Exhibit 10

STATE OF ARIZONA)
)
) ss
COUNTY OF PIMA)

AFFIDAVIT OF TRANSLATION

I, Lois Clark Gillette, being duly sworn, deposes and says: I am a professional translator of the Spanish to English language with 22 years of professional experience, a Master's Degree in Translation and Certified by the American Translator's Association; I have prepared the attached English translation of the Award and Tribunal Decision for ICSID Case No. ARB/11/25, which to the best of my knowledge and belief is true and accurate.

Lois Clark Gillette

Lois Clark Gillette

Sworn to and subscribed before me
this 7 day of May, 2015.

Janet M. Mankee

JANET M. MANKEE
Notary Public - Arizona
Pima County
My Comm. Expires Mar 11, 2018

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

OI EUROPEAN GROUP B.V.
(Claimant)

and

BOLIVARIAN REPUBLIC OF VENEZUELA
(Respondent)

ICSID Case No. ARB/11/25

AWARD

Members of the Tribunal

Professor Juan Fernández-Armesto, President

Professor Francisco Orrego Vicuña, Arbitrator

Mr. Alexis Mourre, Arbitrator

Secretary of the Tribunal

Ms. Ann Catherine Kettlewell (until 30 January 2015)
Mr. Gonzalo Flores (since 2 March 2015)

Date of delivery to the parties: 10 March 2015

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LIST OF DEFINED TERMS

Alenvidrio	Strategic Alliance of Glass Companies [*Alianza Estratégica de Empresas de Vidrio*]
Ambev	Companhia de Bebidas das Americas
BIT or Venezuela-Netherlands BIT or Netherlands-Venezuela BIT	The Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Venezuela and the Kingdom of the Netherlands signed on 22 October 1991 and entering into force on 1 November 1993, to remain in force for fifteen years.
Hearing	Hearing on jurisdiction and the merits held 16 through 21 September 2013.
C I	Statement of Claim filed by the Claimant on 1 August 2012.
C II	Counter-Memorial on the Defenses to Jurisdiction filed by the Claimant on 29 March 2013.
C III	Rejoinder on the Objections to Jurisdiction filed by the Claimant on 26 August 2013.
C IV	Reply on the Merits filed by the Claimant on 1 July 2013.
C V	Closing Brief filed by the Claimant on 25 November 2013.
C-XX	Claimant's Exhibits
Cabrera	Report by Jesús Eduardo Cabrera Romero, legal expert appointed by the Respondent, issued on 26 August 2013.
CADIVI	Commission for the Administration of Currency Exchange of the Bolivarian Republic of Venezuela
Cash	All the funds the Companies hold in cash and bank accounts.
ICSID or the Centre	International Centre for the Settlement of Investment Disputes

CLA- XX	Claimant's Exhibits
Umbrella Clause	Article 3(4) of the Venezuela-Netherlands BIT.
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965.
Cost of Goods Sold	Variable costs Companies incur in manufacturing the products they later sell.
Costs of the proceedings	The provisions of funds paid to ICSID by the Parties.
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969.
Expropriation Decree	Presidential Decree No. 7,751 issued by the President of the Republic on 26 October 2010 and published in Official Gazette No. 39,538 of 26 October 2010.
Respondent or Venezuela or Republic	Bolivarian Republic of Venezuela.
Claimant or OIEG	OI European Group B.V.
Dolzer & Schreuer	R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford University Press (2008)
DY	Luoyang Dayang Refractory Co., Ltd.
Companies	Owens-Illinois de Venezuela C.A. and Fábrica de Vidrios los Andes C.A.
Favianca	Fábrica de Vidrios los Andes C.A., founded on 8 August 1968, in which the Claimant holds 32% direct interest and 39.996% indirect interest.
DCF	Discounted Cash Flow valuation method.
Defense Expenses	Legal expenses incurred by the parties.

Reasonable Defense Expenses	Defense Expenses actually incurred by Claimant that are indispensable to adequately defend its interests.
Gómez	Statement of Luis Gómez given 31 July 2012.
Guitera I	First expert report by Jean-Luc Guitera (KPMG Forensic in France), the Respondent's economic expert, issued in March of 2013.
Guitera II	Second expert report by Jean-Luc Guitera (KPMG Forensic in France), the Respondent's economic expert, issued 23 August 2013.
Hernández	Report by Jose Ignacio Hernández G, legal expert appointed by the Respondent, issued on 25 June 2013.
INDEPABIS	Institute for Defense of People in the Access to Goods and Services of the Bolivarian Republic of Venezuela
Preliminary Report by Envidrio	Preliminary Report by Envidrio (undated) Exhibit R-14.
INPSASEL	National Institute for Prevention, Health and Work Security of the Bolivarian Republic of Venezuela.
JATs	Temporary Administrative Boards created by the INDEPABIS to manage the Plants.
Kaczmarek I	First expert report by Brent C. Kaczmarek (Navigant Consulting Inc.), the Claimant's economic expert, issued 1 August 2012.
Kaczmarek II	Second expert report by Brent C. Kaczmarek (Navigant Consulting Inc.), the Claimant's economic expert, issued 1 July 2013.
LECUPS	Law for Expropriation for Public or Social Interest, published in Official Gazette No. 37,475 of 1 July 2002, Exhibit CLA-89.

LOPCYMAT	Organic Law on Prevention, Working Conditions, and the Work Environment, Published in Official Gazette No. 38,236 of 26 July 2005.
Machaen I	First statement of Enrique Machaen given 30 July 2012.
Machaen II	Second statement of Enrique Machaen given 1 July 2013.
Joint Matrix	Matrix containing calculations of the value of the Companies based on several parameters used in the DCF valuation performed by the economic experts dated 9 October 2013.
MINCIT	Ministry of the People's Power for Science, Technology and Intermediate Industries of the Bolivarian Republic of Venezuela.
NAV-XX	Exhibits to Mr. Kazmarek's reports.
OBGC	Owens Brockway Glass Container Inc., OI Group company that owns the *know-how,* technology and intellectual property used at all the Companies.
Glass Strengthening Project	Strengthening of the public sector's industrial capacity for the production of glass containers.
OI	Group controlled by Owens-Illinois Group, Inc.
OIdV	Owens-Illinois de Venezuela C.A., founded on 13 April 1958, in which the Claimant holds 73.97% interest.
Pazos	Statement of Noé Pazos given 1 July 2013.
PGR	Office of the Attorney General of the Bolivarian Republic of Venezuela.
Pimentel I	First statement of Yuri Pimentel given 26 March 2013.

Pimentel II	Second statement of Yuri Pimentel given 20 August 2013.
Business Plan	The Companies' 2010 Business Plan, Exhibit NAV-20.
Plants	Los Guayos Plant in the State of Carabobo Valera Plant in the State of Trujillo, where OldV and Favianca operated, respectively.
Polar	Inversiones Polar C.A., largest food group in Venezuela, minority shareholder and the Company's main customer.
First Session	First Session held on 20 May 2012 at the World Bank headquarters in Paris, France.
FPS	Full Protection and Security.
R I	Preliminary Exceptions and Bifurcation Request filed by the Respondent on 30 November 2012
R II	Counter-Memorial on the Merits filed by the Respondent on 29 March 2013.
R III	Reply to the Preliminary Objections filed by the Respondent on 1 June 2013.
R IV	Rejoinder on the Merits filed by the Respondent on 26 August 2013.
R V	Closing Brief filed by the Respondent on 25 November 2013
Arbitration Rules	Procedural Rules Applicable to ICSID Arbitration Proceedings.
RLA	Claimant's Exhibits.
R-XX	Respondent's Exhibits.
Sarmiento I	First statement of Alexander Sarmiento given 25 March 2013.

Sarmiento II	Second statement of Alexander Sarmiento given 23 August 2013.
Secretary	Ms. Ann Catherine Kettlewell, Legal Counsel at the ICSID, Secretary of the Arbitral Tribunal.
SENIAT	Integrated National Service of Customs and Tax Administration of the Bolivarian Republic of Venezuela.
Request for Arbitration	Request for Arbitration received by the Centre on 7 September 2011.
HT	Hearing Transcript in Spanish.
HT (English)	Hearing Transcript in English.
FET	Fair and Equitable Treatment.
USD	Unites States Dollar.
VEB or Bs.	Venezuelan Bolivar.
Venvidrio	Venezolana del Vidrio, C.A. company founded on 26 April 2011 which took over the direct management of the Plants.

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Abaclat	*Abaclat and Others v. Argentine Republic, (formerly Giovanna a Beccara and Others v. Argentine Republic)*, ICSID Case No. ARB/07/5, Decision on jurisdiction and admissibility, 4 August 2011.
ADC	*ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungría*, ICSID Case No. ARB/03/16, Award, 2 October 2006.
ADF	*Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, 21 November 2007.
AIG	*AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003.
Ambiente Ufficio	*Ambiente Ufficio SpA and Others v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on jurisdiction and admissibility, 8 February 2013.
AMT	*American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997.
Azurix	*Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006.
Biwater	*Biwater Gauff (Tanzania) Limited v. República Unida de Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008.
Caratube	*Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012.
Cemex	*CEMEX Caracas Investments B.V. & CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010.

CME	*CME Czech Republic B.V. v. Czech Republic* (CNUDMI), Partial Award, 13 September 2001.
Conoco Phillips	*ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Company v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/30, Decision on jurisdiction and merits, 3 September 2013.
Desert Line	*Desert Line Projects LLC v. Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008.
Deutsche Bank	*Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka,* ICSID Case No. ARB/09/2, Award 31 October 2012.
EDF	*EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009.
Electricity Co. of Sofia	*The Electricity Company of Sofia and Bulgaria,* Interim Measures of Protection, Order, 1939 P.C.I.J. (ser. A/B) No. 79 (5 December).
ELSI	*Elettronica Sicula S.p.A. (United States of America v. Italy),* 1989 I.C.J. 15 (20 July).
Enron	*Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award, 22 May 2007.
Eureko	*Eureko B.V. v. Republic of Poland (Ad hoc),* Partial Award, 19 August 2005.
Fedax	*Fedax N.V. v. Republic of Venezuela,* ICSID Case No. ARB/96/3, Decision on objections to jurisdiction, 11 July 1997.
Flughafen	*Flughafen Zürich A.G. and Gestión e Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case, No. ARB/10/19, Award, 18 November 2014.
Glamis	*Glamis Gold v. United States of America*, Arbitration under UNCITRAL Rules, Award, 8 June 2009.

Global Trading	*Global Trading Resource Corp. and Globex International, Inc. v.* Ukraine, ICSID Case No. ARB/09/11, Award, 23 November 2010.
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Jan de Nul	*Jan de Nul N. V. and Dredging International N. V. v. Arab Republic of Egypt,* ICSID Case No. ARB/04/13, Award, 6 November 2008.
Jan Oostergetel	*Jan Oostergetel and Theodora Laurentius v. The Slovak Republic,* UNCITAL, Decision on jurisdiction, 30 April 2010.
Kardassopoulos	*Ioannis Kardassopoulos v. Georgia* and *Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010.
KT Asia	*KT Asia Investment Group B.V. v. Republic of Kazakhstan,* ICSID Case No. ARB/09/8, Award, 17 October 2013.
Lemire	*Joseph C. Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Decision on jurisdiction and liability, 14 January 2010.
Lemire (Award)	*Joseph C. Lemire v. Ukraine,* ICSID Case No. ARB/06/18, Award, 28 March 2011.
LG&E	*LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic,* ICSID Case No. ARB/02/1, Decision on liability, 3 October 2006.
Loewen	*The Loewen Group, Inc. and Raymond L. Loewen v. United States of America,* ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003.
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Malicorp	*Malicorp Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/08/18, Award, 7 February 2011.
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M.C.I.	*M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador,* ICSID Case No. ARB/03/6, Award, 31 July 2007.
Metalclad Corporation	*Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.
MHS	*Malaysian Historical Salvors Sdn, Bhd c Government of Malaysia,* ICSID Case No. ARB/05/10, Decision on request for annulment 16 April 2009.
Mobil	*Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on jurisdiction, 10 June 2010.
Mohammad Ammar Al-Bahloul	*Mohammad Ammar Al-Bahloul v. Republic of Tajakistán,* SCC Case No. V(064/2008), Partial Award on jurisdiction and merits, 2 September 2009.
Mytilineos	*Mytilineos Holdings SA v. State Union of Serbia and Montenegro and the Republic of Serbia,* UNCITAL, Partial Award on jurisdiction, 8 September 2006.
Neer	*L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States,* Opinion of the Commissioners, 15 October 1926. IV R. Int'l Arb. Awards 60-66.
Occidental	*Occidental Exploration & Production Co. v. Republic of Ecuador,* UNCITRAL (LCIA) Case No. UN 3467, Final Award, 1 July 2004.
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Pey Casado	*Víctor Pey Casado and Fundación Presidente Allende v. Republic of Chile,* ICSID Case No. ARB/98/2, Decision on request for provisional measures, 25 September 2001.
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Plama	*Plama Consortium Ltd. v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, Order of the Tribunal on the Claimant's Request for Urgent Provisional Measures, 6 September 2005.
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Ronald Lauder	*Ronald S. Lauder v. Czech Republic* (UNCITAL), Final Award, 3 September 2001.
Saba Fakes	*Mr. Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20, Award, 12 July 2010.
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Saluka	*Saluka Investments BV (Netherlands) v. Czech Republic* (UNCITAL), Partial Award, 17 March 2006.
Saur	*SAUR International S.A v. Argentine Republic,* ICSID Case No. ARB/04/4, Decision on jurisdiction and liability, 6 June 2012.
Sempra	*Sempra Energy International v. Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007.

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Siemens	*Siemens A.G. v. Argentine Republic,* ICSID Case No. ARB/02/8, Award, 6 February 2007.
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Suez	*Suez, Sociedad General de Aguas de Barcelona S.A., e InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic,* ICSID Case No. ARB/03/17, Decision on jurisdiction, 16 May 2006.
Tecmed	*Técnicas Medioambientales Tecmed, S.A. v. United Mexican States,* ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.
Ulysseas	*Ulysseas, Inc. v. Republic of Ecuador*, CNUDMI, Final Award of 12 June 2012.
Vivendi II	*Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.* v. *Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007
Waste Management	*Waste Management Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.

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I. INTRODUCTION

1. On 7 September 2011, the International Centre for the Settlement of Investment Disputes ["**ICSID**" or "**Centre**"] received a request for arbitration ["**Request for Arbitration**"] from OI European Group B.V. ["**OIEG**" or "**Claimant**"], against the Bolivarian Republic of Venezuela ["**Venezuela**" or the "**Respondent**" or the "**Republic**."]

2. On 9 September 2011, the Centre acknowledged receipt of the Request for Arbitration, and the payment of the corresponding registration fee.

3. Initially, the Claimant was represented in these proceedings by the law firm Volterra Fietta, with offices in London, United Kingdom, and Latham Watkins with offices in Chicago, Illinois, USA and London, United Kingdom. The Claimant is currently represented by: (a) the Volterra Fietta law firm, and specifically the attorneys Robert Volterra, Stephen Fietta, Patricio Grané Labat and Álvaro Nistal; (b) the law firm Escritorio Muci-Abraham, with offices in Caracas, Venezuela, and specifically Mr. José Antonio Muci, and (c) Mr. Lucas Bastin, of Quadrant Chambers, in London, United Kingdom.

4. The Respondent was initially represented by the Office of the Attorney General of Venezuela, by the Acting Attorney General, Dr. Manuel Enrique Galindo Ballesteros, and the law firm Shearman & Sterling LLP, with offices in Washington, D.C., USA and Paris, France specifically by the attorneys Fernando Mantilla Serrano, Thomas B. Wilner and Christopher M. Ryan. On 22 May 2014 the law firm Shearman & Sterling LLP announced its withdrawal as representatives of the Respondent.

5. The Claimant and the Respondent shall be jointly referred to herein as the "Parties." The complete list of the Parties' representatives and their respective addresses has been provided on the cover sheet of this Award.

II. HISTORICAL BACKGROUND OF THE PROCEEDINGS

6. On 26 September 2011, the Secretary General of the ICSID registered the Request for Arbitration in accordance with Article 36(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ["**ICSID Convention**"] and notified the parties that it had been registered.

7. The proceedings were initiated based on the Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Venezuela and the Kingdom of the Netherlands ["**Venezuela-Netherlands BIT**" or the "**Netherlands – Venezuela BIT**" or the "**BIT**"] signed on 22 October 1991 and entering into force on 1 November 1993, to remain in force for fifteen years. In relation to the Venezuela-Netherlands BIT, in its Request for Arbitration the Claimant stated that on 30 April 2008, Venezuela presented a notice of termination, six months prior to the expiration date of the BIT. Consequently, the Claimant argued that Article 14(3) of the BIT provides that "[i]n relation to the investments made prior to the termination date of this Agreement, the foregoing Articles of the same shall remain in effect for an additional period of fifteen years from said date." The Claimant concluded that the proceeding should be conducted based on the Venezuela-Netherlands BIT.

8. In the Notice of Registration, the Secretary General invited the Parties to proceed to constitute a Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings [the "**Institution Rules**."]

9. Given that more than sixty (60) days had passed since the registration of the Request for Arbitration without the parties having reached an agreement regarding how to constitute the Tribunal, the Claimant invoked Article 37(2)(b) of the ICSID Convention by letter of 15 December 2011.

10. By letter of the same date, the Claimant appointed as arbitrator Professor Francisco Orrego Vicuña, a Chilean national of the Republic of Chile.

11. By letter of 19 December 2011, Professor Orrego Vicuña accepted his appointment as arbitrator in these proceedings.

12. Ninety (90) days having elapsed since the registration of the Request for Arbitration without the Tribunal having been constituted, by letter of 28 December 2011, the Claimant requested that the Chairman of the Administrative Council of the ICSID appoint the arbitrators who had not yet been appointed, in accordance with the provisions of Article 38 of the ICSID Convention, and Rule 4 of the Procedural Rules Applicable to ICSID Arbitration Proceedings [the "**Arbitration Rules**."]

13. By letter of 29 December 2011, Dr. Carlos Escarrá Malavé, Attorney General of the Republic, acknowledged receipt of the Claimant's letter of 28 December 2011and stated that he was in the

process of engaging the services of a law firm and outside counsel for this matter and that he would proceed to appoint the corresponding arbitrator.

14. By letter of 11 January 2012, Venezuela communicated that Messrs Thomas Wilner, Christopher M. Ryan, José Pertierra and Fernando Mantilla Serrano of the law firm Shearman & Sterling LLP, in Washington, D.C., in addition to the Office of the Attorney General, via the Attorney General of the Republic, Dr. Carlos Escarrá Malavé and Ana María de Stefano Lo Piano, would represent the Respondent in this case.

15. By letter of 12 January 2012, the Respondent appointed Mr. Alexis Mourre, a French national, as arbitrator.

16. On 13 January 2012, Mr. Alexis Mourre accepted his appointment as arbitrator in these proceedings.

17. By letter of 2 February 2012, the Respondent reported the death of Dr. Carlos Escarrá Malavé and the appointment, on the same date, of the new Attorney General of the Republic, Dr. Cilia Flores. In said letter and in view of the circumstances, the Respondent asked for these arbitration proceedings to be postponed for two months so that Dr. Flores could familiarize herself with the case and participate in Venezuela's defense.

18. On 3 February 2012, the Claimant submitted its comments on the Respondent's request, opposing said postponement, since a) the Respondent had been being represented by outside counsel during the proceeding, b) the outside counsel had sufficient authority to act on behalf of their client, c) the new Attorney General had already been appointed, and d) the proceedings were still in the initial stages.

19. By letter of 10 February 2012, the Centre acknowledged receipt of the Respondent's request and the Claimant's objections of 2 and 3 February 2012, respectively. The Centre informed the parties that the Claimant had requested the appointment of the arbitrators that had not yet been appointed in accordance with Article 38 of the ICSID Convention and Rule 4(4) of the ICSID Arbitration Rules, and that it would move forward with said request in the next few days.

20. After consulting with the parties, and in accordance with Article 38 of the ICSID Convention, and Rule 4 of the Arbitration Rules, on 29 March 2012, the Chairman of the Administrative Council of the ICSID appointed Professor Juan Fernández-Armesto, a Spanish national, as the third Arbitrator and President of the Tribunal. On 30 March 2012, Professor Fernández-Armesto accepted his appointment as arbitrator and President of the Tribunal.

21. On 30 March 2012, the Secretary-General notified the parties under Rule 6(1) of the ICSID Arbitration Rules, that the three arbitrators had accepted their respective appointments, and that the

proceedings had now been formally instituted, and that Ms. Ann Catherine Kettlewell, Legal Counsel at the ICSID, would act as Secretary of the Arbitral Tribunal [the "**Secretary.**"]

22. On 23 April 2012, after consulting with the Parties, the Tribunal set the date for the first session for 20 May 2012, to be held in person in Paris, France ["**First Session.**"]

23. The First Session of the Tribunal was held on said date at the World Bank Conference Centre in Paris, France. The participants were:

Members of the Tribunal
Professor Juan Fernández-Armesto, *President*
Professor Francisco Orrego Vicuña, *Arbitrator*
Mr. Alexis Mourre, *Arbitrator*

Office of the Secretary of the ICSID
Ms. Ann Catherine Kettlewell, *Secretary of the Tribunal*

Representing the Claimants:
Mr. Stephen Fietta, *Volterra Fietta*
Mr. Douglas Freedman, *Latham & Watkins*
Ms. Michelle Bradfield, *Latham & Watkins*
Mr. Lucas Bastin, *Latham & Watkins*
Ms. MaryBeth Wilkinson, *OI European Group B. V.*

Representing the Respondent:
Mr. Fernando Mantilla-Serrano, *Shearman & Sterling LLP*
Mr. Christopher M. Ryan, *Shearman & Sterling LLP*
Mr. Oliver Tuholske, *Shearman & Sterling LLP*
Mr. Thomas Parigot, *Shearman & Sterling LLP*
Mr. Arno Gildemeister, *Shearman & Sterling LLP*
Dr. Cilia Flores, *Attorney General of the Republic*
Dr. Anna María De Stefano, *Attorney General's Office Coordinator*
Dr. Victor Álvarez, *Advisor to the Attorney General*
Dr. Gilberto Hernández, *Advisor to the Attorney General*
Dr. Inés Adarme, *Advisor to the Attorney General*
Dr. Ronald Meignen, *Advisor to the Attorney General*

24. The representatives of the Office of the Attorney General of the Republic were present during the First Session by telephone from Caracas, Venezuela. In addition, Mr. Fernando Mantilla-Serrano was present via telephone from Bogota, Colombia.

25. The Parties confirmed that the Members of the Arbitral Tribunal were validly appointed. They agreed, among other things, that the Arbitration Rules applicable to this proceeding would be those in effect as of 10 April 2006. The Parties agreed on various procedural matters including the

that the language in which the award would be issued would be the Spanish language. After consulting with the Parties, the Tribunal decided, among other things, that the languages in which the proceedings would be conducted would be Spanish and English, and that the proceedings would take place in Washington, D.C. Said agreements and decisions were set down in the Minutes of the First Session signed by the President and the Secretary of the Tribunal on 14 June 2012, which were distributed to the Parties on the same date.

26. On 18 June 2012, the Claimant asked the Tribunal to modify section 13.4.4 of the Minutes of the First Session since it believed it was inconsistent with Section 13.4.3. The Respondent submitted its comments in relation to this point on the same date. The Claimant replied to the Respondent's comments and on 19 June 2012, the Respondent submitted another response to the Claimant. By letter of 21 June 2012, the Tribunal informed the Parties that it was not necessary to amend section 13.4.4. of the Minutes of the First Session, and moreover presented an example to illustrate the purpose of section 13.4.4.

27. In accordance with the procedural calendar set forth in the Minutes of the First Session, the Claimant submitted its Memorial on 1 August 2012 ["**CI**"]. The translation of the Memorial was submitted on 16 August 2012 in accordance with section 10.3 of the Minutes of the First Session. On 30 October 2012, the Claimant sent the Members of the Tribunal a full copy in Spanish of all the Exhibits to the Claimant's Memorial, in addition to the expert report by Mr. Brent Kaczmarek.

28. On 27 November 2012, the Respondent informed the Tribunal of the registration of ICSID Case No. ARB/12/21 and argued that Case ARB/12/21 was related to this case and, for reasons of procedural economy, should be consolidated. In the same letter, the Respondent asked the Tribunal to suspend the proceedings for at least three (3) months. On 28 November 2012, the Claimant submitted its comments, opposing the Respondent's request and asking the Tribunal to order the Respondent to adhere to the procedural calendar established in the Minutes of the First Session. On 28 November 2012, the Centre remitted the letters sent by the Parties related to this point in accordance with section 11(a) of the Minutes of the First Session and Rule 24 of the ICSID Administrative and Financial Regulations. On 30 November 2012, the Tribunal acknowledged receipt of the Parties' letters and decided not to suspend the proceedings, ordered Venezuela to adhere to the established deadlines for the Counter-Memorial and left open the possibility that, if the Parties felt at any time further steps should be taken, they should present a substantiated request to the Tribunal, which would make a decision after hearing the other Party.

29. In accordance with the procedural calendar established in the Minutes of the First Session, the Respondent submitted its Memorial on Preliminary Objections and request for bifurcation ["**RI**"] on 30 November 2012.

30. On 6 December 2012, Arbitrator Alexis Mourre submitted an additional statement in the case.

31. On 8 December 2012, in light of the request for bifurcation submitted by the Respondent and the suspension of the proceedings, the Parties agreed to extend the deadline for the production of documents until after the Arbitral Tribunal had made a decision regarding the request for bifurcation. On 11 December 2012, the Tribunal confirmed this agreement.

32. The Parties exchanged correspondence in relation to the extension of the Respondent's Counter-Memorial deadlines over the next few days. On 20 December 2012, the Tribunal announced to the Parties that it would issue a decision regarding the bifurcation in the first week of January 2013, and that no further information or comments from the Parties would be necessary.

33. On 2 January 2013, the Arbitral Tribunal issued Procedural Order No. 1, denying the Respondent's request for bifurcation. The Tribunal invited the Parties to hold a conference call to determine the timeline for the next phase of the proceeding.

34. By letter of 4 January 2013, the Tribunal set the agenda for the conference call. On 7 January 2013, the telephone conference call was held, with the following persons present:

Members of the Tribunal
Professor Juan Fernández-Armesto, *President*
Professor Francisco Orrego Vicuña, *Arbitrator*
Mr. Alexis Mourre, *Arbitrator*

Office of the Secretary of the ICSID
Ms. Ann Catherine Kettlewell, *Secretary of the Tribunal*

Representing the Claimants:
Mr. Stephen Fietta, *Volterra Fietta*
Mr. Douglas Freedman, *Latham & Watkins*
Ms. Michelle Bradfield, *Latham & Watkins*
Mr. Lucas Bastin, *Latham & Watkins*
Ms. MaryBeth Wilkinson, *OI European Group B. V.*

Representing the Respondent:
Mr. Christopher M. Ryan, *Shearman & Sterling LLP*
Mr. Thomas Wilner, *Shearman & Sterling LLP*
Mr. Fernando Mantilla-Serrano, *Shearman & Sterling LLP*
Dr. Victor Álvarez, *Advisor to the Attorney General*
Dr. Andrea Flores Ynserny, *Advisor to the Attorney General*

35. The items discussed during the conference call were: (i) the procedural calendar, (ii) lifting the suspension of the proceedings, (iii) document production phase and (iv) location at which the hearing would be held. After having heard the Parties' arguments, on 9 January 2012, the Tribunal issued its decision in relation to said points.

36. On 10 February 2013, the Respondent announced the appointment of Acting Attorney General of the Republic, Dr. Manuel Enrique Galindo Ballesteros.

37. On 16 February 2013, the Claimant announced that it would be represented solely by the law firm Volterra Fietta, and specifically by the following attorneys: Robert Volterra, Stephen Fietta, Jiries Saadeh, Ernesto Feliz, and Álvaro Nistal.

38. On 7 March 2013, the attorneys for the Respondent announced the death of President Hugo Chávez and asked for an extension of the deadline for submitting its Counter-Memorial to 29 March 2013. On the same date, the Claimant submitted its comments, opposing said request for extension. The Respondent replied to the Claimant's comments on the same date, reiterating its request for a two-week extension of the deadline originally set by the Tribunal in its letter of 9 January 2013. Lastly, the Claimant reiterated its opposition to the deadline extension. On 11 March 2013, taking into account the circumstances of the request, the Tribunal granted the Respondent's request for a deadline extension and invited the parties to agree upon the deadlines and language for the submission of the Reply and Rejoinder. On 22 March 2013, the Parties agreed to the rest of the procedural calendar and specifically with regard to the Reply and Rejoinder, which was confirmed by the Tribunal on 28 March 2013. By letter of 12 April 2013, the Tribunal confirmed the calendar for the submissions and the calendar for document production.

39. On 29 March 2013, the Claimant submitted its Counter-Memorial to the Respondent's objections to jurisdiction ["**CII**"]. On the same date, the Respondent submitted its Counter-Memorial on the Merits ["**RII.**"]

40. On 13 April 2013, the Claimant submitted the Spanish translation of its Counter-Memorial to the Respondent's objections to jurisdiction and the supporting documentation for said memorial. On the same date, the Respondent submitted the English translation of the supporting documentation for its Counter-Memorial on the Merits.

41. On 26 April 2013, both Parties submitted their requests for production of documents. On 17 May 2013, the Arbitral Tribunal issued Procedural Order No. 2 containing its decision regarding each Party's request for production of documents.

42. On 30 May 2013, the Claimant informed the Centre that it was adding Mr. Patricio Grané Labat to the contact list for Volterra Fietta, the law firm representing the Claimant.

43. On 1 June 2013, the Respondent submitted its Reply to the Preliminary Objections ["**RIII.**"]

44. On 1 July 2013, the Claimant submitted its Reply on the Merits ["**CIV.**"] On the same date, the Respondent submitted its Reply on Jurisdiction.

45. On 5 July 2013, the Claimant submitted a request for provisional remedies to prevent the unauthorized dissemination of confidential information regarding its production processes and protect its right to the non-aggravation of the dispute. On the same date, the Claimant submitted a request for document production based on recently learned fact about the Respondent.

46. On 8 July 2013, the Respondent submitted its initial comments and asked for the suspension of the proceedings and/or an extension of the deadline for the Respondent to submit its Rejoinder. On 10 July 2013, the Claimant submitted its comments in relation to the Respondent's request for suspension and/or deadline extension.

47. On 11 July 2013, the Tribunal determined the procedural calendar for the Parties to submit their arguments in relation to (a) the request for document production and (b) the request for provisional remedies. It also decided that the Respondent's Rejoinder should be submitted no later than 23 August 2013.

48. On 16 July 2013, the Claimant informed the Centre that Mr. José Antonio Muci Borja, of the law firm Escritorio Muci-Abraham & Asociados, with offices in Caracas, Venezuela, was joining its team of representatives.

49. On 17 July 2013, the Claimant submitted the Spanish translation of its Reply on the Merits. On the same date, the Respondent submitted the English translation of its Reply on Jurisdiction.

50. On 22 July 2013, the Respondent submitted its objections to the Claimant's request for document production. On 24 July 2013, the Claimants asked the Tribunal for leave to submit comments on the Respondent's objections. On the same date, 24 July 2013, the Tribunal authorized said submission. On 29 July 2013, the Claimant submitted its comments to the Respondent's objections. On 31 July 2013, both Parties submitted additional comments in this regard. On 1 August 2013, the Tribunal instructed the Parties not to submit any observations that had not been authorized by the Tribunal.

51. On 6 August 2013, the Tribunal issued Procedural Order No. 3 on the production of documents.

52. On 14 August 2013, the Claimant informed the Centre that Mr. Lucas Bastin, of Quadrant Chambers, with offices in London, United Kingdom, was joining its team of representatives.

53. On 19 August 2013, the Claimant informed the Centre that it would require Spanish/English interpretation services during the hearing to be held in this case, in accordance with section 10.6 of the Minutes of the First Session.

54. On the same date, the Respondent informed the Tribunal of the Parties' agreement for an extension for Venezuela to submit its Rejoinder on the Merits and the Claimant's Rejoinder on Jurisdiction, to be submitted on 26 August 2013, rather than 23 August 2013. The Claimant confirmed this information on the same day and reiterated that the translation of said Memorial would be submitted on the date originally agreed upon, namely, 30 August 2013.

55. On 20 August 2013, the Tribunal confirmed the procedural calendar agreed upon by the Parties. By the same letter it set the agenda for the conference call to take place before the hearing to be held on 30 August 2013.

56. On 21 August 2013, the Claimant filed a request based on Rule 34(2)(b) of the ICSID Arbitration Rules to conduct a visual inspection of the facilities of the plant owned by the Claimant. On 22 August 2013, the Tribunal informed the Parties that said item would be added to the agenda for discussion during the telephone conference call on 30 August 2013. On 27 August 2013, the Respondent submitted its comments to said request.

57. On 23 August 2013, the Claimant submitted its Rejoinder on Jurisdiction ["**CIII.**"]

58. On 26 August 2013, the Respondent submitted its Rejoinder on the Merits ["**RIV.**"]

59. On 28 August 2013, the Tribunal gave instructions regarding the translations of the Claimant's Rejoinder on Jurisdiction and the Respondent's Rejoinder on the Merits.

60. On the same date, the Respondent submitted comments on the Claimant's request for provisional remedies of 5 July 2013.

61. On 29 August 2013, the Claimant asked the Tribunal to order the Respondent to submit unredacted documents which were produced by the Respondent as a result of Procedural Order No. 3.

62. On 30 August 2013, the Respondent submitted the English translations of the supporting documentation submitted with its Rejoinder on the Merits.

63. By letter of 5 September 2013, the Tribunal informed the Parties that it would be calling Mr. Qing Jiang to testify during the hearing.

64. On 7 September 2013, the Tribunal issued Procedural Order No. 4 on the hearing rules.

65. On the same date, the Claimant submitted the Spanish translation of its Rejoinder on Jurisdiction.

66. Between September 16 and 21, 2013, the Tribunal held a hearing on jurisdiction and the merits [the "**Hearing**"] at the World Bank Conference Centre in Paris, France. The following were present at the hearing:

Members of the Tribunal
Professor Juan Fernández-Armesto, *President*
Professor Francisco Orrego Vicuña, *Arbitrator*
Mr. Alexis Mourre, *Arbitrator*

Office of the Secretary of the ICSID
Ms. Ann Catherine Kettlewell, *Secretary of the Tribunal*

Representing the Claimants:
Mr. Robert Volterra, *Volterra Fietta*
Mr. Stephen Fietta, *Volterra Fietta*
Mr. Patricio Grané Labat, *Volterra Fietta*
Mr. Jiries Saadeh, *Volterra Fietta*
Mr. Álvaro Nistal, *Volterra Fietta*
Ms. Zuzana Morhacova, *Volterra Fietta*
Ms. María Juliana Muci, *Volterra Fietta*
Mr. José Antonio Muci, *Escritorio Muci-Abraham & Asociados*
Mr. Lucas Bastin, *Quadrant Chambers*
Ms. MaryBeth Wilkinson, *OI European Group B. V.*

Representing the Respondent:
Mr. Fernando Mantilla Serrano, *Shearman & Sterling LLP*
Mr. Thomas Wilner, *Shearman & Sterling LLP*
Mr. Christopher Ryan, *Shearman & Sterling LLP*
Mr. John Adam, *Shearman & Sterling LLP*
Mr. Thomas Parigot, *Shearman & Sterling LLP*
Ms. Anna Tevini, *Shearman & Sterling LLP*
Mr. Guillermo Salcedo, *Shearman & Sterling LLP*
Ms. Sanaz Payandeh, *Shearman & Sterling LLP*
Dr. Manuel Galindo, *Attorney General (Acting), Office of the Attorney General of the Bolivarian Republic of Venezuela*
Dr. Magaly Gutiérrez, Office of the Attorney General of the Bolivarian Republic of Venezuela

67. The following persons were examined:

For the Claimants

Experts
Mr. José Ignacio Hernández, *Grau, García, Hernández & Mónaco*

Mr. Brent Kaczmarek, *Navigant Consulting, Inc.*

Witnesses
Mr. Enrique Machaen
Mr. Luis Gómez
Mr. Noé Pazos
Mr. Matthew DeDad
Mr. Qing Jiang

For the Respondent:

Experts
Mr. Jean-Luc Guitera, *KPMG*
Mr. Jesús Cabrera

Witnesses
Mr. Alexander Sarmiento
Mr. Yuri Pimentel
Mr. Pablo Morales
Mr. Rafael Romero

68. On 30 September 2013, the Tribunal issued Procedural Order No. 5 on the post-hearing filings.

69. On 14 October 2013, the Parties filed the corrections to the transcripts of the Hearing in English ["**HT (English)**"] and Spanish ["**TA**"], in accordance with Procedural order No. 5. Said corrections were authorized by the Tribunal and the amended transcripts were sent to the Parties on 3 December 2013.

