaca and Demaseca *do not* have the capacity to generate profits for them, or that the value of Claimants' shareholding in the Companies is determined solely by the expectation of the potential compensation that Venezuela shall grant them for the forced acquisition process under Decree No. 7.394.

713. The Tribunal is of the opinion that this case can be distinguished from the case of *Metalclad v. Mexico.* Claimants referred to that arbitration to hold that the standard to be applied to fully compensate for the damage caused to Valores and Consorcio is monetary compensation equivalent to the fair market value of the Investments.[896] However, in *Metalclad v. Mexico*, NAFTA breaches of fair and equitable treatment and illegal expropriation were found. Unlike this case, it conclude that Metalclad had *"totally lost its investment"*, and that, in that case, the damages corresponding to the breaches of granting fair and equitable treatment and compensation for adopting measures equivalent to expropriation would be the same, since both situations entailed the impossibility of the operation of the confinement and prevented any significant return on Metalclad's investment. Now, in the case of *CMS v. Argentina,* where a breach of the standard of fair and equitable treatment was found, the tribunal did not order as compensation to the investor the full fair market value of the investment, but the difference between the hypothetical fair market value of the claimants' shares without regulatory changes (namely, without the pesification measures), and the current fair market value with the regulatory measures taken (with the pesification measures).[897]

714. In addition, the evidence in the record of this arbitration proves that the value of the Investments during and after the series of measures that constitute breaches of Articles III(1), IV(1) and VII of the BIT was not zero.

715. The Tribunal shall not present its analysis of Gruma's reports, but not before clarifying that it shall proceed to assess the statements contained therein in their context.

716. Gruma's 2012 20-F Report, submitted on April 30, 2013 to the U.S. Securities & Exchange Commission points out that control of Monaca and Demaseca was lost on January 22, 2013 and that, as a result of that loss of control, Gruma would cease to consolidate the financial information of the Companies in its financial statements.[898]

717. As the Tribunal noted in paragraphs 476 to 477 above, it is apparent from the 2012 Gruma Annual Report (cut to December 31, 2012) that based on calculations that qualify as "preliminary" there were not yet "identified" that there were "indications" of impairment in the value of Claimants'

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[896] Memorial, ¶ 254.

[897] *CMS v. Argentina,* ¶¶ 419-422.

[898] Gruma's 2012 20-F Report (Exhibit C-44) *("In accordance with IFRS, we concluded that we lost control of our Venezuelan subsidiaries, Molinos Nacionales, C.A. ("MONACA") and Derivados de Maíz Seleccionado, C.A. ("DEMASECA") on January 22, 2013. As a result of such loss of control, we will cease the consolidation of the financial information of MONACA and DEMASECA starting January 22, 2013 and consequently we will present the net investment and results of operations of these companies as of such date as a discounted operation").*

net investment in Monaca and Demaseca, which would not permit an estimate of any future charge for such impairment. Gruma considered then that there was the possibility of an impairment in the investment but it had not been identified and that it was not possible to estimate it at that time. In short, the Companies had a value, an impairment was possible, but could not be estimated at that time.

718. On the other hand, the 20-F Report submitted by Gruma to the U.S. Securities & Exchange Commission on April 30, 2014, corresponding to the fiscal year ended on December 31, 2013 ("Gruma's 2013 20-F Report") provides that such company *"recognized the investment in Monaca and Demaseca as a financial asset, classifying it as an available-for-sale financial asset"*,[899] whereby Mr. Spiller recognized at the Hearing that at that time Gruma was not giving for zero the value of the Companies. In the same report, Gruma's auditors made an *"impairment test"*, which consisted of comparing the carrying values against what could be the fair market value of the Companies.[900] This exercise necessarily entails that the auditors carried out certain valuation exercises. Gruma's 2013 20-F Report establishes that *"the potential recoverable amounts using the income or market approach were higher than the carrying value of these investments and therefore, no impairment adjustment was deemed necessary"*.[901] Based on the foregoing, the Tribunal considers that the auditors did assign a certain value to the Companies, and that by the time Gruma's 2013 20-F Report was filed and after the Administrative Ordinance, Claimants appeared to believe that they had not lost the full value of their Investments.

719. Now, in December 2015 Gruma announced that it was going to write off the carrying value of tis investments in Venezuela.[902] The reason expressed to cancel the investment was the strong depreciation of the bolivar and the macroeconomic situation of Venezuela. This entails that, by the Valuation Date in January 2013, the Investments were considered not to have a zero value.[903]

720. The Tribunal then concludes that Claimants have not proved that the Companies ceased to have any value to Claimants as a result of the measures adopted by Venezuela until early 2013, when all the alleged actions had been taken. On the contrary, the evidence gathered in this arbitration and Gruma's behavior indicate that the Investments in the Companies continued to have value, although less. Indeed, the Tribunal considers that there is sufficient causal link between Respondent's wrongful conduct that the harm suffered by Claimants, corresponding to a decrease in the value of their Investments in the *real scenario.*

721. The Tribunal does not agree with Mr. Spiller's position that the ADM Transaction is not an adequate indication of the present value of Monaca and Demaseca.[904]

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[899] GRUMA, S.A.B. de C.V., U.S. Securities & Exchange Commission, Form 20-F, Annual Report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the fiscal year ended December 31, 2013 (hereinafter, "Gruma's 2013 20-F Report"), page 35 (Exhibit CLEX-078).

[900] Hearing, Day 5, Tr. 1037:14:19.

[901] Gruma's 2013 20-F Report, page 35 (Exhibit CLEX-078).

[902] Gruma, "Gruma announces the cancellation of its investment in Venezuela", December 16, 2015 (Exhibit R-207) *("GRUMA, S.A.B. de C.V." ('GRUMA') (Mexican Stock Exchange: GRUMAB) announces today that, effective December 31, 2015, it shall write off its net indirect investment in Molinos Nacionales, C.A. ('MONACA') and Derivados de Maíz Seleccionado, DEMASECA, C.A. ('DEMASECA'). As previously reported, GRUMA lost control of MONACA and DEMASECA on January 22, 2013 and ceased to consolidate the financial information of these operations. GRUMA continued to reflect the carrying value of these indirect net investments in its balance sheet in the 'Investment in Venezuela Available for Sale' account. Given the strong depreciation of the bolivar and Venezuela's macroeconomic situation, GRUMA has decided to write off the carrying value of indirect net investments in MONACA and DEMASECA, as well as the accounts receivable that certain subsidiaries of GRUMA have with MONACA. The cancellation shall result in a charge to income of approximately Ps. 4,362 million to be recorded in December 2015 in the 'Income (Loss) from Discontinue Operations, Net' account. The charge is a virtual game, so GRUMA's cash generation shall not be affected"*. [emphasis added]

[903] During the Hearing, Mr. Spiller accepted that upon writing off the carrying value of the investments Gruma and its appraisers considered at that time that the value of the investment was zero. (Hearing, Day 5, Tr. 1044:10-13).

[904] Hearing, Day 5, Tr. 1007:3-1008:2 ("[...] *Hart and Vélez allege that ADM's transaction is one of the best indications of the*

722. Indeed, the Tribunal considers that the ADM Transaction reflects the value of the Investments in the *real scenario.*[905] Historical transactions involving or falling on a company subject to valuation may constitute a fair indication of value. In the current case, this transaction reasonably entails that the fair market value of the Investments as of the Valuation Date was USD$192.6 million, after deducting the royalty debt with Azteca International Trademarks, A.G. ("Azteca Trademarks") to USD$74.1 million from the USD$266.7 million of the ADM Transaction.[906]

723. It is the Tribunal's view that this transaction represents a measure of the *fair* market value of the Investments after the BIT-breaching measures had been taken by Venezuela.[907] The transaction price was established unilaterally by ADM, as can be seen from Article 1.2 of the Local Equity Interest Purchase Agreement between Archer-Daniels-Midland Company and GRUMA S.A.B. de C.V. of Valores, of December 14, 2012 ("Valores Purchase Agreement") and Article 1.2 of the Local Equity Interests Purchase Agreement between Archer-Daniels-Midland Company and GRUMA, S.A.B. de C.V. of Consorcio, of December 14, 2012 ("Consorcio Purchase Agreement").[908] Also, Mr. Fernando Chico Pardo's letter of intent reveals that the price established between ADM and GRUMA had been agreed by Mr. Chico Pardo and ADM before Gruma decided to exercise its right of first refusal. The Tribunal considers that the documents between Mr. Chico Pardo and ADM before Gruma exercised its right of first refusal reflect the understanding of two parties outside of this dispute regarding the value of the ADM Transaction. It is not a price fixed or determined by Gruma or by Claimants, but the price that a shareholder other than Claimants fixed and that a third party outside this dispute and not a shareholder of the Companies (Mr. Chico Pardo) accepted. If ADM unilaterally fixed the price and the third party considered that this was the market price of the shares and offered to buy them, without it having been demonstrated that one or the other was in a position to be forced to buy or sell, that is the value which the Tribunal must take into account as a value freely fixed in the market and which cannot be affected by the statement subsequently made by ADM and Gruma in the contract concluded between them.[909] At the time of this representation, the price had already been determined and Gruma's only option was to acquire the shares at the price offered by the third party (Mr. Chico Pardo) or at a higher price.

724. Venezuela is then right when it points out that in the *real scenario* and for the day following the Valuation Date, the value of the Companies was not "zero", as Claimants allege.

725. Upon determining the evidentiary value relating to the ADM Transaction and specifically the purchase price of the transactions in the Valores Purchase Agreement and the Consorcio Purchase Agreement, both dated December 14, 2012,[910] the Tribunal considers relevant: (i) that the Valuation Date set forth by Claimants (January 21, 2013) is only one month after the ADM Transaction and that only five months after the ADM Transaction the Claimants commenced this arbitration without proof of an impairment that brought the value of the Companies to "zero", or to an additional loss in the value of the Investments, between the date of the ADM Transaction and

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current value of MONACA and DEMASECA, claiming that this entails that in the current value, that is, under the MONACA and DEMASECA measures, are worth 266.7 million. Hart and Vélez make a fundamental mistake here: the transaction was not about MONACA and DEMASECA. The transaction was about 3 percent, as far as this case is concerned, 3 percent of Valores and Consorcio. Now, Valores and Consorcio: what is the most important asset towards the end of 2010, 2012? They are not necessarily the shares since shares do not generate value directly but it is the possibility or the rights that Valores and Rights have to demand a compensation from Venezuela

[905] *See* Hart/Vélez Second Report, ¶ 42 *("Our primary position is that the appropriate measure of damages is the difference between the value of the companies at the valuation date (which we belief is reflected in the 2012 ADM Transaction) and the value of the companies if alleged measures had not occurred (the counterfactual value).* [...]".

[906] *See* Hart/Vélez Second Report, ¶ 10.

[907] *See supra,* § V.A.3.d.

[908] Valores Purchase Agreement (Exhibit CLEX-071); Consorcio Purchase Agreement (Exhibit CLEX-072).

[909] Valores Purchase Agreement (Exhibit CLEX-071); Consorcio Purchase Agreement, Article 1.2 (Exhibit CLEX-072).

[910] Valores Purchase Agreement (Exhibit CLEX-071); Consorcio Purchase Agreement (Exhibit CLEX-072).

the Valuation Date or the date of commencement of arbitration; (ii) that there is no evidence that the value assigned to the shares of Valores and Consorcio in the bid made by Mr. Chico Pardo to ADM or in the price that it set before Gruma exercised its right of first refusal merely represents an estimate of the possible compensation that Venezuela would grant for the assets subject to expropriation after the process of forced acquisition; (iii) that in the ADM Transaction, Gruma did not amend the allocation of value of the shares it would purchase from ADM, relevant to this dispute; and (iv) that in the value analysis of other transactions that Claimants' experts consider relevant to prove the value in the *counterfactual scenario,* the acquisition price is taken as the market price, and therefore, such treatment should be given to the price set in the 2012 ADM Transaction that only refers to companies in the same sector, but also indicates the share price of the same companies. Therefore, the Tribunal does not agree with Mr. Spiller's assertion during the Hearing that the most important asset of Valores and Consorcio is not the shares in Monaca and Demaseca, but the right to receive compensation from Venezuela.[911]

726. The Tribunal then concludes that in the real scenario the value of the Investments is USD$192.6 million after deducting the royalty debt to Azteca Trademarks equivalent to USD$74.1 million from USD$266.7 million corresponding to the 2012 ADM Transaction.

2. Value of the Investments in the counterfactual scenario

727. After having concluded what the value of the Investments is in the *real scenario,* as a result of Respondent's unlawful actions, the Tribunal shall proceed to determine the value of the Investments in the *counterfactual scenario.*

728. First, the Parties agree to measure the value of the Investments in the *counterfactual scenario* through the application of the DCF model.[912]

729. Dellepiane/Spiller determine the fair market value of Claimants' respective shareholdings in the Companies as of January 21, 2013 *"excluding the effect of the expropriation and hindrance measures on the management of such companies and assuming free access to the foreign exchange market and free transfer abroad of dividends and other investment-related payments".*[913]

730. For this purpose, as stated above, they apply a DCF approach and conclude that the value of the Companies as of the aforementioned date is the sum of USD$653.6 million, from which the value of the debt with Azteca Trademarks of USD$74.1 million must be deducted to arrive a fair market value of USD$579.5 million.[914]

731. Dellepiane/Spiller also estimate *"the damages caused to Claimants during the year 2012 as a consequence of the redirection of white corn ordered by Venezuela in benefit of companies competing with Monaca and Demaseca"*[915] which they estimate, once adjusted, in the amount of USD$7 million. That same redirection, in the opinion of Dellepiane/Spiller, has an impact on the

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[911] *See* Hearing, Day 5, Tr. 1007:11-20 *("The transaction was about 3 percent, as to this case, 3 percent of Valores and Consorcio. Now, Valores and Consorcio: what is the most important asset towards the end of 2010, 2012? It is not necessarily the shares since the shares do not generate value directly, but rather the possibility or the rights of Valores and Consorcio to demand compensation from Venezuela for the measures or the expropriation").*

[912] *See, for example,* Memorial, ¶ 259 *("To calculate the fair market value of the Investments, Experts used two methodologies: (i) Discounted Cash Flow, as principal methodology, and (ii) Relative Valuation, as secondary method to corroborate the reasonableness of the results obtained from the Discounted Cash Flow methodology. Both methodologies yielded similar results".* [emphasis added]); Rejoinder, ¶ 588 *("Because MONACA and DEMASECA remain in the power and under the control of Claimants, a proper valuation exercise must be based on a comparison between a Discounted Cash Flow ('DCF') valuation in the scenario of non-existence of the alleged measures ('counterfactual scenario') and a DCF valuation that considers such measures ('current scenario')".* [emphasis added]

[913] Dellepiane/Spiller First Report, ¶ 7.

[914] Dellepiane/Spiller First Report, ¶ 8.

[915] Dellepiane/Spiller First Report, ¶ 10.

Companies' estimate of fair market value in that the projections of future corn flour sales are based in party on quantities actually sold in 2012. An increase in sales in 2012, without the impact of redirecting translates into an increase in the projection of future sales and the consequent increase in the fair market value of the Companies. This impact on fair market value is estimated in USD$43.2 million.

732. Finally, Dellepiane/Spiller explain that they have been instructed by Claimants' counsel to update damages from the Valuation Date (January 21, 2013) to July 28, 2014 using two interest rates (a) the equivalent of Libor plus 4%; and (b) the capital cost of the grain milling and food processing industry in the United States.

733. In their response to Respondent's expert criticisms, Dellepiane/Spiller point out that, contrary to what Venezuelan experts assert, there is no evidence that Mr. Fernández Barrueco had shareholding in the Companies on the Valuation Date. In addition, the investigation against ADM Latam does not mention the Companies. Accordingly, the Companies' relationships with Mr. Fernández Barrueco and ADM Latam do not affect the determination of the value of the Companies.[916]

734. In responding to Venezuelan experts' criticism of the DCF valuation model, Dellepiane/Spiller points out three points they consider fundamental.