70. On 21 October 2013, the Parties' experts, Mr. Guitera and Mr. Kaczmarek, presented a joint matrix in accordance with the instructions given by the Tribunal during the Hearing and Procedural Order No. 5.

71. On 25 November 2013, the Parties filed the Closing Brief in accordance with Procedural Order No. 5 ["**CV**" and **RV**"].

72. On 26 November 2013, the Tribunal issued the Decision on Provisional Remedies.

73. On 6 December 2013, the Claimant asked the Tribunal for clarification in relation to the Post-Hearing Briefs in light of the brief filed by the Respondent. The Respondent presented its comments in relation to said request on 16 December 2013 and 23 December 2013. On 12 February 2014, the Tribunal issued Procedural Order No. 6, admitting the documents submitted by the Respondent.

74. On 9 December 2013, the Parties submitted a summary of costs of the proceedings.

75. On 13 December 2013, the Claimant submitted comments in relation to the Respondent's cost summary, asking the Tribunal to note that the Respondent had not followed the instructions given by the Tribunal. The Respondent submitted its comments on 30 December 2013. In Procedural Order No. 6, issued on 12 February 2014, the Tribunal invited the Claimant to submit its comments no later than 21 February 2014, since it had not had the opportunity to comment on the additional information the Respondent had submitted in its cost summary. On 21 February 2014, the Claimant submitted its comments.

76. On 22 May 2014, the law firm Shearman & Sterling LLP sent a letter informing the Centre that it would no longer be representing the Bolivarian Republic of Venezuela.

77. On 4 March 2015, the Parties were informed that Mr. Gonzalo Flores would act as the Secretary of the Tribunal, replacing Ms. Ann Catherine Kettlewell who was no longer with the ICSID Office of the Secretary, and the arbitration proceedings were declared closed in accordance with Rule 38(1) of the Arbitration Rules.

III. PETITIONS OF THE PARTIES

1. BRIEF SUMMARY OF THE PARTIES' PETITIONS

78. OIEG asks that the Tribunal dismiss the objections to jurisdiction raised by the Respondent and declare that Venezuela, with respect to the Claimant, has violated five protection standards of the Venezuela-Netherlands BIT. Specifically, the Claimant requests a declaration that:

- it suffered the expropriation of its investment;
- it suffered unfair and inequitable treatment;
- it did not enjoy the physical safety and protection of its investment;
- the Respondent breached the obligations assumed in connection with the treatment given the foreign investments of Dutch nationals;
- it did not enjoy the guaranteed transfer of payments related to its investment

79. The Claimant additionally asks that the Tribunal declare that Venezuela caused indirect damages as the result of the use of the expropriated assets and that it must pay for moral damages.

80. As indemnification for the damages suffered, OIEG is requesting a compensation of no less than USD 929,544,714, plus compound interest on the amount awarded by the Tribunal as damages, capitalized annually from the date of the expropriation up to the date of the award, and capitalized from the date of the award up to the actual payment date; as well as the award of the costs of this arbitration against the Respondent or, alternatively, the award of the costs with respect to the preliminary objections and the request for bifurcation and any other reparation that the Tribunal deems appropriate.

81. For its part, the Respondent requests, first, that the Tribunal declare its lack of jurisdiction to hear this dispute and declare the Claimants' claims inadmissible. Secondarily, the Bolivarian Republic of Venezuela asks the Tribunal to dismiss the claims set forth by the Claimants in their entirety and award the costs generated by this arbitration against them.

2. CLAIMANT'S CLAIMS

82 In its Closing Arguments, the Claimant asks the Tribunal to issue an award that:

> "(1) orders that the Respondent's preliminary objections be rejected in their entirety;

(2) declares that the Respondent has breached the BIT, including Articles 3(1), 3(2), 3(4), 5, and 6.

(3) orders the Respondent to pay the Claimant damages in the amount of no less than USD 929,544,714, including

a. USD 729,821,323 for expropriation of the Claimant's economic interests in the Companies.

b. USD 16,833,383 for the Respondent's expropriation of the excess cash in the bank accounts of OIdV and Faviainca;

c. USD 54,292,257 for the loss of revenue resulting from the Respondent's unlawful interference in the repatriation of the Claimant's dividends paid by OIdV and Favianca;

d. USD 50,566,759 for indirect damages resulting from the Respondent's use of the unlawfully expropriated assets to cause damage to the Claimant's businesses outside Venezuela;

e. USD 68,030,992 for indirect damages resulting from the dissemination of OI's intellectual property and other confidential information and processes by the Respondent outside Venezuela as a consequence of the expropriation of the Plants; and

f. USD 10,000,000 for pain and suffering resulting from the Respondent's atrocious behavior during the six months following the expropriation;

(4) orders the Respondent to pay compound interest on the amount awarded by the Tribunal to the Claimant for damages at an interest rate of LIBOR +4%, to be capitalized annually from the date of the expropriation up to the date of the award, and capitalized annually or biannually (whichever is greater) from the date of the award until the payment in US dollars is received by the Claimant in same day funds in a bank account outside Venezuela designated by the Claimant for this purpose;

(5) orders the Respondent to pay all the Claimant's arbitration costs, including but not limited to all the expenses and fees of the ICSID and the Tribunal and all legal costs and expenses incurred by the Claimant (including but not limited to legal expenses and attorneys' fees), with interest calculated in accordance with paragraph (4) above;

(6) if the Tribunal does not order the Respondent to pay all the Claimant's arbitration costs, that it order the Respondent to pay all the Claimant's costs with respect to the preliminary objections and the request for bifurcation, including but not limited to all the expenses and fees of the ICSID and the Tribunal and all the legal costs and expenses incurred by the Claimant (including but not limited to legal expenses and attorneys' fees), with interest calculated in accordance with paragraph (4) above;

(7) Order any other additional reparation that the Tribunal deems appropriate."

3. RESPONDENT'S CLAIMS

83. In its Rejoinder on the Objections to Jurisdiction, the Respondent requests as first claim:

"(1) [that the Tribunal] declare that the Claimant has not made an investment and that this dispute therefore does not fall under the jurisdiction of the Centre or the Arbitral Tribunal;

(2) declare that the Claimant's claim in relation to the alleged damage caused to its operations outside Venezuela described in Sections O and IC.G of its Memorial does not fall under the Arbitral Tribunal's jurisdiction.

(3) order the Claimant to pay all the Respondent's costs in connection with the Preliminary Objections of 30 November 2012 and this Rejoinder to the Claimant's Counter-Claim, including the fees and expenses of the Arbitral Tribunal and the ICSID and all the legal fees and expenses incurred by the Respondent (including, but not limited to the fees and expenses of attorneys, experts and consultants);

(4) order any other measure that it deems appropriate."

84. With respect to the merits, in its Closing Arguments, the Respondent requests that the Tribunal:

"(1) declare that the Claimant has not violated the Venezuela-Netherlands BIT, including Arts. 3(1), 3(2), 3(4), 5, and 6.

(2) declare that the Claimant is not entitled to receive any compensation;

(3) order the Claimant to pay the Respondent all arbitration-related costs, including the expenses and fees of the Arbitral Tribunal and the ICSID, as well as all legal costs and expenses incurred by the Respondent (including, without limitation, the expenses and fees of attorneys, experts and consultants);

(4) order any other additional reparation it deems appropriate."

IV. FACTUAL BACKGROUND

1. GENERAL OUTLINE OF THE CASE

85. The dispute arises from the expropriation of the two largest glass container production plants in Venezuela. The Claimant alleges that this expropriation was carried out illegally and with no compensation, and that the Respondent's behavior with regard to the Claimant's investments breached numerous obligations under the BIT, requesting a sizeable compensation. On the other hand, in addition to rejecting the Tribunal's jurisdiction, the Respondent denies that the Claimant made an investment and contends that there was no breach of the BIT.

2. DRAMATIS PERSONAE

OIEG

86. The Claimant is OI European Group B.V. ["**OIEG**"] a company incorporated on 17 February 1999 in accordance with the laws of the Kingdom of the Netherlands.[1] OIEG is part of the group controlled by Owns-Illinois Group, Inc. ["**OI**"],[2] one of the world's largest glass container manufacturers.

OIdV and Favianca

87. The Claimant and OI hold equity interests in glass production and distribution companies throughout the world. In Venezuela, OIG operated through two companies in which it was the majority shareholder [the "**Companies**"]:

- Owens-Illinois de Venezuela C.A. ["**OIdV**"] incorporated on 13 April 1958,[3] in which the Claimant holds 73.97% of the shares;[4] and

- Fábrica de Vidrios los Andes C.A. ["**Favianca**"] incorporated on 8 August 1968,[5] in which the Claimant directly holds 32% of the shares[6] and indirectly holds 39.996%[7] (i.e. 71.996% of the shares directly and indirectly).

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[1] Claimant's Articles of Incorporation, recording date 17 February, 1999, Exhibit C-3.
[2] "About Us" section on the OI website, Exhibit C-108.
[3] OIdV Articles of Incorporation and Bylaws, Exhibit C-1.
[4] The Claimant directly holds 73.97% of the shares in OIdCV since 31 December 2005. See OIdV Share Register, Exhibit C-109.
[5] Favianca Articles of Incorporation and Bylaws, Exhibit C-2.
[6] The Claimant directly holds 32% of the shares in Favianca since 31 December, 20015. See Favianca Share Register, Exhibit C-110.
[7] OIdV holds 54.07% of the shares in Favianca since 29 March, 1973; therefore, the Claimant also indirectly owns OIdV's 39.996% shareholdings in Favianca (i.e. 73.97% of 54.07%). See Favianca Share Register, Exhibit C-110.

88. The Companies were owners of two industrial plants for the production, processing and distribution of glass containers in Venezuela: OIdV operated in the Los Guayos plant in Carabobo State, and Favianca operated in the Valera Plant in Trujillo State [together, the "**Plants**"]. The Plants had the latest generation technology and exclusive equipment of OI's group of affiliated companies.[8]

Bolivarian Republic of Venezuela

89. The Respondent is the Bolivarian Republic of Venezuela, who acts through various government agencies such as the Ministry of Science, Technology and Intermediate Industries [*Ministerio del Poder Popular para Sciencia, Tecnología e Industrias Intermedias* – "**MINCIT**"]; the Office of the Attorney General of the Republic [*Procuraduría General de la República* – "**PGR**"]; the Venezuelan Consumer Protection Agency [*Instituto para la Defensa del Pueblo en al Acceso a los Bienes y Servicios* – "**INDEPABIS**"]; the National Institute of Occupational Prevention, Health and Safety [*Instituto Nacional de Prevención Laboural, Salud y Seguridad* – "**INPASASEL**"]; the Commission for the Administration of Currency Exchange [*Comisión de Administración de Divisas* – "**CADIVI**"]; and the National Customs and Tax Administration Service [*Servicio Nacional Integrado de Adminiministración Aduanera y Tributaria* – "**SENIAT**"].

Venvidrio

90. In order to manage the industrial assets that originally belonged to the Companies and produce and market glass containers, the Respondent, by Presidential Decree,[9] created a company assigned to the MINCIT: Venezolana del Vidrio, C.A. ["**Venvidrio**"]. Venvidrio was founded on 26 April 2011[10] and assumed direct management of the Plants on 30 April 2011.[11]

Polar

91. Inversiones Polar C.A. ["Polar"] is Venezuela's main food sector group. In addition, it was a minority shareholder and the main customer of the Companies.

3. CONTEXT PRIOR TO THE EXPROPRIATION

92. In late 2002, Venezuela was swept by intense protests and a general labor strike in the oil industry. This strike spread to major food distributors and producers.

93. In view of these events, then-President Hugo Chávez created the Mercal mission, whose objective was to create warehouses and supermarkets with low-cost staple foods and products. In addition, the Ministry of Food was created in 2004.[12]

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[8] "About Us" section on the OI website, Exhibit C-108.
[9] Presidential Decree No. 8,134, Official Gazette No. 39,649 of 5 April 2011, Exhibit C-78.
[10] RII, paragraph 166; First witness statement of Alexander Sarmiento dated 25 March 2013 [hereinafter "**Sarmiento I**"], paragraph 26.
[11] RII, paragraph 167; First witness statement of Yuri Pimentel dated 26 March 2013 [hereinafter, "**Pimentel I**"], paragraph 53; Sarmiento I, paragraph 27.
[12] HT, day 1, pp. 33 and 34

94. The Government also undertook reforms that included the establishment of a new exchange control system and an expropriation law.

The exchange control system in Venezuela and CADIVI

95. With the aim of adopting measures designed to "achieve the stability of the currency, ensure the continuity of the country's international payments and counteract undesirable capital flight,"[13] in 2003, Venezuela adopted an exchange control system and created an agency in charge of approving transactions in foreign currency: CADIVI.[14] Consequently, a company that wishes to buy raw materials abroad, pay dividends to its shareholders or make any other transaction that requires the conversion of Bolivars ["**VEB**"] into US Dollars ["**USD**"] must obtain the approval of CADIVI.[15]

96. In addition, CADIVI is tasked with authorizing, *inter alia*, the repatriation of international investment capital; the remittal of international investment profits, earnings, and dividends; and the compensation of international investors for the expropriation of international investment dividends.[16]

The Venezuelan regulatory framework for expropriations: the LECUPS

97. Since 2002, the forcible acquisition of rights and properties belonging to private persons in Venezuela is regulated by the Law on Expropriation for Reasons of Public or Social Interest [*Ley de Expropiación por Causa de Utilidad Pública o Social* – "**LECUPS**"].[17] Given that this is a crucial law for expropriation procedures, some of its most relevant characteristics are described below.

98. Procedures under the LECUPS begin with an expropriation decree[18] that requires a prior declaration of public interest.[19] This decree can only be enforced in two ways:

- voluntarily, through an amicable settlement, before the expropriation proceedings begin or
- forcibly, authorized by the Judiciary.

[13] Exchange Resolution No. 1 of February 2003, published in Official Gazette No. 37,653 of 19 March 2003, Whereas Clause 1, Exhibit RLA-114.
[14] Exhibit RLA-114, Arts. 1 and 2; CADIVI was created in 2003 by Decree No. 2,330 of 6 March 2003 published in Official Gazette No. 37,644 of 6 March 2003, Exhibit RLA-115.
[15] CI, paragraph 49.
[16] Exchange Order No. 56 of 18 August 2004 published in Official Gazette No. 38,006 of 23 August 2004, Art. 2, Exhibit RLA-116.
[17] Law on Expropriation for Reasons of Public of Social Interest, published in Official Gazette No. 37,475 of 1 July 2002, Exhibit CLA-89.
[18] LECUPS, Art. 5.
[19] With certain exceptions, see LECUPS, Arts. 14, 15, and 16.

99. With regard to the amicable settlement, this phase allows the parties to reach an agreement on the valuation of the properties.[20] The owner has the opportunity to participate in the creation of an appraisal commission consisting of three experts:

- one designated by the expropriating entity,
- one by the owner, and
- one named by the parties by mutual agreement.[21]

If an agreement on the value of the expropriated property is not reached, the amicable settlement will come to an end and the expropriating entity may initiate a judicial procedure.[22]

100. If the amicable settlement is unsuccessful, the expropriating entity may resort to the courts to request the expropriation of the property in question.[23] The Court hearing the expropriation request "shall order publication of the edict in which the presumed owners shall be summonsed [....]."[24] After the party subject to expropriation presents its defense and an evidentiary hearing is held, the Judge will make a decision on the merits of the case, but not on the amount. This decision may be appealed before the Supreme Court of Justice.[25] Once the Court declares the need to acquire the property or right, the price will be settled based on the value established by the previously designated appraisal commission. If an agreement is not reached, the Judge must convene a second appraisal commission that will determine the fair price of the property.[26] This second appraisal may also be appealed before the Supreme Court of Justice. Once the appraisal is final, the expropriating entity will deposit the amount with the Court hearing the case and the property is formally handed over.[27]

101. There are two variations of the forcible enforcement authorized by the Judge:

- preliminary occupation, which may be allowed as a provisional remedy, and
- permanent occupation, which the Judge can only order after payment of the fair compensation.

102. Occupation prior to the transfer of title is provided for by means of an emergency procedure and is subject to the following requirements:

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[20] LECUPS, Art. 22.
[21] LECUPS, Arts. 19 and 22.
[22] LECUPS, Art. 22.
[23] Ibid.
[24] LECUPS, Art. 26.
[25] LECUPS, Arts. 22, 32, and 33.
[26] LECUPS, Art. 25.
[27] LECUPS, Arts. 45 and 46.

- Public works declared to be "of public and social interest" based on Art. 14 must have been declared a matter "of urgent implementation" by the expropriating entity in the text of the expropriation Decree itself.[28]

- The property must be valued by an appraisal commission for purposes of the preliminary occupation, "which shall be ordered by the court with jurisdiction to hear the expropriation proceedings, after the respective complaint is filed and provided the expropriating entity states the amount determined to be the fair price of the property."[29]

- The Judge hearing the expropriation proceeding must notify the owner and the occupants.[30]

- Before decreeing the preliminary occupation of the property, the Judge will order "notification of the owner and the occupants, if any, in order to conduct a judicial inspection to leave record of all factual circumstances that must be taken into account to set the amount of the fair compensation for the property in question."[31]

103. Lastly, Article 52 of the LECUPS recognizes another occupation measure called "temporary occupation." This occupation is an administrative act that may be issued by the Administration to perform specific activities with works declared to be of public interest, and cannot exceed six months.

4. THE ORIGINS OF THE INVESTMENT

104. The origin of the Claimant's presence in Venezuela dates back to the initial investments made by the OI subsidiaries that created OIdV and Favianca in 1956 and 1968, respectively (see paragraph 87). The Claimant acquired its direct shareholdings in these Companies on 31 December 2005 when it merged with Owens Illinois International B.V. a subsidiary of OI and the holder of those shares.[32]

105. At the time of the expropriation, the Companies belonging to the Claimant were the leaders in the Venezuelan glass container market.[33] In the production process, they used the know-how, technology and intellectual property belonging to Owens Brockway Glass Container Inc. ["**OBGC**"], a subsidiary of OI, under a technology transfer agreement entered into with OBGC, which stipulated the payment of substantial royalties.[34]

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[28] LECUPS, Art. 56
[29] Ibid.
[30] Ibid.
[31] LECUPS, Art. 57
[32] OIdV Share Register, Exhibit C-109; Favianca Share Register, Exhibit C-110.
[33] CI, paragraph 38; RII, paragraphs 43 and 221; CIV, paragraph 23; RV, paragraph 88.
[34] OBGC letter to OIdV dated 11 November 2010; Exhibit C-53; First witness statement of Enrique Machaen dated 30 July 2012 [hereinafter "**Machaen I**"] paragraph 17.

106. The Los Guayos plant (operated by OIdV) had six furnaces and 11 bottle molding machines.[35] The Valera plant (operated by Favianca) had three furnaces and six molding machines.[36] In addition, the Plants supplied their own electricity.[37] The efficiency of glass manufacturing plants is typically measured by the "pack-to-melt" ratio they achieve.[38] The Plants operated at a ratio of over 90%, which means that between the time [that the raw materials were melted] and the time that the finished glass containers were packed for shipment, less than 10% of the volume was lost—a very competitive result internationally.[39]

107. In addition to their advanced technology, the Plants had a highly qualified and specialized workforce:[40]

> "Given the complexity and nature of the operations, they had the potential to be dangerous if not properly carried out. That is why OIdV and Favianca always placed great emphasis on the proper training of the employees and on the implementation of strict safety precautions at the plants."[41]

108. The Companies were glass suppliers in the Venezuelan market for major brands such as Heinz, Kraft and Gerber, among others.[42] Its main customer was Polar, the major food sector group in Venezuela.

109. The Companies were the only ones in the glass industry with majority foreign ownership.[43]

5. THE EXPROPRIATION

110. The first news that the Bolivarian Republic intended to expropriate the Companies came out on 25 October 2010. There is no previous announcement or administrative act in the case record pointing to this possibility. That evening, then-President of Venezuela, Hugo Chávez, made a television broadcast announcing the expropriation of the Companies:

> "The expropriation of that glass company, what's it called?—Owens Illinois!—is already all set. Let it be expropriated. Elías [Jaua – Vice President of Venezuela], proceed.

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[35] Extracts from presentation: *OI Venezuela Country Overview* dated October 2008, pages 19 and 21, Exhibit C-7; Machaen I, paragraph 16; First witness statement of Luis Gómez dated 31 July, 2012 [hereinafter "**Gómez**"], paragraph 10; CI, paragraph 30.
[36] Ibid.
[37] Extract from presentation: *OI Venezuela Country Overview* dated October 2008, pages 19 and 21, Exhibit C-7; Machaem I, paragraph 24; CI, paragraph 31.
[38] The "pack-to-melt" ratio is a measure of efficiency used in the industry that measures the moment at which the raw materials are melted into a mixture and the moment at which finished glass containers are packed for shipment. Machaen I, paragraph 26.
[39] CI, paragraph 34; Machaen I, paragraph 26.
[40] Machaen I, paragraphs 18, 23, and 30; CI, paragraph 35.
[41] Machaen I, paragraph 30.
[42] HT, day 2, 6:20. CI, paragraph 33; Machaen I, paragraph 22.
[43] RV, paragraph 120.

Ownens-Illinois, a North American company that has been exploiting the workers here for years, destroying the environment there in .... there in .... in Trujillo. Go and see the mountains they've destroyed. And taking the Venezuelan people's money. Hitcher [Minister of the Environment], do an environmental study; all the environmental damage. Proceed as indicated, Vice President." [44]

The Expropriation Decree

111. The next day, 26 October 2010, the Respondent issued Presidential Decree No. 7,751 [the "**Expropriation Decree**"],[45] formalizing the emergency forcible acquisition[46]:

> "(...) of the movable properties, real properties and improvements presumably owned by the commercial company OWENS ILLINOIS DE VENEZUELA, C.A. used for the production, processing and distribution of glass containers in the aforementioned companies, essential for execution of the project 'STRENGTHENING OF THE PUBLIC SECTOR'S INDUSTRIAL CAPACITY IN THE MANUFACTURE OF GLASS CONTAINERS FOR THE VENEZUELAN PEOPLE,' aimed at carrying out the industrial activity involving the production and distribution of glass containers, as well as for the promotion of endogenous development and job creation, as specified below:
>
> A) Real properties, consisting of:
>
> The OWENS ILLINOIS DE VENEZUELA, C.A. Plant located on the Guaraca National Highway, Las Garcitas local road, opposite the Las Garcitas Shopping Centre, Los Guayaos, Carabobo State; and
>
> The Fábrica de Vidrios los Andes C.A. (FAVIANCA) plant, also known as the OWENS ILLINOIS VALERA PLANT, located in the Carmen Sánchez de Jelambi Industrial Zone in the Valera municipality of Trujillo State.
>
> B) The movable properties such as machinery, equipment and materials that form part of or are found inside the real properties identified above that are needed to execute the project "STRENGTHENING OF THE PUBLIC SECTOR'S CAPACITY IN THE MANUFACTURE OF GLASS CONTAINERS FOR THE VENEZUELAN PEOPLE."

[44] Video of President Chávez's expropriation announcement on 25 October 2010, Exhibit C-19.
[45] The Expropriation Decree was published in Official Gazette of the Bolivarian Republic of Venezuela No. 39,538 and entered into force the same day it was promulgated, 26 October 2010. Presidential Decree No. 7,751 dated 26 October 2010, Official Gazette No. 39,538 dated 26 October 2010, Art. 1, Exhibit C-24.
[46] Expropriation Decree, Art. 4, Exhibit C-24.

> C) The means of transportation used in the processes executed by OWENS ILLINOIS DE VENEZUELA needed to execute the project.
>
> D) Any other tangible assets forming part of the commercial company OWENS ILLINOIS DE VENEZUELA C.A. needed to execute the project "STRENGTHENING OF THE PUBLIC SECTOR'S INDUSTRIAL CAPACITY IN THE MANUFACTURE OF GLASS CONTAINERS FOR THE VENEZUELAN PEOPLE."[47]

112. The "Whereas" Clauses of the Expropriation Decree made mention of the following facts:

- "that the company Owens Illinois has been engaged in practices that result in a violation of the exercise of free competition, thus affecting other producers,"[48]
- that it is the duty of the State to adopt such measures as may be needed to prevent the harmful and restrictive effects of the abuse of dominant position and other conducts that might degenerate into monopolistic practices contrary to the basic principles of our social rule of law,"[49] and
- "the national sector dedicated to the production and marketing of glass containers is a priority in the economic policy of endogenous development promoted by the National Government for the purpose of creating jobs and guaranteeing a proper level of welfare for the population."[50]

113. The expropriated properties "will become the assets of Venezuela, through the MINCIT."[51] It also indicates that the PGR will be in charge of handing the expropriation procedure provided for in the LECUPS up to effective transfer of the ownership of the properties."[52]

114. On the morning of 26 October 2010, the Respondent sent armed contingents of the Bolivarian National Guard [*Guardia Nacional Bolivariana* – "**GNB**"] to monitor access to the Plants and safeguard the expropriated properties.[53] The GNB remained at the facilities for several weeks.[54] A

[47] Expropriation Decree, Art. 1, Exhibit C-24.
[48] Expropriation Decree, "Whereas Clause" 5, Exhibit C-24.
[49] Expropriation Decree, "Whereas Clause" 6, Exhibit C-24.
[50] Expropriation Decree, "Whereas Clause" 7, Exhibit C-24.
[51] Expropriation Decree, Art. 2, Exhibit C-24
[52] Expropriation Decree, Arts. 2 and 3, Exhibit C-24
[53] CI, paragraphs 4 and 58; RII, paragraph 106; Pimentel I, paragraph 13; Sarmiento I, paragraph 38.
[54] CI, paragraph 68.

few hours later, the workers arrived at the Plants and began protesting against the expropriation outside the facilities.[55]

6. THE TRANSITION PERIOD

115. On 27 October 2010, MINCIT Minister Ricardo Menéndez, joined by Deputy Minister Yuri Pimentel, met with OIdV's board of directors, represented by Messrs Enrique Machaen and Luis Gómez at MINCIT headquarters in order to make a first attempt at contact following the announcement of the measure:[56]

> "The Minister also explained how the Ministry wanted to proceed from that point on. He did not expect the Ministry to take over management of the Plants immediately and abruptly. Rather, at the same time the Ministry went about pursuing the legal procedures for the eventual management and forced acquisition of the Plants' assets, OIdV and its personnel would continue to operate the Plants as always, while the Ministry would be limited to supervising OIdV's actions without interfering in its operations, but would, as needed, provide OIdV any support required by its employees. To that end, supervisory bodies appointed by the Ministry would be set up the following day and would also begin to organize the transition for managing the Plants."[57]

116. During these exchanges, the Minister stated that "any measure taken in an attempt to stop the Plants from operating would be considered an act of sabotage."[58]

117. That same day, General Orlando Rodríguez of the GNB held a meeting with workers at the Los Guayos plant. Given that the meeting was unsuccessful, the General called a meeting for that same afternoon at the regional headquarters of the GNB.

118. Following this a transition period began, initially led by Deputy Minister Pimentel, who assumed responsibility on a *de facto* basis[59] until January 2011 when responsibility was taken over by Mr. Alejandro Sarmiento.[60]

119. The first objective was for the Plants to continue operating normally; Respondent therefore decided that OIdV and Favianca's workers should continue to work at the facilities.[61] The second objective was for all of the knowledge and experience in managing and operating the Plants to be

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[55] CI, paragraph 60; RII, paragraphs 87, 107, 119, and 125; Pimentel I, paragraph 15; Witness statement of Noé Pazos dated 1 July 2013 [hereinafter, "**Pazos**"], paragraph 22.
[56] *Gobierno y Owens Illinois se reunieron: La empresa accede a colabourar* [Government and Owens Illinois Meet: The Company Agrees to Cooperate], Noticias 24, 27 October 2010, Exhibit R-58; *Menéndez informa sobre primera reunion entre el Gobierno y Owens* [Menéndez Reports on First Meeting between the Government and Owens], Video Clip, 27 October 2010, Exhibit R-99.
[57] Pimentel I, para. 29.
[58] Pimentel I, para. 33; Machaen I, para. 38.
[59] Pimentel I, paras. 10 and 54.
[60] Sarmineto I, para. 5.
[61] HT, day 3, 73: 4-16.

transmitted to a new management team. To do this Respondent implemented what was termed "Operation Mirror" in the Plants, which consisted of forming a management team comprised of five members of the work force, distinguishing the areas of priority and identifying certain essential profiles.[62] Each of these individuals was required to shadow the corresponding OIdV manager in order to acquire the necessary know-how for managing the Plants autonomously:

> "Operation Mirror" consisted of designating "mirrors," or people who would work with us to learn our everyday duties. The objective of the "mirrors" was to learn from us how to manage the operations of the Valera Plant in order to guarantee that the plant operated normally.[63]

The preventive occupation measure ordered by INDEPABIS

120. On 27 October 2010, INDEPABIS (the Venezuelan Consumer Protection Agency), went to Favianca to "carry out [a] preventive temporary occupation measure."[64] The following day it returned to Favianca "in order to appoint the Management Board that would oversee the company's operations, administration, use and protection…"[65]

121. In addition, on 29 October 2010, INDEPABIS visited the Los Guayas Plant in order to conduct an audit.[66] The members of this State agency performed their inspections in the presence of the GNB.[67] After determining purported violations of the Law for the Defense of People's Access to Goods and Services, INDEPABIS ordered a "preventive temporary occupation and operation measure for a term of ninety (90) days [...]."[68]

122. INDEPABIS also set up a temporary management board ["**JAT**"] for OIdV in order to supervise its operation, management and use.[69]

Negotiation of the Collective Agreement

123. Over a period of several days in November 2010, the Ministry of Labor of the Republic visited the Los Guayos Plant and required OIdV's management to participate in the negotiation of a

[62] The priority areas selected were: logistics, sales and marketing, human resources, finance, and plant management. Sarmiento I, para. 21.
[63] Pazos, para. 30. *See also*, Sarmiento I, paras. 8 and 21, in relation to the Los Guayos Plant.
[64] INDEPABIS Act of 27 October 2010, Exhibit C-38.
[65] INDEPABIS Act of 28 October 2010, Exhibit C-45.
[66] CI, para. 61.
[67] RII, paras. 124 and 126.
[68] INDEPABIS Act of 29 October 2010, Exhibit C-47.
[69] INDEPABIS Acts of 27, 28, and 29 October 2010, Exhibits C-38, C-45, and C-47, respectively.

collective labor agreement with members of the plant's worker's union.[70]

The provisional remedy ordered by the First Administrative Court

124. On 18 November 2010 the Office of the Attorney General filed a petition with the First Administrative Court for a provisional remedy consisting of the occupation, possession and use of the movable and immovable properties and improvements presumably owned by OIdV and Favianca.[71]

125. On 20 December 2010, the First Administrative Court:

- ordered the requested provisional remedy in favor of Respondent for the occupation, possession and use of the property owned by the Companies, and

- authorized the creation of an *ad hoc* management board ["***ad hoc* Management Board**"], designated by MINCIT, to manage, organize and oversee the Companies.[72]

MINCIT Resolution

126. As a result of the Judgment handed down by the First Administrative Court, and by implementing Article 8 of the Expropriation Decree, MINCIT issued Resolution No. 34 of 11 March 2011.[73] This resolution formed the *ad hoc* Management Board to manage "the companies OWENS ILLINOIS DE VENEZUELA, S.A., the OWENS ILLINOIS DE VENEZUELA, C.A. plant and FABRICA DE VIDRIOS LOS ANDES, C.A. (FAVINCA) [*sic*]" with Mr. Sarmiento as its representative.[74] Article 2 of this resolution set forth the Board's duties:

> "The appointed board shall have the fundamental objective of directing operations for management, organization and oversight of the above-named companies in order to guarantee the continuity of production, distribution and sale of glass containers for essential products. They are therefore empowered to execute any acts and documents inherent in the day-to-day management and necessary for the normal operation of the companies, following compliance with

[70] Ministry of Labor Acts dated 23 November and 3 December 2010, Exhibit C-60. Letter from OI to Respondent dated 8 December 2010, Exhibit C-51, para. 5.
[71] Ruling of the First Administrative Court of the Caracas Metropolitan Area of 20 December 2010, Exhibit C-63.
[72] *Ibid.*
[73] MINCIT Resolution No. 034 of 11 March 2011, published in Official Gazette No. 39,634 of 15 March 2011, Exhibit C-72. The *ad hoc* Management Board consisted of Messrs Jorge Ortega, Alexander Sarmiento, Antonio Cordero, Leonardo Hernández, Martin Álvarez, Reyes Butrón, and Carlos Alvarado.
[74] *Ibid.*, Articles 1 and 3.

> the procedures set forth under law, and any other matter entrusted to it by the Ministry of People's Power for Science, Technology and Intermediate Industries […]."

Court orders of the Enforcement Courts

127. On 16 and 25 March 2011, respectively, the Enforcement Courts for the Los Guayos and Valera municipalities:

- enforced the provisional remedy authorized by the First Administrative Court for the occupation, possession and use of the Companies' assets;
- installed the *ad hoc* Management Board; and
- ordered that the Companies' bank accounts could only be used with the express authorization of the *ad hoc* Management Board.[75]

128. During the proceeding to enforce the provisional remedy, the representatives for OIdV noted that OIdV:

> "is not a party to any judicial or administrative proceeding brought by the Bolivarian Republic of Venezuela in relation to the aforementioned expropriation of assets. Owens Illinois de Venezuela C.A. is entitled to the benefit of legal protection provided for both under Venezuelan law and international law (through the Agreement on Encouragement and Reciprocal Protection of Investments between Venezuela and the Kingdom of the Netherlands)."[76]

129. Despite his estimate that the transition period would end at the end of March 2011,[77] Mr. Sarmiento asked the Enforcement Courts for a 30-day extension for each Plant:

> "[…] in order to guarantee continuity of administrative and accounting procedures, the board orders a transition period of no greater than thirty (30) consecutive days, for which it will instruct the representatives of [OIdV and Favianca, respectively] to do everything necessary to avoid a total or partial shutdown of operations, as well as with respect to [continuing] payroll payments, operating, administrative, maintenance and investment expenses or expenses of any other nature."[78]

130. Once those 30 days had expired, Mr. Sarmiento asked OIdV for an additional extension until 30 April 2011, with respect to five specific directors.[79]

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[75] Court orders of 16 and 25 March 2011, Exhibits C-75 and C-77, respectively.
[76] *Ibid.*
[77] Sarmiento I, para. 20.
[78] Court orders of 16 and 25 March 2011, p.3, Exhibits C-75 and C-77, respectively.
[79] The employees receiving the request included: José Henriquez, Sol Pedrosa, Daybel Morales, Marilena Montagner, Rodolfo Angulo. Letter from Mr. Sarmiento to OIdV representatives dated 18 April 2011, Exhibit C-82.

131. The transition period finally came to an end on 30 April 2011, when the Companies ceded control to Venvidrio.

7. THE CREATION OF VENVIDRIO

132. On 5 April 2011, then President Chávez authorized the creation of Venvidrio, a State-owned company affiliated with MINCIT, which would retain all the industrial assets previously owned by the Companies and take charge of the production and sale of glass containers.[80]

133. Venvidrio, with Mr. Sarmiento as President,[81] directly took over management of the Plants[82] on 30 April 2011, bringing the transition period to a close: at that time, the formation of the new boards of directors had been completed and the process of employer substitution for the workers (who were transferred over to Venvidrio's payroll) [83] had been finalized.