735. First, they assert that Hart/Vélez overestimate the country's risk premium by relying on Venezuela's Emerging Markets Bond Index ("EMBI") as values above 10%, such as that proposed by Venezuela's experts, are congruent only with yields observed on sovereign bonds in situations closed to default. Venezuela's credit rating as of the Valuation Date ("B1") indicates a better ability to pay than that reflected by Venezuela's EMBI as of that date. This means that Venezuela's EMBI at the beginning of 2013 incorporates not only macroeconomic, political and regulatory risks *"but also additional risks related to Venezuela's potential voluntary default of its international financial obligations"*.[917] That is, they include a risk of expropriation without compensation (or, in other words, the risk of seizure). The BIT explicitly requires that the breach of the expropriated investment exclude the effect of the measures, or threat thereof.[918] Accordingly, the risk of seizure should be eliminated in the estimate of WACC to determine the fair market value of the Companies in a *counterfactual* scenario (namely, in the absence of measures in breach of the Treaty). They conclude then that Dellepiane/Spiller's country risk estimate *"(4%) does include the risk the investment is expropriated, but considers that the investor shall receive fair compensation for such expropriation (namely, excludes the risk of seizure)"*.[919]

736. Second, Dellepiane/Spiller consider that the application of a size premium in the calculation of the discount rate is incorrect. First, because the inclusion of such a premium is not widely used in the financial literature and second, because, contrary to Hart/Vélez's assertion, the Companies (jointly) can be considered "large companies" in terms relative to the size of the Venezuelan market.[920]

737. Finally, Claimants' experts point out that Hart/Vélez overestimate the cost of debt in dollars *"by directly using an interest rate of 13% on loans in bolivars to discount flows of funds denominated in dollars, without taking into account that expectations of devaluation of the bolivar against the*

[916] Dellepiane/Spiller Second Report, ¶ 39-44.
[917] Dellepiane/Spiller Second Report, ¶ 8(a).
[918] Dellepiane/Spiller Second Report, ¶¶ 8 and 62-83. The Tribunal considers that the analysis of whether the country risk premium includes the expropriation risk would be relevant in the FFD model, regardless of the breaches of the Treaty that may be found.
[919] Dellepiane/Spiller Second Report, ¶ 8.
[920] Dellepiane/Spiller Second Report, ¶ 8 and 84-94.

dollar reduce the cost in dollars of loans in bolivars. Since Hart/Vélez estimate a WACC in dollars, the use of a debt cost rate in bolivars is incorrect".[921]

738. For its part, Hart/Vélez consider that the valuation of the Companies should consider the impact of Claimants' own actions on the potential sale to a third party, taking into account their relationship with Mr. Fernández Barrueco – the subject of a criminal proceeding in progress of which the seizure was dictated and ADM Latam, an entity which, according to Respondent's experts, has admitted acts of corruption in Venezuela.[922]

739. After analyzing the Venezuelan corn and wheat market and the Companies' performance, Hart/Vélez criticize the DCF model used by Dellepiane/Spiller with respect to input data and the fundamentals thereof for preparing projections and proceed with an analysis of corn operations versus wheat operations, production, sales projections, prices and future price projections, costs and expenses, and the discount rate.[923] They also point out that there was an increase in the sales of the Companies as a result of the management of the special administrators.[924]

740. Hart/Vélez question the method of comparable companies used by Dellepiane/Spiller to validate their calculation in that, on one hand, they did not include transactions in which the Companies were involved and, on the other hand, they made a mistake in the method of choosing comparable companies and in the calculation of the control premium.[925]

741. They also question Claimants' proposed interest rate as exaggerated and inappropriate and point out that the Tribunal must estimate interest on the award.[926]

742. To establish the *counterfactual* value, Hart/Vélez have taken the Dellepiane/Spiller model and have introduced the following main changes:

> "i. Production level: Adjusted to exclude the impact of seizure and special administrators measures, which contributed to an increase in production between 2010 and 2012; ii. Operating margin on wheat: Aligned to historical margin levels. iii. Discount rate: Compass Lexecon used a discount rate of 10.12%, while we recommend a discount rate of 19.16% to adequately justify the risks faced by companies. Most of the difference in the discount rate comes from the country risk premium, the size risk premium and the cost of debt".[927]

743. The Tribunal considers that the Companies have an operating and cash flow generation track record such that the difference between the value of equity in the *counterfactual* scenario can be established using the DCF methodology. This methodology is used to determine the value of an asset at a specific date based on the net cash flows that the asset is expected to generate over time.

744. In addition, Hart/Vélez agree that to determine the *counterfactual scenario* it is feasible to initially take the model used by Dellepiane/Spiller. In fact, experts of both Parties carry out an exercise of calculation of the *counterfactual scenario* based on the same model, but with substantial differences in the following aspects:

(i) Sales of wheat flour and the impact of measures subject to dispute.

[921] Dellepiane/Spiller Second Report, ¶¶ 8 and 95-99.
[922] Hart/Vélez First Report, ¶¶ 42 *et. seq.*
[923] Hart/Vélez First Report, ¶¶ 127-161.
[924] Hart/Vélez Second Report, ¶ 25.
[925] Hart/Vélez First Report, ¶¶ 162-177.
[926] Hart/Vélez First Report, ¶¶ 178 to 197.
[927] Hart/Vélez Second Report, ¶ 12.

Claimants' experts perform a valuation by taking sales volumes from 2008 to 2012, while Respondent's experts estimate that the analysis period should be from 2003 to 2009.

(ii) The impact on the price of the potential sale to a third party of Claimants' links with Mr. Fernández Barrueco and ADM Latam, an entity which, according to Respondent's experts, has admitted acts of corruption in Venezuela.

(iii) The operating margin on wheat that Respondent's experts believe should be adjusted to its historical values.

(iv) The discount rate that Dellepiane/Spiller consider should be set at 10.12% and that Hart/Vélez set at 19.16%. This difference in calculation is particularly relevant to the difference between the experts with respect to the country risk premium; the risk premium by size that Respondent's experts consider should be included and that Claimants' experts reject; and the cost of the debt that, according to Claimants' experts, have been overestimated by Respondent's experts.

745. In addition, the Parties differ in the applicable interest rate and the application or non-application of taxes on the sums payable for damages.

746. In the applicable DCF model for determining the value of the Investments in the *counterfactual scenario,* the Tribunal shall apply the items over which the Parties have no differences. Unless the Tribunal indicates otherwise by *infra-accepting* the criticisms made by Respondent and by Hart/Vélez in their reports, it shall take those figures included in the DCF model from Claimants' experts in their compensation model for finding them reasonable.

747. As a preliminary matter, the Tribunal also announces that it shall take as its valuation date the proposal of the Claimants, that is, the day before the publication of the Administrative Ordinance. Although the Tribunal concluded that it did not result in an expropriation, as Claimants alleged, it did constitute Venezuela's last action in the chain of measures that the Tribunal has found as breaching the BIT and it is also the valuation date referred to by the Parties and their experts in this arbitration without a different valuation date being raised or suggested.

748. The Tribunal shall now refer to each of the items pointed out in paragraph 744 above, as well as to other differences between the Parties with respect to the DCF model with the least impact on the valuation of the Investments.

a. Differences of the Parties with respect to the DCF model in the counterfactual scenario

(i) Sales volume

749. Dellepiane/Spiller estimate future sales volumes (wheat flour, corn flour, etc.) based on average observed sales from 2008 to 2012 and project their increase between 2013 and 2011 according to Venezuela's population growth projections (1.6% per year).

750. Upon making adjustments to the economic model proposed by Claimants, Hart/Vélez point out that in calculating future sales, account must be taken of a historical period during which the measures subject to dispute were not in force, otherwise there would be no *counterfactual scenario.* Accordingly, they point out that it is not possible to take into account the sales period analyzed by

Claimants' experts (2008-2012), but rather a period prior to the measures adopted by Venezuela (2003-2009). On this subject, they state that if the Tribunal believes that the value of Monaca should exclude both the benefits and the expenses generated by the seizure and special administration (namely, the *counterfactual scenario)*, then the production period should be a period that is not influenced by the effects of the seizure and special administration measures. This period would be prior to 2010.[928]

751. The Tribunal does not agree with the adjustment made by Respondent's experts for two fundamental reasons. First, there is no evidence that the sales results of the Companies during the period included in the economic model of Claimants' experts were the result of the management of special administrators or of the measures adopted by Venezuela and which are the subject of the dispute.[929] Second, it is contradictory to seek, on one hand, to dismiss the results obtained during the period 2008-2012 alleging positive interference of the special administrators and, at the same time, to argue that during the same period the administrators of the Companies were the Claimants and not the special administrators, and that the Venezuelan officials had no interference in administrative decisions. In short, Respondent's experts seek to make an adjustment on the on the basis, not proven that the special administrators and the special measures adopted by Venezuela generated an increase in sales over the 2003-2009 period.

752. Respondent's experts have insisted that the value of the Companies as of the Valuation Date is what is reflected in the ADM Transaction. They have also pointed out that, if the *real scenario is to be compared with the counterfactual scenario* for the purpose of determining damages, the value in the first of the above scenarios would be the ADM Transaction and in the second the value of the Investments in the absence of the measures. This means that in order for the proposed adjustment to be successful, it must be proven that it was the measures adopted by Venezuela or the management of the special administrators or both that generated the increase in sales in the period analyzed by Claimants' experts, an issue that the Tribunal does not find proven.

753. The Tribunal considers it decisive that the portfolio of products marketed by both companies are basic staple foods, which from 2008 to 2012 represented approximately 95.7% of the total production of Monaca and Demaseca, and that the corn flour and wheat flour markets grew at annual rates of 2.3% and 1.6% respectively from 1992 to 2010 in Venezuela.