134. Once Venvidrio had been formed and a bank account had been opened in its name, Respondent requested that the Companies transfer all available cash funds into Venvidrio's account.[84] After informing Respondent about the bank accounts that were held in their name and the balances available at the time in those accounts,[85] the Companies transferred all of their cash to Venvidrio's account.[86]

8. EXPROPRIATION PROCEDURE

135. The formal transfer of ownership of the Companies' assets is still pending, because the expropriation procedure under the LECUPS continues its course in the Venezuelan courts and a final decision has not been handed down to date.[87]

136. The Office of the Attorney General commenced the amicable settlement phase provided for under the LECUPS in late 2010[88] and proposed that the parties sign an Official Record of

[80] Presidential Decree No. 8,134, Official Gazette No. 39,649 of 5 April 2011, Exhibit C-78.
[81] CI, para. 87; Sarmiento I, para. 3.
[82] RII, paras. 99 and 167.
[83] The employment contracts for those OIdV workers who wished to work for Venvidrio were transferred under the "employer substitution" procedure on 26 April 2011, RII, para. 166; Sarmiento I, para. 27.
[84] RII, paras. 163 and 168; Letter from OIdV to Respondent dated 13 May 2011, Exhibit C-85; Letter from OIdV to Respondent of 25 January 2012, Exhibit C-101.
[85] Letter from OIdV to Respondent dated 13 May 2011, Exhibit C-85.
[86] Letter from OIdV to Respondent dated 25 January 2012, Exhibit C-101. The only exception to this was "the minimum amount of Bs. 34.28 in an account held by Fabrica [sic] de Vidrios de los Andes, C.A. in Banco Mercantil, which was not able to be transferred due to bank-related administrative reasons."
[87] RII, para. 167.
[88] RII, para. 265.

Commencement of Amicable Settlement on 17 November 2010.[89] Shortly thereafter, on 9 December 2010, OIdV wrote to Minister Menéndez informing him that the Companies:

> "would not participate in the expropriation procedures initiated by the Office of the Attorney General of the Republic or sign the proposed official record for purposes of said procedures because they disagree with its terms." [90]

OIdV also contended that fair compensation should be determined based on the provisions of the BIT.[91]

137. In view of the fact that the parties were unable to reach an amicable agreement, on 14 March 2011, the Office of the Attorney General initiated a legal procedure under the LECUPS, filing an expropriation petition with the First and Second Administrative Courts requesting:

> "the expropriation of the movable and immovable properties belonging to the commercial companies OWENS ILLINOIS DE VENEZUELA, C.A. and FÁBRICA DE VIDRIOS LOS ANDES, C.V. (FAVIANCA)."[92]

138. On 5 April 2011, the same day that Venvidrio was created, the Fact-Finding Panel of the Supreme Court of Justice issued a decision in which it admitted the expropriation petition filed by the Office of the Attorney General and ordered that notice be served to the owners of the Companies so that the respective judicial inspections could be conducted.[93]

139. The expropriation proceeding was subsequently joined with the case involving the provisional remedy that had been authorized by the First Administrative Court.[94] Currently, the Second Administrative Court is still hearing the expropriation proceedings.[95]

9. OTHER EVENTS OCCURRING AT THE TIME OF THE EXPROPRIATION

INPSASEL audit and fine

140. On 22, 23, 29 November, and 2 December 2010, Respondent sent its employment health and safety agency, INPSASEL to the Los Guayos Plant. INPSASEL performed an exhaustive

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[89] Official Record of Commencement of Amicable Settlement dated 17 November 2010, Exhibit R-4.
[90] Letter from OIdV to Minister Menéndez dated 9 December 2010, Exhibit R-5.
[91] *Ibid.*
[92] *See* Decision of the Fact-Finding Panel of the Supreme Court of Justice dated 5 April 2011, Exhibit 114 of the Report of Jose Ignacio Hernández G., legal expert appointed by Claimant, issued on 25 June 2013 [hereinafter, "**Hernández**"].
[93] *Ibid.*
[94] Hernández – Exhibit 111.
[95] Hernández, para. 46.

investigation and imposed on Claimant requirements for improving certain health and safety measures.[96]

141. Specifically, on 22 and 23 November 2010, INPSASEL conducted an inspection in the Los Guayas plant to determine whether OIdV had met certain requirements that had been previously imposed.[97] INPSASEL's reports showed specific irregularities that OIdV had failed to correct. On 25 August 2011, a report proposing sanctions was issued and on August 30, 2011 INPSASEL initiated a sanctions proceeding against OIdV due to the alleged commission of five violations of the Organic Law on Prevention, Working Conditions and the Work Environment ["**LOPCYMAT**"].[98]

142. OIdV responded on 16 September 2011, denying any accusation and requesting the proposed fine be dismissed.[99]

143. Finally, on 28 February 2012, INPSASEL issued an administrative decision indicating that OIdV had not complied with certain provisions of the LOPCYMAT, and imposing a fine of VEB 10,988,550 for such violation.[100]

Envidrio's report

144. In order to carry out audits that would allow the Plants' conditions to be verified and to obtain help for its management, Respondent sought the assistance of Envidrio, a Uruguayan glass producer.[101] Envidrio accessed the Plants and issued a preliminary status report in January 2011 ["**Envidrio Preliminary Report**"].[102] Envidrio's presence at the Plants was strongly opposed by OIdV, who perceived its "technology, technical procedures and know-how to be under threat." [103]

Visits by third-parties to the Plants

145. MINCIT authorized third parties to visit the Plants against the Companies' wishes.[104]

[96] INPSASEL Records of 22, 23, and 29 November and 2 December 2010, Exhibit C-59.
[97] INPSASEL Records (Los Guayos Plant) of 22, 23, and 29 November and 2 December 2010, Exhibit C-59.
[98] INPSASEL Record of Initiation of 30 August 2011, Exhibit C-93; Notice of INPSASEL to OIdV dated 30 August 2011, Exhibit C-94.
[99] Brief submitted by OIdV to INPSASEL on 16 September 2011, Exhibit C-95.
[100] INPSASEL Administrative Decision dated 28 February 2012, p. 21, Exhibit C-102.
[101] Sarmiento I, para. 53.
[102] Envidrio Preliminary Report, Exhibit R-14.
[103] Letter from OIdV to Respondent dated 12 November 2010, Exhibit C-54.
[104] CV, para. 89; Letter from OIdV to Respondent dated 12 November 2012, p. 2, Exhibit C-54; HT, day 3, 76:7-26.

146. In January 2011, Respondent allowed certain administrators from the Chinese company Sunrise Technology into [the Plant].[105]

147. Some months after the Transition Period ended, Venvidrio signed a cooperation agreement with Envidrio, the primary objective of which was to create the Strategic Alliance of Glass Companies [**"Alenvidrio"**]:[106]

> "Under the framework of Alenvidrio, Venvidrio and Envidrio have planned the eventual construction of a glass production plant in the Brazilian state of Rio Grande do Sul."[107]

148. Furthermore, Venvidrio was in contact with the Brazilian beer maker Companhia de Bebidas das Americas [**"Ambev"**][108] with its sights sets on a possible collaboration, specifically the joint construction of a plant in Brazil.[109] Venvidrio carried out certain glass exports to Brazil.[110]

Difficulties with CADIVI

149. In 2008 and 2009, the Companies made a request to CADIVI for authorization to acquire foreign currency for distribution of the dividends declared in May 2008, November 2008 and June 2009.[111] Two years later, on 8 September 2011, CADIVI denied the three requests, concluding that the dividends referred to in the request had already been paid to the Companies' shareholders.[112] This prevented the Companies from being able to transfer dividend payments to Claimant at the exchange rate set by the government.[113] Claimant used the parallel foreign currency market—with a higher exchange rate than the official rate—to take the dividends out of the country.[114]

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[105] RIV, para. 132 (7); Exhibit C-69, HT, day 3, 75:17 – 77:33.
[106] "*Uruguay y Venezuela concretan primera alianza estratégica para producción de vidrio*," [Uruguay and Venezuela Create First Strategic Alliance for Glass Production"] Uruguay Sustentable, dated 6 December 2011, Exhibit C-99, CI, para. 115.
[107] Sarmiento I, para. 68.
[108] Announcement made by the Venezuelan Ministry of Foreign Affairs with respect to the execution of an agreement between the Venezuelan company Venvidrio and Brazil's Ambev on 6 June 2011, Section 11, Exhibit C-88.
[109] Sarmiento I, para. 70; RII, para 236.
[110] *Venvidrio Los Guayos ha exportado 191 millones de envases a Brasil* [Venvidrio Los Guayos Has Exported 191 Million Glass Containers to Brazil], Noticias 24 Carabobo, 21 August 2013, Exhibit C-243.
[111] Request from OIdV to CADIVI No. 797382 dated 23 May 2008, Exhibit NAV-112; Request from OIdV to CADIVI No. 11414277 dated 8 September 2011, Exhibit NAV-113; Request from FAVIANCA to CADIVI No. 11575749 dated 5 August 2009, Exhibit NAV-114.
[112] Administrative decision of 8 September 2011 on request No. 7973822, Exhibit R-15; Administrative decision of 8 September 2011 on request No. 11414277, Exhibit R-16; Administrative decision of 8 September 2011 on request No. 11575749, Exhibit R-17.
[113] CI, para. 49.
[114] CV, para. 284.

Tax credit

150. At the beginning of 2011, SENIAT acknowledged that OIdV had VEB 28,199,986 in tax credits.[115] In May 2011, however, SENIAT did not acknowledge these tax credits. Its refusal was based on the fact that OIdV had not paid the first instalment of its estimated income tax for the following year, 2011.[116] The claim arising from these facts was withdrawn by Claimant.

10. COMPENSATION NEGOTIATIONS

151. From January to July 2011, the Companies and Respondent held four meetings to determine the compensation due.[117]

152. At the meeting on 17 March 2011, Claimant presented an appraisal for somewhat over USD 1 billion for 100% of the Companies.[118] At the following meeting on 11 July 2011, Respondent made a counter-offer of USD 100-120 million,[119] contending that the appraisal was based on a study performed by RSM León, Delgado & Asociados.[120] The meeting ended with no agreement on the compensation owed.[121]

153. Over four years have passed since the Plants were expropriated, and Respondent has still not paid Claimant any compensation.[122]

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[115] Claimant's tax credit document for OIdV dated 16 March 2011, Exhibit C-76.
[116] CI, para. 349.
[117] CI, para. 122; RII, paras 277-284; CIV, para. 100; RV, para. 181 (1).
[118] Summary of the meeting of 17 March 2011, pp. 1-2, Exhibit C-162; RII, para. 282; CIV, para. 107; RV, para. 181(3); Second Witness Statement of Alexander Sarmiento dated 23 August 2013 [hereinafter, "**Sarmiento II**"], para. 37; Second Witness Statement of Yuri Pimentel dated 20 August 2013 [hereinafter, "**Pimentel II**"], paras 27-29.
[119] RII, paras. 282 and 283; CIV, para. 110; Second Witness Statement of Enrique Machaen dated 1 July 2013 [hereinafter, "**Machaen II**"], para. 44; Summary of the meeting of 11 July 2011, Exhibit C-164, pp. 1-2; CV, para. 78; Pimentel II, para. 76; Sarmiento I, para. 80.
[120] RSM Appraisal of OIdV, Exhibit R-22, p. 3.
[121] CIV, para. 110.
[122] CV, para. 75, note 119.

V. JURISDICTIONAL OBJECTIONS

154. Respondent has put forward two objections to the jurisdiction of the Tribunal. (1.) First, it claims that the Tribunal lacks jurisdiction to hear this dispute on the basis that Claimant has failed to prove the existence of an investment under the terms set forth in Article 1(a) of the BIT and Article 25(1) of the ICSID Convention. (2.) Second, Respondent alleges that the Tribunal lacks jurisdiction to hear claims for damage to Claimant's business outside of Venezuela.

155. On the other hand, Claimant believes the Tribunal does in fact have jurisdiction to hear this dispute, based on its having proven the existence of an investment pursuant to Article 1(a) of the BIT and Article 25(1) of the ICSID Convention. Furthermore, Claimant submits that the Tribunal must consider damage to Claimant's business outside of Venezuela as a background matter and, accordingly, must dismiss the second jurisdictional objection put forward by Respondent.

1. NONEXISTENCE OF THE INVESTMENT

A. Respondent's position

156. In its pleadings, Respondent has argued that the Tribunal lacks jurisdiction, claiming that the requirement for an investment to exist has not been met under both Article 1(a) of the BIT and Article 25(1) of the ICSID Convention. Respondent claims that the term "investment"

- (a) has an inherent and objective meaning,
- (b) requires that a contribution be made,
- (c) Article 1 of the Venezuela-Netherlands BIT does not negate the inherent and objective meaning of the term "investment."

157. Respondent further alleges that OIEG (d) has made no contribution whatsoever for its investment and that (e) there is already a proceeding with the very same object, which prevents the Tribunal from hearing this case.

a. The term "investment" has an inherent and objective meaning

158. Respondent has argued throughout this proceeding that the term "investment" has an inherent and objective meaning, both under Article 1(a) of the BIT and Article 25(1) of the ICSID

Convention,[123] which meaning entails making a contribution.[124]

159. According to Respondent, this principle is also applicable to treaties—such as the Venezuela-Netherlands BIT—that contain a non-exhaustive definition of the term "investment" based on a classification of assets.[125] The expression "every kind of asset" contained in Article 1(a) of the BIT cannot include all conceivable investments, particularly if the object and purpose set forth in the Preamble of the BIT is taken into consideration.[126]

160. Respondent strongly opposes a literal reading of Article 1(a) of the BIT, which based on its understanding Claimant relies on, as it asserts that it violates Article 31 of the Vienna Convention on the Law of Treaties ["**VCLT**"].[127] Respondent contends that Article 31(3) of the VCLT also favors an objective and intrinsic interpretation of the term "investment" in Article 25 of the ICSID Convention.[128]

161. Respondent finds Claimant's arguments that would attempt to deny the existence of an objective and intrinsic definition of the term "investment" to be irrelevant and flawed.[129] The main arguments Respondent relies on to refute Claimant's objections are noted in the paragraphs below.

162. First, Respondent denies that the definition of investment set forth in the BIT determines the scope of jurisdiction referred to under Article 25 of the ICSID Convention,[130] and advocates for the application of the double keyhole test,[131] aimed at determining

- whether the activity in question is covered by the parties' agreement and
- whether it meets the requirements of the ICSID Convention.[132]

163. Second, Respondent submits that a literal interpretation of Article 1(a) of the BIT conflicts with Article 31 of the VCLT, as it does not take into account the Preamble of the BIT, which Respondent recognizes as its object and purpose, and therefore cannot be considered to be a good-faith interpretation.[133] Respondent insists that interpreting Article 1(a) of the BIT by adhering to the current meaning that ought to be attributed to the term "investment" is the same as

[123] RI, Sections II.B.1-2; RIII, para. 9 *et seq.*; RV, para. 30.
[124] RIII, paras. 11-15; RV, para. 33.
[125] RI, para. 23; RIII, paras. 58 and 74; RV, para. 31.
[126] RI, paras. 20-25; RIII, para. 74; RV, para. 31.
[127] RI, para. 25; RV, paras. 31 and 39-40.
[128] RV, para. 32.
[129] RIII, paras. 16-30.
[130] RV, para. 36.
[131] *Ibid.*
[132] RI, para. 30.
[133] RV, para. 40.

interpreting the term according to its objective and inherent meaning.[134] And, although it accepts that Claimant's investment is included under a literal reading of Article 1(a) of the BIT,[135] it asserts that both the literal and historical interpretation lead to an absurd interpretation that all assets are considered investments.[136]

164. Finally, Respondent submits that what is truly important is not to determine whether ownership of the assets constitutes an investment, *per se*, but whether in this case Claimant's merely passive holding of shares, without having made a contribution, amounts to an investment.[137] To support its position, Respondent relies on several awards, and specifically on *Malicorp*.[138]

b. The inherent and objective meaning of the term "investment" requires a contribution as a *sine qua non*

165. Respondent alleges that the inherent and objective meaning of the term "investment" requires a contribution as a *sine qua non*, which Claimant did not, in its view, make. According to Respondent, this fundamental principle has been confirmed by several tribunals in their analysis of the Convention and bilateral investment treaties,[139] regardless of whether they used the intuitive or deductive method to define the concept of investment.[140]

166. Respondent claims that Claimant has not met the *sine qua non* requiring a contribution and therefore an investment does not exist, which in turn implies that the Tribunal lacks jurisdiction to hear this dispute. Respondent recommends that the Tribunal take its lead from the decision in the *KT Asia* case, which establishes that the lack of a contribution is enough for the tribunal to reject jurisdiction over the dispute.[141]

c. Article 1 of the Venezuela-Netherlands BIT does not negate the inherent and objective meaning of the term "investment"

167. Respondent contends that Article 1 of the Venezuela-Netherlands BIT does not negate the inherent and objective meaning of the term "investment," which requires that a contribution be made as a *sine qua non*.[142] Following the reasoning in the *KT Asia* award, Respondent alleges that

[134] *Ibid.*
[135] RIII, para. 78.
[136] RV, para. 42.
[137] RV, para. 43.
[138] RV, para. 45, *Malicorp*, para. 110.
[139] RI, Section II.B.3; RIII, Section II.A.2; RV, para. 46.
[140] RV, para. 47.
[141] RV, para. 57, citing *KT Asia*, para. 206.
[142] RV, para. 58.

the requirements for an investment to exist are the same in the BIT and the Convention, given that the BIT does not add any additional requirements.[143] According to Respondent, the expressions

- "by [the investor],"
- "of the [investor]" and
- "investments made"

used in the BIT must be interpreted in the sense that the investor must make a contribution in order for an investment to exist.[144]

d. Claimant has made no contribution

168. Respondent argues that Claimant has failed to prove that it made any contribution to acquire its shares in OIdV, and that an investment therefore does not, legally speaking, exist.[145]

169. Respondent submits as a counter-argument to Claimant's allegations that:

170. First, Respondent rejects Claimant's argument contending that it is the "investment" that must "contribute," as it finds this to be a flawed interpretation of the contribution requirement.[146]

171. Second, Respondent believes that the contributions Claimant alleges it has made (through its control of the reinvestment of retained profits through contributions made by the predecessor shareholders of OIdV or by taking on liabilities in the form of the predecessor shareholders' debts) are not in keeping with modern case law, are factually erroneous and must be rejected by the Tribunal.[147]

- it cannot be accepted that Claimant made a contribution through its own inaction; in other words, through the decision not to take benefits from OIdV. Such benefits belong to OIdV and Favianca, not to Claimant, a situation that could be looked at differently had dividends been distributed and had Claimant reinvested such dividends in OIdV, which did not occur;[148]

- OIEG could not have relied on the contributions of its predecessors because the prohibition against the lifting of the veil goes both ways,[149] and because contributions by

[143] RV, para. 59.
[144] RIII, para. 86; RV, para. 60.
[145] RI, paras. 10 and 66-67; RIII, Section II.B; RV, para. 65
[146] RV, paras. 56 and 66.
[147] RV, para. 67.
[148] RV, para. 68.
[149] RI, paras. 66-70.

Claimant's non-Dutch predecessors would be irrelevant for purposes of determining jurisdiction;[150]

- the liabilities assumed by OIEG in the merger, through which it acquired OIdV's shares, would amount to nothing more than financial engineering and could not be considered commitments or contributions for acquiring an investment;[151] moreover, the debt has allegedly not been paid and the mere holding of assets, without a contribution, has been rejected by the tribunals in *Quiborax* and *KT Asia*.[152]

171. Finally, Respondent deems any of Claimant's shares in OIdV and Favianca that were registered in the Direct Foreign Investment Registry as irrelevant, on the grounds that:[153]

- the mere registration has no bearing on establishing whether an investment was made,
- it cannot be considered an acknowledgment that Claimant has made an investment under the terms of Article 1(a) of the BIT and Article 25(1) of the ICSID Convention, and
- registration only has any effect in the internal legal system.

173. As such, Respondent submits that Claimant has failed to prove that it made it any contribution for its investment. Pursuant to the objective and inherent meaning of the term "investment" established in Article 1(a) of the BIT and Article 25(1) of the ICSID Convention, Claimant would not have an investment, and therefore, the Tribunal lacks jurisdiction to decide the case.

d. The existence of a proceeding with the same object

174. Respondent has informed the Tribunal of the existence of another investment arbitration filed by Favianca and OIdV against Venezuela (ICSID Case No. ARB/12/21), in its letter dated 27 November 2012. Although the Tribunal denied Respondent's request to suspend this arbitration in its letter of 30 November 2012, it left open the possibility that the parties might in the future request a procedure to assess the possible consequences of the parallel proceeding.

175. In its Preliminary Objections, Respondent insisted on reserving all rights accorded to it with regard to the initiation of the parallel proceeding and its impact on the present dispute. Nevertheless, Respondent has not re-invoked ICSID Case No. ARB/12/21 in this proceeding.

[150] RV, para. 69.
[151] RV, para. 71.
[152] RV, para. 72, citing *Quiborax*, paras. 228-33, 237 and *KT Asia*, para. 204.
[153] RV, para. 73.

B. Claimant's position

176. Claimant submits that the Tribunal has jurisdiction to hear the claims put forward in this proceeding. First, Claimant insists that its investments comply with the definition of "investment" under both (a) Article 1(a) of the BIT and (b) Article 25(1) of the ICSID Convention. Secondly, and regardless of the applicable legal definitions, Claimant argues that it has proven that (c) it did make an investment in Venezuela.

a. Claimant made an investment pursuant to Article 1(a) of the BIT

177. Claimant asserts that Respondent's objections that OIEG did not make an "investment" because it has not made a "contribution" must be rejected:

- first, because they are not supported by the language of the BIT, and
- second, because case law does not require a shareholder to "make" a "contribution," given that Article 1(a) of the BIT considers that the rights derived from ownership of the shares are an "investment."

178. Claimant contends that an orthodox application of the principles governing the interpretation of international treaties leaves no doubt that Claimant's investments in Venezuela are covered by Article 1(a) of the BIT.[154] In particular, Claimant argues that its investments constitute:[155]

- assets in the form of shares in OIdV and Favianca pursuant to the *chapeau* in Article 1(a) of the BIT,
- the rights derived from ownership of such shares pursuant to Article 1(a)(ii) of the BIT, and
- its stake as a majority shareholder in the movable and immovable property of OIdV and Favianca under Article 1(a)(i) of the BIT.

179. OIEG therefore contends that Respondent's attempt to distort the clear language and scope of Article 1(a) must be rejected by the Tribunal.[156]

180. Claimant asserts that current case law[157] does not require a shareholder to "make" a "contribution" in order for its investment to be valid under Article 1(a) of the BIT.[158]

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[154] CII, paras. 16 and 18; CIII, paras 26-28.
[155] CII, para. 16.
[156] CII, para. 17; CIII, para. 23.
[157] CII, para. 20. For this it relies on cases such as *Mobil*, paras. 162-166; *CEMEX*, paras. 150-158; and *Fedax*, paras. 29-31.
[158] *See also* CII, paras. 20 and 28-29.

Furthermore, Claimant relies on *Mobil*,[159] *Inmaris*,[160] *Saluka*,[161] and *Mytilenos*[162] to:

- reinforce its argument that the definition of "investment" under a bilateral investment treaty does not implicitly require that an investment be made as a *sine qua non*, except in the case of an explicit requirement,[163] and

- to distinguish between making payments that could be considered a "contribution" and the existence of "shares," that in and of themselves constitute an investment and are the basis on which jurisdiction is established.[164]

181. Claimant refers to the decision by the tribunal in *CME* to reject Respondent's argument that in order for the acquisition of shares by a predecessor to be considered an "investment," it is necessary for the investor to have made a contribution, regardless of the fact that the companies acquired did not need a contribution given their success and profitability.[165]

182. In addition, Claimant asserts that any possible requirement with regard to making a contribution can only be related to an "investment" and not the "investor,"[166] which argument relies on cases cited by Respondent such as *Deutsche Bank*, *Ulysseas* and *Caratube*.[167]

183. Finally, Claimant relies on numerous decisions by arbitral tribunals[168] based on bilateral investment treaties and the ICSID Convention to support the position that possessing shares is, in itself, an "investment" in accordance with Article 1(a) of the BIT.[169]

184. Claimant contends that given the lack of evidence provided by Respondent of the need to "make" a "contribution" in order for an "investment" to exist, the Tribunal must assert its jurisdiction, without the need to examine the existence of an "investment" under Article 25(1) of the ICSID Convention.[170] It is the definition of investment under the BIT that determines and controls the

[159] CIII, para. 24, citing *Mobil*, para. 165.
[160] CII, para. 22, citing *Inmaris*, para. 130.
[161] CII, para. 23, citing *Saluka*, paras. 210-211.
[162] CII, para. 22, citing *Mytilenos*, paras. 126-130.
[163] CII, para. 17.
[164] CII, para. 25; CIII, para. 61; HT, day 1, 89:13-19.
[165] CII, para. 26; *see CME*, paras. 384.
[166] HT, day 1, 90:15-28; CIII, paras. 73 and 75.
[167] CIII, para. 74, citing *Deutsche Bank*, para. 295; *Ulysseas*, para. 251; and *Caratube*, para. 360.
[168] For example, *AMT*; *Suez/AWG*; *Mobil*; *IBM*.
[169] CIII, paras. 30-37.
[170] CII, paras. 38 and 48.

meaning of the term "investment" in the ICSID Convention.[171]

b. Claimant has satisfied all additional requirements for establishing an "investment" under Article 25(1) of the ICSID Convention

185. Claimant denies the existence of a strict "double keyhole test" that according to Respondent is necessary to confirm the existence of an "investment" under both Article 25(1) of the Convention and under the BIT.[172] Moreover, even if the ICSID Convention did impose any sort of additional requirement to determine the existence of an "investment," Claimant claims to have complied with such requirement.[173]

186. First, Claimant reiterates that Venezuela's argument that Article 25(1) of the Convention requires that a "contribution" be "made" in order for an "investment" to exist is groundless,[174] especially given the history of the drafting of the Convention.[175]

187. OIEG argues that, unlike the strict interpretation of the criteria to determine an "investment" in the *Salini* case,[176] more recent decisions of arbitral tribunals[177] confirm that the characteristics of an "investment," which can be a "contribution," are not jurisdictional requirements, but are at best "characteristics." Furthermore, any analysis of such "characteristics" inherent in an "investment" must be comprehensive and take into account the specific circumstances of the case.[178]

188. In addition, Claimant contends that case law confirms that Article 25(1) of the ICSID Convention "must not be subject to an unduly restrictive interpretation"[179] and that a tribunal must have "[very] compelling reasons"[180] to set aside the definition of investment agreed by the parties in the BIT.[181]

189. Therefore, Claimant submits that Respondent's insistence that a "contribution" must be "made" as a jurisdictional requirement under Article 25(1) of the ICSID Convention has no basis under Law, and reiterates that there can be no doubt that holding shares is an investment.[182] It therefore

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[171] CII, paras. 39-48.
[172] CIII, paras. 29 and 32-42.
[173] CII, para. 49; CIII, para. 44.
[174] CII, para. 52 and 53.
[175] CII, paras 54-57.
[176] *Salini*, para. 52-57.
[177] Claimant examines this in CII, paras. 60 *et seq*., the decisions in *MCI*, para. 165; *Biwater*, paras. 312-314; *MHS*, para. 80; *Inmaris*, para. 129; *Pantechniki*, para. 43; *see also*, CIII, paras. 49-51.
[178] CII, paras 68-74; CIII, para. 44.
[179] CIII, para. 30, citing *Ambiente Ufficio*, para. 479.
[180] CIII, para. 30, citing *SGS v. Paraguay*, para. 93; *Inmaris*, para. 130.
[181] CIII, paras. 45-48,
[182] CII, para. 75.

rejects the application of the *Quiborax* case, cited by Respondent, as it claims that the fact in that case do not correspond to this case.[183]

c. Claimant made an "investment" in Venezuela

190. Claimant contends that Respondent has invented a *sine qua non* requirement in order for jurisdiction to exist: that a contribution must be made.[184] In Claimant's view, Respondent has not been able to explain what the requirement for such contribution would consist of, given that such jurisdictional requirement does not actually exist.[185] Given that Claimant and its investments have made various contributions, Respondent would be forced to seek out a sufficiently limited definition of contribution to exclude all such investments.[186]

191. Claimant argues that it has proven that it has allocated numerous "economically valuable resources"[187] to OIdV and Favianca, as majority and controlling shareholder[188] of certain companies that operate large industrial facilities, generate significant production and cash flow and pay significant amounts of taxes in Venezuela,[189] and also, more specifically, by:[190]

- reinvesting profits retained in the Companies,[191]
- assuming the debts of Claimant's predecessor shareholders in OIdV and Favianca,[192]
- making payments through its predecessor shareholders of capital increases in OIdV and Favianca.[193]

192. In summary, Claimant submits that even if the Tribunal were to find that there is a *sine qua non* requirement to make a contribution, it is clear that OIEG has met that requirement.[194] Claimant therefore asks the Tribunal to dismiss Respondent's first jurisdictional objection.

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[183] CII, paras. 76 and 77.
[184] CV, para. 15; HT, day 1, 88:19-23.
[185] CIII, paras. 58 *et seq.*
[186] CV, para. 16.
[187] Definition of "contribution" initially given by Respondent in its RI, para. 41.
[188] CIII, para. 13.
[189] CIII, para. 14; HT, day 1, 93:5-15.
[190] CV, para. 17; CIII, paras. 55 and 56.
[191] *See* CII, paras. 80 and 81; CIII, para. 87 *et seq.*
[192] *See* CIII, paras. 94 and 95; HT, day 1, 94:6-7.
[193] *See* CII, paras. 82-86; CIII, para. 92.
[194] CV, para. 18.

C. The Analysis of the Tribunal

193. In its first objection, the Bolivarian Republic denies that the Claimant is the owner of a protected investment in Venezuela. It submits that, in order for an investment to exist, it is not sufficient that the shares be listed in Art. 1(a) of the BIT, but rather that it is essential that the investor have made a contribution. OIEG never made a contribution of its own, since it acquired its interests in the Companies in a corporate restructuring—the only contribution was made by other companies of the OI group, predecessors of OIEG; and the Claimant could not benefit from it.[195]

194. The Claimant holds the opposite view: it is the owner of shares that confer control over two large glass-producing companies in Venezuela; the contribution exists and was made by the companies of the OI Group from which it acquired the shares; and it is not necessary that each successive investment holder make a new contribution.[196] OIEG adds that, even assuming *arguendo* that the opposite position were accepted, it would also have met the requirement; since it has reinvested undistributed profits generated by the Companies and has assumed financial obligations of its predecessor amounting to more than US$100 million.

195. In order to resolve this dispute, the Tribunal will first (a) establish the proven facts, then (b) set out the law, (c) define the concept of investment and, finally, (d) analyze the counter-arguments of the Respondent.

a. Proven facts

196. The OI group's investment in Venezuela dates back to the middle of the 20th century: OIdV was organized in 1958 and Favianca in 1968.

OIdV

197. At the time of the organization of OIdV in 1958, Owens Illinois of Panama S.A. contributed Bs. 9,400 and acquired 94%.[197] Since then, OIdV has been controlled continuously by companies of the OI group and has been engaged very actively in business, operating a large plant for the manufacture of glass.[198] It is undisputed that, both at the time of its organization and on subsequent occasions, companies of the OI group made the necessary contributions of capital, of technology and of know-how to permit the development of its manufacturing and business activities.

198. OIEG, the Claimant here, was founded in 1999 in Holland and from its creation until today has been 100% owned by the OI group. It has acted—directly or through affiliates—as a holding

[195] HT, day 1, pp. 77 et seq.
[196] Id., pp. 94 et seq.
[197] CII, paragraph 83; Exhibit C-118, pp. 3-4
[198] CI, paragraph 18.

company for the shares of the group. At least since 2002, OIEG has owned—among many other companies—of 100% of the capital of a second Dutch holding company, Owens Illinois International B.V.

199. In 2002, this subsidiary (Owens Illinois International B.V.) acquired 73.97% of the equity of OIdV upon liquidation of the Venezuelan holding company OIV Holding C.A., which at that time held the shares.

Favianca

200. The history of the holding of the interest in Favianca is similar. In 1973, OIdV acquired an interest in Favianca; and in 1982 it capitalized reserves until its interest reached 70%.[199] Since that time, Favianca has always been controlled by the OI Group, has engaged in the manufacturing of glass containers and has been the recipient of multiple contributions of capital, technology and know-how.

201. In 2002, Owens Illinois International B.V.—the Dutch company holding the interest in OIdV—also acquired a 32% interest in Favianca and did so in the same corporate transaction (the liquidation of OIV Holding C.A.).

202 Since 2002, the shares that are the subject of this litigation, the 73.97% of OIdV and the 32% of Favianca, are controlled through a Dutch company of the OI group.[200]

Simplification of the Dutch Structure

203. In late 2005, the OI group decided—for reasons that are not in the record—to merge its subsidiaries OIEG and Owen[s]-Illinois International B.V. The merger was accomplished as follows:[201]

- OIEG was the surviving company;
- Owens Illinois International B.V.[202] was the absorbed company and was terminated;
- Owens Illinois International B.V. made a general transfer of all of its assets and liabilities to the surviving company, OIEG; among the assets were the interests in OIdV and in Favianca, which became the property of the surviving company;
- Since OIEG now owned 100% of the capital of the absorbed companies, there was no need to increase its capital.

[199] Minutes of meeting of shareholders of Favianca, 26 February 1982, Exhibit C-142.
[200] Accounts of Owen Illinois International B.V., Exhibit c-233, pa. 6.
[201] According to the certificate of merger granted by the Rotterdam Notary van Eijck, 30 December 2005, Exhibit C-235.
[202] In the merger, a second company in the group, OI Glass Holdings B.V., was also absorbed.

204. In summary: OIdV and Favianca, the two Venezuelan Companies that are the subject of this litigation, have been part of the OI group since their organization in the mid-twentieth century. In 2002 the OI group already owned the Venezuelan shares through OIEG, the Dutch company that is the Claimant here. It happened, however, that the control was indirect, by way of a second company, also Dutch, a 100%-owned subsidiary named Owen-Illinois International B.V.

205. In late 2005, OI made the decision to simplify the chain of ownership. To this end, it decided that the 100%-owned subsidiary would be merged into its parent company. Thus, Owen-Illinois International B.V. was terminated; and OIEG succeeded to direct ownership of the OIdV and Favianca shares (shares that it already controlled).

Reserves 2006-2009

206. During the 2006-2009 fiscal years, OIdV and Favianca continued their business activities in Venezuela and generated significant earnings, distributing a portion in the form of dividends, with the rest remaining in both companies as undistributed reserves. The Claimant has confirmed,[203] and the Respondent has not questioned, that the total amount of such additional reserves created during those four fiscal years (reduced by dividends paid) reached nearly US$100 million, of which approximately US$73 million corresponded to OIEG.

b. Applicable law

207. Investments protected by the BIT are defined in Article 1(a), which states as follows:

"For purposes of this Agreement:

a) The term "investments" shall include all types of assets, including without limitation:

(i) Real and personal property, as well as any other rights *in rem* in all types of assets;

(ii) Rights arising from shares of stock, bonds and other forms of interest in companies and joint ventures;

(iii) Ownership interests in cash, other assets and any other benefit having economic value;

(iv) Rights in intellectual property, technical processes, goodwill, and know-how:

(v) Rights granted under public law, including rights to prospect, explore, extract, and exploit natural resources."

[203] CI, paragraph 80.

208. The BIT contains a very broad notion of "investments": it defines them by reference to "all types of assets," and then offers a non-exhaustive list of certain classes of assets that in all events would constitute investments.

209. Both parties accept that the shares that the OI group held in OIdV and Favianca are contemplated in this list:

- On the one hand they are "real and personal property" [protected by paragraph (i)] and

- On the other they are "rights arising from shares of shock . . . in companies" [protected by paragraph (ii)].[204]

210. *Prima facie* it would appear thus indisputable that the shares of OIdV and Favianca ought to be considered as investments protected by the BIT. However, the difficulties arise from Article 25 of the Convention, which mandates the following:

> "The Centre's jurisdiction shall extend to disputes of a legal nature that arise directly from an investment between a Contracting State . . . and the citizen of another Contracting State and which the parties have agreed in writing to submit to the Centre. (…)."[205]

211. The Bolivarian Republic argues that the term "investment," as it is used in Article 25 of the Convention, has an intrinsic and objective meaning and that this meaning requires as a condition *sine qua non* that the investor have made a contribution—since Article 1 of the BIT did not, nor can it, negate this requirement. On the contrary: the Republic argues that Article 1 of the BIT even assumes the same intrinsic and objective definition of investment that emerges from Article 25 of the Convention. In the instant case, the Respondent[sic] itself did not make any contribution; it cannot benefit from the contributions made by its predecessors; and therefore it is not the owner of a protected investment.

c. The Concept of Investment

212. Respondent's objection raises one of the *quaestiones vexatae* of investment arbitration: the concept of the protected investment. And more precisely: what occurs when States include very broad definitions of the concept of investment in their treaties and agree to have all disputes with investors resolved through ICSID arbitration? How does this practice find a balance with the requirement contained in Article 25 of the Convention, which restricts the Centre's jurisdiction to "any legal dispute" that arises "directly out of an investment"?

213. This difficulty is exacerbated because the Convention does not include a definition of the concept of investment. This was a decision made consciously by its drafters; a very generic definition was included in the first version of the text ("*any contribution of money or other assets of economic value for an indefinite period, or…not less than five years*"), but was abandoned due to lack of

[204] HT, day 1, 85:3-6; CII, paragraph 78.
[205] Emphasis added by the Court

agreement. Ultimately, the decision was made to leave the Convention totally devoid of any definition as to what one should understand by investment.[206]

214. The parties have argued at great length about the requirements of Article 25 of the Convention and its relationship with Article 1(a) of the BIT concerning the existence of an objective and inherent concept of investment, about the need for the investor to have made a contribution, about the characteristics such contribution must have and if it is enforceable for the investment or the investor.

Does an objective and inherent concept of investment exist?

215. The first question to decide is whether a unique, objective and inherent concept of investment exists.

216. The Tribunal agrees with the Bolivarian Republic that the concept of "investment" used in Article 25(1) of the Convention does have an objective and inherent meaning.[207] The Centre's jurisdiction has certain limits that cannot be breached, that States cannot overstep. Disputes submitted to ICSID arbitration must be legal in nature and must "aris[e] directly out of an investment." States are given the latitude to define the concept of investment, but they cannot distort it. They cannot make an investment dispute out of something that by all accounts lacks this nature.

217. In this case the States have delimited the investments they wish to protect in Article 1(a) of the BIT, and they have done so broadly, agreeing that the term "investment" shall comprise every kind of asset, and then offering a non-exhaustive list of examples articulated around five categories:

- Moveable and immoveable property,
- Investments in companies and joint-ventures,
- Credit rights,
- Industrial or intellectual property,
- Government concessions.

218. Not all assets, based on the simple fact that they are included in the non-exhaustive list of examples, constitute an investment. Such assets must be a true investment in order to meet the objective and inherent characteristic of all investments.[208] To provide an example that will lend

[206] C. Schreuer, *et alii*, "The ICSID Convention," 2nd edition, p. 115; *see also Ambiente Ufficio*, para. 448, *et seq.*
[207] RV, para. 32.
[208] The conclusion that the concept of investment has inherent and objective content is now commonly accepted by case law: *KT Asia*, para. 165, *Global Trading*, para. 43; *Quiborax*, para. 214.

clarity to the question: think about a citizen of a foreign country who is entitled to collect a pension. The pensioner's credit right could be understood as something that would fall under the third category of the assets mentioned in Article 1(a) of the BIT.[209] However, the right to receive a pension does not constitute an investment and accordingly should not be understood as being included under the BIT's scope of protection, or within the scope of jurisdiction of ICSID arbitration, as defined by Article 25(1) of the Convention.

219. Having set forth this conclusion, the Tribunal agrees with Claimant[210] in that States enjoy wide discretion to define which investments they wish to protect through a BIT and that Article 25(1) of the Convention should not be subject to a restrictive interpretation. If two States have included a certain asset within a list of investments, a tribunal should only exclude it if it fails to meet the requirements of the objective and inherent concept of investment, if there is a compelling reason to do so.[211]

220. This interpretation is reinforced by the way the historical negotiations leading up to the adoption of the Convention in its current form took place. Although the negotiating parties failed to reach an agreement on a definition of the concept of investment, the solution they chose was to omit it from Article 25(1), and compensate for this liberal concession with the introduction of Article 25(4), a provision that was absent in the first versions, and that allows States to restrict the Centre's *ratione materiae* jurisdiction to certain financial transactions and assets through a simple notice.[212] The Bolivarian Republic has not availed itself of this option.[213]

Delimitation of the concept

221. What then, does that objective and inherent concept of the term "investment" entail?

222. An unequivocal answer is elusive given that "investment" is not a legal concept, but an economic process that may encompass very diverse legal realities—ranging from the ownership of property or a stock portfolio to control of a company, to a utilities concession agreement. The Law provides for and has the capacity to define obligations, credit rights, legal transactions, securities, contracts, ownership, possession—it is even able to delimit the concept of business. Yet the Law is of little help in defining a complex and economic process such as carrying out an investment.[214] All a legal scholar can aspire to do is establish a catalogue of characteristics that would prove

[209] The category includes, using the English version, which is clearer, "title to other assets."
[210] CII, para. 30.
[211] *See Ambiente Ufficio*, para. 470; *Inmaris*, para. 130.
[212] *Ambiente Ufficio*, para. 452.
[213] But even the effects of that notice are relative insofar as they refer, in essence, to information on those matters about which the contracting State does not wish to negotiate the protection of an investor.
[214] *Ambiente Ufficio*, para. 427.

to be of some assistance in the task of discerning whether or not an asset, in a specific situation, fits within the economic category.[215]

223. It is essential in this task to make a preliminary classification within the generic concept of investment based on the asset chosen, as there is a paradigmatic and clearly varied category of assets that leaves no room for doubt, while uncertainty remains with regard to the other types of assets.

Types of assets

224. The most common category of investments are in corporate assets, i.e., situations in which the foreign investor is the corporate owner of an enterprise located in the receiving State (enterprise should be interpreted as any organization having capital and labor that produces goods or services to be placed on the market); this alternative, frequently referred to as direct investment, can be formalized either by creating a branch office, or controlling a company created in the destination country, which is the entity that in turn engages in the corporate activity.

225. The second category is comprised of all other assets, those which do not give the investor any ownership of an enterprise in the destination country. Situations within this group can be highly varied in nature. In investment case law, conflicts typically arise when the purported investor has executed contracts with the receiving State—for construction,[216] services,[217] supply of goods—or holds negotiable instruments issued by the State itself.[218]

Application to this case

226. The first category, corporate assets, represents the paradigm of investors that deserve protection and are unquestionably included under both the BIT and the Convention.

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[215] There are different lists of characteristics typical of investments, like the one in *Salini*, para. 52, and the one in C. Schreuer, (*vide*: "The ICSID Convention," 2nd edition, p. 158). In a nutshell, the required characteristics are contribution, duration and risk (*see Quiborax*, para. 219). It is important to clarify that the required characteristics are merely guidelines: it is possible for an asset to be an investment even when it does not meet all the characteristics, and vice versa.
It is doubtful that the characteristics have the same meaning in different types of investment; thus, for instance, the risk in a corporate investment is the possibility of obtaining benefits or incurring losses, while in an investment in public debt the risk is that the State will not pay—by all accounts two very different uncertainties. And the requirement of a contribution, as understood in a corporate asset, makes little sense in other assets such as public debt or corporate obligations.
The *Salini* test was designed to discern whether or not a construction contract constitutes an asset. Its usefulness in other situations is doubtful. For difficulties in applying the *Salini* test to public debt *see Ambiente Ufficio*, para. 482.
[216] *Salini; Pantechniki.*
[217] *SGS*; *MHS.*
[218] *Abaclat*; *Ambiente Ufficio.*

227. Indeed, the second paragraph of Article 1(a) of the BIT includes among the protected assets "shares…and other kinds of interests in companies."

228. And corporate assets also include, by their very nature, investments for purposes of Article 25(1) of the Convention. The ICSID Convention was enacted precisely to promote and protect these types of investments. The Preamble of the Convention invokes, as the first justification for the Treaty, the need for "international cooperation for economic development." The creation of a local company by a foreign investor is precisely the most direct and immediate way to favor economic development in the receiving State. The foreign investor contributes money, goods or industry, creates an organization in the destination country, generates employment, pays taxes, introduces goods or services to the local market—all of which are wealth-creating activities.

Conclusion

229. Article 25(1) of the Convention defines those disputes that may gain access to ICSID arbitration and does so by requiring that such disputes "aris[e] directly out of an investment." The concept of investment utilized in that provision has an objective and inherent meaning that States cannot distort by classifying as investments those relationships that do not meet the necessary requirements.

230. The scope and characteristics of the objective and inherent concept of investment are open to debate, and whether certain uncommon assets are part of this or not: it is legitimate to ask whether a mere sales agreement, or the acquisition of a corporate obligation, or simply owning an apartment for weekend use meet the objective and inherent requirements in order to be considered an investment.

231. The same question cannot be posed with regard to corporate assets located in the destination country, and especially if the foreign investor manages the company. The acquisition and holding of this type of asset represents the quintessential investment, and, by nature, complies with the objective and inherent requirements of an investment. Consequently, there is nothing preventing two States that are negotiating a BIT and want to define the scope of protection from including them in the assets protected. If they do so, as have the Bolivarian Republic and the Netherlands, they cannot be deemed in any way to be distorting the concept of investment or violating Article 25(1) of the Convention.

232. In this arbitration, OIEG, through its controlling shares in OIdV and Favianca, owns corporate assets located in Venezuela, consisting of two large glass manufacturing plants, and has managed these at least since 2002.[219] Assets such as these, expressly included in the list contained in the BIT, also comply, by their very nature, with the requirements of Article 25(1) of the Convention. The purpose and aim of the BIT and the Convention are to promote economic development and wealth creation in the destination country. Corporate investments in which the foreign investor

[219] The OI group has been managing them since long before, but as the focus is only on OIEG, it did not acquire its shares in the Companies until 2002.

contributes money or goods to create or acquire a company, manages it with its own technology and maintains its ownership for a long period of time, are those that most clearly contribute so that such purpose and aim may be achieved.

d. Counterargument of the Bolivarian Republic

233. Respondent alleges in contrast to this conclusion that OIEG has not made any contribution whatsoever: it allegedly acquired the shares in the Venezuelan Companies through a restructuring completed in 2005, to which no contribution was made, and has failed to make any contribution since that date.

234. The Tribunal does not share this view.

235. The existence of a contribution by the foreign investor in the form of a monetary contribution, goods or industry, constitutes one of the characteristics that, as a general rule, assets must meet in order to be classified as investments.[220] The Tribunal is willing to accept that in a case such as this one, in which OIEG claims to be the owner of corporate assets in Venezuela, this requirement could be relevant: the ownership of corporate assets in the destination country requires the foreign investor to have made some contribution, at least at the very beginning, when the company started operating or made the acquisition.

236. Yet the Tribunal harbors no doubt that OIEG, *hic et nunc*, has more than complied with that requirement.

Cash Contribution

237. The most common way for a foreign investor to contribute to the company in the destination country is by means of a cash contribution.

238. It is indisputable that the OI group, from the formation of the Companies in the last century, has made several cash contributions. It would thus seem that the requirement is met.

239. The Bolivarian Republic, however, argues that OIEG, which has separate legal status and Dutch citizenship, and invokes it to benefit from the BIT, may not benefit from the contributions made by other companies in the group, which lack those characteristics, before OIEG became the owner of the shares.[221]

240. It is not necessary for the Tribunal to address this argument brought by the Respondent, since even if it accepted for the sake of argument that the contributions made by previous owners do not qualify (a matter that the Tribunal does not address), it is a fact that OIEG has also made its

[220] For certain assets, such as the acquisition on a secondary market of negotiable instruments, it is arguable as to whether there is a true contribution.
[221] RIII, para. 103.

own cash contributions after its acquisition of the Venezuelan Companies.

241. Indeed, during fiscal years 2006-2009 OIEG has provided cash to the companies, when it did not withdraw part of the profits generated, and allowed them to be kept as reserves. The total amount retained (excluding the dividends paid to shareholders) amounts to almost USD 100 million, of which USD 73 million correspond to OIEG. When a shareholder decides not to collect profits in full, but to leave them—in whole or in part—with the company, it is waiving a right and making a contribution of cash to the company, which is enriched to the extent of the amount that the shareholder relinquished.

242. It is true that the funds provided by the foreign investor to Venezuelan Companies would have been generated in the destination country itself. But this is irrelevant:

- first, because there is no requirement that the funds be of foreign origin;[222]

- and also, because the investor could have repatriated the dividends, since the BIT grants it the right to do so, in order to immediately reinvest them in the company; all that has happened is that both cash flows have been compensated.

243. The Respondent also raises one last argument: OIEG could not have made a contribution by means of its own inaction—that is, by not withdrawing the profits generated in the form of dividends.[223]

244. The argument is not persuasive: it is not true that the investor has remained inactive. The creation of a reserve requires an agreement of the company's governing bodies, controlled by the OIEG, in which it decides to distribute only part of the profits, and apply the rest to reserves.

Contribution of Effort

245. In addition, OIEG has been making, since becoming the owner of the investment, a contribution in the form of effort: the management of Venezuelan Companies. This is not an insignificant contribution, since one of the main goals that is sought with foreign investment is to improve the management skills of domestic companies.

246. In this case, OIEG has been managing OIdV and Favianca since 2002, first indirectly through its subsidiary Owens Illinois International B.V., and directly since 2005. This management activity has been made by participating and voting in shareholders' meetings, and appointing directors and managers of the Companies. The results have been very successful: under the management

[222] C. Schreuer, et al.: "The ICSID Convention: A Commentary," 2nd edition, 2009, p. 136, with reference to the opinion of Mr. Broches during the drafting of the treaty.
[223] RV, para. 68.

of OIEG, the Venezuelan Companies have expanded their activity, increased the employment they offer, and expanded their ability to earn profits.

247. In short, the Tribunal is satisfied that the Claimant has made a significant contribution to the Venezuelan Companies during the period in which it has controlled them. This contribution has been reflected in its own efforts in managing the Companies and in a cash contribution, which exceeds USD 73 million.

e. Coda

248. There are situations in which a foreign investor, although it is the owner of a protected investment, does not enjoy the protection of the corresponding treaty. This happens in cases in which the investor has not acted in good faith, has engaged in abuse of rights, has fraudulently benefited from a corporate structure, or is only the formal owner of the investment but has made no investment.

249. The Respondent does not allege that the Claimant has not acted in good faith, has engaged in abuse of rights, or has fraudulently benefited from a corporate structure. In addition, the Tribunal does not see evidence that these situations could have occurred.

250. The Respondent, however, has made a special reference to an award in which the Arbitral Tribunal would have established that a lack of contribution is sufficient to deny the existence of investment and its own jurisdiction: *KT Asia*. Actually, that case can be clearly distinguished from this case.

KT Asia

251. The facts in *KT Asia* are the following:

> Mr. Ablyazov was the ultimate owner of multiple companies through trustees and straw men, who were the ones who formally claimed to be the owners of the securities. These persons acted on behalf of Mr. Ablyazov, but kept this situation secret. Mr. Ablyazov himself was never formally a shareholder in any of the companies, and, therefore, a group of companies never existed. The claimant, KT Asia, had acquired the shares of BTA (the company that was the object of the alleged expropriation) from two other companies controlled by Mr. Ablyazov for a nominal price, which it never actually paid. KT Asia never injected capital or made any contribution for the benefit of BTA, neither during the acquisition nor afterward.

252. Based on those facts, the tribunal in *KT Asia* held that the claimant had not made any contribution in connection with the alleged investment, and that it had neither the capacity nor the intention of

doing so in the future. Therefore, the tribunal ruled that there was no investment for purposes of article 25(1) of the Convention.[224]

253. *KT Asia* is part of a long list of cases in which the tribunals rejected the claimants' standing to sue, because they had only disbursed a nominal value for the investment, which showed that they were mere trustees, straw men, or intermediaries.[225]

254. This factual situation bears no relation to the one in this arbitration. In this case, the Claimant belongs to a group of companies that historically has made important contributions to the Venezuelan Companies; it has legitimately acquired shares during the liquidation of a Venezuelan holding company belonging to the group, and since then it has managed the Companies and made significant contributions of capital when it reinvested a significant portion of the dividends generated.

Mobil

255. In fact, the nucleus of fact of this dispute is more similar to the one in *Mobil*, a case in which the claimant decided to restructure in order to incorporate a Dutch company into the chain of ownership and benefit from the BIT between the Netherlands and Venezuela. The Bolivarian Republic raised a jurisdictional defense, arguing that the restructuring implied an abuse of rights; the tribunal rejected it with regard to the disputes arising after the taking of control. In its argument, the tribunal stated the following:

> *"190. It thus appears to the Tribunal that the main, if not the sole purpose of the restructuring was to protect Mobil investments from adverse Venezuelan measures in getting access to ICSID arbitration through the Dutch-Venezuela BIT. This choice was considered as "logical," taking into account the double taxation agreements concluded by the Netherlands and the activities that Exxon Mobil already had in that country.*
>
> *191. Such restructuring could be "legitimate corporate planning" as contended by the Claimants or an "abuse of right" as submitted by the Respondents. It depends upon the circumstances in which it happened."* [226]

256. In the specific circumstances of that case, the tribunal held that the restructuring performed by *Mobil* actually constituted *"legitimate corporate planning."*[227]

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[224] *KT Asia*, para. 206.
[225] *Phoenix*, para. 119; *Caratube*, par. 435; *Quiborax*, para. 232; *Saba*, paras. 121 and 147.
[226] *Mobil*, para. 190-191.
[227] See also *Saluka*, paras. 229 and 230.

2. DAMAGE TO THE CLAIMANT'S BUSINESS OUTSIDE VENEZUELA

A. Introduction

257. In its Statement of Claim, OIEG sought USD 123,849,648 for the possible losses that it could suffer as a result of the entrance of Venvidrio in the Brazilian market.[228] OIEG argued that:

- Respondent allowed third parties access to the Plants on numerous occasions and therefore allowed third parties total access to its intellectual property, *know-how* and technical processes.

- Venvidrio executed a cooperation agreement with one of the visiting companies, Uruguayan Envidrio. The aim of the alliance was to jointly produce, exchange technology and knowledge, and expand the exports of glass containers to the Brazilian market.

- In 2011, Venvidrio executed agreements with Brazilian beer producer, Ambev, and with the Ecuadorian government to supply them with glass containers.

- OIEG had a 55% share of the Brazilian market for the sale of glass containers, and according to the calculations of its expert, it could end up losing 9.5% of its market share.

258. In its Closing Brief, Claimant adjusted the amount of its claim for damages suffered outside of Venezuela to USD 50,566,759.

B. Respondent's Position

259. Venezuela has insisted that the Arbitral Tribunal lacks jurisdiction to rule on the damages to Claimant's businesses outside Venezuela because:

- The claim is based on assets that are not owned by Claimant;[229] and

- Because Claimant has not proven the existence of any damage or loss, and without damage there can be no dispute.[230]

260. As the Bolivarian Republic explains, Claimant is not the owner of the technology, *know-how* and technical processes used in the Companies. Therefore, Venezuela argues that:

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[228] CV, para. 323.
[229] RI, Section III.A.1; RIII, Section III; RV, para. 76.
[230] RI, para. 84.

- The intellectual property of another company of the group is not an "investment" for the purpose of art. 1 of the BIT and the owner thereof, OBGC (which is not part of the present arbitration) cannot be considered an "investor";[231]

- OIEG lacks standing and cannot have suffered any damage whatsoever, derived from the treatment that Respondent may have given to the intellectual property acquired.

261. Therefore, Respondent argues that the Arbitral Tribunal lacks jurisdiction to determine whether Respondent acquired the intellectual property used by the Companies in accordance with the Law.[232]

262. Moreover, Venezuela alleges that the damages suffered by Claimant outside Venezuela are speculative[233] and have not materialized.[234] Venezuela relies on several decisions of international tribunals[235] to argue that when a dispute has not crystallized, there is no dispute whatsoever to settle.

263. Finally, Respondent believes that the alleged damages related to assets that do not belong to Claimant are not covered by the BIT, and therefore asks that the Tribunal declare lack of jurisdiction to rule with respect thereto.

C. Claimant's Position's Position

264. Claimant opposes the argument put forth by Venezuela that the Tribunal lacks jurisdiction to rule on its claims for damages suffered by its businesses outside Venezuela.

265. Claimant alleges that the damages it suffered are a direct result of the illegal actions of Venezuela in expropriating the Companies.[236] Claimant asserts that in the present proceeding, it is not even claiming part or all of the "(colossal) amount" that the intellectual property of OBGC represents, rather only the damage suffered as a result of the illegal actions of Venezuela.[237]

266. Finally, Claimant believes that the concession of full[238] compensation for the damages it suffered indirectly is a matter of substance and not jurisdiction.[239] Therefore, it asks the Tribunal to

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[231] RV, para. 78.
[232] RV, para. 79.
[233] RI, para. 85.
[234] RI, para. 89.
[235] *Mariposa Development Company*, p. 338, 341; *Metalclad*, para. 66; RI, paras. 89-91.
[236] CII, Section III; CIII, Section VIII; CV, para. 20.
[237] CIII, para. 100; CV, para. 20.
[238] CIII, paras. 101-104.
[239] CV, para. 21.

reiterate the conclusion adopted in paragraph 29 of Procedural Order No. 1 and reject the second objection to jurisdiction raised by Respondent.

D. The Analysis of the Tribunal

267. The Tribunal reiterates the decision that it adopted in paragraph 29 of Procedural Ruling No. 1:[240] The determination of harm is intrinsically linked to the existence of a breach. Therefore, Defendant's second objection cannot be separated from the substance of the dispute. The Tribunal will address this claim once the existence of an expropriation is found and in the context of the determination of the compensation due.

3. CONCLUSION

268. In conclusion, the Tribunal rejects the two jurisdictional defenses raised by Venezuela, and rules that the Centre has jurisdiction and the Tribunal itself has jurisdiction to hear all the issues raised in this proceeding and rule on the substance of the dispute.

[240] Procedural Ruling No. 1: "29. Defendant's second objection concerns a claim by Plaintiff about alleged harm suffered outside Venezuela. The determination of harm is intrinsically linked to the existence of a breach. Therefore, Defendant's second objection cannot be separated from the substance of the dispute, and it is not possible to make a preliminary rejection of the objection. The rejection *in limine* of Plaintiff's claim for harm suffered outside Venezuela would imply a possible risk of prejudging, since the Tribunal would be deciding matters before the parties had the opportunity to fully address them." [The Tribunal's translation]

VI. LIABILITY

1. APPLICABLE LAW

269. The law that applies to Claimant's requests must be settled in accordance with the provisions of the BIT and, if applicable, with the provisions of Article 42(1) of the ICSID Convention.

270. Article 9(5) of the Netherlands-Venezuela BIT provides as follows:

> "The arbitral award shall be based on:
>
> - the law of the Contracting Party concerned;
> - the provisions of this Agreement and other relevant Agreements between the Contracting Parties;
> - the provisions of special agreements relating to the investments;
> - the general principles of international law; and such rules of law as may be agreed by the parties to the dispute."

271. The Arbitral Tribunal shall then first apply Venezuelan Law and the provisions of the BIT itself and in the absence of other agreements between the Netherlands and Venezuela or special agreements relating to the investment by Claimant—supplement them with the applicable general principles of international Law.

272. Article 42(1) of the Convention provides as follows:

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

273. The sources referred to in this provision do not differ substantially from the provisions in Article 9(5) of the Netherlands-Venezuela BIT: agreements between the State and the investor, Venezuelan Law and the rules of international law, including the BIT itself.

274. The order in which applicable sources are listed is not the same in each of the sources. This, however, is not relevant, as the relation among these sources is not hierarchical but based on specificity.

Considerations in connection with Claimant's requests

275. The Tribunal shall now analyze the claims made by Claimant on the merits, following the order in which Claimant proposed them in its filings.

276. In its analysis of the claims, the Tribunal has taken into consideration the abundant and extensive documents filed by the Parties and all of the factual and legal arguments in support of each of their claims. Nevertheless, in this Award the Tribunal shall only expressly refer to the arguments it deems crucial for its decision.

2. BREACH OF ARTICLE 6 OF THE BIT: UNLAWFUL EXPROPRIATION

277. The main cause of action of Claimant is the fact that the Bolivarian Republic of Venezuela, through the actions and omissions of its government entities, has unlawfully expropriated the Claimant's investment in violation of Article 6 of the BIT. Respondent, in turn, denies the unlawfulness of the expropriation and argues that it was conducted in compliance with international Law.

2.1. Claimant's Position

278. Claimant argues that the expropriation conducted by Respondent is unlawful as it does not comply with the requirements of Article 6 of the BIT and, thus, it is entitled to be "fully compensated" for its investment.[241] Claimant specifically argues that: (i) the expropriation was not in the public interest; (ii) the expropriation was arbitrary, contrary to Venezuelan Administrative Law and violated the Companies' right to due process of law; (iii) the expropriation was discriminatory in nature, and (iv) Respondent has not paid any form of compensation.

(i) The expropriation was not in the public interest

279. Claimant considers it demonstrated that the expropriation was not conducted in the defense of a "genuine public interest" according to the standard set in *ADC*.[242] President Chávez selected Claimant because of its foreign nationality.[243] In addition, Claimant suggests that the true motivation for the expropriation was a desire to cause damage to Polar, the largest private company in Venezuela and minority shareholder and main customer of the Companies.[244]

280. The Expropriation Decree and the accusations of noncompliance with environmental, labor and jurisdiction laws were nothing but a "convenient device"[245] to dispossess OIEG of its Companies[246]—since prior to the expropriation, the authorities had never made any accusation against the Companies.

281. Further, Claimant assures that the manifest incoherence of the diverse justifications offered by Venezuela for the expropriation—in the President's words, the alleged contraventions of

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[241] CI, paras. 158-172; CIV, paras. 160-264; CV, para. 110.
[242] CI, para. 158, citing *ADC*, para. 432.
[243] CV, para. 28.
[244] CI, paras. 161 and 162.
[245] Term used by the arbitral tribunal in the *Siemens* case, para. 273. See citation in CI, para. 158.
[246] CI, para. 159.

environmental law and workers' rights; in the Expropriation Decree, violations of free competition—was fabricated in a rush after the fact and highlights the lack of a genuine public interest.[247]

282. Claimant states that although the Expropriation Decree is founded on alleged violations of the Right to free competition, no credible evidence supporting such accusations has been produced[248] and Venezuelan authorities have neither investigated nor issued any decision on the alleged violations.[249] Neither a violation of free competition (which can only be penalized by the Superintendence for the Promotion and Protection of Free Competition) nor any of the other reasons offered by Respondent (food security or endogenous development)[250] justifies expropriation.[251]

(ii) The expropriation was arbitrary, contrary to Venezuelan Administrative Law and violated the Companies' right to due process

283. Claimant considers that Article 6(a) of the BIT requires all expropriations to be conducted in compliance with due process of law, which grants significant procedural rights which have been violated in this case. Namely,

- The obligation to give investors sufficient notice;[252]
- Investors' right to be heard before the State implemented the expropriation order;[253]
- The right to be informed of precisely which assets are being expropriated;[254]
- The right to know the implementation plan for the expropriation order.[255]

284. Claimant argues that it does not need to prove the fact that the expropriation violated Venezuelan Law to demonstrate that Respondent violated Article 6 of the BIT.[256] However, it considers that the violation by the Republic of its own Law clearly shows that Venezuela acted arbitrarily or without complying with due process of law.[257] Claimant refers to three types of violations of domestic Law by the Republic:

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[247] CI, para. 160; CV, para. 29.
[248] CV, para. 63.
[249] CV, para. 65; HT, day 4, 14:34-36.
[250] CV, para. 66; HT, day 4, 15:2-4.
[251] CV, paras. 63 and 64.
[252] CI, paras. 165-167.
[253] CI, para. 165.
[254] CV, paras. 36-44.
[255] CIV, para. 238; CV, paras. 45-52.
[256] CV, para. 53.
[257] *Ibid.*

- It failed to comply with any of the prior requirements set forth in the LECUPS;[258]
- It implemented the Expropriation Decree in an unlawful manner,[259] and
- It occupied the Plants with no respect for due process of law.[260]

285. Specifically:

286. First, Claimant argues that Respondent failed to comply with any of the prior requirements set forth in the LECUPS[261] because:

- It did not declare that a given type of "public works" had a "public purpose and social interest," which declaration must be issued by the legislative branch of Venezuela.[262]
- It did not make a decision to build "a specific public works project;"[263]
- It did not design a project for said "public works" to identify the property that "necessarily" had to be expropriated in order to perform the public works,[264] but rather first identified the property it wished to expropriate and then decided what to do with it.[265]

287. Second, Claimant considers that the actions taken by Respondent to implement the Expropriation Decree are unlawful. The LECUPS requires compliance with certain conditions prior to occupying the expropriated property.[266] Nonetheless, they were not met in the instant case:[267]

- OIEG was given no notice prior to the expropriation;
- the expropriated property was not valuated by an appraisal committee; and
- Venezuela did not deposit any funds so as to guarantee the payment to the owner.

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[258] CV, para. 59; HT, day 4, 14:3-23.
[259] CV, paras. 67 and 68.
[260] CV, paras. 69-74.
[261] CV, para. 59; HT, day 4, 14:3-23.
[262] CV, paras. 59-61.
[263] *Ibid.*
[264] CV, para. 62.
[265] HT, day 4, 14:18-36.
[266] CV, para. 67.
[267] CV, paras. 67 and 68.

288. Finally, Claimant asserts that Venezuela fabricated accusations regarding a violation of the INDEPABIS Law by the Companies in order to occupy the Plants without complying with due process of law.[268] Claimant bases its argument on the statements by the Respondent's expert witness on Venezuelan Law:

- The expert stated that the reference to Articles 111 and 112 of the INDEPABIS Law in the Plants occupation records were probably "errors" made due to the urgency of the situation,[269] and

- The expert confirmed at the Hearing that in order to occupy the Plants based on a violation of the INDEPABIS Law, Respondent should have initiated a formal, prior administrative penalty procedure and stated he was not aware of the existence of any such procedure.[270]

289. Claimant concludes that the expropriation was not conducted in accordance with due process of law, thus violating Article 6(a) of the BIT.

(iii) The expropriation was discriminatory in nature

290. Claimant argues that Respondent has expropriated the investments of OIEG in a discriminatory manner, in violation of Article 6(b) of the BIT.

291. Claimant supports its argument by stating that the Companies were expropriated in order to maintain the company out of foreign hands, as then President Chávez specifically mentioned the American ownership of the Companies during his expropriation announcement.[271] In addition, Claimant considers that the expropriation has had the effect of eliminating the only foreign participation in the glass container manufacturing industry.[272] Such industry has not been subject to a more extensive nationalization process in the sector and the other Venezuelan companies of the sector have not been expropriated by the State.[273] Therefore, Respondent has afforded discriminatory treatment in violation of Article 6(b) of the BIT.[274]

(iv) Respondent has failed to provide any compensation whatsoever to the Claimant

292. Claimant argues that Respondent has paid no form of compensation.[275] According to Claimant, this constitutes sufficient motive for the Tribunal to consider that Respondent has violated A 6 of the BIT.

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[268] CV, paras. 69-74.
[269] CV, para. 72; HT, day 4, 81:18 – 82:18.
[270] CV, para. 72; HT, day 4, 81:18 – 82:18.
[271] Based on the *Eureko* case, Claimant assures that discrimination includes situations in which expropriation is conducted to maintain a company out of foreign hands. CI, para. 168.
[272] CV, para. 170.
[273] *Ibid.*
[274] CV, para. 168.
[275] HT, day 2, 40:16-18.

293. Claimant denies that lack of compensation may be attributed to Claimant itself.[276] Claimant considers that it has been proved that Respondent did not conduct negotiations in good faith and made an absurdly low compensation offer with complete disregard for fair market price that was designed to evade the responsibilities of the Republic.[277] Thus, it considers that the decision entered in *Conoco Phillips* is applicable to this dispute. In that case—based on the same BIT as this dispute—the Tribunal decided that Venezuela had violated the compensation requirement under Article 6(c) of the BIT, as it did not negotiate the compensation with Claimants based on the fair market price of the expropriated investments.[278]

294. OIEG considers that it has been demonstrated that the expropriation procedure has made no progress because Respondent failed to comply with the basic procedural requirements to move the procedure forward.[279]

295. Moreover, Claimant denies the existence of a lack of investment and poor performance at the Plants, stating that the accusations of the Republic in that regard only seek to reduce the amount of compensation it must pay under the BIT.[280]

296. In summary, Claimant considers it evident that the expropriation violated all of the cumulative requirements set forth in Article 6 of the BIT and was therefore unlawful pursuant to international Law.

2.2. Respondent's Position

297. Respondent argues that the expropriation complies with the requirements of Article 6 of the BIT and that the Tribunal cannot award compensation to Claimant.[281]

298. Respondent insists that international Law recognizes the right of sovereign States to conduct expropriations,[282] adding that Article 6 of the BIT allows for the expropriation of assets under certain circumstances, which are fully met in the case at hand.[283] Respondent states that the expropriation: (i) was conducted in the public interest; (ii) complied with due process of law; (iii) was not discriminatory, and (iv) was in exchange for compensation, which under the BIT does not need to be immediate and which Respondent has attempted to pay by means of negotiations and following the expropriation procedure set forth in Venezuelan law.

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[276] CV, para. 76.
[277] CV, paras. 76-83.
[278] CV, paras. 113 and 114.
[279] CV, para. 87; HT, day 4, 60:24 – 63:15.
[280] CV, paras. 96-105.
[281] RII, paras. 307 and 308.
[282] RV, para. 84.
[283] RV, para. 85.

(i) Venezuela acquired the Plants in the public interest

299. Respondent states that it acquired the Companies in the defense of two well-known, long-established public interest policies: food security[284] and endogenous development;[285] and to protect fundamental constitutional principles.[286]

300. The Bolivarian Republic considers that the Companies were expropriated in the defense of Venezuelan food security. Respondent bases this allegation on:

- The text of the Expropriation Decree,[287]
- The public statements made by Minister Mr. Menéndez, who mentioned this point in at least four appearances,[288] and
- The statements made by Mr. Machaen[289] and Mr. Hernández,[290] who claimed to know that this was one of the justifications offered by Respondent for the expropriation.[291]

301. With regard to the endogenous development policy (i.e., the policy to promote domestic and autonomous production in strategic sectors of the economy[292]), Respondent holds that Claimant's silence proves the validity of this policy as grounds for expropriation.[293]

302. Finally, in response to Claimant's allegations regarding incoherence in the justifications offered by Venezuela for the expropriation, Respondent argues as follows:

- President Chávez did not order the expropriation—it was ordered under the Expropriation Decree;[294]
- There is no fundamental inconsistency between President Chávez's speech and the subsequent statements made by other Government officials;[295]
- Claimant has failed to prove its theory that the expropriation was aimed at negatively affecting the Polar Group.[296]

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[284] RII, paras. 31-39.
[285] RII, paras. 45-50.
[286] RII, para. 316.
[287] RV, paras. 89 and 90.
[288] RV, para. 92.
[289] RV, paras. 92-96.
[290] RV, para. 97.
[291] *Ibid.*
[292] RII, para. 47.
[293] RV, paras. 104 and 105.
[294] RV, para. 111.
[295] RV, para. 112.
[296] RV, paras. 113-115.

303. Therefore, Respondent concludes that the expropriation was conducted in the public interest, in accordance with the requirements of Article 6 of the BIT.

(ii) The expropriation was carried out in accordance with due process

304. Respondent denies any violation of due process of law in the course of the expropriation.

305. Venezuela makes the following statements to defend its argument:[297]

- In the context of expropriations, the only requirement of due process of law under international Law is for the receiving State to assure the investor is provided with an opportunity to have measures reviewed by an independent entity.
- Under international Law, the receiving State is not required to give notice of the expropriation order in advance;
- Respondent has acted in compliance with its domestic Law, and
- Even if it had not, failure to comply with domestic Law does not constitute a breach of international Law or of the BIT.

306. Specifically, the Bolivarian Republic argues that according to the principles of international Law, due process of law requires an opportunity for the expropriation and compensation to be reviewed by an independent entity.[298] The LECUPS provides such mechanisms for independent review. Claimant, however, refused to use them from the outset.[299]

307. Venezuela states that there is no requirement (either under international Law or under Venezuelan Law) for the receiving State to give early notice of the expropriation order to the investor.[300]

308. Respondent adds that the forced occupation and acquisition of the Plants was conducted in accordance with Venezuelan Law.[301] The applicable laws are the Constitution, the LECUPS and Article 6 of the INDEPABIS Law,[302]—the special law in connection with the general provisions of the LECUPS.[303]

309. Respondent bases the lawfulness of the Expropriation Decree on four key arguments:

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[297] RV, para. 122.
[298] RV, para. 123.
[299] RV, paras. 124-126.
[300] RV, para. 128.
[301] RV, para. 132.
[302] RV, para. 136, quoting HT, day 4, 40:1-25.
[303] RV, paras. 133-137.