754. In addition, the Tribunal finds that Dellepiane/Spiller is correct in stating that in order to estimate future sales volumes for Monaca and Demaseca, sales volumes should be projected based on the portfolio of products existing at the Valuation Date, and not taking into account products whose transactions were discontinued in previous years.[930] If the Tribunal relied on discontinued products, it would not conform to the model that seeks to re-establish the situation that would have existed in the absence of breaches of the Treaty.

755. Nor does the Tribunal find reason in Hart/Vélez's criticism of the Dellepiane/Spiller model regarding the utilization factor of the Monaca and Demaseca plants. As mentioned above, it is reasonable to project an increase in sales in accordance with Venezuela's population growth projections (at 1.6% per year). In addition, the Tribunal notes that the installed capacity of the production plants is sufficient to maintain future sales projections.

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[928] Hart/Vélez Second Report, ¶ 72.

[929] Ministry of Food, Applications for Active Currency as of December 31, 2011 – Application, Status and Product, September 2013 (Exhibit R-109 (bis)); GRUMA, 2010 Annual Report, 2010, page 23 (Exhibit R-016) *"Sales volume increased 14% to 523 thousand tons compared to 459 thousand tons in 2009. This was due to (1) the migration of consumers to commodities as a result of the difficult economic situation, (2) a slowdown in the supply of certain competitors, and (3) efficiencies in production and distribution at some of our facilities, which allowed us to increase the supply of our products").*

[930] Dellepiane/Spiller Second Report, ¶ 133.

756. The Tribunal finds duly substantiated and supported the figures on which Claimants' experts calculate the sales volumes of Monaca and Demaseca, figures that are not the subject of detailed analysis by Respondent's experts except that, as noted, those experts believe that a period should have been taken prior to the one chosen by Claimants' experts.

757. Accordingly, the Tribunal shall take the valuation determined for this item by Claimants' sales volume experts, without the adjustments proposed to the model by Hart/Vélez.

(ii) Impact of the relationships with Mr. Fernández Barrueco and ADM Latam

758. With respect to the potential impact on the assessment of Claimants' or the Companies' alleged relationship with Mr. Fernández Barrueco or ADM Latam, Hart/Vélez seeks to break the causal link between Venezuela's actions and Claimants' alleged lower value for the Companies.

759. For the purpose, they point out that:

> "a due diligence process would have revealed warning signs that could affect the attractiveness of companies before third parties interested in acquiring them, in particular the involvement with Mr. Fernández Barrueco and ADM Latin America on several occasions. Gruma, as the parent company of Monaca and Demaseca, partnered with Mr. Fernández Barrueco in 2004 and again in 2006, although it was involved in non-transparent transactions with other parties. While Mr. Fernández Barrueco transferred his shares in Valores and Consorcio in June 2008, the manner in which the transaction occurred could raise red flags. It was not a clean sale of the shares; instead, a transfer was made to a trust, which curiously contains his initials in the name (RFB Holdings)".[931]

760. With respect to ADM Latam, Respondent's experts point out that Respondent sold wheat to Monaca between 2004 and 2012 and, that, although the Companies were not mentioned in the U.S. Department of Justice's report in the investigation to ADM Latam, the truth is that

> "Sophisticated buyers probably did not want to be involve with entities that have the same remote probability of being involved in illegal or questionable activities, such as MONACA and DEMASECA. Compass Lexecon's assertion that an insurance or contractual indemnity clause would protect against such risks is false. Full compensation for insurance or contractual clauses cannot be guaranteed, and even if there were able to indemnify against participation, the buyer would still be exposed to losing the investment, making it unattractive. In addition, the investor would be buying into a company with employees possibly involved in criminal, fraudulent or inappropriate activities".[932]

761. The Tribunal notes that Respondent's experts make no estimate of the impact on the value of the Companies of their alleged association with Mr. Fernández Barrueco or ADM Latam. For the Tribunal moreover, it is not clear – because the conclusion of Respondent's experts is not clear either – whether they claim that he Companies have no value because of their alleged association with Mr. Fernández Barrueco or ADM Latam, or whether the value should be decreased by that alleged association. If the first thing, the Respondent's experts would be against their own assertion that the value of the ADM Transaction corresponds to the value of the Companies. If the second, Respondent's experts do not provide any basis or element that allows to determine the impact of these associations in the value of the Companies.

762. In addition, however, the existence or not of a relationship between Mr. Fernández Barrueco and

[931] Hart/Vélez Second Report, ¶ 121.
[932] Hart/Vélez Second Report, ¶ 125.

Claimants and the Companies is a matter of debate before the Venezuelan courts and the delay in the judicial decision on the issue and the treatment that Venezuela has given to Claimants in the process in which they seek to clarify it is precisely one of the actions that the Tribunal has taken into account to determine the breach of the BIT. The Tribunal cannot then accept that, on one hand, Claimants are prevented or hindered from having access to the possibility of proving whether there is a connection with Mr. Fernández Barrueco and, on the other hand, give that connection as true and proven for the purpose of concluding that the Companies have no value or that their value should be substantially reduced.

763. As for ADM Latam, beyond being a supplier of wheat to the Companies, the Tribunal does not find any evidence or indication that such a link may affect the value of the Companies because an investigation has been opened into ADM Latam in the United States.

764. Accordingly, the Tribunal considers that there is no discount or deduction to the value of the Companies, for the alleged relationship with Mr. Fernández Barrueco or ADM Latam.

(iii) The operating margin

765. Two fundamental criticisms raise Hart/Vélez to the model proposed by Dellepiane/Spiller. On one hand, Hart/Vélez argue that in the projection of Claimants' experts, wheat prices shall exceed historical trends. On the other hand, Dellepiane/Spiller not only assumes that costs shall increase but also that the prices that Monaca would charge Venezuelan customers for wheat flour would increase even more.[933]

766. In addition, according to Respondent's experts, Dellepiane/Spiller did not project the selling price of wheat flour per kilogram, but rather calculated the price per ton, took its expected costs and selling prices in bolivars and converted them into US dollars,[934] and assumed that wheat costs would increase in the future from USD$1,344 per ton level in 2012 to USD$1,548 per ton in 2022, that is, an increase of 15%. However, for wheat flour prices, Claimants' experts assume that the 2012 price of USD$1,603 per ton would increase to USD$1,902 per ton, or an increase of 19%.[935]

767. Hart/Vélez point out that these are ungrounded assumptions by Claimants' experts to inflate the gross margin of wheat in their valuation as they assume that Monaca would charge customers more for wheat flour and receive a higher profit.

Dellepiane/Spiller add that prices would not increase gradually, but would increase almost immediately after the Valuation Date and continue with the pricing scheme forever, which *"is not a valid assumption since it is unreasonable for MONACA to continue to take advantage of its customers perpetually, without facing competition or migration to alternative products in the face of such a scheme"*.[936]

768. Respondent's experts conclude that beyond the above problems, Dellepiane/Spiller's pricing assumptions are unreasonable and that it is therefore necessary to adjust Monaca's wheat flour prices in line with the historical operating margin and raise those prices with inflation rather than the Dellepiane/Spiller pricing scheme that they consider "fictitious". The effect of the proposed adjustment to wheat flour prices by Hart/Vélez is a reduction in the value of the Companies by USD$104.5 million.[937]

[933] Hart/Vélez Second Report, ¶ 76.
[934] Hart/Vélez Second Report, ¶ 77.
[935] Hart/Vélez Second Report, ¶ 78.
[936] Hart/Vélez Second Report, ¶ 79.
[937] Hart/Vélez Second Report, Exhibit 5.

769. The Tribunal has reviewed the cost growth estimates for wheat and prices for wheat flour proposed by Dellepiane/Spiller in their economic model, and does not consider them to be unreasonable or to result in fictitious prices that warrant an adjustment of the magnitude proposed by Respondent's experts. The model, proposed by Claimants' experts, contrary to what Respondent's experts claim, takes into account historical trends and the estimation of a 15% cost growth and 19% price growth in a scenario in which the measures are no longer in effect and the Companies can operate without restrictions. In the context of this market, the model proposed by Dellepiane/Spiller is neither unreasonable nor fictitious. Respondent's experts do not include, in addition, a clear and convincing explanation of how they arrive at an adjustment of USD$104.5 million, which differs from the "unreasonable" rating of the detailed exercise presented in their two reports by Claimants' experts.