- Contrary to the Claimant's argument, the LECUPS does not require the prior existence of "public works;" and even if it did, Article 6 of the INDEPABIS Law, the application of which prevails in this case, does not require the prior existence of "public works;"[304]

- Under the LECUPS, there is no requirement for the prior declaration of a "public purpose or social interest" to be linked with "public works," or for a decision to construct "public works" to be made prior to the publication of the Decree;[305]

- Similarly, there is no requirement for a *causa expropiandi* to exist; and even if there were, it is irrelevant as Article 6 of the INDEPABIS Law, which applies primarily, does not require the existence of a cause of expropriation;[306]

- It is not true that the Expropriation Decree is penalizing in nature; the Decree is based on Article 6(1), not Article 6(3), of the INDEPABIS Law,[307] and therefore complies with Venezuelan Law.

310. Further, Respondent holds that the occupation of the Plants was performed in accordance with Venezuelan Law and rejects all allegations to the contrary, based on the following arguments:

- Contrary to what Claimant says, Venezuelan Law allows for the occupation of expropriated property without court authorization;[308] in fact, Article 6(4) of the INDEPABIS Law requires no court authorization in order to occupy expropriated assets;[309] thus, INDEPABIS was entitled to occupy the Plants since the Expropriation Decree was published;[310]

- INDEPABIS was entitled to decide whether to conduct the occupation under Article 6(4) or do so under Article 112(1) of the INDEPABIS Law indistinctly;[311] it chose to carry out the occupation under Article 112 because there was an objective risk of dismantlement or production stoppage;[312]

- The occupation did not violate Article 4 of the Expropriation Decree, since that Article does not require occupation to be conducted pursuant to Article 56 of the Expropriation Law but simply contemplates that possibility;[313]

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[304] RV, paras. 138-150.
[305] RV, para. 152.
[306] RV, para. 156.
[307] RV, paras. 157 and 158.
[308] RV, para. 161.
[309] RV, para. 162.
[310] RV, para. 163.
[311] RV, para. 166.
[312] RV, para. 165.
[313] RV, para. 167.

- The occupation order issued by the First Administrative Court is lawful: Venezuelan case law allows for the issuance of provisional remedies in expropriation proceedings, and it was requested by Respondent *ex abundanti cautela.*[314]

311. Finally, Respondent argues that under international Law, an alleged violation of domestic Law does not constitute a failure to comply with the due process of law guarantee set forth in Article 6 of the BIT, except where the investor is able to prove that a given breach of domestic legislation, under the precise circumstances of a case, can amount to an international violation[315]—which Claimant has not been able to prove.[316]

312. In the light of these arguments, Respondent concludes that the expropriation and occupation of the plants was conducted in accordance with the due process requirement set forth in Article 6 of the BIT.

(iii) The expropriation was not discriminatory

313. Respondent considers that Claimant has been unable to prove that the expropriation was discriminatory either in terms of its purpose or in terms of its effect.[317] The expropriation was not conducted in order to place the glass container manufacturing industry in national hands; and the reference made by President Chávez to the nationality of the parent company was "obviously incidental" and isolated.[318] The effect of the expropriation was not discriminatory either. The dominant position that OIEG held in the market turned it into a critical objective to guarantee food security.[319] However, the Republic saw no need and had no intent to expropriate other glass container manufacturing companies which did not place the Venezuelan economy and food security at risk.[320]

(iv) Respondent has met and continues to meet its payment obligations

314. Respondent admits that it must compensate Claimant by paying the fair market price of Claimant's share in OIdV and Favianca.[321] However, Respondent states it could only be reasonably expected to comply with such duty in two ways:

- By means of direct negotiations; or

[314] RV, paras. 168 and 169.
[315] RV, para. 172.
[316] RV, para. 174.
[317] RV, para. 116.
[318] RV, para. 117.
[319] RII, para. 349.
[320] *Ibid.*
[321] RV, para. 178.

- By means of the procedure set forth in the LECUPS, which has already been initiated.[322]

315. Respondent argues that Article 6 of the BIT does not require compensation to be paid immediately, but "without undue delay." Therefore, it considers that there has been no breach of Article 6, because:

- Claimant has not allowed the procedure established by the State to be carried out adequately, and
- Claimant has not proved that such procedures cannot result in the payment of fair compensation within a reasonable period of time.[323]

316. Specifically, Venezuela argues that the following undisputed facts are sufficient to establish that Respondent has complied or has reasonably attempted to comply with Article 6 of the BIT:[324]

- The Parties held four meetings to negotiate the compensation;
- Claimant only discussed the amount in two of those meetings;
- Claimant initially requested compensation in the amount of one billion US dollars;
- Respondent made a counteroffer of USD 100-120 million;
- Claimant made no subsequent counteroffer and did not seek to resume negotiations.

317. Respondent argues that its offer was reasonable,[325] and even if it were not, it holds that Claimant made no counteroffer and was not willing to resume negotiations. Therefore, Respondent accuses Claimant of participating in the negotiations superficially and even in bad faith.[326]

318. Venezuela is willing to pay the applicable compensation by means of the procedure established for said purpose: the one provided in the LECUPS.[327] That procedure complies with the requirements of Article 6 of the BIT,[328] is progressing "at top speed,"[329] the summonses for all of the parties have

[322] RV, para. 179.
[323] RV, para. 180.
[324] RV, paras. 181 and 182.
[325] RV, para. 183.
[326] RV, para. 185.
[327] RV, para. 201.
[328] RV, para. 196.
[329] RV, para. 212.

already been published,[330] and the process is now at the stage at which the fair price is to be set.[331]

319. Respondent insists that the Claimant's non-appearance at the proceedings is what has thwarted their proper progress.[332] Claimant could have participated in the LECUPS procedure reserving its rights under the BIT. The fact that the compensation amount has not been established and that Claimant has not received it are consequences of its own attitude.[333]

320. In summary, the Bolivarian Republic considers it proved that Claimant has no basis to argue that Venezuela has not paid the compensation in breach of the provisions of Article 6 of the BIT.

2.3 The Analysis of the Tribunal

321. Claimant argues that the Bolivarian Republic of Venezuela has expropriated its investment in Venezuela. Respondent does not deny it. To resolve this dispute, the Tribunal will proceed as follows:

- First, it will explain the requirements for expropriation in the BIT (A);
- Second, it will establish the proven facts (B);
- Next, it will determine whether the proven facts fit the expropriation standard (C);
- Subsequently, it will determine whether the BIT's requirements for legitimate expropriation have been met (D).

A. Requirements for expropriation in the BIT

322. As a starting point, it is worth recalling the wording of Article 6 of the BIT between the Netherlands and Venezuela:

> "None of the Contracting Parties shall take any measure to expropriate or nationalize the investments of nationals of the other Contracting Party, or take measures with an effect equivalent to that of nationalization or expropriation in relation to such investments, except if the following conditions are met:
>
> a) Such measures shall be taken in the public interest and in accordance with due legal process;

[330] RV, paras. 212-219.
[331] RV, para. 220.
[332] RV, para. 205.
[333] RV, para. 208.

b) The measures shall not be discriminatory or contrary to any commitment assumed by the Contracting Party that takes them;

c) The measures shall be taken after fair compensation. Such compensation shall represent the market value of the affected investments just before the measures are taken or before the imminent measures are made public knowledge, whichever occurs first; it shall include interest at a normal commercial rate up to the payment date; and in order to be enforced for the claimants, it shall be paid and made transferable without undue delay to the country designated by the interested claimants in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants."[334]

323. The above provisions are expressed in terms of prohibition: they obligate the Bolivarian Republic of Venezuela (and also the other State) to refrain from adopting "expropriatory measures" except if they meet certain requirements: public interest, due process, non-discrimination and proper compensation.

Measures

324. Although not defined in the BIT, the concept of "measure" must be understood in the broad sense. This can be seen (applying Article 31(1) of the Vienna Convention on the Law of Treaties) from the very text of the BIT, which adds the adjective "any" to the noun to emphasize its broad scope. Consequently, it encompasses all types of administrative, legislative or judicial acts performed by any of the branches of government of the Bolivarian Republic (or by any other entity for whose acts the Republic is liable in accordance with International law), and prohibits such acts from resulting in an expropriation, nationalization or equivalent measures.

325. The BIT does not define the terms "expropriation," "nationalization," or "equivalent measure" and this gap must be filled in based on the principles of International Law.

Expropriation

326. "Expropriation" consists of the State, in exercise of its sovereign powers, dispossessing an investor protected by the Treaty, depriving it of the control or the ownership of a protected investment. Dispossession means that the investor suffers the loss of the use and enjoyment (and sometimes also the ownership) of the investment. Thus, the definition in the BIT centers on the investor, not on the State. It does not require that the dispossession of the investor result in an appropriation in benefit of the State. However, in most cases, the investor's loss will lead to the reciprocal gain of a public entity, which will facilitate the classification of the action as expropriatory. The definition in the Treaty also does not require that the intent to dispossess exist.

[334] Emphasis added.

327. Investment and investor are defined terms in the BIT and the Tribunal has concluded that Claimant is an investor for the purposes of the Treaty and that it is the owners of a protected investment materialized in the Plants.[335]

Nationalization

328. "Nationalization" is a term similar to expropriation, with the addition that it frequently involves complete sectors of the economy and that the State normally assumes ownership of the investment it has taken from the investor.[336]

Equivalent measures

329. The third term used by Article 6 of the BIT is "measures with an equivalent effect." The circumlocution covers what is usually known as regulatory or indirect expropriation. These are legislative or administrative acts adopted by State, normally in exercise of its regulatory or policy-making powers, but which translate into a significant interference in the use and enjoyment of an investment, not necessarily going so far as to deprive the investor of the ownership and control of its investment.

Exceptions

330. The prohibition on adopting expropriatory, nationalization or equivalent measures is not absolute. The BIT allows them, provided three conditions are met (and the appropriate compensation is also paid):

- They are for reasons of public interest;
- They are not discriminatory; and
- They are adopted in accordance with "due process of law."

331. A legitimate expropriation additionally requires the payment of a "fair" compensation that:

- Must represent the market value of the expropriated investment;
- At the time "just before the measures are taken or the imminent measures are made public knowledge, whichever occurs first;"
- "shall include interest at a normal commercial rate up to the payment date;" and
- "shall be paid and made transferable without undue delay;"

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[335] See paragraph 158 *supra*.

[336] In practice, the term nationalization is usually reserved for the expropriation of natural resources or industrial sectors in benefit of the State or a government entity; *see* Brownlie: "Principles of Public International Law, 7th Ed (2008), p. 532.

- "in any freely convertible currency accepted by the claimants."

B. Proven facts

332. The relevant proven facts for determining whether an expropriation took place are the following (a more extensive explanation is found in paragraphs 85 to 153 above):

333. (i) On the evening of 25 October 2010, President Chávez made a televised speech announcing the immediate expropriation of the Venezuelan companies owned by Owens-Illinois. This was the first news that the Bolivarian Republic intended to expropriate the Companies.

The Expropriation Decree

334. (ii) The next day, 26 October 2010, the Bolivarian Republic enacted the Expropriation Decree, formalizing, on an urgent basis, the forced acquisition of:

- the properties owned by OIdV,
- the OIdV and Favianca Plants, including the movable property belonging to or found in those plants;
- the means of transportation used in the OIdV process that were necessary for executing its work and
- any other tangible goods belonging to OIdV that were needed to execute purpose of the project "strengthening of the public sector industrial capacity in the manufacture of glass containers for the Venezuelan people" ["**Glass Strengthening Project**"][337]

335. According to the Expropriation Decree, the expropriated goods became part of the Republic's assets through the MINCIT, pursuant to Art. 11 of the LECUPS.[338]

The preventive occupation measure ordered by INDEPABIS

336. (iii) The next day, 27 October 2010, INDEPABIS (the Venezuelan Consumer Protection Agency), went to the Valera plant owned by Favianca to "carry out the preventive temporary occupation measure" under Articles 111 and 112 of the INDEPABIS Law.[339] One day later, it appointed the management board that it entrusted with the management of the company.[340]

[337] Expropriation Decree, Art. 4, Exhibit C-24.
[338] Expropriation Decree, Art. 2, Exhibit C-24
[339] INDEPABIS Act of 27 October 2010, Exhibit C-38
[340] INDEPABIS Act of 28 October 2010, Exhibit C-45.

337. (iv) At the Los Guayos Plant owned by OIdV, the events occurred somewhat differently. On 29 October 2010, INDEPABIS went to this factory in order to conduct an audit.[341] After determining purported violations of the INDEPABIS Law, INDEPABIS ordered a "preventive temporary occupation and operation measure for a term of ninety (90) days [...]" and created a temporary management board.[342]

338. The result of the acts ordered by INDEPABIS was that, effective 29 October 2010, the Bolivarian Republic took physical possession of the Valera and Los Guayos Plants and exercised effective control over them.

The provisional remedy ordered by of the First Administrative Court

339. (v) Several weeks later, on 18 November 2010, the Office of the Attorney General filed a petition with The First Administrative Court for an unnamed provisional remedy consisting of the occupation, possession and use of the movable and immovable properties and improvements presumably owned by OIdV and Favianca.[343] The petition was based on the injunctive power of the Administrative Law judge and the urgency of implementing the Glass Strengthening Project.[344] On 20 December 2010, without allowing Claimant a hearing, the Court:

- Ordered the requested provisional remedy and

- Authorized the creation of an ad hoc management board, appointed by MINCIT, to manage, organize and control the Companies.[345]

This provisional remedy was subsequently joined to the expropriation proceedings,[346] and came to be the instrumental occupation measure in those proceedings.

340. (vi) Three months later, on 11 March 2011,[347] the MINCIT effectively created the Management Board. Several days later, on 16 and 25 March 2011, respectively, the Enforcement Courts of the Los Guayos and Valera municipalities:

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[341] CI, paragraph 61.
[342] INDEPABIS Act of 29 October 2010, Exhibit C-47.
[343] Ruling of First Administrative Court of the Caracas Metropolitan Area of 20 December 2010, Exhibit C-63.
[344] *Ibid*, page 12.
[345] Ruling of First Administrative Court of the Caracas Metropolitan Area of 20 December 2010, Exhibit C-63.
[346] Judgment of Second Administrative Court of 19 May 2011, Herández – Exhibit 11.
[347] MINCIT Resolution No. 034 of 11 March 2011, published in Official Gazette No. 39,634 of 15 March 2011, Exhibit C-72. The ad hoc Management Board consisted of Messrs Jorge Ortega, Alexander Sarmiento, Antonio Cordero, Leonardo Hernández, Martin Álvarez, Reyes Butrón and Carlos Alvarado.

- Enforced the provisional remedy authorized by The First Administrative Court for the occupation, possession and use of the Companies' assets;

- Installed the ad hoc Management Board; and

- Ordered that the Companies' bank accounts could only be used with the express authorization of the ad hoc management board.[348]

341. The management of the Plants, initially entrusted to INDEPABIS, thus passed without interruption to the ad hoc management board ordered by the Administrative Court and controlled by the MINCIT.

342. Lastly, the Bolivarian Republic created a public company under the MINCIT, Venvidrio, which on 30 April 2011 assumed direct management of the Plants.[349] Venvidrio also appropriated the balances in the bank accounts belonging to the Companies.[350]

Expropriation procedure under the LECUPS

343. (vii) Although the Bolivarian Republic has material control and possession of the expropriated assets, at least since 29 October 2010, the formal transfer of ownership is still pending, because the expropriation procedure under the LECUPS continues its course in the Venezuelan courts and a final decision has not been handed down to date.[351]

344. The Office of the Attorney General commenced the amicable settlement phase ordered in the LECUPS in late 2010[352] and proposed that the parties sign an Official Record of Commencement of Amicable Settlement on 17 November 2010.[353] Shortly thereafter, on 9 December 2010, OIdV wrote to Minister Menéndez informing him that the Companies

> "would not participate in the expropriation procedures initiated by the Office of the Attorney General of the Republic or sign the proposed official record for purposes of said procedures because they disagree with its terms." [354]

[348] Court orders of 16 and 25 March 2011, Exhibits C-75 and C-77, respectively.
[349] RII, paragraphs 99 and 167.
[350] Letter from OIdV to the Respondent dated 25 January 2012, Exhibit C-101. The only exception to this was "the minimal amount of Bs. 34.28 in the Fabrica [sic] de Vidrios de los Andes, C.A. account in the Banco Mercantil, which could not be transferred due to administrative issues of the bank."
[351] RII, paragraph 167.
[352] RII, paragraph 265,
[353] Official Record of Commencement of Amicable Settlement dated 17 November 2010, Exhibit R-4.
[354] Letter from OIdV to Minister Menéndez dated 9 December 2010, Exhibit R05.

OIdV also contended that the fair compensation should be determined based on the provisions of the BIT.[355]

345. In view of the fact that the parties were unable to reach an amicable agreement, on 14 March 2011, the Office of the Attorney General initiated a legal procedure under the LECUPS, filing an expropriation petition with the First and Second Administrative Courts requesting

> "the expropriation of the movable and immovable properties belonging to the commercial companies OWENS ILLINOIS DE VENEZUELA, C.A. and FÁBRICA DE VIDRIOS LOS ANDES, C.V. (FAVIANCA)."[356]

346. On 5 April 2011, the same day that Venvidrio was created, the Fact-Finding Panel of the Supreme Court of Justice issued a decision in which it admitted the expropriation petition filed by the Office of the Attorney General and ordered that notice be served to the owners of the Companies so that the respective judicial inspections could be conducted.[357] The expropriation proceeding was subsequently joined with the provisional remedy that had been authorized by The First Administrative Court.[358] Currently, the Administrative Courts continue to hear the expropriation proceedings.[359]

Compensation Negotiations

347. (viii) From January to July 2011, the Companies and Respondent held four meetings to determine the due compensation.[360]

348. At the meeting of 17 March 2011, Claimant presented an appraisal for somewhat over USD 1 billion for 100% of the Companies.[361] At the following meeting on 11 July 2011, Respondent made a counter-offer of USD 100-120 million.[362] The meeting ended without an agreement being reached.[363]

349. (ix) Over four years have passed since the Plants were expropriated, and Respondent has still not paid Claimant any compensation.[364]

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[355] *Ibid.*
[356] *See* Judgment of the Fact-Finding Panel of the Supreme Court of Justice dated 5 April 2011, Hernández – Exhibit 114.
[357] *Ibid.*
[358] Hernández – Exhibit 111.
[359] Hernández – paragraph 46.
[360] CI, paragraph 122; RII, paragraphs 277-284; CIV, paragraph 100; RV, paragraph 181 (1).
[361] Summary of the meeting of 17 March 2011, Exhibit C-162, pp. 1-2; RII, paragraph 282; CIV, paragraph 107; RV, paragraph 181(3); Sarmiento II, paragraph 37; Pimentel II, paragraphs 27-29.
[362] RII, paragraphs 282 and 283; CIV, paragraph 110; Machaen II, paragraph 44; Summary of the meeting of 11 July 2011, Exhibit C-164, pp. 1-2; CV, paragraph 78; RII, paragraphs 282 and 283; Pimentel I, paragraph 76; Sarmiento I, paragraph 80.
[363] CIV, paragraph 110.
[364] CV, paragraph 75, note 119.

C. The fit of the facts with the concept of expropriation

350. The proven facts show that:

- Claimant, through its controlling shareholdings in two Venezuelan companies, OIdV and Favianca, was the owner of an investment in the Bolivarian Republic, materialized in the Plants.
- The Bolivarian Republic has issued a Decree ordering the "forced acquisition" of the Plants and certain ancillary assets;
- Since 29 October 2010, the possession and management of the Plants has been assumed by agencies or entities that are part of Respondent.
- OIdV and Favianca, and OIEG indirectly, were deprived of the use and enjoyment of the assets.

351. In the Tribunal's opinion, the facts fit neatly with the presumptions that underlie Art. 6 of the BIT: Bolivarian Republic of Venezuela has taken an expropriation measure, and more specifically, a nationalization measure, with respect to an investment protected by the Treaty.

352. Indeed:

Expropriatory measure

353. Claimant states that the expropriation took the form of an Expropriation Decree through which its Companies were reduced to mere empty shells stripped of any practical and economic use, and all its assets subjected to a forced acquisition in favor of the State.

354. There is nothing to disagree with in this assessment.

.... and nationalization measure

355. The measures taken by the Bolivarian Republic are not simply expropriatory, they also entail nationalization. The properties and rights of which the foreign investor was deprived have gone on to become the assets of the National Executive Branch, thus reinforcing the conviction that the adopted measures are expropriatory.[365]

Sovereign in nature

356. In order to be classified as expropriatory or nationalization measures, the measures adopted by a State must also have been executed in exercise of sovereign powers and not mere acts of a contractual nature. This requirement is met in the present case: an expropriation formalized in a

[365] The divestment/appropriation duality is *prima facie* evidence that the State has expropriated the asset; *see* Newcombe: "The Boundaries of Regulatory Expropriation in International Law," (2005) 10:1 ISCID Review, p. 6 n. 19.

Decree can never be considered an act of a contractual nature. To the contrary, we are dealing with an exceptional administrative power that is only available to the State.

357. The preventive temporary occupation measures ordered by INDEPABIS are also administrative in nature.

358. Similarly, the decisions on occupation, possession and advance use of the Companies' assets issued by The First Administrative Court are judicial acts executed by one of the branches of the Venezuelan government in exercise of its jurisdictional powers.

Relevant date

359. The facts described above also make it possible to establish the relevant date for purposes of the expropriation.

360. This date must coincide with the time that the decision to deprive the investor of the use and enjoyment of its investment was enacted. In this case, that is 26 October 2010, the date on which the Expropriation Decree was issued and went into force.

Legality requirements for expropriation

361. Article 6 of the BIT presupposes that the expropriatory measures or their equivalents will only be legal if the following conditions are met:

- They are due to reasons of public interest;
- They are not discriminatory;
- They are adopted in accordance with "due process of law" and
- The appropriate compensation is paid.

362. Therefore, it must be determined whether the Republic met these conditions for the expropriation to be classified as legal. Claimant argues that each of the requirements must be met.[366] The Tribunal—as well as the legal doctrine[367]—agree. The failure to meet any of the requirements would make the expropriation unlawful.

363. In the following section, the Tribunal will determine whether Venezuela has complied with the requirements set forth in the Treaty.

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[366] CIV, paragraphs 192 and 202.
[367] R. Dolzer and c. Schreur, Principles of International Investment Law, Oxford University Press (2008) [**"Dolzer & Schreuer"**], p. 91.

D. Requirements for an expropriation to be considered lawful

364. Claimant argues that Venezuela has not met any of the set conditions for a lawful expropriation according to Art. 6 of the BIT. The Bolivarian Republic, on the other hand, believes that it has complied with all of them.

365. The Tribunal will determine:

- First, if the measure was issued in the public interest[368] (a);
- Second, if the expropriation was carried out in keeping with due process[369] (b);
- Third, if the expropriation was discriminatory[370] (c), and
- Lastly, if Claimant has been compensated[371] (d).

a. The measure was taken in the public interest

366. Claimant believes it has been proven that the expropriation was not carried out in defense of a "genuine public interest" for three main reasons:

- There is an obvious inconsistency between the reasoning in the president's speech and in the Expropriation Decree, which would demonstrate the lack of a legitimate public interest.[372]
- The Expropriation Decree and the accusations of violation of the defense of competition laws were a "convenient device"[373] for stripping OIEG of its Companies,[374] since there is no evidence to support the supposed violations of the right to free competition, nor have the Venezuelan authorities investigated and/or issued any decision.[375]
- Neither the violations of free competition[376] nor any of the other reasons invoked by Respondent (food security or endogenous development)[377] justify the expropriation according to Venezuelan law.[378]

[368] RII, paragraph 317.
[369] RII, paragraph 342.
[370] RII, paragraphs 345 – 350
[371] RII, paragraph 351.
[372] CI, paragraph 160; CV, paragraph 29.
[373] Term used by the Arbitral Tribunal in the Siemens case. See summary in CI, paragraph 158.
[374] CI, paragraph 159.
[375] CV, paragraph 63.
[376] CV, paragraph 65; HT, day 4, 14:34-36.
[377] CV, paragraph 66; HT, day 4, 15:2-4.
[378] CV, paragraphs 63 and 64.

367. For its part, Respondent asserts that the Tribunal must grant greater deference to the definition that the Republic has made of its public interest [379] and explains that the expropriation was carried out to protect basic constitutional principles[380] and in defense of two well-known and long-standing policies of public interest: food security[381] and endogenous development,[382] which the Republic has been implementing since 2001[383] and 2007,[384] respectively.

The Tribunal's opinion

368. In order to determine whether the expropriation was actually carried out for reasons of public interest, we must analyze how the Expropriation Decree itself justifies the decision. The decree defines its objective as a project that it refers to with the name "strengthening of the public sector's industrial capacity in the fabrication of glass containers for the Venezuelan people," and establishes the grounds for the administration's actions in its 'whereas clauses' as follows:

- The national sector dedicated to the production and marketing of glass containers is a priority within the economic policy of endogenous development promoted by the National government in order to create jobs and guarantee a proper level of welfare for the population;[385]

- The INDEPABIS Law declares all the assets needed to engage in the production, manufacture, import, storage, transportation, distribution and marketing of goods and services to be of public utility and social interest.[386]

369. These two 'whereas clauses' allow Respondent to assert that the expropriation was carried out in defense of well-known and longstanding policies of public interest: endogenous development[387] and food security.[388]

370. The Tribunal partially shares Respondent's position. It believes it plausible that the Decree was issued to foster endogenous development, but does not find sufficient proof that its purpose was also to guarantee food security.

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[379] RII, paragraph 314.
[380] RII, paragraph 316.
[381] RII, paragraphs 31-39.
[382] RII, paragraphs 45-50.
[383] RII, paragraph 32.
[384] RII, paragraph 45.
[385] Expropriation Decree, Whereas Clause 7, Exhibit C-24.
[386] Expropriation Decree, Whereas Clause 8.
[387] RII, paragraphs 45-50.
[388] RII, paragraphs 31-39.

Endogenous development

371. Endogenous development is a public policy defined by the Bolivarian Republic designed to promote and consolidate national and autonomous production in sectors considered to be of importance for development, which it has been implementing in various sectors of the economy since 2007.[389]

372. In its Preamble, the Expropriation Decree invokes endogenous development as one of its objectives, envisaging the expropriation of the Plants as a way of making progress in attaining that objective by transferring Venezuela's main glass producer to the public sector. From that perspective, the economic policy of promoting endogenous development may be associated with the requirement of public interest established in Art. 6 of the BIT.

Food Security

373. Food security is supported in Art. 305 of the Constitution of the Bolivarian Republic of Venezuela, which deems it as

> "…sufficient and stable availability of food throughout the nation and timely and permanent access to it by consumers. Food safety will be reached by developing and favoring internal agricultural production, understanding this to be produce obtained from agricultural, livestock, fishing and aquatic activities. Food production is of national interest and fundamental for the economic and social development of the Nation. For these purposes, the State will decree the financial, commercial, technology transfer, land holding, infrastructure, training, and other measures necessary to reach strategic levels of self-supply. (…)"[390]

374. This is, therefore, a legitimate public policy with constitutional status, as it is established in the Respondent's Constitution.

375. Nevertheless, the Tribunal does not find in the Decree any express reference to food security nor to the Organic Law of Food Security and Sovereignty, the purpose of which is precisely to protect food security.[391] The justification was used for the first time in the public statements made by some Ministers after the Expropriation Decree and has subsequently been used in the Respondent's filings.[392]

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[389] RII, paragraph 47.
[390] Constitution of the Bolivarian Republic of Venezuela, Art. 305.
[391] Hernandez, Par. 98-99.
[392] Video clip of 28 October 2010, Declarations of Minister Menendez, Exhibit R-100: "We are talking…about what has been the concentration in this company of approximately 64% of the production of packaging in Venezuela. This packaging is the packaging…for food consumption; this packaging somehow makes viable or not viable the enormous effort which has been made agriculturally, the enormous effort that has been made in the area of food. If we do not have the containers in which this food is transported, it is impossible to think that we will ever have food security in Venezuela."

376. For their part, at the Hearing both Mr. Sarmiento,[393] a representative of the Republic during the transition period[394] and later President of Venvidrio, and Mr. Cabrera,[395] expert witness for the Respondent, confirmed that food security was not a motivating factor for the expropriation.

377. Therefore, the Tribunal concludes that food security cannot serve as justification that the expropriation of the Plants was made in the public interest.

Infringement of Free Competition

378. The Expropriation Decree also states among its whereas clauses, the following:

> "WHEREAS
> Activities that involve an abuse of the dominant position and that may infringe on express conditions of competition in the economy are contrary to the fundamental principles of the Constitution of the Bolivarian Republic of Venezuela,
>
> WHEREAS
>
> That the Owen [sic] Illinois corporation has been carrying out practices that infringe on the exercise of free competition, thereby affecting other producers,
>
> WHEREAS
>
> It is the duty of the State to adopt the necessary measures to prevent the injurious and restrictive effects of the abuse of the dominant position and other behaviors that could degenerate into monopolistic practices which are contrary to the fundamental principles of our social State based on the rule of law"[396]

379. The Claimant challenges that in spite of the fact that the Expropriation Decree is based on alleged infringements of the exercise of free competition, no credible evidence has been presented to support these accusations,[397] nor have the Venezuelan authorities[398] investigated and/or issued any decision convicting the Claimant. Furthermore, the Claimant argues that the alleged infringements

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[393] HT, Day 3, 70:20-25.
[394] See Par. 118 *supra.*
[395] HT, Day 4, 72:32-73:25
[396] Expropriation Decree, Whereas Clauses 4, 5, and 6, Exhibit C-24.
[397] CV, Par. 63.
[398] As Dr. Hernandez explained at the hearing, the Superintendence for the Protection and Promotion of Free Competition is the only organism under Venezuelan law authorized to declare an infringement of free competition. See HT, Day 4, 49:25-26.

of free competition[399] can only be penalized by the Superintendence for the Protection and Promotion of Free Competition and do not justify the expropriation.[400]

380. It is a fact that the Companies were the main producers in the glass containers market; it is possible, although no evidence has been brought forth to support this, that the Companies had a dominant position in that market. What there is no evidence of is that the Companies abused their dominant position—which is the only offense penalized by anti-trust regulations.

381. In any case, even if the Companies had a dominant position, this would never justify such an extreme measure as expropriation: experts for both Parties agree in that the expropriation could not be carried out exclusively to remedy an alleged position of dominance on the part of the Claimant.[401]

382. Moreover, it is very significant that Venezuelan authorities who defend free competition have not investigated the accusation contained in Whereas Five of the Expropriation Decree and that there is no resolution that supports it.

383. For this reason, the Tribunal deems that the Respondent has not proven that the alleged position of dominance of the Companies in the Venezuelan glass market can be considered a factor of public interest that justifies the expropriation.

384. In summary, the Tribunal finds that the Republic nationalized the Claimant's investment in an attempt to favor endogenous development, which allows it to consider the requirement of "public interest" established in Art. 6 of the BIT to have been met.

b. The expropriation was carried out in compliance with due legal process

385. Art. 6(a) of the BIT requires that in order for an expropriation to be considered legitimate, it must be adopted

> "in accordance with due legal process."

386. The Claimant asserts that by carrying out the expropriation, Venezuela has not only violated the international standard of due process, but has also violated its domestic law, which would constitute a *prima facie* violation of due process.[402] For its part, Venezuela asserts that a simple

[399] CV, Par. 65; HT, Day 4, 14:34-36.
[400] CV, Par. 63 and 64.
[401] Report by Jesus Eduardo Cabrera Romero, expert witness for the Respondent, issued on 26 August 2013, Par. 97 [from here on, "**Cabrera**"]; Hernandez, Par. 12 and 14.
[402] CV, para. 117

violation of domestic law is not sufficient to trigger a breach of art. 6(a) of the BIT.[403]

387. Unlike other Treaties,[404] which expressly require the expropriation proceeding to be carried out in accordance with the domestic law of the expropriating State, Art. 6(a) of the Venezuela—Netherlands BIT does not do so. The article does not refer specifically to the regulations of the expropriating State, but to due process[405] in general, a generic concept which must be interpreted in accordance with the requirements of international Law; it is this minimum regulatory standard commonly accepted in all States under the rule of law which guarantees the subject that any decision affecting it will be adopted after having gone through a fair and equitable process.[406]

388. Therefore, in the matter of expropriation the Court must limit itself to analyzing whether Venezuela has satisfied the requirement of due process, as it is understood in international Law, without making an evaluation of non-compliance with internal Venezuelan Law. (The allegations of the Complainant regarding non-compliance with the LECUPS with respect to the unlawful execution of the Decree of Expropriation and with respect to the irregular occupation of the Plants may constitute violations of the standard of fair and equitable treatment and will be analyzed in the next Chapter).

389. The Complainant has identified four possible violations of due process:

- The lack of prior notification;[407]
- The right to be heard prior to the expropriation;[408]
- The inaccurate identification of the property expropriated;[409] and
- The lack of knowledge of the expropriation measure implementation plan.[410]

Notification, right to be heard, implementation plan

390. The Complainant asserts that prior to the expropriation of the Plants the Republic never advised the Companies with respect to the alleged violations of environmental, labor or free competition

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[403] RV, para. 172
[404] A. Reinisch, Legality of Expropriations, in A. Reinisch, *Standards of Investment Protection,* Oxford University Press, UK (2008) p. 191.
[405] The regulation uses the expression "due proceeding," "*due process"* in the English version; in Spanish the most frequent expression is "debido proceso," and wall be that used by the court; there is no substantive difference between "due proceeding" and "due process."
[406] Dolzer & Schreuer, p. 91
[407] CI, para. 165 – 167
[408] CI, para . 165
[409] CV, para. 36 – 44
[410] CIV, para. 238; CV. Para. 45 – 52

legislation, and that they were never given the opportunity to argue their defense.[411] For its part, the Republic denies that the requirements of due process in international Law require advance notification of the expropriation to the affected party.[412]

391. The Tribunal concurs with the Respondent insofar as no general principle of international Law exists which requires the appropriating State to notify the expropriated party in advance of its decision.[413] There are imaginable situations—e.g., the midst of a food crisis or a collapse of financial markets—in which immediacy is essential to achieve the objectives sought in the public interest and in which prior notification would frustrate the operation. For those same reasons, international Law cannot recognize an absolute right to the investor to be heard and make allegations prior to the State executing the expropriation measure or to know the execution plan to be adopted.

392. The requirements of international Law with respect to due process in the expropriation of property owned by foreigners falls more within a grey area: they do not require *ex ante* notification, but rather the possibility of being able to resort *ex post* to an independent authority. What is essential is that the decision adopted by the expropriating State can be reviewed subsequently by a legal Authority which does not belong to the Executive Branch. And, In Venezuelan Law, this requirement is satisfied: the LECUPS is a modern and protective law which affords legal protection to the expropriated party, and which permits the Judge to review the administrative expropriation action and determine the valuation owed to the expropriated party due to its loss of equity.[414]

393. Therefore, the Tribunal considers that the decision of the Republic to order the expropriation of the Plants by means of the *ex-parte* enactment of the Expropriation decree, which was issued under the LECUPS, in itself is compatible with the requirement of BIT article 6(a), that the decision has been taken

> "in accordance with due legal process."

394. Whether the Republic met or failed to meet the due process requirements pursuant to the LECUPS [Law for Expropriation for Public or Social Interest] is another matter. Failure to meet said requirements could constitute a violation of the fair and equitable treatment standard guaranteed by the BIT, a matter we shall discuss in the following Chapter.

Certainty regarding the object of the expropriation

395. The Claimant also argues that an essential component of due process, required by international Law, is that the party whose property is expropriated must know, with certainty, which assets the State is forcibly acquiring. The Tribunal shares this view: if the expropriation order, which may

[411] CI, para. 165 – 167
[412] RII, para. 332.
[413] United Nations Conference on trade and Development, "Expropriation: UNCTAD Series on Issues in International Investment Agreements I," New York and Geneva (2012), p. 40; cfr, ™Kardassopoulos, para. 397 and *ADC*, para. 435.
[414] LECUPS, Art. 5 through 8, 23 through 44

have been issued *inaudita parte*, did not clearly and with certainty define which assets are to be expropriated, this would allow the Executive Branch to determine, at its discretion, what set of assets would be expropriated and this would undermine the investor's right to obtain an independent review of the decision.

396. And on this point, the expropriation measure adopted by the Bolivarian Republic of Venezuela shows significant weaknesses.

397. Article 1 of the Expropriation Decree decrees the forcible acquisition of the movable and real property and improvements belonging to the OIdV commercial company. However, paragraph a) of the same article includes the Valera Plant among the property expropriated, which was not part of the OIdV's property, but rather was owned by an independent company, Favianca. (OIdV merely held a minority interest in Favianca).

398. Moreover, Art. 1 *in fine* of the Decree includes an extensive clause that expropriates the following:

> "[a]ny other tangible assets that form a part of the commercial company Owens Illinois de Venezuela, C.A. that are necessary to achieve the purpose of the work, which is the «Reinforcement of the public sector's industrial capacity for the production of glass containers»"[415]

399. The Tribunal agrees with the Claimant's legal expert in that the definition of the assets expropriated in Article 1 of the Decree is ambiguous, excessively broad and leaves it entirely unclear whether the property expropriated covers the property of OIdV alone, or whether the company as a whole is being expropriated, including its assets and liabilities.

400. The imprecise language of the Decree prevented the Claimant from knowing precisely which of its assets would be expropriated, and as such, violated its right to due process. This concern is also shared by the Respondent's expert.[416]

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[415] Expropriation Decree Art. 1 *in fine*.

[416] Mr. Cabrera stated: (HT, day 4, 81:4-16): "PRESIDENT OF THE TRIBUNAL: But with the liabilities, if you think, you believe that Owens' liabilities, OIdV doesn't have to pay the liabilities, it doesn't have to pay them. The liabilities, I am unclear about the liabilities. If the liabilities are part of the expropriation, or they go, as Mr. Moore said, with the goodwill, and it is actually the company including all of its assets and liabilities that is being expropriated. Do you see my confusion?
A. [Sr. Cabrera]. Yes, yes, I'm confused by the same thing. Because if I go by the Expropriation Decree, this is a collection of property that constitute a company, and said company is going to continue to operate with this property, and that's why a board of directors was appointed. Now, at no time does it take into account the assets or liabilities of the original owner of the property which still exists, which would be Owens. And in reality I cannot answer that question."
In response to the President of the Tribunal's question with regard to what had been expropriated, Mr. Hernández responded (Spanish Record, day 4, 50:27-31): "Well, I admit that when I drafted my report that was one of the most difficult matters to understand, because it was never clear, in my opinion, what exactly was being expropriated. Article 1 of the Expropriation Decree talks about Owens Illinois de Venezuela. But later when it lists the property to be expropriated, it includes property owned by a company, Favianca, that isn't listed in the first Decree."

401. The uncertainty regarding exactly which property was being expropriated persisted throughout the expropriation process. The application for advance provisional remedy filed by the Attorney General listed companies and offices[417] among the tangible assets owned by OIdV that do not appear on the Expropriation Decree and in the prayer for relief requested the seizure of all the property of the Companies and "their subsidiaries."[418] The decision of the First Administrative Court to grant the provisional remedy consisting of said seizure, compounded the error by ordering the seizure of property that was not listed in the Expropriation Decree.[419]

402. Moreover, despite the fact that the Expropriation Decree only lists certain property and improvements, the Respondent actually expropriated the manufacturing and business activity in which both companies owned by OIEG were engaging in Venezuela. The Respondent took over not only the property comprising the Los Guayos and Valera Plants, but also

- The goodwill of OIdV and Favianca;[420]
- The cash deposited into the bank accounts held by OIdV and Favianca;[421]
- The technology and the *know-how* used at the glass manufacturing Plants.

403. In summary, the Tribunal considers it to be a proven fact that in the Expropriation Decree and the subsequent legal action, the Respondent failed to clearly identify the property subject to expropriation, the definition of which constitutes a basic guarantee of due process required by international Law. As such, the Republic has violated "due process of law" in violation of Article 6(a) of the BIT.

c. The expropriation was not discriminatory

404. The Claimant claims that Venezuela expropriated the Companies specifically because they were foreign investments, and points to the express reference to the nationality of OI in the announcement made by President Chávez[422] and in the statements made by Minister Menéndez and Vice President Jaua.[423] Moreover, it claims that the expropriation had the effect of eliminating

[417] Ruling of the First Administrative Court for the Metropolitan Area of Caracas of 20 December 2010, Exhibit C-63, p. 10 and 11.
[418] *Ibid.*, first prayer for relief.
[419] *Ibid*, p. 29; Section IV, paragraph 2.
[420] This was confirmed by the Respondent's expert at the Hearing. See HT, day 4, 80:15-21.
[421] RII, paragraphs 163 and 168; Exhibits C-75 and C-77.
[422] CIV, paragraph 244.
[423] *Ibid* , paragraph 335-336.

foreign participation in the glass container manufacturing industry, since other companies in the sector were not expropriated.[424] The Respondent, on the other hand, claims that the expropriation was not discriminatory with regard to its motivation or effect,[425] and was unrelated to the nationality of OI.[426] In fact, the reference made to its nationality by President Chávez was merely incidental and isolated.[427]

405. Article 6(b) of the BIT prohibits discriminatory expropriations. Discrimination requires more than different treatment. In order for it to exist, similar cases must be treated differently without justification.[428]

406. The Claimant argues that it was expropriated because it was an investment owned by U.S. nationals, but merely states some presumptions in defense of its theory, which cannot be considered sound proof of its argument:

407. First of all, it argues that President Chávez, in his speech announcing the expropriation added the tagline "a company with U.S. capital" after the name "Owens-Illinois." This simple *obiter dictum* does not appear to be sufficient to justify the claim that the US nationality of the OI group was a decisive factor in the decision to expropriate. Moreover, as the Respondent correctly points out,[429] the claim that Venezuela expropriated its investment specifically because it was foreign and American, contradicts its other argument that the true purpose of the expropriation was to cause damage to Polar Group.[430]

408. Secondly, the references made by Minister Menéndez and Vice President Jaua on 26 October 2010 can hardly be classified as discriminatory.

409. Vice President Jaua announced the passage of the Expropriation Decree and in response to a question from a reporter, stated that the government was acting in the defense of the public interest, in clear contrast with what other previous governments had done,[431] which had allowed the "neo-colonialization by transnational companies, particularly American companies"—a statement of a political and historical nature that cannot be classified as an indication of discrimination. For his

[424] CI, paragraph 170, CIV, paragraph 260
[425] RI, paragraph 393; RV, paragraph 116.
[426] *Ibid*, paragraph 347.
[427] *Ibid*, paragraph 117.
[428] *Saluka*, paragraph 313.
[429] RII, paragraph 348.
[430] CI, paragraph 74.
[431] Exhibit C-27, min. 3:30.
"Journalist: [...] Why did all that time go by?
Vice President: First of all, the ban on monopolies and oligopolies was enshrined in the Constitution of 61, but nothing was done. On the contrary, the bourgeois State favored the creation of oligopolies and monopolies, primarily of a transnational nature. It was selling out the Fatherland: the neo-colonialization of Venezuela by transnational interests, particularly American interests, such as in the case of Owens-Illinois."

part, Minister Menéndez did not even mention the nationality of the Claimant, but merely stated that

> "(...) it is in the interest of the collective that... a product ... as essential as a container in which a product consumed by every Venezuelan is packaged, cannot be part of a monopoly held by one economic group, much less by a transnational."[432]

410. The Tribunal has already established the conclusion that the Republic expropriated the Plants to promote endogenous development, a legitimate public policy that it may implement in the manner it believes best serves the common good, even via expropriations and nationalizations. In the decision to expropriate, the decisive factor appears to have been the expropriated Companies were operating in the glass manufacturing sector in which the Venezuelan Government wished to implement said policy—and not the U.S. nationality of the OI group.

411. Moreover, given that OI had more than 60% of the market share of the glass container manufacturing industry,[433] its expropriation cannot be understood to constitute discrimination in favor of domestic investors, but rather a strategic decision. The expropriation of the company ensured that the government would control the largest share of the glass container manufacturing sector—considered by the Republic to be strategic for its endogenous development policy.[434]

412. Therefore, the Tribunal does not consider it to have been proven that the expropriation was carried out for discriminatory reasons.

d. Prior (or against) just compensation

413. The Claimant claims that the expropriation cannot be legitimate, since despite the fact that over four years have passed, it has received no compensation whatsoever for the assets of which it was deprived.[435]

414. The Respondent for its part, acknowledges that it must compensate the Claimant with the just market value of its share in OIdV y Favianca[436] and that it has not yet done so,[437] but points out that Article 6(c) of the BIT does not require payment of compensation to be immediate, but rather "without undue delay." The Respondent claims that the procedure provided by the LECUPS adheres to the provisions of Article 6(c) of the BIT[438] and is currently at the stage in which the fair value is being set.[439]

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[432] Exhibit C-31, min. 5:23
[433] Exhibit R-33, Exhibit R-55
[434] CI, paragraph 27-38.
[435] HT, day 2, 40:16-18; CV, paragraphs 76 and 111-112.
[436] RV, paragraph 178.
[437] HT, day 2, 40:16-18.
[438] RV, paragraph 196.
[439] RV, paragraph 220.

Article 6(c) of the BIT

415. Article 6(c) of the BIT, in the Spanish version, requires that the expropriation measure be taken "with prior just compensation." According to the literal wording, the law requires that just compensation precede the dispossession of the expropriated investor.

416. However, this reading of the Spanish version does not match the English and Dutch versions of the Treaty: they require that the expropriation be carried out "against just compensation" in English, and *"tegen een billijke schadeloosstelling"* in Dutch. This language requires the payment of just compensation—but fails to define the moment at which said compensation must be paid. There is, then, a clear contradiction between the different versions of the BIT—which according to the closing of the Treaty are "equally authentic."

417. How do we resolve this contradiction? The Protocol contains a rule to settle this question: Point 3 establishes that

> "the English version shall be taken as a reference."

418. The correct interpretation of the Treaty is then that the expropriation must be carried out "against just compensation." This wording allows the expropriation to take place without prior payment, but requires payment to be made at some undefined future date, which Article 6 of the BIT *in fine* defines by ordering that the compensation

> "shall be paid and made transferable without undue delay."

Proven Facts

419. The following are proven facts:

420. (i) The expropriation procedure under the LECUPS is still moving through the Venezuelan Administrative Courts and no final decision has as yet been rendered. These proceedings, in which neither the companies nor the Claimant are participating,[440] began on 14 March 2011 as a result of the request for expropriation filed by the Attorney General's Office, and is currently being processed by the Second Administrative Court.[441] As of the date of the award, there is no evidence the fair value has been determined nor has the Claimant received any compensation whatsoever.

421. (ii) Between January and July of 2011 the Companies and the Respondent held four meetings out of court for purposes of determining the proper compensation. Given the vast differences between the two parties—the Claimant valued 100% of the Companies at just over USD 1 billion, while the Bolivarian Republic of Venezuela counter-offered a range of between USD 100-120 million—the meetings broke down without any agreement.

[440] Letter from OIdV to Minister Menéndez dated 9 December 2010, Exhibit R-5.
[441] Hernández-Exhibit 111.

The Tribunal's Decision

422. The Tribunal has already established that the LECUPS is a modern law, compliance with which in principle meets the requirements of Article 6(c) of the BIT. However, given that the process began nearly four years ago and the fair value has still not been set, much less any compensation paid, does this delay constitute "undue delay," which would violate the express provision of Article 6(c) *in fine* of the BIT?

423. The Bolivarian Republic of Venezuela acknowledges that it owes compensation to OI Group and that the value of the expropriated property exceeds, based on Venezuela's own calculations, USD 100 million—a significant sum by any account. The BIT requires that the Bolivarian Republic pay compensation "without undue delay." In order to meet this requirement, it would have been appropriate for the procedure provided in the LECUPS to have moved forward without delay, and that the fair value owed under said Law would have been established and paid—without prejudice to the investor's right to file a claim under the BIT, if it believed that, despite the payment made, the Bolivarian Republic of Venezuela had not fully performed its obligations under international law that it undertook in the Treaty.

424. The Respondent acknowledges that the legal proceedings in Venezuela have been drawn out, but it justifies this by saying that the Claimant's failure to appear has made proper processing difficult.[442] However, the experts for both parties confirmed at the hearing that the opposite is true.[443] In particular, the expert for the Respondent stated:

> "CLAIMANT (Mr. Grané Labat).- Would you say that this means that the failure to appear on the part of this, of this expropriated party would not stand in the way of this legal proceeding contemplated by the Law for the purpose of paying the compensation?
>
> EXPERT (Mr. Cabrera).- It would not stand in the way."[444]

425. Consequently, the Tribunal concludes that the Bolivarian Republic has failed to offer a plausible explanation to justify the delay of more than four years in setting and paying the fair value due in compliance with the LECUPS, which in turn implies that the requirement under Article 6(c) of the BIT that the compensation be paid "without undue delay" has not been met.

* * *

426. In summary, the Tribunal holds that the Bolivarian Republic of Venezuela has not been able to prove that the Expropriation Decree has complied with all the requirements set forth in Article 6 of the BIT. Although this Tribunal has reached the conclusion that the expropriation was carried out in the public interest, and is not discriminatory, Venezuela has failed to ensure due process of law, by

[442] RV, paragraph 205.
[443] HT, day 4, 26:10 – 27:2; Hernández, paragraphs 26 and 159-160.
[444] HT, day 4, 65:7-11.

failing to precisely identify the property it intended to expropriate, and there has been excessive and unjustified delay in the payment of the fair value due under the LECUPS. Therefore, the expropriation of the Claimant's investment is not in accordance with the provisions of the Treaty and must be considered illegal.

3. ANCILLARY CLAIMS AND CONVERTIBILITY CLAIM

427. The Claimant considers it proven that the actions of the Respondent, in addition to constituting expropriation measures, also constitute violations of art. 3(1), 3(2), 3(4), and 5 of the BIT. The Claimant asserts that Venezuela, through the acts and omissions of its government agencies:

- has treated the Claimant's investments in an unfair and inequitable manner, and has hindered, by means of arbitrary and discriminatory measures, the operation, maintenance, management, use, enjoyment and disposal of the investment, in violation of art. 3(1) of the BIT;

- has failed to grant full physical security and protection to the Claimant's investments, in violation of art. 3(2) of the BIT;

- has failed to comply with the obligations assumed by it with respect to the treatment of the investments, in violation of art. 3(4) of the BIT [**"Umbrella Clause"**];

- and has failed to guarantee that the payments related to the Claimant's investments can be transferred in a freely convertible currency, in violation of art. 5 of the BIT, all such facts being attributable to Venezuela.

The first three claims will be referred to as the **"Ancillary Claims."**

428. The Claimant considers that each breach of the BIT is independent and cannot be legally incorporated into the other breaches[445] and that each one grants it the right to petition for a declaratory judgment and to obtain full compensation for the totality of the damages (including moral damages) caused.[446] Notwithstanding, *hic et nunc*, it does not claim any amount whatsoever, with the exception of moral damages, with respect to the Ancillary Claims.

429. The Respondent denies that Venezuela has violated articles 3(1), 3(2), 3(4), and 5 of the BIT.[447] It adds that in the event the Tribunal decides that a wrongful expropriation has occurred, the analysis of the Ancillary Claims would be superfluous, since all the damages

[445] CV, para. 122.
[446] CV, para. 122.
[447] RII, para 359.

claimed by the Claimant, with the exception of one (moral damages) are incorporated in the expropriation compensation.[448]

Analysis of the Tribunal

430. The Tribunal has reached the conclusion that the Bolivarian Republic has expropriated the Claimant's investment located in Venezuela in violation of the Treaty, an action which, in accordance with the provisions set forth in art. 6(c) of the BIT requires the Respondent to pay fair compensation which "represents the market value of the investments affected," plus interest "at a normal commercial rate through the date of payment."

431. The Respondent agrees that, from the theoretical standpoint, a certain conduct can constitute one or several violations of the BIT. However, it adds that in this case, once the conclusion that a wrongful expropriation has occurred is reached, the analysis of the Ancillary Claims would be unnecessary, since all damages claimed by the Claimant—with the exception of moral damages—would arise as a result of the wrongful expropriation.

432. Despite the fact that the Tribunal agrees with the Respondent in that the analysis of the Ancillary Claims would probably be futile in practical terms, its request cannot be granted:

- First, because the Tribunal must make a fully informed assessment of the possible existence of moral damages,

- and also, because the Claimant has expressly and repeatedly requested a declaratory judgment.

433. Therefore, the Tribunal proceeds to analyze, albeit briefly, the Ancillary Claims.

4. BREACH OF ART. 3(1): OF THE BIT: FAIR AND EQUITABLE TREATMENT

4.1 Claimant's Position

434. The Claimant considers that the Respondent violated the standard of fair and equitable treatment [**"FET"**] set forth in art. 3(1) of the BIT.[449]

435. In the first place, the Claimant considers that the Bolivarian Republic misinterprets the FET standard established in the Treaty, since it attempts to equate the FET standard in the BIT with the international minimum standard of treatment.[450] OEIG considers that neither art. 3(1) of the

[448] RII, para 361
[449] CV, para. 123
[450] CIV, para. 271

BIT nor art. 3(1) of the BIT Protocol link or limit the FET standard in the BIT to the minimum standard of treatment of customary international Law.

436. The Claimant asserts that to violate the FET standard in the BIT, it is sufficient for the conduct of the Respondent to show "a relatively lower degree of impropriety."[451] Nevertheless, the Claimant alleges that, if the applicable standard were the minimum standard in accordance with international Law, which requires the conduct to "show a relatively higher degree of inadequacy," the conclusion would be the same; the Respondent's conduct was so flagrant, and with so great a degree of impropriety that there is no doubt that the treatment afforded to the Claimant's investment was neither fair nor equitable and, therefore, the Respondent violated art. 3(1) of the BIT.[452]

FET

437. The Claimant reports numerous acts and omissions by the Republic which violate the FET standard. In particular, the Claimant considers it proven that Venezuela:

- Through its officials, coerced the personnel of the Companies and engaged in a campaign of harassment against OIdV and Favianca;
- Acted in an arbitrary manner with respect to the Claimant's investments;
- Has utilized its power for an improper purpose;
- Violated the legitimate expectations of the Claimant;
- Denied the Claimant and the Companies due process and procedural justice;
- Has treated the Claimant's investment in a discriminatory manner;
- Has failed to comply with its duty to act in a transparent manner; and
- Has not acted in good faith with respect to the Claimant.

438. The following paragraphs briefly summarize the Claimant's allegations with respect to such acts of non-compliance.

The coercion of Companies' personnel

439. The Claimant asserts that the Respondent violated the FET standard by coercing, threatening and harassing the Companies' personnel as of the time of the expropriation.[453] According to the

[451] CIV, para. 279, citing *Saluka*, para. 293.
[452] CIV, para. 280-282.
[453] CV, para. 123.

Claimant, the threat of treating "saboteurs,"[454] ruthlessly, issued in a context of a military occupation of the Plants[455] instilled fear in the personnel and had the desired effect; it obligated the Companies' personnel to remain in their positions and operate the Plants to the exclusive benefit of the Respondent.[456]

Reasons for the expropriation

440. OIEG alleges that Venezuela has acted in an arbitrary manner in general,[457] but particularly emphasizes that the expropriation was arbitrary,[458] because it never offered any plausible, clear and coherent justification[459] and because it took control of the Plants without having a clear plan for the transition period.[460]

Abuse of authority

441. The Claimant adds that the Bolivarian Republic applied its laws for a purpose other than that for which they were created.[461] Thus, the Claimant holds that the Respondent violated art. 3(1) of the BIT because[462]

- It used the Venezuelan expropriation procedure illegally to sanction violations of free competition which were never proven;[463]
- It usurped the legal authority of the Superintendence by sanctioning those violations;[464]
- It utilized the INDEPABIS Law to deprive the Claimant and the Companies of the legal protections afforded by the Expropriation Law.[465]

Legitimate expectations

442. Furthermore, the Claimant considers that the lack of a proceeding prior to the expropriation with respect to the charges of environmental damage, workforce exploitation or breach of the right to competition through the Courts or administrative proceedings, and contrary to the provisions of Venezuelan Law, constitutes a violation of the legitimate expectations of OIEG with respect to

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[454] CI, para. 79-86, Rejoinder brief, para. 295
[455] CIV, para. 294
[456] CIV, para. 294-296; CV, para. 123.
[457] See CV, para. 124, which refers to para. 118.
[458] The Claimant asserts that the international Tribunals have held that a measure is arbitrary when: 1) it is confused or unclear; 2) is not the result of a rational decision-making process, or 3) constitutes a failure to observe legal due process, an act which impacts or at least surprises, the sense of legal correctness. CV, para. 124, citing *Occidental*, para. 163, *LE&E*, para. 158; and *ELSI*, respectively.
[459] CIV, para. 301-306
[460] CV, para. 124 and 128.
[461] CV, para. 129; para. 309; CI, para. 192, citing *PSEG*, para. 247 and *Mohammad Ammar Al-Bahloul.*
[462] CV, para. 129.
[463] CV, Section III.A(i); CIV, para. 311; Hernández, para. 81-82 and 94; Cabrera, para. 95-96.
[464] Hernández, para. 101; HT, day 4, 49:11-25.
[465] CV, para. 68-74; CIV, para. 312.

the treatment its investments would receive.[466] Likewise, the Claimant alleges that the non-compliance with the Investments Law (which sets forth the obligation of fair and equitable treatment, non-discrimination and compensation for expropriation) also frustrated its legitimate expectations, in violation of the FET standard.[467]

Due Process

443. The Claimant considers it to be proven that the Respondent deliberately denied the Claimant the right to due process and procedural justice to which its investments are entitled.[468] In addition to the violations of due process identified in the preceding section, the Claimant considers that the following conduct on the part of the Respondent violated the obligation of FET contained in the BIT:

- The lack of prior notification of the expropriation;[469]
- The "obscurity"[470] in the declaration and execution of the Expropriation Decree and the successive delays by the Respondent to put an end to the period of forced labor in the Plants.[471]
- The threats by the Respondent to the Companies' personnel to charge them with "sabotage," without clarifying the meaning of that concept or indicating any law or penalty which would sanction such conduct;[472]
- The execution of burdensome audits which exceeded the jurisdiction of the supervising authorities, obtaining court orders in violation of Venezuelan Law and forcing the Companies to participate in the collective bargaining negotiations despite the expropriation.[473]

444. The Claimant considers that the actions by the Respondent are contrary to the provisions in *AIG* with respect to the fact that due process requires the absence of arbitrariness,[474] and denies that, as indicated by the Respondent, it is required to exhaust all legal remedies available to it in Venezuela, since no obligation exists under the BIT or the ICSID agreement to litigate violations of due process in national law courts.[475] Therefore, it considers that the actions described constitute a violation of international Law and, specifically, the FET standard.

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[466] CIV, para. 317.
[467] CIV, para. 318.
[468] CIV, para. 323.
[469] CI, para, 205; CIV, para. 324 and 327.
[470] CIV, para. 325, citing *Kardassopoulos*, para. 397.
[471] CIV, para. 325.
[472] CIV, para. 326, CV, para. 125.
[473] CIV, para. 328.
[474] CIV, para. 329.
[475] CIV, para. 330.

Discrimination

445. The Claimant also argues that the Respondent implemented measures which were discriminatory, both in intent and effect. First, it considers that the context, tone and language of the announcement by President Chávez demonstrates that the expropriation was carried out for political and discriminatory reasons,[476] a fact which can also be noted in the statements by Minister Menéndez and Vice President Jaua.[477] Secondly, the Claimant holds that the Respondent has admitted that no other expropriations have occurred in the glass sector, for which reason Venezuela has treated the Claimant's investments in a discriminatory manner in comparison with any other company in the glass production sector,[478] and therefore, in an unfair and inequitable manner.[479]

Transparency

446. The Claimant asserts that the statements during the Hearing confirmed that the Respondent failed to comply with its duty to act in a transparent manner, which constitutes a violation of art. 3(1) of the BIT. This duty required the Respondent to make decisions which could affect the Claimant based on a known and understandable legal framework, and that it act in a transparent manner in its administrative processes.[480] Nevertheless, the Respondent failed to comply with its duty to act in a transparent and honest manner because:

- The Expropriation was carried out without prior notification to the Claimant;[481]
- The Respondent has been unable to provide a coherent justification for the expropriation;[482]
- The Respondent failed to identify, in a clear and coherent manner, the property expropriated;[483]
- The lack of transparency during the Plant occupation period (from October 2010 through April 2011), which is manifested, for example, in the numerous and diverse requirements made by several authorities, the establishment of periods for finalizing the period of forced labor which were repeatedly unmet.[484]

[476] CIV, para. 334.
[477] CIV, para. 335-336.
[478] CIV, para. 337.
[479] CI, para. 209.
[480] CI, para. 210-213, citing Dolzer & Schreuer and *Tecmed*, para. 154; CV, para. 127.
[481] CI, para. 164-167 and 213.
[482] CV, para. 127.
[483] CV, para. 128.
[484] CI, para. 214.

- The failure to provide minutes or any document regarding the meeting of the Cabinet Ministers on 26 October 2010, at which the Expropriation Decree was approved, despite the order of the Court to produce such documents.[485]

- Obtaining the *ex parte* order dated 20 December 2010 is derived from an abuse of power and is in violation of significant provisions of Venezuelan law.[486]

Good faith

447. In addition, OIEG holds that Venezuela has violated the principle of acting in good faith, which it considers "inherent to FET."[487] The Claimant considers that the following conduct on the part of Venezuela, individually, and more so together, constitute convincing evidence that the Respondent did not act in good faith, in violation of art. 3(1) of the BIT:

- The Respondent expropriated the Companies without compensation and without a legitimate public interest. In particular, the Respondent's apparent concern for "food supply safety" in Venezuela is contradicted by the fact that the Respondent now exports glass containers to Brazil;[488]

- It utilized the Bolivarian National Guard (GNB) to take physical possession of the Plants;[489]

- It forced the employees to accede to its demands under the threat of accusing them of "sabotage"[490]

- It carried out a campaign of harassment against the Companies, initiating multiple audits and investigations[491]

- It failed to notify the legal proceedings directly related to the Companies and disclosed Envidrio confidential and proprietary information.[492]

448. Finally, the Claimant considers it to be proven that the Respondent acted in an arbitrary and discriminatory manner, in violation of the FET standard, and asserts that the same arbitrary and discriminatory conduct has hindered the OIEG investments, in violation of art. 3(1) of the BIT *in fine*.[493]

449. The Claimant therefore concludes that the Respondent has violated the FET standard and that, by means of arbitrary and discriminatory measures has hindered the functioning, operation, management, maintenance, usage, enjoyment and disposal of the Claimant's investments, in

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[485] CIV, para. 347.
[486] CIV, para. 347.
[487] CI, para. 216, citing Dolzer & Schreuer.
[488] CIV, para. 353.
[489] CI, para. 218.
[490] *Ibid.*
[491] *Ibid.*
[492] CIV, para. 354 and 355.
[493] CI, para. 230.

violation of the provisions set forth in art. 3(1) of the BIT.[494]

4.2 Respondent's Position

450. The Respondent denies having treated the Claimant in an unfair and inequitable manner, and that the post-expropriation conduct of the Republic has been discriminatory and arbitrary, and therefore does not constitute a violation of art. 3(1) of the BIT.

451. First, the Republic argues that the threshold for determining that the FET standard has been violated is high.[495] The Republic asserts the application of the FET standard defined in *Waste Management*, which reaffirms that the violation of the FET is reserved to a conduct which is:

> "arbitrary, grossly unfair, unreasonable or idiosyncratic, discriminatory, and which exposes the Claimant to sectorial o racial damages or implies a lack of due process the result of which is contrary to legal decency."[496]

That is, the Respondent argues that its conduct must be subject to a relatively higher degree of impropriety,[497] advocating that the applicable standard be determined with due deference to the State.[498] Furthermore, the Respondent rejects an abstract application of the standard and, therefore, requests an analysis be made of the specific circumstances of the case.[499]

452. The Respondent concludes that in no case has its conduct implied an unfair or inequitable treatment to the Claimant, regardless of the standard used.

Coercion of personnel

453. The Respondent characterizes as fictitious and fabricated *ex profeso* for the arbitration proceeding the allegations by the Claimant that Venezuela coerced OIdV personnel to carry out a prolonged period of forced labor.[500] The Respondent rejects those allegations based on the following arguments:

- No evidence whatsoever exists of the alleged coercion, since none of the correspondence during that period drafted under instructions from counsel and sent by OIdV to the Respondent mentions the matter;[501]

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[494] CIV, para. 372.
[495] RII para. 368-369, in which it relies on the *Biwater* and *Waste Management* cases, para. 98
[496] RIV, para. 320.
[497] *Ibid.*
[498] RIV, para. 321.
[499] RII, para. 369; RIV, para. 322.
[500] RV, para. 230 and 231.
[501] RV, para. 232.

- It has not been proven that the alleged coercion was the result of threats of accusations of "sabotage" or that it was induced by the presence of the GNB;[502]

- The documentary evidence demonstrates that the Plant personnel continued working voluntarily and/or because they considered that they had the obligation to do so under Venezuelan law;[503]

- The witnesses for the Respondent (Vice Minister Pimentel,[504] Mr. Sarmiento,[505] Mr. Morales,[506] and Mr. Romero[507]) confirmed that the OIdV employees cooperated voluntarily during the Supervision Period.[508] However, the testimony of the witnesses for the Claimant should be dismissed, since Mr. Machaen had no first-hand knowledge of the facts[509] and the testimony of Mr. Gómez is not credible;[510]

- The Claimant's employees, including those residing outside Venezuela, at no time documented the alleged fear of retaliation on the part of the employees[511] ;

- It is implausible that the reference to "sabotage" by Minister Menéndez has caused the effect claimed by the Claimant, since it referred to the condemnation of actions designed to paralyze the Plants, and the witnesses confirm that they did not have a coercive effect;[512]

- The Claimant has overstated the presence of the GNB which, during the majority of the time was present in very small groups, positioned at the Plant guard posts, without interfering with entries and departures and who only went inside the Plants to go to the cafeteria;[513]

- The Claimant's employees and, specifically, Mr. Machaen and his team, drew their own conclusions when the Minister mentioned "sabotage."[514]

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[502] RV, para. 233.
[503] RV, para. 234.
[504] RII, para. 144; RIV, para. 88; Pimentel I, para. 43-48 and 53-55; Pimentel II, para. 14 and 17-20.
[505] RII, para. 144; RIV, para. 88; Sarmiento I, para. 20-22 and 32-36.
[506] RIV, para. 88-90, Pablo Morales witness Statement dated 22 August 2012, para. 15 and 19.
[507] RIV, para. 88-91, Rafael Romero witness statement dated 23 August 2013, para. 7 and 11)
[508] RV, para. 235.
[509] RV, para. 236 and 240-242.
[510] RV, para. 236 and 243-253.
[511] RV, para. 237.
[512] RV, para. 238.
[513] RV, para. 239.
[514] RV, para. 240.

Reasons for the expropriation

454. Furthermore, Venezuela considers that the Claimant has failed to prove the alleged lack of consistency in the Republic's reasons for the expropriation, or that it was politically motivated, or that the absence of preparatory documents can undermine the validity of the reasons set forth in the Expropriation decree. Therefore, it denies the Claimant's allegations that Venezuela's conduct was arbitrary.[515]

Abuse of power

455. The Republic asserts that at no time has it used its power for inappropriate purposes. Venezuela considers it to be proven that the expropriation was carried out with a specific and legitimate objective, and that no basis whatsoever exists for the Claimant's allegations that INDEPABIS and INPSASEL committed abuse of power or acted with the intention of causing harm to the Claimant.[516]

Legitimate Expectations

456. Likewise, the Respondent alleges that the claim by the Claimant that its legitimate expectations were frustrated cannot succeed. The Republic argues that OIEG has not even attempted to demonstrate that it relied on specific commitments or regulations when it made its alleged investment, or that any Venezuelan legal regulation has been modified or interpreted to its detriment.[517]

Due Process

457. The Respondent holds that it has not denied due process or procedural justice to the Claimant or the Companies. Venezuela considers the following facts to be proven, which in its opinion prevent the Claimant from alleging violation of the FET Standard:

- The expropriation was not based on environmental, labor or right to competition reasons;[518]

- There are no grounds for the allegations by the Claimant of forced labor, disorganization in taking possession of the Plants or exploitation of the Plant intellectual property;[519]

[515] RIV, para. 327-329.
[516] RIV, para. 331.
[517] RIV, para. 333-335.
[518] RIV, para. 337.
[519] RIV, para. 338.

- The *ex parte* order authorizing the occupation of the Plants was issued in accordance with Venezuelan legislation and, in any event, was not challenged by the Claimant in the Venezuelan Courts.[520]

Discrimination and Good Faith

458. Likewise, Venezuela denies that the expropriation was carried out due to the national origin of the Claimant and therefore considers that the allegations of discrimination against the Claimant should be dismissed.[521]

459. Finally, Venezuela asserts that its actions have been transparent and in good faith. In particular it considers proven that:

- The expropriation and the *ex parte* occupation order were foreseeable as a legitimate exercise of the power of the Bolivarian Republic under Venezuelan Law;[522]

- The Claimant has failed to demonstrate that it acted on the assumption that INDEPABIS and INPSASEL would not carry out audits, that fines would not be imposed or that the Supervision Period would not be extended;[523]

- The evidence demonstrates that the Claimant did not challenge the expropriation or its implementation as being contrary to Venezuelan law, but rather it recognized its obligations under Venezuelan law and undertook to cooperate in good faith;[524]

- The expropriation was carried out to guarantee food safety and the endogenous development policy of the Republic, and the Claimant has failed to demonstrate that any other reason existed;

- The commissioning of the Envidrio Report and the disclosure of Plant technical information to third parties was necessary given the deteriorated condition of the Plants and, in particular, their furnaces.

460. In short, the Respondent denies having violated in any way the FET standard during the transition period and considers that the Claimant has grouped all the trivialities which then occurred and has characterized them as international unlawful acts.[525]

461. Finally, the Republic denies that its alleged arbitrary or discriminatory conduct has hindered the management, use or enjoyment of its investment in violation of art. 3(1) *in fine* of the BIT and

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[520] RIV, para. 339.
[521] RIV, para. 340-341.
[522] RIV, para. 343.
[523] *Ibid.*
[524] RIV, para. 344.
[525] RII, para. 208.

considers that the Claimant's claim should be dismissed for reasons identical to those already set forth in this section.[526]

462. In view of all the arguments, the Respondent concludes that all the claims put forward by the Claimant with respect to alleged violations of art. 3(1) of the BIT should be dismissed.

4.3. Analysis of the Tribunal

463. In its arguments and in its petition, the Claimant proposes that the same events that led to the expropriation of its investment—which have already been analyzed in the previous section—constitute an additional international illegal act of unfair and inequitable treatment sanctioned by the Treaty. However, as has been indicated, the Claimant is claiming no additional compensation for these alleged violations: the compensation requested for the expropriation of its investment also includes the damage caused by these illegal acts, with the exception of moral damages. OIEG is suing for USD 10 million for moral damages stemming from what it refers to as the Respondent's atrocious conduct[527] during the six months following the expropriation.

464. The Respondent, for its part, denies the existence of unfair or inequitable treatment and any arbitrary or discriminatory measures.

Determining of the scope of analysis

465. The Claimant includes in the alleged violation of the standard of FET not only the actions that resulted in the takeover of the Plants, but also the actions of INPSASEL and INDEPABIS, two State agencies, as well as those of the Judicial Branch of the Venezuelan government.

466. To resolve this issue, the Tribunal shall first determine what standard of protection is established by the Treaty (A). Once the standard of protection has been clarified, the question of whether the events constitute a violation of the standard of FET can be analyzed (B).

A. Definition of the standard of FET in the BIT

467. Throughout the arbitration, the Republic has insisted that the scope of the guarantee of FET defined in the BIT is limited to the minimum standard of treatment of Customary International Law. In support of its thesis, it has invoked the verbatim text of item 2 of the Protocol, which uses the adverb "as well as" to indicate that the notion of FET must be analyzed from the perspective of both the most favored nation and the minimum standard of treatment of foreign nationals under international law.[528]

[526] RII, para. 422.
[527] CI, para. 248 (v).
[528] RIV, para. 314.