770. The Tribunal considers the sale price calculations proposed by Claimants to be appropriate.[938] As Dellepiane/Spiller prove, if 2008 were to be taken as the base year for the analysis of sales prices of wheat flour – as Hart/Vélez maintains- the Tribunal would be basing itself on an arbitrary year to establish future sales;[939] when extending the analysis period, it is noted that sales prices have increased above Venezuelan inflation. Therefore, it would be reasonable for the selling prices of wheat flour to evolve in line with Venezuelan inflation, and for Monaca to be able to pass on to its selling prices a portion of the expected devaluation effect.

771. Likewise, the Tribunal concludes, for the corn flour segment in the regulated sector, that it would not be appropriate to assume that Venezuela shall maintain a policy of price updating lagging along the entire planning horizon.[940] With regard to the sales prices of corn flour in the unregulated sector, Dellepiane/Spiller are right to criticize the comparison of Hart/Vélez between prices denominated in different currencies.[941]

772. Finally, the Tribunal takes as projection of the variable cost of the purchase of corn that based on expected Venezuelan inflation, as proposed by Dellepiane/Spiller.[942] Hart/Vélez simply make a general criticism of the fact that Claimants' experts did not conduct historical analyses of the variable costs of Monaca and Demaseca,[943] and asset that "there were other competitive factors that produced operating losses of MONACA and DEMASECA in the corn flour business during the period 2009-2012".[944]

773. The Tribunal shall, accordingly, take for purposes of calculation of operating margins on wheat flour [and corn flour] the DCF economic model submitted by Claimants' experts without the adjustments proposed by Respondent's experts.

(iv) The discount rate

774. For the purpose of discounting the estimated future cash flows for Monaca and Demaseca as of the Valuation Date, Dellepiane/Spiller used the WACC. WACC represents the average cost of the Companies in raising funds from shareholders (capital) and lenders (debt) and has three main components: (i) the cost of equity; (ii) the cost debt; and (iii) the capital structure or relative weight between debt and equity. Hart/Vélez do not question the methodology chosen by Dellepiane/Spiller to discount cash flows but consider that Dellepiane/Spiller does not adequately take into account the risks to which Monaca and Demaseca are subject.[945]

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[938] *See* Dellepiane/Spiller Second Report, Schedule C.2.
[939] Dellepiane/Spiller Second Report, ¶ 147.
[940] Dellepiane/Spiller Second Report, ¶ 159.
[941] Dellepiane/Spiller Second Report, ¶ 164.
[942] Dellepiane/Spiller Second Report, ¶ 179.
[943] Hart/Vélez First Report, ¶ 153.
[944] Hart/Vélez Second Report, ¶ 69.
[945] Hart/Vélez First Report, ¶¶ 158, 199.

775. One of the substantial differences between the experts of the Parties is that Dellepiane/Spiller consider that the discount rate should be 10.12% while the experts of Venezuela set it at 19.16%. The Tribunal shall then refer to those elements of WACC that have essential relevance in the difference between the experts, namely, the size risk premium the country risk premium, the market risk premium, and the cost of the debt.

(a) Size premium

776. The Tribunal is not convinced that it is appropriate to apply the size premium advocated by Respondent's experts. The Tribunal considers that if a size risk premium is to be applied – a matter which is debatable as proven by the Parties' submissions – it must take into account the market in which the Companies operate.

777. According to Respondent's experts *"small businesses have risk characteristics that differ from those of large firms. Large companies have access to more resources to react better and adapt to factors that could negatively affect the business, such as competition, economic crises, etc. Smaller firms, on the other hand, have fewer resources to react and adapt to these kinds of factors"*.[946] Even assuming that the hypothesis put forward is true, the Tribunal considers that the alleged size risk must be measured taking into account the environment in which the Companies operate, that is, the competition, crises and other factors in the environment in which they operate: the Venezuelan environment.

778. Respondent's experts determine the size premium by comparing the size of the Companies with the large U.S. conglomerates without proposing the adjustments that would be necessary given that the Companies operate in Venezuela.[947] The Tribunal considers that, in this case, it would be appropriate to compare the size of Monaca and Demaseca with the companies in the market where they operate.[948] Indeed, for the Venezuelan market, Companies would be considered "large" if they were measured by their income, by the number of their employees or by the size of their share capital compared to the market capitalization of the companies listed on the Caracas Stock Exchange as of December 31, 2012. Therefore, the Tribunal does not find it appropriate to apply a size premium applying parameters that are not comparable.

779. The Tribunal shall therefore no apply a size premium in determining the value of the Companies for the purpose of liquidating damages.

(b) Country risk premium

780. The Parties' experts agree on the need to apply a country risk premium. They also agree that the country risk premium reflects the differential represented by the additional risk of operating in Venezuela instead of the United States,[949] and that the appropriate methodology for estimating country risk is frequently to determine the differential between the yield of sovereign bonds issued in dollars by the host country (in this case Venezuela) and bonds issued by the United States Treasury with similar maturity (measured by the EMBI).[950]

781. Dellepiane/Spiller consider that, in the case of Venezuela:

"However, the use of the spread of their own sovereign bonds during the analysis period

[946] Hart/Vélez Second Report, ¶ 85.
[947] Hart/Vélez First Report, ¶ 222.
[948] Hart/Vélez Second Report, ¶ 91.
[949] Dellepiane/Spiller First Report, ¶ 86; Hart/Vélez Second Report, ¶ 93.
[950] Dellepiane/Spiller First Report, ¶ 175.

> is not appropriate as it reflects the risk of countries in situations close de default. In particular, the spread on Venezuelan bond yields averaged 1,087 basis points (namely, 10.87%) over the last five years and stood at 776 basis points on January 21, 2013. According to Professor Damodaran, a country risk premium of 10% is attributable to countries with a rating of "Caa3", which represents the lowest tier of the category of speculative bonds in bad standing and subject to a very high credit risk ("Caa"). Other arbitral tribunals have concluded that, in situations close to default, the interest rate differential is no longer an appropriate measure of the country risk faced by a private investor":[951]

782. Next, they point out that Venezuela's credit rating at the Valuation Date was "B1" which would entail a lower risk premium than that shown by its sovereign bonds at that date. They conclude that *"sovereign bond credit ratings are normally given exclusively by the country's economic capacity to repay, which is determined primarily by macroeconomic factors such as the level of reserves and the budget deficit"*. They also claim that

> "In the last five years, countries with similar repayment capacity to Venezuela were able to place debt at substantially lower rates than Venezuela had to offer for its own bonds. This is an indication that the term yields of Venezuelan sovereign bonds are affected by considerations other than their ability to repay the debt, and, accordingly, their credit rating and are rather related to the risk of willingness to pay, and to a general investment climate perceived as a hostile by foreign investors. That is, conduct that is contrary to the investment treaty and should therefore be excluded from the calculation of country risk in order to determine compensation based on the fair market value established in the treaty".[952]

783. Therefore, Claimants' experts consider that, under these specific conditions, the EMBI does not represent an appropriate measure on the risks that should be considered in the fair market value of the Companies.[953]

784. Dellepiane/Spiller then conclude that *"in order to avoid contaminating the calculation of country risk by factors that are not reflected in Venezuela's credit rating, we use as a measure of country risk the average yield (above the risk-free rate) of the bonds from countries with credit ratings similar to Venezuela, estimated by Professor Damodaran at 400 basis points (namely 4.0%)"*.[954] In addition, they argue that the use of Venezuela's EMBI is not appropriate for estimating the discount rate of a private company whose operational risks are not equal to those of a state contractor that depends purely and exclusively on the contracts with Respondent.[955] Neither do the companies depend so closely on the level of income or the economic cycle, nor do they have the Venezuelan State as a client, with the risk of defaulting on sovereign bonds.[956]

785. Hart/Vélez consider that Dellepiane/Spiller's reasoning is contradictory in that they assert, on the one hand, that the sovereign bond spread is not appropriate in this circumstance because it reflects that Venezuela is in a bad financial situation and subject to a very high credit risk and yet they argue that Venezuela's credit rating at the Valuation Date was higher – a "B" rating – which would entail a lower level of risk.[957]

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[951] Dellepiane/Spiller First Report, ¶ 176.
[952] Dellepiane/Spiller First Report, ¶¶ 177-178 [emphasis added].
[953] Dellepiane/Spiller First Report, ¶ 178; Dellepiane/Spiller Second Report, ¶ 66.
[954] Dellepiane/Spiller First Report, ¶ 179.
[955] Dellepiane/Spiller Second Report, ¶ 69.
[956] Dellepiane/Spiller Second Report, ¶ 70.
[957] Hart/Vélez First Report, ¶ 220.

786. Respondent's experts add that the calculation of Dellepiane/Spiller not only ignores the actual country risk associated with Venezuela, but also uses a group of countries with a rating similar to that of Venezuela but does not analyze whether the risk of those countries is comparable to that of Venezuela. In fact, according to them, it is clear that this substitute risk spread does not fully reflect the country risk inherent in Venezuela.[958]

787. For Respondent's experts, *"the appropriate country risk assessment for the Companies is the spread of sovereign bonds using Venezuelan bonds* ([EMBI])".[959] Claimants' own experts agree that by the Valuation Date the five-year average of this spread was 10.87% (or 1.087 basis points). This data, in Respondent's experts opinion, adequately represents the additional risk that should be added to a calculation of cost of capital based on U.S. data for Companies and adds that *"this country risk premium does not include forfeiture risk, which can also be considered as part of a country risk adjustment, nor does it include currency risks in its cash flows".*[960]

788. In summary, although both Parties' experts agree that the spread between the yield on Venezuelan dollar-denominated sovereign bonds and U.S. Treasury bonds with similar maturities (as measured by EMBI) is often the appropriate measure to determine country risk, and although both agree that for the Valuation Date the five-year average of this spread was 10.87%, the experts of Claimants believe that in this case it would not be appropriate to apply this methodology.

789. The Tribunal shall analyze the differences on the issue of the country risk premium in the specific context in which they were raised by the Parties' experts in this arbitration. In this context, the Tribunal disagrees with Respondent's expert assessment. First, while these experts insist that the spread between U.S. sovereign bonds and Venezuelan bonds (EMBI) should be taken, they do not specifically explain why this spread would reflect more than the risk of the respective country not paying its debt and how that risk would impact a specific business or line of business specifically in Venezuela. Nor does it explain why this differential *"does not include forfeiture risk, which can also be considered as part of a country risk adjustment nor does it include currency risks in their cash flows",*[961] or how that differential and Respondent's risk of inability to pay impacts the estimate of the discount rate or private equity companies, whose investment is not tied to state-owned resources, who could initiate a similar transaction in a different country, who do not rely on contracts with Respondent, and who do not have Respondent as their primary customer or purchaser.

790. In summary, the Tribunal agrees with Dellepiane/Spiller that the country risk measure proposed by Venezuela does not realistically or reasonably measure the risk of the Investments in Monaca and Demaseca. For the Companies, as companies whose sales continued to increase despite Venezuela's economic situation, that sell basic necessities, that do not depend on the State as their main client, the Tribunal considers it less convenient to apply as a country risk premium the market risk perception on Venezuela's sovereign bonds, bearing in mind that it has not been specifically explained either: (i) why it would not be relevant or appropriate to take into account the specific characteristics of the business of Monaca and Demaseca, or (ii) how Respondent's proposed measure (EMBI) is appropriate to the specific situation of Monaca and Demaseca.

791. The Parties have not submitted an alternative form of country risk calculation and the Tribunal could not make an estimate on bases that the Parties have not submitted or alleged. The Tribunal considers, for the reasons stated above, that the country risk rate for this specific case that is most reasonable with the activity of the Companies and the sector in which they operate is that proposed

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[958] *Id.*
[959] Hart/Vélez First Report, ¶ 221.
[960] *Id.*
[961] Hart/Vélez First Report, ¶ 221.

by Claimants' experts and, therefore, shall take 4% as the country risk premium.

(c) Market risk premium

792. The market risk premium represents the additional return on the risk-free rate that investors require to make investments in shares rather than risk-free assets.[962]

793. The Tribunal agrees with Hart/Vélez estimate of the market risk premium (also "ERP") as an arithmetic average. The appropriate ERP to use to estimate the cost of the Companies' own fund as of January 21, 2013 is then the ERP offer rate in a long-term horizon estimated at 6.11%.

(d) Cost of debt and its components

794. Hart/Vélez advocate applying the real historical debt cost of Monaca and Demaseca before taxes, for a total of 13%,[963] while Dellepiane/Spiller calculate the cost of debt through a synthetic approach.[964]

795. The Tribunal has decided not to apply the cost of the debt as proposed by Venezuela, since it applies an interest rate denominated in bolivars. The Tribunal finds that Claimants are right that the discount rate and discounted cash flows must be denominated in the same currency. Hart/Vélez would be overestimating the cost of the debt in dollars precisely because of the exchange risk between the bolivar and the dollar, and the existence of an expectation of devaluation.

796. However, there is no disagreement among Parties' experts on how the *synthetic* cost of the debt would be calculated (composed of: i) the risk-free rate; (ii) the industry risk premium; and (iii) the country risk premium). Experts fundamentally agree on the industry risk rate, so the substantial difference for the calculation of the cost debt is in the risk-free rate and the country risk premium.[965]

797. As for the latter, the Tribunal has already indicated that it shall take a country risk premium of 4%.

798. With respect to the risk-free rate, the Tribunal considers that the corresponding rate for 10-year United States Treasury bonds should be applied.

799. First, because there must be a coincidence between the horizon of the security chosen and that of the assets being valued. In this regard, the Tribunal agrees with Claimants' expert's assessment that this horizon *"is measured in terms of 'duration' which is a technical term in finance that measures the weighted average time until cash flows are paid to the instrument holder"*.[966] If the calculation of the cash flows (the "duration" of the cash flows) of Monaca and Demaseca is eight years, the period is similar to the duration of a ten-year U.S. Treasury bond, which at the Valuation Date was approximately nine years. It is, therefore, the measure closest to the horizon of duration of the assets valued.

800. Second, because the duration of these instruments is similar to that of the market portfolio, they have low sensitivity to unexpected changes in inflation and have a low liquidity premium.

801. Finally, because the reasoning presented by Claimants' experts in this arbitration has been supported by abundant and forceful references to the financial literature, including the recommendation of recognized professors such as Damodaran and Copeland, while the criticism

[962] *See* Dellepiane/Spiller Second Report, ¶ 117.
[963] Counter memorial, ¶ 528; Hart/Vélez First Report, ¶ 230.
[964] Dellepiane/Spiller Second Report, ¶ 95.
[965] Dellepiane/Spiller Second Report, ¶ 95; Hart/Vélez Second Report, ¶ 105.
[966] Dellepiane/Spiller First Report, ¶ 162.

presented by Respondent's experts is based on subjective appraisals and particularly on its experience in these matters.

802. The Parties agree on the calculation of the industry risk premium at 1.5%.

803. The Tribunal shall then apply the risk-free rate proposed by Claimants of 1.80%.

804. Thus, the synthetic costs of debt would be the result of the sum of i) the risk-free rate (1.8%); ii) the industry risk premium (1.5%); and iii) the country risk premium (4%), namely, 7.3%.

805. Taking into conisderation the above, the discount rate to be applied would be 10.2%, according to the following adjusted table:

Cost of own capital:	
Risk-free rate	1.8%
ERP	6.11%
Beta (adjusted end)	0.93%
Country risk premium	4%
Size risk premium	0%
	11.47%
Debt cost after taxes:	
Debt cost before taxes	4%
Industry premium	1.5%
Venezuela's tax rate	34%
	4.82%
Capital Structure:	
Debt-to-equity ratio	23.5%
Debt-to-total capital ratio	19.03%
Own capital to total capital ratio	80.97
WACC (Discount rate)	**10.2%**

(v) Damages due to redirection of corn

806. It is not in dispute that in 2012 Venezuela ordered the Companies to "redirect" 86,400 MT of white corn form their property to other Venezuelan companies.

807. Claimants consider that the "redirection" caused them a damage that they calculate, pointing out that it entailed a decrease of 27,472 MT in the corn flour sales of the Companies in 2012. The figure of 27,472 MT represents the difference between budgeted sales (158,114 MT) and sales actually observed (130,642 MT) during the months of April through December 2012 (period within which corn from Monaca and Demaseca was destined to other companies in compliance with the "redirecting" measure).[967]

808. The Tribunal has ruled that the order to redirect corn flour constitutes a breach of the Treaty.[968] The Tribunal shall then accept the calculation of the impact of the redirection of corn submitted by Claimants, but it shall adjust it taking into account the WACC corrected under the aforementioned parameters.

[967] Dellepiane/Spiller Second Report, ¶ 216.
[968] *Supra*, ¶¶ 616-618.

809. The reasons that lead the Tribunal to this conclusion are the following: First, by redirecting to third parties the corn that the Companies had for sale, the Companies ceased to dispose of assets of their property that they would have sold in the normal course of their operations. Second, because in order to estimate the impact of the redirection, it is necessary to include in the sales of the Companies corresponding to the period in which the redirection took place, the tons that were not sold as a consequence thereof. Third, because nothing in the documents and evidence provided or in the Companies' financial information suggests, as Respondent experts suggest, that the tons of corn redirected would not have been sold or would have been sold at a different price or margin than that presented by Claimants. Finally, because adjusting sales, eliminating the impact of redirection, affects the basis on which the fair market value of the Companies is determined. The foregoing also demonstrates that there is a sufficient causal link between Venezuela's conduct contrary to the BIT and the loss suffered by Claimants.