468. The Claimant's understanding, on the other hand, is that the standard reflected in article 3(1) of the BIT and item 2 of the Protocol does not coincide with the minimum customary treatment, but instead represents an autonomous and broader contractual standard. In its opinion, article 3(1) of the BIT does not tie the standard of FET to the minimum standard of treatment of customary international law, nor does item 2 of the Protocol introduce such a limitation.[529] (In any case, the Claimant maintains that even if the minimum customary standard of treatment is applied, the result would be the same: the Respondent's conduct was so blatant that it also violated the less demanding standard[530]).

FET in the BIT and its Protocol

469. The obligation to accord FET to protected investments is recognized in article 3(1) of the BIT and item 2 of its Protocol.

470. Article 3(1) of the BIT establishes the following:

> "1. Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by arbitrary or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those nationals."

471. The BIT thus contains two rules:

- On the one hand, it ensures FET of the protected investments.
- And, furthermore, it prohibits arbitrary or discriminatory measures against protected investors.

472. The regulation of article 3(1) of the BIT is supplemented by item 2 of the Protocol, which sets out the following:

> "The Contracting Parties agree that the treatment of investments shall be considered to be fair and equitable as mentioned in Article 3, paragraph 1, if it conforms to the treatment accorded to investments of their own nationals, or to investments of nationals of any third State, as well as to the minimum standard for the treatment of foreign nationals under international law, whichever is more favorable to the national concerned."

473. Thus, the standard orders that the treatment accorded to a protected investor shall be fair and equitable if it conforms:

- "to the treatment accorded to national [Venezuelan] investments or
- to investments of nationals of any third State,

[529] CIV, para. 272.
[530] CIV, para. 280-284

- as well as to the minimum standard for the treatment of foreign nationals under international law,

whichever is more favorable to the [protected Dutch investor]."

474. What is the exact meaning of this vague provision?

475. Article 31(1) of the VCLT requires treaties to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context."

476. Applying this interpretative principle, the Spanish text of the BIT proves vague, since it seems to require the guarantee of FET to be accorded in accordance with the standard most favorable to the investor, from among the following:

- the treatment accorded to national investments
- the treatment to investments of nationals of third States and
- the minimum standard of Customary International Law.

477. However, the English text is written in a totally different way:

> *"The Contracting Parties agree that the treatment of investments shall be considered to be fair and equitable as mentioned in Article 3, paragraph 1, if it conforms to the treatment accorded to investments of their own nationals, or to investments of nationals of any third State, whichever is more favorable to the national concerned, as well as to the minimum standard for the treatment of foreign nationals under international law."*

478. In the English version, it is clear that the treatment accorded to the investment shall be fair and equitable if it satisfies a dual requirement:

- If the treatment confirms to the treatment accorded to investments of nationals or investments of third States, applying the most favorable of the two alternatives, and
- Additionally (*"as well as"*) to the minimum standard for the treatment of foreign nationals under international law.

479. What to do to resolve this conflict of authority? The Protocol contains a rule to resolve this issue: item 3 establishes that:

> "the English text shall be taken as a reference."

480. Therefore, the regulation of FET envisaged in the English version of item 2 of the Protocol shall prevail. In practical terms, this regulation implies that the FET guaranteed by the BIT

- As a general rule, shall equate to the minimum customary standard;

– Unless the investor is able to prove that the treatment guaranteed for the investments of nationals or third States is superior.

United Kingdom – Venezuela Treaty

481. The Claimant has attempted to avail itself of this exception, arguing that the standard of treatment established in the Treaty between the United Kingdom and Venezuela is indeed superior. Article 2(2) of that Treaty indicates that

> "[i]nvestments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment in accordance with international law."[531]

482. The Tribunal does not agree with this assessment: it is not true that the Treaty with the United Kingdom offers superior treatment to the minimum customary standard, since in reality it only offers protected investors FET "in accordance with international law." The Treaty therefore does not guarantee FET in abstract, but rather only as recognized by international law. And the level of protection that international law offers and ensures to foreign nationals is precisely what is known as the minimum customary standard.

483. In short, the Tribunal concludes that *hic et nunc* the general rule should be applied, and that the standard of FET enjoyed by the Claimant in relation to its investments in Venezuela is the minimum customary standard (or to use the terminology of the Protocol to the BIT, "the minimum standard for the treatment of foreign nationals under international law").

Minimum customary standard

484. What should be understood by minimum standard of treatment to foreign nationals guaranteed by Customary International Law?

485. The issue is fraught with difficulties because there is no consistent case law. Furthermore, it becomes necessary to make distinctions, taking into account the varying nature of actions that generate international liability on the part of the State.

486. The first formulation of the standard of FET seems to have been the one adopted in *Roberts,*[532] an arbitral decision rendered in 1926 by the General Claims Commission of the United States and Mexico, which prosecuted the actions of Mexico's Executive Branch and defined the minimum

[531] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, Exhibit CLA-3.
[532] Roberts, pp. 77-81

standard as that which is required *"in accordance with ordinary standards of civilization."*[533]

487. Mr. Roberts, an American, had been imprisoned in Mexico under what he understood to be inhumane conditions. Mexico argued that Mexican citizens were imprisoned under identical conditions. And the Tribunal decided as follows:

> *"Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization. We do not hesitate to say that the treatment of Roberts was such as to warrant an indemnity on the ground of cruel and inhumane imprisonment."*[534]

488. The standard defined in *Roberts* (*"in accordance with ordinary standards of civilization"*) was established in the 1920s, in a context of injury to a foreign citizen's individual rights and of prosecution of actions taken by the Executive Branch—not judicial actions or legislative actions. Perhaps the most important thing about the award is the principle that an action attributable to the State can generate international legal liability, despite the fact that the measures affect both nationals and foreign nationals equally and even if there is no bad faith or willful breach of obligations.

489. The minimum customary standard has not remained frozen. It has developed significantly since its early formulations 100 years ago, driven by the establishment of Human Rights and the implementation of the Rule of Law. Well into the 21st century, *Roberts* is of dubious relevance for the protection of foreign investors against administrative, legislative or judicial actions that interfere with the use and enjoyment of their investment. What is relevant is not the standard as it was defined in the 20th century, but rather the standard as it exists and is accepted today—since both Customary International Law and the standard itself are constantly evolving.[535] And it is quite possible that currently the minimum customary standard and the FET envisaged in the treaties have converged, according the investor with substantially equivalent levels of protection.

490. Article 3(1) of the BIT should serve as a starting point in the task of unravelling the current meaning of the standard. On the one hand, the precept outlines the general principle that the investor will be ensured FET in accordance with the minimum international standard and, moreover, it adds a specific prohibition: no State must adopt "arbitrary or discriminatory

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[533] Another frequently cited case is *Neer*; however in reality it is only applicable to situations of denial of justice; cfr. J. Paulsson and G. Petrochilos: "Neer-Ly Misled?"; Foreign Investment Law Journal, Vol. 22, No. 2, (2007), p. 243.
[534] Roberts, p. 80 [underlining is the Tribunal's].
[535] *ADF*, para. 179; *Gold Reserves*, para. 567

measures" that affect "the operation, management, maintenance, use, enjoyment or disposal" of the investments.

What, then, should FET be taken to mean?

491. FET represents an indeterminate legal concept, which imposes a minimum standard of conduct on all States with respect to foreign nationals. A State violates it when it takes an action or a chain of actions that are demonstrably unlawful or fail to recognize the basic requirements of the rule of law.[536] The duty of according FET to foreign nationals is mentioned with respect to the State as a whole, and it binds all branches that it comprises. The obligation of FET can be violated in the following ways:

- Through administrative actions, taken by administrative authorities for which the State is responsible, directly against the investor;
- Or also by means of judicial actions that affect the investor, if they involve a denial of justice;
- Or lastly by means of general legislative actions, enacted by the State, if the new regulation contradicts the investor's legitimate expectations.

492. What should be understood by "arbitrary or discriminatory measures"?

493. The BIT not only mentions the guarantee of FET but also prohibits the adoption of "arbitrary or discriminatory measures" that affect the investment.

494. It is not easy to define what arbitrary is. The fundamental idea of arbitrariness is that legality, due process, the right to judicial remedy, objectivity and transparency in the State's management are replaced by privilege, preference, bias, preclusion and concealment.[537] Professor Schreuer has defined (and the *EDF* Tribunal has accepted[538]) as arbitrary:

> *"a measure that inflicts damage on the investor without serving any apparent legitimate purpose; a measure that is not based on legal standards but on discretion, prejudice or personal preference; a measure taken for reasons that are different from those put forward by the decision maker; a measure taken in willful disregard of due process and proper procedure."*

[536] *Glamis* stated in the same regard that violation of the customary minimum treatment requires that *"[...] an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons [...]"* (*Glamis*, para. 616).
[537] See, among many others: *Ronald Lauder*, para. 221; *Tecmed*, para. 154; *Loewen*, para. 131; *Saluka*, para. 307.
[538] EDF, para. 307; Professor Schreuer acted as an expert in these proceedings, and his opinion was cited and adopted by the Tribunal.

495. Discrimination, in turn, requires an investment to be treated differently from other investments, without this being justified on any objective grounds; it requires a measure to affect one foreign investor and not others, precisely on account of his foreign status, or on account of his belonging to a certain ethic, religious or national group.[539]

496. In short: In this case, the BIT requires the existence or non-existence of FET to be determined according to the standard of treatment for foreign nationals imposed by international law and, in particular, prohibits States from adopting arbitrary or discriminatory measures that may affect the protected investment.

B. Application of the standard of FET to the facts

497. The Claimant asserts that the actions taken by Venezuelan authorities violated the guarantee of FET and were arbitrary and discriminatory.

498. The Republic of Venezuela, for its part, denies that it has treated the Claimant unfairly and inequitably and also denies that the Republic's post-expropriation conduct has been discriminatory and arbitrary, therefore constituting a violation of article 3(1) of the BIT.

499. The Tribunal will analyze each of the Claimant's allegations below:

C. The expropriation

500. In para. 426 above, the Tribunal has already reached the conclusion that the expropriation was unlawful because:

- Due process was not followed, upon failing to precisely identify the assets that it aimed to expropriate, and
- The Bolivarian Republic has incurred an excessive and unjustified delay in payment of the due compensation.

501. As the expropriation was unlawful, the Republic must have also breached the guarantee of FET, since it proves difficult to imagine an unlawful direct expropriation that does not involve a violation of that standard.[540]

D. The actions of the INDEPABIS

502. The Claimant alleges that the temporary occupation and operational preventive measures issued by the INDEPABIS constitute administrative acts which:

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[539] *LG&E*, para. 174.
[540] C. Schreuer, *Introduction: Interrelationship of Standards*, in A. Reinisch, *Standards of Investment Protection*, Oxford University Press, UK (2008), p. 3.

- deprive the Claimant and the Companies of the legal protections afforded by the Expropriation Law,[541] that is, an abuse of power;

- are a violation of its right to due process, being excessively burdensome,[542] and

- are a violation of Venezuelan law.[543]

503. The Respondent denies that the actions of the INDEPABIS have violated national law[544] or that there has been any abuse of power.[545] In particular, the Republic asserts that:

- The occupation by the INDEPABIS did not violate art. 4 of the Expropriation Decree since that article does not establish that the occupation be carried out by virtue of art. 56 of the Expropriation Law, but rather simply states that possibility;[546]

- Contrary to the assertions by the Claimant, Venezuelan Law permits the occupation of expropriated property without court authorization.[547] In fact, art. 6(4) of the INDEPABIS Law does not require court authorization for the occupation of expropriated property.[548] Therefore, the INDEPABIS could occupy the Plants as of the publication of the Expropriation Decree.[549]

- The INDEPABIS could elect to carry out the occupation either under the terms of art. 6(4) or art. 112(1) of the INDEPABIS Law;[550] it elected to do so by virtue of art. 112 due to the existence of an objective situation of risk of production collapse or standstill;[551]

- The Claimant did not challenge the expropriation or the subsequent occupation of the Plants.[552]

504. The Arbitral Tribunal must determine whether the actions by the INDEPABIS violated the FET standard. To do so, it will explain the occupation system for expropriated property under

[541] CV, para. 68-74; CIV, para 312.
[542] CIV, para. 328.
[543] CI, para. 87 *et seq*.
[544] RIV, para. 331.
[545] RIV, para. 343.
[546] RV, para. 167.
[547] RV, para. 161.
[548] RV, para. 162.
[549] RV, para. 163.
[550] RV, para. 166.
[551] RV, para. 165.
[552] RIV, para. 344

Venezuelan regulations (a), will recall the actions by the INDEPABIS, (b) and finally will reach a decision (c).

(i) The occupation system for expropriated property under Venezuelan law

505. The LECUPS is a protective law which protects the rights of the expropriated party. Therefore, the occupation of expropriated property can only be ordered by the Courts (except when the expropriated party gives its consent).[553] The administration is lacking in jurisdiction to execute the Expropriation Decree on its own initiative.

506. The judge can authorize the occupation at two moments in time: during the expropriation process ("prior occupation"), or once the expropriation process is completed ("final occupation").

507. The prior occupation is a provisional remedy issued by the Judge which the LECUPS makes subject to some very strict requirements[554]:

- The public works have been declared to be in need of "urgent execution" by the expropriating agency;[555]
- The expropriating agency has filed the expropriation action and requests prior occupation;[556]
- The Appraisal Commission appraises the expropriated property;[557]
- The expropriating agency deposits the amount established as the fair price compensation;[558] and
- The owner and occupants are notified of the prior occupation.[559]

(ii) The action of the INDEPABIS

508. The Expropriation Decree was fully conscious of the property occupation system set forth in the LECUPS, and the legal requirement that such occupation be carried out under the supervision of the Courts. In fact: Art. 4 of the Expropriation Decree requires the occupation of the Plants to be carried out in accordance with Art. 56 of the LECUPS:

> "The reinforcement work is classified as being in need of urgent execution … for the purpose of the prior occupation of the property indicated in article 1 of this decree, in accordance with the provisions set forth in article 56 of the Expropriation Law …"

[553] Hernández, para. 120.
[554] LECUPS, arts. 56-59
[555] LECUPS, art. 56
[556] LECUPS, art. 56
[557] LECUPS, arts. 56 and 19
[558] LECUPS, art. 56
[559] LECUPS, arts. 56 and 57.

509. Art. 5 of the Decree adds:

> "In accordance with the provisions set forth in the LECUPS, proceed to carry out the actions … for the acquisitions of the property mentioned, necessary for the execution of the Reinforcement work … the execution of which is classified as urgent."

510. Nevertheless, as it actually happened, the Bolivarian Republic did not follow the legal procedure set forth in the LECUPS and ordered in the Expropriation Decree itself, instead seeking a different procedure to occupy the property by means simple administrative acts, without legal intervention. To this end, it made use of a special Law, the INDEPABIS Law, the purpose of which is to guarantee to citizens access to goods and services, and of a public agency responsible for its application, the INDEPABIS.

511. Immediately after issuing the Expropriation Decree, on 27 October 2010, the Bolivarian Republic instructed the INDEPABIS to make an appearance in the expropriated companies and take possession *ipso jure* of the Plants, creating Temporary Management Boards (**"TMB"**) for each of them in Favianca and in OIdV for their management.[560] To do this, the INDEPABIS utilized the inspection authority granted to it by the Law and the possibility of adopting preventive measures in the event the companies are not complying with the obligations set forth by the aforementioned regulation. The measures adopted by the INDEPABIS were formalized in three brief certificates issued based on the following articles of the INDEPABIS Law:

- In Favianca, on the basis of arts. 111.1 and 111.12;[561] these regulations define as an unlawful act that "production chain members" restrict the supply of goods or that a risk exists of "destruction, disappearance or alteration of goods or documents";

- In OIdV based on art. 111.2, 111.11 and 111.12[562] of the INDEPABIS Law;[563] art. 111.2 defines the unlawful act of failing to exhibit books or documents; art. 1211.11 that of

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[560] INDEPABIS certificate dated 28 October 2010, Attachment C-45)

[561] INDEPABIS Law, Art. 111:
"1. When the member or members of the production, distribution and consumption chain, service providers or responsible third parties close, abandon, restrict supply, refuse to sell goods, hinder the normal performance of any of the phases of the chain, alter the characteristics of the service provision established in article 7 of this Law or presumably have failed to carry out any activity for the normal performance of the process, in any of the production, manufacture, import, storage, transportation, distribution and trade phase […]
12. A perceived risk exists of destruction, disappearance or alteration of goods and the documentation required in accordance with the provisions of this Law, including those recorded in magnetic or similar media, as well as by any other pertinent evidentiary element for the determination of the facts investigated."

[562] INDEPABIS Law, Art. 111:
"2. When, in accordance with the law, the required party required to do so fails to exhibit the pertinent books and documents or fails to provide the elements necessary to carry out the inspection […]
12. A perceived risk exists of destruction, disappearance or alteration of goods and the documentation required in accordance with the provisions of this Law, including those recorded in magnetic or similar media, as well as by any other pertinent evidentiary element for the determination of the facts investigated."

[563] INDEPABIS Certificate dated 29 October 2010, Attachment C-47.

concealing information, and 111.12 the risk of "destruction, disappearance or alteration of goods or documents."

(iii) Tribunal's Analysis

512. The Tribunal agrees with the Claimant in that INDEPABIS engaged in arbitrary conduct that constitutes an abuse of power, as there is a contradiction between the reasons invoked by INDEPABIS for ordering the occupation and the real purpose behind them.

513. INDEPABIS ordered the temporary occupation of the Plants by means of an administrative decision issued ex parte and having immediate effect. The reason cited by this agency to adopt a measure so drastic and invasive of the fundamental rights of the party affected by the expropriation was that the Companies were allegedly committing certain unlawful acts prohibited by the INDEPABIS Law: according to the Records of the proceedings,

- The Companies were allegedly restricting the supply of goods;
- There was an alleged risk of destruction, disappearance or alteration of goods or documents;
- OIdV was allegedly refusing to exhibit books or documents or concealing information.

514. Respondent has failed to provide any evidence in support of these allegations. Even INDEPABIS lacked any evidence whatsoever: before the temporary occupation could be ordered a prior penalty procedure had to be initiated, and this was never carried out by INDEPABIS. Respondent's expert himself stated he was unaware of the existence of the penalty procedure.[564] Since there is no case file that shows, even if just circumstantially, that the unlawful acts were real, there is no legal basis to justify the ordering of the occupation. Also very significant is the fact that, despite the elapsed time, after adopting such a draconian provisional order, INDEPABIS never came to penalize the Companies for the unlawful acts that were under investigation.

515. Respondent's allegation that INDEPABIS decided to carry out the occupation pursuant to Article 112 based on the existence of an objective risk of dismantling or stoppage of production[565] lacks any factual basis. There are no signs whatsoever that at any time Claimant considered the possibility of resisting the expropriation by stopping production in its factories.

516. In reality, the purpose behind the Bolivarian Republic's decision to use INDEPABIS temporarily occupy the Plants was to avoid the cumbersome procedure established in the LECUPS which requires litigating the case in administrative courts and securing a court order. It is important to remember that pursuant to Article 56 of the LECUPS, expropriated assets may only be

[564] HT, day 4, 71:24-28.
[565] RV, par. 165.

occupied once their value has been assessed by a valuation commission and the fair price has been deposited. These highly protective requirements were circumvented by means of the interim order entered by INDEPABIS.

517. This is recognized by Respondent's expert himself:

> "To apply the prior occupation procedure… it was necessary to wait until the petition for expropriation was made by means of a proper lawsuit… have the expert appraisal performed and deposit the amount concerned. In other words, I think that the de facto application based on Article 6 [of the INDEPABIS Law][566] was the result of urgency…"[567]

518. Venezuela decided not to conduct the occupation of the Plants pursuant to Article 56 of the LECUPS because—as its expert recognizes—the protective procedure therein prescribed would have required time and the deposit of the fair price. Respondent resorted to the temporary occupation measure established in the INDEPABIS Law to take over the Plants for the purpose of depriving Claimant of its rights under the LECUPS rather than as a temporary measure resulting from the existence of alleged violations of the INDEPABIS Law by the Companies.

519. As an example of the arbitrary decisions, Schreuer includes "[text in English]."[568] In the opinion of this Tribunal, the decision by INDEPABIS to carry out the occupation of the Plants falls neatly within this category and constitutes a violation of the FET guarantee set forth in the BIT.

E. The decision of the Administrative Court

520. The Claimant alleges that the advance provisional remedy issued by the First Administrative Court on 20 December 2010, in which it authorized the occupation, possession and use of the property owned by the Companies implied an abuse of power and a violation of its right to due process and good faith, due to:

- not having been notified of the proceeding or the decision in accordance with the law;[569] and
- having been issued *inaudita parte* in violation of Venezuelan law[570]

521. The Respondent denies that the *inaudita parte* order authorizing the occupation of the Plants was issued in violation of Venezuelan legislation,[571] since Venezuelan case law permits the issue of

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[566] Venezuela's expert considers that the reference to Article 112 contained on the Records of the proceedings must have been a mistake and that the occupation was actually carried out pursuant to Article 6 of the INDEPABIS Law. The conclusion is the same regardless of which article is the right one.
[567] HT, day 4, 82:11-18.
[568] See par. 494 *supra*.
[569] CI, para. 207; CIV, para 324, 327.
[570] CIV, para. 328.
[571] RIV, para. 386.

provisional remedies in expropriation proceedings, it being, furthermore, the measure required by the Respondent *ex abundante cautela.*[572] In any event, because it was not challenged by the Claimant in the Venezuelan courts it cannot be held that an unfair proceeding took place.[573]

522. Although the Parties do not expressly so state, the international standard to assess whether a legal decision is in accordance with the FET guarantee is the denial of justice. Therefore, the Tribunal, in the first place, will analyze the regulations and requirements for the denial of justice (a), will then establish the proven facts (b), and subsequently verify whether the requisite elements are present to declare that Venezuela committed a denial of justice (c).

a. Regulations and requirements for denial of justice

523. Denial of justice constitutes a violation of the FET guaranteed in the BIT. Tribunals and doctrine have unanimously held that the FET guarantee contained in investment protection treaties include as an element the denial of justice.[574]

524. That the facts which occurred have the requisite requirements to be able to be considered an international unlawful act of denial of justice is a different question. For this to occur it is common practice for the party alleging the unlawful act to prove two requirements:

- (i) The legal system of the host State must have applied to the foreign investor treatment clearly and obviously contrary to the legal system or due process;

- (ii) The foreign national in turn must have exhausted all existing domestic legal remedies to combat the legal decision in question, or must prove that the filing of such appeals would be clearly futile.[575]

525. (i) The national courts must administer justice in accordance with generally accepted standards at the international level. They deviate from those standards if they refuse to admit or process without undue delay a claim by a foreign national, or if they issue a judgment following a proceeding which is severely flawed or the contents of which is manifestly inadmissible and unlawful. In these cases we are faced with a denial of justice.[576]

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[572] RV, para. 168 and 169.
[573] RIV, para. 338.
[574] *Jan de Nul*, para. 188; *Jan Oostergetel*, para. 272; *Pey Casado*, para. 655-657.
[575] The requirement of exhausting the remedies is under no circumstances applicable when the violations of the FET materialize in administrative or legislative acts—its requirement is limited to legal actions.
[576] Pastor Ridruejo: "Curso de Derecho Internacional Público y Organizaciones Internacionales" [Course on Public International Law and International Organizations], 2007, p. 553.

526. (ii) The denial of justice presupposes a second requirement: the investor must have exhausted all domestic remedies against the unlawful decision of the national legal system. As the arbitrator stated in *Pantechniki*:

> *"Denial of justice does not arise until a reasonable opportunity to correct aberrant judicial conduct has been given to the system as a whole"*[577]

527. However, this general rule has a significant qualification: in the application of international Law governing international claims, the appellant is not obligated to exhaust the domestic remedies when it is denied access to justice, when unreasonable delays existed in reaching the decision or when subsequent remedies promise to be futile, due to the existence of reasonable doubt as to their existence or their possibility of success.

b. Proven facts

528. The following constitute proven facts:

- Despite the fact that since the end of October, 2010, the Bolivarian Republic had already taken possession of the Plants through the administrative measures adopted by the INDEPABIS, on 18 November 2010 the PGR decided to validate the occupation legally, and filed a petition for an advance provisional remedy of occupation of the Plants with the First Administrative Court. It should be noted that this measure was not a prior occupation petition under the terms of article 56 of the LECUPS, but was requested as an unnamed provisional remedy.

- On 20 December 2010, the First Administrative Court responded to this petition and adopted *inaudita parte* the unnamed provisional remedy and organized an *ad hoc* management board to manage the Companies.

- During the provisional remedy execution proceeding, the representatives of OIdV appeared in the proceeding, simply to put on the record that the company "is not a party to any legal or administrative proceeding initiated by the Republic … with respect to the aforementioned expropriation of assets …."[578] Therefore, OIdV freely made the decision not to appeal the unnamed provisional remedy and not to participate in the subsequent execution process.

- On 14 March 2011, the PGR initiated the legal proceeding under the LECUPS, filing a petition for expropriation before the First and Second Administrative Courts. Subsequently, the provisional remedy was combined with the expropriation proceeding.[579] Currently, the Second Administrative Court is hearing the expropriation

[577] *Pantechniki*, para. 96.
[578] Court orders dated March 16 and 25, 2011. Attachments C-75 and C-77, respectively.
[579] Hernández, Attachment 111.

proceeding[580] . The Claimant has decided not to participate in that proceeding.

c. Tribunal's Analysis

529. In the decision dated 20 December 2010, the First Administrative Court issued an ex-parte unnamed provisional remedy order, under which:

- the assets of OIdV, Favianca and two other companies which were not mentioned in the Expropriation Decree were to be occupied; and
- an *ad hoc* management board was to be formed.

530. The effect of that decision is substantially identical to that of the previous occupation provided for in Article 56 of the LECUPS, even if it was not issued pursuant to that provision and was called an unnamed provisional remedy order. The Court justified that decision under different legal provisions,[581] based on the urge to carry out the Glass Strengthening Project, and stated that it was a reversible order.[582] The unnamed provisional remedy order differs from the previous occupation under the LECUPS in that it was agreed without appraising the assets and without a bond or guarantee for the fair price—in other words, the judgment was issued disregarding the guarantees set forth in Article 56 of the LECUPS.

531. The Second Administrative Court subsequently consolidated this unnamed provisional remedy order into the expropriation proceedings and, as was explained by Claimant's expert, the provisional remedy order became an instrumental occupation order within the expropriation proceedings.[583]

532. The manner in which the order was issued and its content in disregard of the LECUPS raise serious questions as to its legality. Nevertheless, this Tribunal will now analyze the requirements for the existence of denial of justice in the reverse order: it will first examine whether domestic remedies were exhausted; and only if it is concluded that said requirement is met will it evaluate whether the Venezuelan Judiciary acted with clear and manifest unlawfulness.

Exhaustion of domestic remedies

533. This Tribunal has already reached the conclusion that it is a commonly accepted requirement for the existence of denial of justice that the wronged party has exhausted or demonstrated the futility of pursuing domestic remedies.

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[580] Hernández, para. 46.
[581] CRBV, Articles 299, 305 and 308; Organic Law of the Administrative Litigation Jurisdiction, Article 4; Code of Civil Procedure, Article 588; Decree with rank, value and force of Law Reforming the Decree with Force of Organic Law of the Office of the Attorney General (PGR), Articles 91 and 92.
[582] Judgment of the First Administrative Court of the Metropolitan Caracas Area dated 20 December 2010, Exhibit C-63, p.26.
[583] Hernández, par. 145.

534. In the case at hand, it is a proven fact that Claimant has not appealed the provisional remedy order and it has voluntarily decided not to participate in the expropriation proceedings—to the point where Claimant only appeared before the Court to state that it would not participate. It is also a fact that Claimant has produced no evidence whatsoever to demonstrate the futility of defending itself before Venezuelan Courts.

535. The requirement to exhaust domestic remedies (or produce proof that the investor is being denied access to domestic justice or that domestic justice has incurred unreasonable delays or that any further motions would most likely be futile) is a requirement for an international tribunal to decide that a court decision has denied justice. International Law cannot become a convenient system to appeal any domestic court decision the investor disagrees with. Before it can be established under International Law that a State's legal system has committed a wrong, it is essential to provide it with a chance to correct its own mistake. This conclusion, by the way, does not exclude (according to Professor Orrego Vicuña) the fact that in cases of evident abuse by the courts, international claims can be made without further conditions.

536. In the circumstances of the case at bar, where Claimant voluntarily chose not to appeal the contested court decision and not to participate in the proceedings before Venezuelan courts, its request that this Tribunal declare that the unnamed provisional remedy order amounted to a violation of the FET standard cannot be admitted.

F. Coercion of personnel

537. Claimant argues that Respondent violated the FET standard by coercing, threatening and harassing the employees of the companies from the moment of the expropriation.[584] In particular, OIEG alleges that the threats to prosecute the employees for "sabotage"[585] in a context of military occupation[586]:

- Instilled fear and coerced employees to stay in their job positions and operate the Plants for the benefit of Respondent;[587]
- Constitute a violation of due process because Respondent never clarified what was meant by "sabotage" nor did it indicate what legal provision defined it as a crime[588] and
- Demonstrate the lack of good faith[589] and transparency of the Republic.[590]

[584] CV, para. 123.
[585] CI, paras. 79-86; Reply Memorial, para. 295.
[586] CIV, para. 294.
[587] CIV, paras. 294-296; CV, para. 123.
[588] CIV, para. 326; CV, para. 125.
[589] CIV, para. 218.
[590] CI, para. 214.

538. Claimant asserts that the FET standard includes the obligation of the State that its regulatory authorities do not coerce or harass the freedom of the investor[591] and also that they act in good faith.[592]

539. Respondent expressly dismissed as fictitious and manufactured Claimant's claims that it coerced OIdV personnel to carry out an extended period of forced work.[593] Respondent opposes such claims on the basis of the following arguments:

- There is no evidence of the alleged coercion[594] nor that it was the result of threats of charges of "sabotage" or that it was induced by the presence of the GNB.[595]
- The evidence shows that the employees of the Plants continued working voluntarily and/or because they believed that they were required to do so under Venezuelan law.[596]
- Witnesses for Respondent confirmed that OIdV workers voluntarily cooperated during the period of oversight.[597] The testimony of the witnesses for Claimant must be rejected given that they lack first-hand[598] knowledge of the facts or are not credible.[599]
- Claimant has exaggerated the presence of GNB.[600]

540. In order to adjudicate the dispute, the Tribunal will establish the proven facts and then analyses whether they meet the requirements necessary to declare that Venezuela acted in violation of the FET.

Proven Facts

541. The proven facts are:

- The GNB entered the facilities of the Plants on the morning of 26 October 2010 and stayed there for several weeks.
- On 27 October 2010, the Minister of MINCIT, Ricardo Menéndez, accompanied by Vic-Minister Yuri Pimentel, met with OIdV management represented by Enrique Machaen and

[591] CI, para. 177, citing *Saluka*, para. 308.
[592] CI, paras. 245-216.
[593] RV, paras. 230 and 231.
[594] RV, para. 232.
[595] RV, paras. 233 and 237.
[596] RV, para. 234.
[597] RV, para. 235.
[598] RV, paras. 236 and 240-242
[599] RV, para. 236 and 243-253.
[600] RV, para. 239.

Luis Gómez at MINCIT offices in order to hold introductory talks after the announcement of the measure.[601]

- During these exchanges, the Minister stated that "any measure taken with the intent to paralyze the operations of the Plants would be considered an act of sabotage."[602]

- That same day, the General of the GNB, Orlando Rodríguez, held a meeting with workers at the Los Guayos plant. Since the meeting was not successful, the General organized a meeting that same afternoon at the regional headquarters of the National Guard.

The Tribunal's Decision

542. Claimant alleges that the Bolivarian Republic coerced the Plant workers by threatening to prosecute them for "sabotage" if they refused to collaborate with the new management installed following the expropriation. The Republic admits that it used the term "sabotage," but it denies that its conduct was coercive or intimidating.

543. Claimant also alleges that there were similar warnings made during the meeting held with Orlando Rodríguez, General of the GNB [Bolivarian National Guard],[603] and later, by the members of the JAT.[604] It also claims that the GNB's presence at the Plants exacerbated the intimidation.[605]

544. The Tribunal dismisses OIEG's claim in light of the fact that it failed to sufficiently prove the events it has alleged.

545. What the record does prove, however, is that the Minister of MINCIT, during the meeting that took place on 27 October 2010,[606] advised the workers not to engage in "sabotage," as any deliberate action taken to stop the Plants from operating would be punished.[607] Apart from the warnings given by Minister Menéndez, Claimant has not proven the alleged threats by General Orlando Rodríguez or the members of the JAT.[608] The Minister's warning was never

[601] The Government and Owens Illinois met: The company agrees to cooperate, Noticias 24, 27 October 2010, Exhibit R-58; Menéndez reports on the first meeting between the government and Owens, Video Clip, 27 October 2010, Exhibit R-99.
[602] Pimentel I, para. 33; Machaen I, para. 38.
[603] Gómez, para. 21; Machaen I, para. 41.
[604] Machaen I, para. 53; Gómez, paras. 29 and 33.
[605] CI, paras. 68 and 82.
[606] Exhibit C-99, min. 1:42; Pimentel I, para. 33; Machaen I, para. 38.
[607] Machaen I, para. 50; Gómez, para. 22; HT, Day 3, 127:7-14.
[608] The statements by Mr. Machaen and Mr. Gómez in this regard are not sufficient proof because – as they themselves admit – it is indirect testimony (Machean I, para. 53; Gómez I, para. 29). The incident with Mr. Baloa is an isolated one, controlled by Mr. Gómez and incapable of spreading fear to every worker (Gómez, para. 33).

consummated and no criminal proceedings for sabotage were ever brought against any employee. What is more: most of the workers continued to work for Venvidirio once the transition period came to an end.[609]

546. Claimant submits that the Minister of MINCIT's statements amount to an international offense because they are a FET violation attributable to the Bolivarian Republic of Venezuela. The Tribunal has already concluded that a State only breaches the FET guarantee when it takes action that is manifestly contrary to the legal system or disregards the basic tenets of the rule of law.[610] The Minister's statements do not amount to a violation of this standard: warning of the consequences of a crime or an unlawful act cannot be interpreted as a threat or coercion.

547. Finally, in paragraphs 579 *et seq.*, the Tribunal will examine the presence of the GNB at the Plants (and will conclude that it was not serious enough to constitute an international offense attributable to the Republic).

548. In summary, the warnings made by Minister Menéndez that any deliberate action taken to stop the Plants from operating would be punished did not constitute threats that would give rise to an international offense. Furthermore, it has not been proven that the workers were coerced to continue working at the Plants. Therefore, no violation of the FET standard for this claim has taken place.

G. The occupation period of the plants

549. Claimant alleges that the occupation period of the Plants was characterized by:

- Violations of due process,[611]
- Lack of transparency[612] and
- Lack of good faith.[613]

550. In particular, Claimant asserts that the Republic:

- Conducted a campaign of harassment against the Companies, initiating multiple and onerous audits and investigations;[614]

[609] Sarmiento I, para. 33.
[610] *See* para. 491 *supra*.
[611] CIV, para. 328.
[612] CI, para. 214.
[613] CIV, paras. 218, 354 and 355.
[614] CI, para. 218.

- Forced the Companies to participate in the negotiation of the collective bargaining agreement thereby violating due process.[615]

- Repeatedly modified the terms for the end of the transition period and did not follow a plan to ensure the orderly transition of operations to Venvidrio.[616]

- Transmitted confidential and protected information to Envidrio.[617]

551. Respondent denies having violated the FET standard in any way whatsoever during the transition period and asserts that Claimant has collected a series of trivial events and characterized them as international offences.[618] The Republic defends itself from Claimant's arguments by stating that:

- It is not proven that INDEPABIS and INPSASEL engaged in abuse of authority or acted with intent to cause damage to Claimant.[619]

- In November 2010, the employer of the workers of the Plants was OIdV, and therefore only OIdV could participate in the collective bargaining negotiations.[620]

- Deadlines for the completion of the transition period were not modified, and in any case that could not be construed as worsening the circumstances or coercion.[621] The policy of the Republic during the transition period was "*laissez-faire*."[622]

- The task of the Envidrio report and the communication of technical information of the Plants to third parties were necessary given their deterioration.

552. In order to settle the dispute, the Tribunal will establish the proven facts and then analyses whether Venezuela acted in violation of the FET.

Proven Facts

553. The proven facts are:

[615] CIV, para. 328.
[616] CI, para. 214; CIV, para. 325.
[617] CIV, paras. 354 and 355.
[618] RII, para. 208.
[619] RIC, para. 331.
[620] RII, para. 188.
[621] RII, para. 179.
[622] RII, paras. 173-176.