810. Taking then the marginal contribution (difference between net sales and variable production costs) of the corn flour segment (USD$72.6 million in 2012 which is equivalent to USD$399 per MT), an increase in sales of 27,472 MT would result in an increase in the Companies' marginal contribution of USD$11.0 million (27,472 MT * USD$399 per MT). Excluding taxes and royalty payments, the Companies could have generated additional cash flows to Claimants of USD$6.6 million during 2012, which adjusted to January 21, 2013, with WACC of 10.2% results in USD$7.0 million.

811. As noted above, failure to redirect white corn in 2012 would affect the calculation basis for calculating the Companies' fair market value as of the Valuation Date which would increase by USD$43.2 million as of January 21, 2013. Accordingly, the total damages caused to Claimants by the redirection of white corn in 2012 is equivalent to USD$50.2 million as of the Valuation Date.

(vi) Royalty debt

812. The Parties agree, and the Tribunal also understands this, that the value of the Companies must be decreased by the amount corresponding to the debt for royalties amounting to USD$74.1 million.

3. Payment in favor of Claimants

813. Based on the foregoing, the payment to which Claimants are entitled is the difference between the value of the Investments in the *actual scenario*, which corresponds to the estimated value resulting from the ADM Transaction – USD$192.6 million – and not to a "zero" value as claimed by Claimants, and the value of the Investments in the *counterfactual scenario,* which, applying the aforementioned variables, including interest, corresponds to the sum of USD$572.8 million. That difference is USD$380.2 million. To the foregoing, one must add: (i) USD$7.0 million corresponding to the increase in the marginal contribution that would have been generated by the additional flows that Monaca and Demaseca would have generated for Claimants had it not been for Venezuela's conduct with respect to the redirection of corn; and (ii) USD$43.2 million corresponding to the increase in the fair market value of the Investments in the absence of the redirection of corn. Accordingly, the payment to which Claimants are entitled is USD$430.4 million.

814. The Tribunal finally notes that Respondent's previous valuations or those involving Respondent in 2010 and 2011,[969] prove that Claimants' valuation based on the DCF model – indicative of the value of the Investments' in the *counterfactual scenario* – is reasonable. The circumstances in which the appraisals were made, in the context of the negotiations that took place after the issuance

[969] *See* Rejoinder, ¶ 447.

of Decree No. 7.394 are of great relevance. These valuations range from USD$574 million to USD$659.1 million. For its part, the Tribunal has concluded that by applying the DCF method, the value of the Investments in the *counterfactual scenario* is USD$572.8 million.

4. Interest and taxes

815. The Treaty does not contain an express clause relating to the payment of interest.[970] However, as noted above, the Tribunal considers that the compensation to be paid by Venezuela to Claimants should be determined by applying the principle of full reparation.[971] Accordingly, the interest applied by the Tribunal must restore Claimants to the position they would be in if the breach had not occurred. In this sense, the Tribunal shares the position taken by the tribunal in *Vivendi v. Argentina (II)*, according to which *"the purpose of the award of interest is to compensate for damages resulting from the fact that, during the period of non-payment by the debtor, the creditor is deprived of the use and disposition of that sum that he was supposed to receive"*.[972]

816. The Parties do not dispute that interest should be recognized on the sums due to Claimants for damages,[973] but their experts discuss the applicable rate.[974] Both accept that interest can be paid on the six-month LIBOR rate, but disagree as to whether the rate to be applied is LIBOR plus 4% (Claimants) or LIBOR plus 2% (Respondent).[975] Claimants' experts have not provided a reasonable justification for applying the fee they are requesting; they basically claim that it was the fee that the attorneys requested them to apply.[976] Respondent's experts, for their part, submit a study of the ICSID awards in which interest has been applied to support their position on the rate to be applied.[977]

817. The Tribunal does not find, nor to Claimants invoke, a compelling reason to liquidate interest in the form and rate proposed by Claimants' experts. Considering the circumstances of the case and the merits presented by the Parties' experts, the Tribunal finds it reasonable to apply a rate of LIBOR + 2%.

818. Once the rate has been fixed, it is for the Tribunal to determine the *dies a quo*. If it were a case of direct expropriation, the determination of the starting point for the application of interest would have a greater degree of certainty. However, as the tribunal in *Azurix v. Argentina* noted, where there is an indirect expropriation or breach of the obligation to provide fair and equitable treatment – as in this case – the determination is more difficult and less certain, unless there is an act that results in a clear dispossession of the investment.[978]

819. In this case, there is no single action that resulted in Venezuela's breach of the Treaty, but rather a series of actions that lead the Tribunal to conclude that Venezuela breached its obligation under Articles IV, III and VII of the BIT.

820. The Tribunal has considered the Parties' submissions, the opinions of the experts and the starting points of the different assessments proposed and finds that although there is a debate about the effects of the Administrative Ordinance and whether it led to the expropriation of the Companies, a circumstance that the Tribunal has answered negatively, the aforementioned Administrative Ordinance maintained the powers of the special administrators and is, according to the evidence

[970] Memorial, ¶ 305; Rejoinder, ¶ 641.
[971] *Supra*, ¶¶ 688-690.
[972] *Vivendi v. Argentina (II)*, ¶ 9.2.3.
[973] *See* Hart/Vélez Second Report, ¶ 127.
[974] Memorial, ¶¶ 305-306; Counter memorial, ¶¶ 539-542.
[975] Dellepiane/Spiller First Report, ¶ 13; Hart/Vélez First Report, ¶ 182.
[976] Dellepiane/Spiller First Report, ¶ 13.
[977] Hart/Vélez First Report, ¶¶ 183-185.
[978] *Azurix v. Argentina*, ¶ 417.

on the record, the last measure directly addressed to Claimants that keeps the special administrators while the precautionary measures remain indefinite, the origin of the Administrative Ordinance. Interest shall be liquidated, accordingly, at a rate of Libor + 2% from the date of the Administrative Ordinance until the date of payment to Claimants.

821. The Parties also disagree as to whether interest should be calculated in a simple or compound manner. On one hand, Claimants assert that the principle of full reparation requires that interest be calculated in a composite manner, in order to place Claimants in the same position that they would have had if Respondent had not taken the unlawful measures at issue.[979] On the other hand, Respondent submits that, under international law, compound interest is appropriate only when justified by special circumstances; however, Claimants have not submitted any special circumstances justifying deviation from the general rule of international law, which provides for the application of simple interest.[980]

822. The Tribunal agrees with Claimants that, in this case, the principle of full reparation requires the updating of the indemnity amount by the application of a compound interest rate. This reflects both the prevailing practice among investment tribunals,[981] and the prevailing reality in the world of finance today.

823. As regards taxes, since it is a compensation for the loss of value of Companies resulting from breaches of Articles IV, III and VII of the BIT, the Tribunal finds no reason to liquidate taxes on the amount of compensation. The Tribunal notes that beyond holding that a tax-free payment is not due, Respondent's experts do not state a reason or basis for taxing this payment, nor do they state the nature of the tax or the legal provision requiring its collection.

VII. COSTS

A. CLAIMANTS' POSITION

824. Appealing to the "broad discretion" of the Tribunal to distribute the costs and expenses of arbitration,[982] and based on the principle that "costs follow event" and the principle of full reparation of damages,[983] Claimants request that Respondent be ordered to pay court costs and that all costs described in Section II of their Costs Brief be reimbursed at a reasonable commercial rate from the date of the award until the date of payment thereof.[984] According to Claimants, the costs paid by Valores and Consorcio in this arbitration proceeding through April 21, 2016 amount to USD$9,893,930.[985] This amount should be added to USD$100,000 corresponding to the payment of the last advance payment requested by the Center, which was made by Claimants on June 14, 2017.

B. RESPONDENT'S POSITION

[979] Memorial, ¶¶ 307-309.
[980] Counter memorial, ¶¶ 543-547; Rejoinder, ¶¶ 642-643.
[981] *See, for example, Chevron v. Ecuador,* ¶ 555; *El Paso v. Argentina,* ¶ 746; *Rumeli v. Kazakhstan,* ¶ 769; *Pope & Talbot v. Canada (Damages Award),* ¶¶ 89-90; *Metalclad, v. Mexico,* ¶ 128.
[982] Claimants' Cost Writ, ¶ 3.
[983] Claimants' Cost Writ, ¶ 4.
[984] Claimants' Cost Writ, ¶ 6. The costs described in Section II of Claimants' Cost Writ are: (i) the advances requested by ICSID, including the payment of the corresponding advances to the Respondent and which were paid by Claimants (USD$700,000); (ii) the fees and expenses of Covington & Burling LLP (USD$5,948,982); (iii) the fees and expenses of Zobrist Law Group (USD$720,646); (iv) the fees and expenses of Venezuelan attorneys (USD$152,950); (v) the fees and expenses of their experts (US$2,175,808), and (vi) the travel expenses of Engineers Huerta and Gámiz and attorneys Vargas and Elizondo (USD$195,544). On May 22, 2017, ICSID requested to each Party a final advance of US$100,000. Claimants paid their share on June 14, 2017. This figure was not included in Claimants' Costs Writ, as payment was requested and made after the date of that Writ.
[985] Claimants' Cost Writ, ¶ 2.

825. Respondent submits that Claimants' procedural behavior *"is far from the principles of good procedural faith"* and, accordingly, requests the Tribunal to order Respondent to pay all costs and expenses of the arbitral proceedings and to compensate Respondent for the expenses incurred in its defense.[986] According to Respondent, the costs incurred by Venezuela in this arbitral proceeding through April 22, 2016 amount to USD$5,674,448.52 not including administrative costs of ICSID.[987]

826. In the alternative, Respondent requests that the Tribunal orders Claimants to pay the costs that would be directly and exclusively attributable to their actions or omissions.[988] In this regard, Venezuela alleges that Claimants did not provide documents that supported the findings of their damage experts and that were necessary for their own experts to verify the assessment made by them. Respondent submits that the costs associated with obtaining such documents – the sum of USD$118,996.15 – are attributable to the negligence of the Claimants and, accordingly, should be borne by them.[989]

C. ANALYSIS OF THE TRIBUNAL

827. The Tribunal considers, and the Parties do not appear to dispute, that under Article 61(2) of the ICSID Convention and Rule 28(1) of the Arbitration Rules, the Tribunal has broad power to determine the costs of arbitration and the apportionment of such costs between the Parties.[990] These costs include, on one hand, the costs of the arbitration – that is, The Tribunal's fees and expenses, ICSID's administrative costs and direct expenses – and, on the other hand, the fees and expense of legal representation incurred by Parties in connection with the arbitration. The costs of arbitration, including the Tribunal's fees and expense, ICSID's administrative expenses and direct expenses, amount to USD$682,245.24. These costs were paid with advances made by Claimants.[991]

The breakdown of the arbitration costs is as follows:

Arbitrator Fees and Expenses	USD$471,986.72
ICSID Administrative Charges	USD$128,000.00
Direct Expenses	USD$82,258.52
Total	**USD$682,245.24**

[986] Respondent's Cost Writ, ¶ 10.
[987] Respondent's Cost Writ, § II.B. The costs claimed by Respondent are: (i) legal fees of Foley Hoag LLP (USD$4,195,000); (b) experts' fees (USD$1,073,142.07) and (c) administrative costs (USD$406,306.45), without including ICSID administrative costs.
[988] Respondent's Cost Writ, ¶ 11.
[989] *Id.*
[990] Claimants' Cost Writ, ¶ 3; Respondent's Cost Writ, ¶ 2. Article 61(2) of the ICSID Convention provides as follows: *"(2) 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.*
Rule 28(1) of the Arbitration Rules provides: *"Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide: (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre; (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties".*
[991] The remaining balance shall be reimbursed by the Center to Claimants.

828. In exercising the power described in paragraph 827 above, the Tribunal considers that the apportionment of costs should be made taking into consideration the relative success of the claims and defenses of each Party, in conjunction with the circumstances of the case and the conduct of the Parties in the proceeding. Other international arbitral tribunals have adopted similar approaches in jointly assessing all or some of these elements.[992]

829. Respondent filed four objections to the jurisdiction of this Tribunal to decide the merits of this dispute or, at least, to rule on the expropriation claim. Although the Tribunal rejected Venezuela's four jurisdictional objections, the Tribunal notes that the question relating to the effects of the denouncement of the ICSID Convention in this case involved a complex legal analysis. In the Tribunal's opinion, both Parties presented valid arguments to support their respective positions, supported by the expert testimony of two recognized jurists.

830. On the merits, Claimants alleged that Venezuela breached its obligations under Articles V, IV, III and VII of the BIT. The Tribunal found evidence of breach of there of these provisions, but not of expropriation. Nor was it proven that the value of the Companies in the *real scenario* was equal to zero, which was the assumption underlying the valuation offered by Claimants.

831. Finally, the Tribunal considers that, in general terms, both Parties presented their case in accordance with the principles of fairness and procedural good faith. Therefore, it does not consider it appropriate to apportion costs to one of the Parties because of its alleged lack of diligence or cooperation.

832. For the foregoing reasons, the Arbitral Tribunal concludes that Respondent should bear all of its own costs. Respondent shall also bear 60% of the costs of the arbitration (namely, USD$409,347.14 of a total of USD$682,245.24) and 60% of the legal fees and expenses incurred by Claimants (namely, USD$5,516,358 of a total of USD$9,193,930).[993] In total, the Respondent shall pay to Claimants the sum of USD$5,925,705.14 as a contribution to the payment of their costs in the arbitration.

833. With respect to Claimants' request for reimbursement of costs *"with interest calculated at a reasonable commercial rate from the date of the award until the date of payment thereof"*[994] - a request that was included in Claimants' Cost Brief, but not in claims of the Memorial or Replication – the Tribunal finds that this is not duly justified and is therefore inappropriate.

VIII. DECISION

834. For the reasons given in this Award, the Tribunal unanimously decides:

(i) To reject all jurisdictional objections raised by Respondent and, accordingly, declare that it has jurisdiction to decide this dispute.

(ii) To declare that Respondent has breached the BIT:

(a) By failing to accord fair and equitable treatment to Claimants' investments in breach of Article IV of the BIT;

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[992] *See, for example, Generation Ukraine v. Ukraine,* § 24; *Desert Line v. Yemen,* ¶¶ 303-304; *EDF v. Rumania,* ¶¶ 327-329.

[993] This figure corresponds to the addition of the following concepts detailed in Section II of Claimants' Cost Writ: (i) fees and expenses of Covington & Burling LLP (USD$5,948,982); (ii) fees and expenses of Zobrist Law Group (USD$720,646); (iii) Venezuelan lawyers' fees and expenses (USD$152,950); (iv) experts' fees and expenses (USD$2,175,808), and (v) travel expenses of Engineers Huerta and Gámiz and attorneys Vargas and Elizondo (USD$195,544).

[994] Claimants' Cost Writ, ¶ 6.

(b) By taking arbitrary measures that hindered the management and development of Claimants' investments in breach of Article III of the BIT;

(c) By preventing the free transfer of funds related to Claimants' investments in breach of Article VII of the BIT.

(iii) To determine that such breaches have caused damages and loss of profits to Claimants.

(iv) To order Respondent to pay to Claimants the sum of USD$430.4 million as compensation for the damages and loss of profit caused by its breach of the BIT.

(v) On the foregoing amount, Respondent shall pay compound interest at Libor + 2% rate from January 22, 2013 until the date of payment to Claimants.

(vi) To order the Respondent to refrain from imposing on the indemnity liens or taxes similar to those already taken into account by Claimants' experts in their calculation thereof;

(vii) To order the Respondent to pay to Claimants the sum of USD$5,925,705.14 as a contribution to the payment of their arbitration costs;

(viii) To reject the other claims, requests and defenses of the Parties.

[illegible signature]
Dr. Horacio A. Grigera Naón
Arbitrator
Date: June 29, 2017

[illegible signature]
Dr. Yves Derains
Arbitrator
Date: July 6 2017

[illegible signature]
Dr. Eduardo Zuleta
Chairman of the Tribunal
Date: July 13, 2017

LIC. SAUL VILLEGAS SOJO
Expert Translator
Directum Translations

The undersigned, SAÚL VILLEGAS SOJO, Expert Translator, appointed by the Supreme Court of the State of Nuevo Leon, as evidenced in authorization number 894 / 2018 dated on January 31, of 2018, certify that this translation to English language is, to my knowledge, true, complete and accurate, without additions or omissions, which was delivered to the undersigned for its translation. Each page of the translated document contains the legend Saúl Villegas Sojo – Expert Translator. This translation is issued in the City of Monterrey, Nuevo Leon on december 21st, 2018.

Saul Villegas Sojo