- Two days after the issuance of the Expropriation Decree, INDEPABIS arrived at the Plants, took possession of them, appointed a board of directors and began an audit.[623]

- During November and December 2010, Respondent dispatched its agency for labor health and safety, INPSASEL, to the Los Guayos plant. INPSASEL conducted a thorough investigation and ordered certain health and safety improvements.[624] In August 2011 INPSASEL proposed imposing a penalty on OIdV, which filed exculpatory pleadings. In February 2012, INPSASEL imposed a fine of VEB 10,988,550 (approximately USD 2,555,476.74 at the official exchange rate at that time[625]) on OIdV for breaching labor health and safety regulations.[626]

- In November 2010, the Ministry of Labor of the Republic required that OIdV management participate in the collective bargaining negotiations with the members of the workers' union.[627]

- MINCIT authorized third-party visits to the Plants against the will of the Companies.[628] Uruguayan company Envidrio and directors of Chinese company Sunrise Technology[629] visited the Plants.

- There were several extensions to the transition period.

The Tribunal's Decision

554. Following the expropriation and takeover of the Plants, a transition period began and lasted for six months. During that period the Plants continued to operate normally under the supervision of the government, which availed itself of this temporary period so that its trusted officials could acquire the know-how needed to manage a glass container production company.

555. OIEG claims that the Plants' transition period was characterized by the Republic's violations of due process,[630] lack of transparency,[631] and lack of good faith.[632] The Republic, on the other hand,

[623] INDEPABIS minutes of 28 and 29 October 2010, Exhibits C-45 and C-47.
[624] INPSASEL minutes of 22, 23 and 29 November and 2 December 2010, Exhibit C-59.
[625] Exchange rate of VEB 4.30/USD in accordance with Exchange Agreement No. 14, published in the Official Gazette of the Bolivarian Republic of Venezuela, No. 39,584, dated 30 December 2010.
[626] INPSASEL administrative decision of 28 February 2012, Exhibit C-102, p. 21.
[627] Ministry of Labor Minutes of 23 November and 3 December 2010, Exhibit C-60. OI letter to Respondent dated 8 December 2010, Exhibit C-51, para. 5.
[628] CV, para. 89; OIdV letter to Respondent of 12 November 2010, Exhibit C-54, p. 2; TA, day 3, 76:7-24.
[629] RIV, para. 132(7); Exhibit C-69; TA, day 3, 75:17 – 77:33.
[630] CIV, para. 328.
[631] CI, para. 214.
[632] CIV, paras. 218, 354 and 355.

submits that Claimant compounded all the trivial things that occurred during the transition period and has characterized them as international offenses.[633]

556. On this point, the Tribunal shares the Republic's view and dismisses OIEG's claim.

557. Aside from the conduct by INDEPABIS that did amount to a violation of due process (and that was previously addressed in paras. 502, *et seq. supra*), the Tribunal finds no evidence that would warrant raising the conduct complained of by Claimant to the classification of an international offense. During the transition period Claimant had to endure situations that could be characterized as unpleasant, and that are inherent to any forced takeover procedure. Nevertheless, Claimant has failed to prove how these situations amount to offenses that would incur liability under the BIT. Specifically, Claimant has not proven that INPSASEL's "re-investigation" gave rise to an FET violation—especially considering that the entity ended up finding violations of legal provisions.

558. In terms of visits by third parties to the Plants and the transfer of intellectual property to Chinese companies, it has also not been proven that this constitutes a FET violation, and the Tribunal refers to the conclusions reached in paragraph 897 *infra* with respect to damages.

559. In conclusion, with the exception of the conduct on the part of INDEPABIS, which was arbitrary and amounted to an abuse of authority in violation of Article 3(1) of the BIT, it has not been proven that the Republic's other conduct during the transition period constituted a violation of the FET standard under the Treaty.

***

560. In summary: the Tribunal agrees with the claims Claimant has presented, and finds that the Bolivarian Republic subjected Claimant's investments to unfair or inequitable treatment and to arbitrary measures in violation of Article 3(1) of the Netherlands-Venezuela BIT because the expropriation violated due process and the takeover of the Plants by INDEPABIS was arbitrary.

5. BREACH OF ART. (3)2 OF THE BIT: FULL PROTECTION AND SECURITY

A. Claimant's position

561. Claimant alleges that Respondent did not ensure the full protection and security (FPS) of OIEG's investments, which would constitute a violation of Art. 3(2) of the BIT.

[633] RII, para. 208.

562. According to Claimant, legal scholars[634] and decisions of international tribunals[635] confirm that the contemporary understanding of the FPS guarantee goes beyond physical protection to include the violation of the rights of investors by operation of the laws of the host State. Claimant defends the extension of the FPS standard to legal protection based on the following arguments:

- Definition of investment in Art. 1(a) of the BIT includes intangible assets, which only enjoy full protection and security through legal;[636]

- There is no overlap between the FET and FPS standards, because the latter involves the positive obligations of care and due diligence.[637]

563. Claimant maintains that Venezuela did not comply with its duty to guarantee the physical protection of Claimant's investments or with its duty to ensure their legal protection.[638]

564. First, Claimant considers that the deployment of the GNB at the Plants caused an atmosphere in which the employees of the Plants were threatened and intimidated[639] and had no other alternative than to obey the orders of Respondent or face legal action for "sabotage."[640] That constitutes, according to Claimant, a breach of the duty to protect the physical safety of its investments.

565. Second, Claimant alleges that by expropriating its investments without taking into account Venezuelan legislation and incurring obvious violations of the Investment Law and LECUPS, Respondent removed the legal protection granted to those investments.[641] Likewise, the Investment Law contained important protections that were breached by the Republic when it expropriated the investment.[642]

566. Consequently, Respondent did not ensure the legal protection of OIEG's investment, [legal protection to which OIEG] was entitled pursuant to art. 3(2) of the BIT.[643]

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[634] CI, para. 220, citing Dolzer & Schreuer.
[635] CI, para. 222, citing *CME*, para. 613; *Siemens*, para. 303; *Biwater*, para. 729, *inter alias*.
[636] CIV, para. 360.
[637] CIV, para. 362.
[638] CI, paras. 224 and 225; CIV, paras. 358-364.
[639] CIV, para. 364.
[640] CI, para. 224.
[641] CI, para. 225; CIV, para. 365.
[642] CI, para. 225.
[643] CI, para. 226; CIV, paras. 365 and 374-381.

B. Respondent's Position

567. Respondent denies having violated Art. 3(2) of the BIT by failing to comply with the FPS standard.[644]

568. First, the Republic argues that the FPS standard is traditionally linked to physical protection and imposes on the State a duty of care and diligence, and not an objective responsibility.[645] Venezuela does not deny that some courts have extended the protection of the FPS clause. However, it maintains that this view is not the predominant one, since a broad interpretation of the FPS clause would overlap with the FET standard.[646] It further argues that the cases cited by Claimant are not applicable, because in all of them there was a modification of the regulatory framework or frustration of legitimate expectations—which did not happen in this case—and the Tribunal's decision was closely linked to the violation of the FET standard.[647]

569. Second, Respondent denies that it has caused any physical coercion of employees of the Companies to continue operating the Plants.[648] In fact, it claims that the majority decided to continue working for Venvidrio.[649] Venezuela maintains that the intervention at the Plants was peaceful and believes that Claimant has exaggerated the presence of the GNB, which for most of the time was present in very small groups (two or three guards),[650] positioned at security booths of the Plants, without interfering with the entry and exit, and only entered the Plants to go to the cafeteria.[651] According to Respondent, the mission of the GNB was to maintain peace at the facilities.[652]

570. Third, Respondent rejects Claimant's argument that by expropriating OIEG investments, Venezuela violated the Investment Law and LECUPS and, therefore, violated the provisions of their own legislation. Respondent holds that Venezuelan law allows and extensively regulates compulsory acquisition and concludes that Venezuela ordered the compulsory acquisition of the Companies in accordance with LECUPS, and that in no way did it deprive Claimant's investments of legal protection. Therefore, it cannot be held that Venezuela violated art. 3 (2) of the BIT.

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[644] RII, para. 412.
[645] RIV, para. 349.
[646] RII, para. 411, citing *Enron*, para. 286.
[647] RIV, para. 350
[648] RII, para. 413.
[649] Ibid.
[650] Ibid.
[651] RV, para. 239.
[652] RII, para. 119.

C. The Analysis of the Tribunal

571. The obligation to accord FPP [Full Physical Protection] to protected investments is recognized under Article 3(2) of the BIT, which immediately follows Article 3(1) regulating the FET guarantee. It reads as follows:

> "1. Each contracting party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and shall not impair, by arbitrary or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those national.
>
> 2. More particularly, each Contracting Party shall accord to such investments full physical security and protection which in any case shall not be less than that accorded either to investments of its own nationals or to the investments of national of any third State, whichever is more favorable to the national concerned."

572. The Parties disagree as to the scope and interpretation to be given to the FPP standard. The debate Centers on determining the breadth of the protection. Claimant alleges that the standard includes not just the physical security of the investment, but legal certainty as well.[653] Claimant argues that the definition of investment in Art. 1(a) of the BIT includes intangible assets, which can only enjoy full security and protection through legal protection.[654] It also insists that there would be no overlap between the FET and FPP standards because this entails the positive obligations of vigilance and due diligence.[655]

573. Respondent denies that the protection extends to legal certainty: the FPP standard is, it claims, traditionally linked to physical protection and would impose on the State a duty of vigilance and diligence, but not of strict liability.[656] Venezuela does not deny that some tribunals have favored an extensive interpretation, but maintains that this is not the predominant view[657] and that the cases cited by Claimant are not applicable.[658]

574. The Tribunal agrees with Respondent.

575. It has been widely argued whether the primary scope of protection of the FPP standard, which only covers physical security, can also be extended to legal certainty. If such extension were accepted,[659] any arbitrary modifications to the legal and regulatory framework could also give rise to violations of the FPP standard.

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[653] It relies on commentators such as Dolzer & Schreuer and on the *CME* and *Siemens* cases, among others.
[654] CIV, para. 360.
[655] *Ibid.* para. 362.
[656] RIV, para. 349.
[657] RII, para. 411.
[658] RIV, para. 350.
[659] And this has been done in *Azurix*, para. 408 and *Vivendi II*, para. 7.4.15, among others.

576. In the case before us, the matter is resolved by the language of Article 3(2) itself.

- First, the precept is similar to a specific application of the FET standard, given that it is immediately inserted after the FET guarantee (contained in Article 3(1)) and leads with the phrase "more particularly." As such, a literal reading of the BIT indicates that there is a general classification—FET under Article 3(1)—and a more specific type—FPP under Article 3(2). Whereas the general classification covers acts that violate legal certainty, the specific type Centers on physical security.

- The language itself in Article 3(2) of the BIT confirms this interpretation: it expressly uses the adjective "physical" to describe the security it guarantees. A literal interpretation, favored by Article 31(1) of the CVDT, unavoidably leads to the conclusion that Article 3(2) of the Treaty is limited to guaranteeing full physical security and protection.

577. In summary, Article 3(2) of the BIT deals with a specific type within the general classification of FET that applies when the security of an investment is impaired by physical violence or civil strife.[660] The responsibility of the State will arise if it fails to adopt the protection measures that would be required out of prudence to protect the foreign property covered under the Treaty.

Application of the Standard to the Facts

578. Claimant alleges that the presence of the GNB beginning on the morning of 26 October 2010—prior to the issuance of the Expropriation Decree—and its continued presence at the Plants over several weeks entailed a violation of the FPP standard.[661] The Republic, in contrast, insists that the intervention of the GNB was carried out without any harassment or threats[662] and was only aimed at keeping the peace in the Plants in light of protests by the workers.[663]

579. The Tribunal agrees with Respondent's view and dismisses OIEG's claim in this respect.

580. The FPP guarantee entails an obligation by the State to deploy its police force or take other coercive measures to prevent others from disrupting the peaceful possession and enjoyment of the investment. The mere presence of the GNB during the takeover of the Companies is a component of the precautionary measures a government authority legitimately can and should take to ensure that control is assumed in an orderly manner, precisely for the purpose of guaranteeing FPP of the investment. It is contradictory to allege that the actions of the State's security forces, which ensure physical security, constitute a violation of the FPP standard.

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[660] Likewise, *Saluka*, para. 483, with reference to other decisions.
[661] CI, para. 226; CIV, paras. 365 and 374–381.
[662] RI, para. 413.
[663] RII, para. 119.

581. In summary: the Tribunal dismisses the claims put forward by Claimant requesting that the Tribunal find that the Bolivarian Republic violated Article 3(2) of the Netherlands-Venezuela BIT.

6. BREACH OF ART. 3(4) OF THE BIT: UMBRELLA CLAUSE

A. Claimant's Position

582. Claimant argues that Venezuela violated the provisions of art. 3(4) of the BIT [the "Umbrella Clause"], which requires that Respondent comply with "any obligations" that could have been assumed regarding the treatment of investments belonging to Dutch nationals.

583. Claimant maintains that international courts, in interpreting umbrella clauses that are similar to that of this BIT, have highlighted the broad scope of phrases such as "any obligations."[664]

584. Complainant believes that Respondent assumed certain obligations with respect to Claimant's investments under Articles 6, 8, 11, 12, and 15 of the Investment Law, which provide respectively[665]:

- The right of investments to receive fair and equitable treatment;
- The prohibition of discriminatory treatment of investments and investors due to the country of origin of capital;
- The prohibition of illegal expropriation under international law;
- The right of international investors and investments to transfer all payments related to investments;
- Venezuela's commitment to develop favorable conditions for investment and investors.

585. Claimant rejects the restrictive interpretation given by Respondent of the terms of art. 3(4) of the BIT and, in particular, the argument that the Umbrella Clause does not require recipient States to respect obligations assumed in investments in general—as set forth in the Investment Law—but only for specific investments.[666] Claimant relies on decisions such as *SGS*[667] and *Enron*[668] to

[664] CI, paras. 233 and 234, citing *Eureko* and *Enron*.
[665] CI, para. 235.
[666] CIV, para. 375.
[667] CIV, para. 377.
[668] CIV, para. 378.

claim that the broad terms in which the Umbrella Clause of the BIT was written force Venezuela to respect the legal obligations under its domestic law, such as the Investment Law.[669]

586. In short, Claimant believes that it is proven that Venezuela did not comply with the obligations arising from the Investment Law, and therefore breached art. 3(4) of the BIT.[670]

B. Respondent's Position

587. Respondent rejects the claim, arguing that the Investment Law, on which Claimant bases its claim, does not refer to specific investments, rather it involves a general rule that establishes a generic regulatory framework for investments in Venezuela. It further argues that the Investment Law does not refer to a specific sector but confirms commitments similar to those already provided for in the BIT and international Law, whereby the cases on which Claimant relies are not applicable. Therefore, Respondent argues that it is inconceivable that the alleged violation of the Investment Law gives rise to a breach of the Umbrella Clause of the BIT.[671]

C. The Analysis of the Tribunal

588. Art. 3(4) of the BIT includes a Clause of Incorporation of other obligations:

> "Each Contracting Party shall observe any obligation it may have entered into with regard to the treatment of investments of nationals of the other Contracting Party."

589. The Tribunal agrees with the Claimant that the Clause of Incorporation is broadly worded. As previous tribunals have reflected,[672] the term "any obligation" includes obligations entered into by law. Consequently, Venezuela has accepted the commitment to fulfil all of the legal obligations established in the Venezuelan legal system.

590. The Venezuelan legal system includes the Investment Law.[673] The purpose of this law is to provide a stable, predictable legal framework for national and foreign investments:

> "Article 1. The purpose of this Decree-Law is to provide investors and investments, both national and foreign, with a stable and predictable legal framework in which same can be carried out in an atmosphere of security, through the regulation of State intervention with regard to those investments and investors, with a view to

[669] CIV, para. 379.
[670] CI, para. 236.
[671] RII, para. 432.
[672] *SGS v. Pakistan*, paragraphs 166-167; *Enron*, paragraph 274.
[673] Decree No. 356 with the status and force of law for the promotion and protection of investments, of 3 October 1999, Special Official Gazette No. 5390 dated 22 October 1999.

> increasing, diversifying, and harmoniously complementing the investments in order to promote national development objectives."

591. The Investment Law also includes certain precepts that are very similar to the guarantees granted to the investments protected under the BIT:

> "Article 6. International investments shall have the right to fair and equitable treatment in accordance with the regulations and criteria of international law and shall not be subject to arbitrary or discriminatory measures that hinder the maintenance, management, use, enjoyment, expansion, sale, or liquidation thereof.
>
> Article 8. The treatment of international investments or investors shall not discriminate based on the country where their capital originates. (…)
>
> Article 11. (…) Investments shall only be expropriated (…) for reasons of public utility or social interest, following the procedure that has been legally established for such purposes, in a non-discriminatory way and with prompt, just, and adequate compensation.
>
> The compensation shall be equivalent to the fair price of the expropriated investment immediately before the time at which the expropriation is announced by the legal mechanisms or made public, whichever occurs first. The compensation, which will include the payment of interest until the effective payment date, calculated on the basis of customary business standards, shall be paid without delay.
>
> Sole Paragraph: The compensations that are applicable as a result of the expropriations of international investments shall be paid in convertible currency and shall be freely transferable out of the country.
>
> Article 12. International investments and, as the case may be, international investors, shall have the right, upon prior compliance with domestic regulations and the payment of the applicable taxes, to the transfer of all payments associated with the investments, such as the initial capital …; the profits, … and the payments that result from the settlement of disputes. (…)"

592. The Venezuelan Investment Law thus offers all investors a protection against expropriation and unfair and unequal treatment analogous to the protection afforded by the BIT to the protected Dutch investors. In turn, article 3(4) of the BIT elevates the failure to comply with "any obligation that [Venezuela] may have entered into with regard to the treatment of [protected] investments" to the category of a breach of the Treaty. Therefore, non-compliance with the Venezuelan Investment Law effectively becomes non-compliance with the BIT as well.

593. The practical consequences of this conclusion are few: the Tribunal has already established the conclusion that Venezuela's actions entailed a failure to comply with the obligations on expropriation and fair and equitable treatment contained in the BIT, with the consequence that the Claimant has the right to receive compensation in accordance with the provisions thereof.

594. The Claimant has not argued that the protection offered by the Venezuelan Investment Law is greater or more extensive than that granted by the BIT. Therefore, the Claimant's substantive rights, as a consequence of the international offenses committed by the Bolivarian Republic of Venezuela, shall be those that proceed from the BIT, and the invocation of the Investment Law shall not provide grounds for greater protection.

595. In summary, the Tribunal considers the claim made by the Claimant, requesting that the Tribunal declare that Venezuela violated the Clause of Incorporation of article 3(4) of the Netherlands-Venezuela BIT, to have merit, even though the consequences thereof do not differ from the ones that were previously identified by the Tribunal.

7. BREACH OF ART. 5 OF THE BIT: TRANSFER OF PAYMENTS

A. Claimant's position

596. The Claimant states that the Bolivarian Republic also breached Art. 5 of the BIT, which guarantees that "payments related to an investment may be transferred … in a freely convertible currency, without restriction or undue delay."[674]

597. OIEG accuses the Bolivarian Republic of having breached this guarantee in two ways:

- First, because the request to transfer funds between OIdV/Favianca and OIEG experienced unwarranted delays; the requests were submitted in May, November, and June 2009 and were denied on 8 September 2011—almost three and a half years later—by CADIVI, the body of the Republic in charge of exchange control; furthermore, the decision was made just one week after the presentation of this arbitration, and never ended up being communicated to the Venezuelan Companies.[675]

- Second, because CADIVI denied the transfer of the dividends declared by OIdV on 21 May 2008 and 15 June 2009 and by Favianca on 24 November 2008 to their parent company;[676] CADIVI's decision was based on an inaccurate inference: that the dividends had allegedly already been paid to OIEG; in reality, the dividends appeared in the balance of the Venezuelan Companies as "accounts payable" because they had been forwarded to the group in the form of a loan.[677]

598. As compensation for the alleged breach of Art. 5 of the BIT, the Claimant claims a compensation of over USD 54 million.

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[674] CI, para. 237.
[675] CIV, para. 153.
[676] CI, para. 241-243.
[677] CIV, para. 153.

B. Respondent's Position

599. The Bolivarian Republic rejects the accusation that it breached Art. 5 of the BIT, based on legal and factual arguments.

600. From the legal point of view, the Respondent emphasizes two limitations on the guarantee offered by Art. 5:

- First, the provision does not grant a foreign investor an absolute right to repatriate its profits, but rather convertibility is only guaranteed "without restriction or undue delay"; i.e., legitimate and justified restrictions on convertibility are fully compatible with the BIT; and Venezuelan exchange control regulations fall into this category.[678]

- Second, Art. 5 of the BIT only guarantees the investor's right to repatriate funds "into a freely convertible currency"; nevertheless, the Treaty does not contain a guarantee that the convertibility has to be done at the official exchange rate, and not at the market rate; other BITs, on the contrary, would include this guarantee.[679]

601. From the factual point of view, the Bolivarian Republic alleges that CADIVI's rejection of the three requests was fully justified.

602. CADIVI warned that the dividends for which authorization was being requested had already been paid and transferred abroad, and in the face of that circumstance, there would have been no alternative but to deny the petitions.[680] Such payment would be deducted on its face from the annual accounts of OIdV and Favianca[681] and would have been confirmed by the expert of the Claimant itself in the course of the Hearing.[682] Furthermore, it would not be true that CADIVI's decision had been made with knowledge of the filing of this arbitration,[683] or that the administrative act had not been communicated to the Venezuelan Companies—was merely made to the management of the Plants, which was what was recorded in the case file.[684]

C. The Analysis of the Tribunal

603. This dispute revolves around Art. 5 of the Bilateral Investment Treaty that guarantees the free transfer of profits generated by a protected investment. Claimant alleges that CADIVI was inordinately late and ultimately in rejecting various requests from OIdV and Favianca to repatriate

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[678] RII, para. 424.
[679] RII, para. 426, with reference to the BITs between France and Venezuela and between the United Kingdom and Venezuela.
[680] RII, para. 294.
[681] RIV, para. 214.
[682] HT, Day 5, p. 55; RV, para. 96.
[683] RIV, para. 220.
[684] RIV, para. 221.

dividends converted into foreign currency at the official exchange rate, and that they therefore had to obtain the foreign currency through the parallel market, suffering the significant loss of more than USD 54 million. The Bolivarian Republic rejects the claim, arguing that the BIT guarantees transferability, but not the exchange rate, and that CAVIDI's rejection was completely justified.

604. To resolve this disagreement, the Tribunal will first establish the proven facts (a.), then analyze the different interpretations of Art. 5 BIT (b), and conclude with a decision on the dispute (c).

a. Proven facts

605. The proven facts are the following:

606. (i) In early 2003, the Venezuelan government issued an Exchange Agreement[685] establishing an exchange control system. In addition, shortly thereafter, it created CAVIDI, a government agency in charge of approving transactions in foreign currency. The Bolivarian Republic's grounds for establishing such measures were[686]:

- The decrease in the supply of foreign currency coming from the oil industry and the extraordinary demand for currency had negatively affected the level of international reserves and the exchange rate, which could endanger the normal development of the country's economic activity;
- The decrease in domestic industry exports, significantly affecting the Nation's accounts;
- The need to adopt measures aimed at achieving the stability of the currency, ensuring the continuity of the country's international payments and counteracting undesirable capital flight.

607. Outside this exchange control system created by the government, there was always the possibility of obtaining USD in Venezuela through the parallel foreign currency market. This market consisted of buying Venezuelan government bonds or corporate bonds with VEB and then selling them in USD. The exchange rate in this parallel market was determined by the play of free supply and demand and was always less favorable than the official exchange rate.

608. (ii) On 21 May 2008 and 15 June 2009, OIdV declared various dividends. Claimant's 73.97% stake in OIdV entitled it to receive VEB 67,040,925 and VEB 77,538,119, respectively.

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[685] Currency Exchange Agreement of the Ministry of Finance published in the official Gazette on 19 March 2003. Whereas Clauses; Exhibit RLA-114.
[686] *Ibid.*

609. On 24 November 2009, Favianca also declared dividends. Claimant's 32% stake in Favianca entitled it to receive VEB 15,693,440.

610. All the dividends were declared in VEB, the official currency of the Bolivarian Republic. OIEG was entitled to a total of VEB 160,272,487 (which, at the official exchange rate at that time—2.15 VEB/USD—would equal USD 74,545,342).

611. (iii) On 27 June 2008 and 6 August 2009, OIdV applied to CADIVI for repatriation of the dividends declared in favor of Claimant. On 23 October 2009, Favianca also submitted an identical request for its dividends. The requests totaled the VEB 160,272,487 owed by the Companies.

612. (iv) Between December 2009 and April 2010, the Companies used VEB 402,573,736 to buy and subsequently sell bonds in the parallel market , which resulted in a balance of USD 59,544,000 at an average exchange rate of 6.76 VEB per USD.[687] The Companies transferred the USDs that were obtained to OI.[688]

613. It must be kept in mind that the dividends were always denominated in VEB and that the amount to be repatriated only totaled VEB 160,272,487. However, the companies spent VEB 402,573,736 on buying USD to send them to their parent company.

614. (iv) In the meantime, the three requests submitted to CADIVI remained undecided. It was not until 8 September 2011 that CADIVI decided to reject them and so notified the Companies, sending the document to their original addresses, which coincided with the address of the expropriated Plants. Claimant has stressed that CADIVI's decision was issued one week after Claimant filed the Request for Arbitration. However, as Respondent has pointed out, the fact that the dates match is a mere coincidence. The ICSID only registered the Arbitration Request on 26 September 2011, i.e. three weeks after CADIVI's decision, and prior to that date, the Republic could not have known its exact terms.

b. The correct interpretation of Art. 5 of the BIT

615. The text of Art. 5 BIT establishes:

> "The Contracting Parties shall guarantee that the payments related to any investment may be transferred. Such transfers shall be made in a freely convertible currency, with no restriction or undue delay. Such transfers shall include, but not be limited to:
>
> a) Profits, interest, dividends and other current income;
> …"

[687] Kaczmarek I, par. 156.
[688] HT, day 5, 35:17 – 36:17

616. The parties are debating the proper interpretation of this provision.

617. Claimant believes that Art. 5 requires the Bolivarian Republic to implement a system of free transferability for the profits generated by protected investments. The creation of an exchange control system with the subsequent need for CADIVI authorization would represent a de jure violation of the accorded guarantee.[689]

618. On the other hand, Respondent asserts that legitimate and justified restrictions to free convertibility are fully compatible with the BIT, because it does not grant the foreign investor an absolute right to repatriate its profits. Rather, it only guarantees free convertibility "without restriction or undue delay." The Venezuelan exchange control regulations, and particularly the requirements for CADIVI authorization,[690] would thus be fully compatible with the Treaty. In addition, the Treaty does not guarantee that conversion has to be done at the official exchange rate.[691]

The Tribunal's Decision

619. The parties debate whether the exchange control system instituted in Venezuela starting in 2003 complies with the guarantees on free transfer and convertibility of profits offered by the BIT to protected investors. On this matter, the Tribunal leans toward the position defended by the Bolivarian Republic.

620. In 2003, Venezuela decided to institute a dual control system that, when the events under analysis occurred,[692] would allow any foreign investor in Venezuela that needed foreign currency to resort to either an official market or a parallel market to obtain it.

621. The official market offered a more favorable exchange rate set by the State, while in the parallel market, which worked through the purchase and subsequent sale of public debt or bonds, the exchange rate was freely established by the market, and in practice was worse for the investor than the official market (because the investor needed a greater quantity of VEB to buy the same amount of USD). Access to the official system required a request to CADIVI, the agency that the Republic had put in charge of managing the exchange control system and that enjoyed broad discretion in granting or denying the authorization, depending on the availability of foreign currencies and for reasons of economic policy.

622. Thus, we see that in the specific case of repatriation of dividends under Art. 121 of Currency Exchange Order No. 56 dated 18 August, 2004:

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[689] CI, paragraph 50.
[690] RII, paragraph 424.
[691] RII, paragraph 426, with reference to the BITs between France and Venezuela and between the United Kingdom and Venezuela.
[692] The currency exchange system in Venezuela has undergone different modifications that will not be analyzed by this Tribunal. The Tribunal limits itself to analyzing the currency exchange system at the time that the events in question occurred.

> "Article 11. The authorizations to purchase foreign currencies (*autorizaciones de adquisición de divisas* – AAD) referring to international investments ... shall be subject to the availability of foreign currencies established by the Central Bank of Venezuela and the guidelines issued by the National Executive Branch."

623. Does Art. 5 of the BIT offer investors an absolute guarantee that they would be able to repatriate their profits at all times, and applying the official market exchange rate? The answer has to be 'no.'

624. (i) This can be seen, first, from the very wording of the article, because it only guarantees the conversion and transfer of funds "with no restriction or undue delay." On the on other hand, it allows the State to create restrictions or delays for justified cause. The introduction of exchange control systems is part of the economic and financial sovereignty of the States, and does not constitute an "undue restriction" for purposes of the BIT. Having created an exchange control system, the State may legitimately opt for a single structure or prefer, as Venezuela has done, a dual system with an official market and another parallel market. The choice of one or the other alternative is a policy decision, outside the scope of an arbitral tribunal's review.

625. (ii) Second, it should be stressed that the BIT only protects the transfer of profits denominated in a "freely convertible currency." Note that the Treaty does not establish any guarantee whatsoever on the applicable exchange rate. In this, it differs significantly from other BITs that do regulate this issue. Thus, the Venezuela – France BIT refers to the normal rate of exchange officially in force on the date of the transfer;"[693] or the United Kingdom – Venezuela BIT to the "rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force."[694]

626. Since there is no reference whatsoever to a guaranteed exchange rate in the BIT between Venezuela and the Netherlands, then provided the exchange control system instituted by the Republic allows free transferability, even if it is at the parallel market exchange rate and not at the official market exchange rate, the accorded guarantee cannot be taken to have been violated. This is precisely what happened: Venezuela instituted a dual system in which the foreign investor could freely opt between repatriating its profits through CADIVI or opt for the parallel market. In the first case, it enjoyed a privileged exchange rate, but the authorization was subject to the availability of foreign currencies and to general policy decisions. In the second case, the exchange rate was the market rate, but the conversion was immediate and did not require an administrative authorization.

627. In summary, the Tribunal thus reaches that conclusion that the exchange control system instituted by Venezuela at the time that the events in question occurred was compatible with the guarantees accorded by Art. 5 of the BIT to guaranteed investors, despite the fact that the exchange rate

[693] Art. 6 *in fine*, Exhibit RLA-45.
[694] Art. 6 *in fine*, Exhibit CLA-3.

that was used resulted in losses for Claimant when the conversion was done.

c. Application of the law to the facts

628. *Pro memoria*: Between June 2008 and October 2009, OIdV and Favianca applied to CADIVI for authorization to repatriate dividends in the amount of over VEB 160 million. In view of the lack of administrative authorization, the Companies used VEB 402 million to buy foreign currencies in the parallel market and repatriated them for the benefit of the OI group. In September 2011, CADIVI rejected the three dividend repatriation requests, arguing that they had already been paid.

629. Claimant believes that Venezuela committed a double violation of Art. 5: CADIVI was guilty of excessive delay and ultimately rejected the request with no justification.

630. The Bolivarian Republic denies having violated Art. 5 of the BIT. It emphasizes that Claimant admits that it transferred the dividends through the parallel market and therefore CADIVI's decision to deny the repatriation of dividends that had already been repatriated was justified.[695] It was the Companies who improperly handled the procedure with CADIVI, asking to expatriate funds that had already been transferred to their parent company.[696]

631. The Tribunal holds that Respondents' defense is pertinent.

632. Having declared the dividend in favor of OIEG, the Companies had the option of resorting to the official market or the parallel market to convert the VEB to USD. Initially, they attempted to access the official market because they exchange rate was better, although there were uncertainties concerning the administrative authorization. A few months after submitting the third request to CADIVI, and without waiting for the government agency to act, the Companies freely decided to abandon the official market route, opting for the alternative and buying the foreign currency in the parallel market, and in this process, they not only spent the amount of the dividends owed (VEB 160,272,487), but a significantly higher figure (VEB 402,573,736).

633. By opting for the parallel market, the companies tacitly waived the option of obtaining the foreign currency through CADIVI. Once the dividends are converted into USD through the parallel market and the funds repatriated to the parent company through this procedure, it is inappropriate for Claimant to complain that the exchange rate was unfavorable and that CADIVI's decision was overdue and denied the request. The Companies themselves were the ones who opted for the parallel market.

[695] RV, paragraph 280.
[696] RV, paragraph 281.

634. Claimant has attempted to justify its behavior by arguing that buying the USD in the parallel market was not due to the repatriation of dividends, but in reality was a loan granted by the Companies to another subsidiary of the group (OI Manufacturing Netherlands B.V.).[697] However, the existence of the loan is not proven, and in any event the annual financial statements of OIdV and Favianca show that the dividends had already been paid.[698]

635. Consequently, CADIVI's decisions to reject the fund transfer requests because the dividends had already been transferred through the parallel market were justified[699] (although they were, in fact, issued somewhat late, this is not serious enough to constitute an illicit act under international law). Once an investor has opted to repatriate the funds through the parallel market, it loses its right to claim the conversion into foreign currency through the official market controlled by CADIVI.

636. Therefore, the Tribunal dismisses the claims set forth by Claimant, asking the Tribunal to declare that the Bolivarian Republic violated Article 5 of the Netherlands-Venezuela BIT.

[697] HT, day 5, 35:21-27
[698] Exhibit NAV-55, p. 39; Exhibit NAV-30, p. 52; HT, day 5, 35:4-8.
[699] Exhibits R-15, R-16 and R-17.

VII. DAMAGES

1. INTRODUCTION

637. Once each of the party's jurisdictional arguments and arguments on the merits have been examined and it is confirmed that the Bolivarian Republic has breached the prohibition on expropriation and the guarantee of FET—contained respectively in Art. 6 and Art. 3(1) of the BIT—it is necessary to determine the appropriate compensation.

638. The parties have provided extensive expert testimony for calculating the damage. The Claimant has used the expertise of Brent C. Kaczmarek, CFA, from the consulting firm Navigant Consulting. Mr. Kaczmarek has submitted two reports ["**Kaczmarek I**" and "**II**"]. For its part, the Respondent has hired Jean-Luc Guitera, a partner at KPMG Forensic in France, who has also submitted two reports ["**Guitera I**" and "**II**"]. Both experts appeared at the Hearing, gave a summary of their positions, and were questioned by the other party and by the Tribunal.

639. Upon finishing their statements, and with the consent of both parties, the Tribunal asked both experts to jointly prepare a matrix with calculations of the value of the Companies, applying various parameters in the assessment of the DCF [the "**Joint Matrix**"].[700] Both experts did so, submitting the joint work dated 9 October 2013. The Tribunal thanks them for their effort.

The Claimant's position

640. The Claimant states that, in accordance with the principles established by International Law, Venezuela is required to make restitution for all the damages that its unlawful conduct has caused the Claimant. This full restitution standard would require not only the payment of the market value of the Companies, but also the recovery of all the other damages caused.[701]

641. The Claimant, specifically, claims a total of USD 929,544,714, divided into six types of damages:

- USD 729,821,323 for the expropriation of the Venezuelan Companies
- USD 16,833,383 for the expropriation of the surplus cash in the bank accounts of OIdV and Favianca
- USD 54,292,257 for the loss of revenue caused by Respondent's unlawful interference with the repatriation of the Claimant's dividends paid by OIdV and Favianca

[700] HT, Day 6, 44:1-6.
[701] CV, para. 133

- USD 50,566,759 for indirect damages caused by the use of property unlawfully expropriated to cause harm to the Claimant's business outside Venezuela

- USD 68,030,992 for indirect damages caused by the dissemination outside Venezuela, and as a consequence of the expropriation of the Plants, of the intellectual property of OI and other confidential information and processes

- USD 10,000,000 for moral damages caused by "egregious conduct" during the six months following the expropriation.

642. In addition, the Claimant claims interest from the date of the expropriation, costs, and interest on the costs.[702]

The Respondent's position

643. For its part, the Respondent denies that the Claimant has any right to receive compensation.[703] Secondarily, based on its expert's calculations, it reaches conclusions diametrically opposed to those of the Claimant:

- With regard to compensation for the expropriation of the Companies, while the Claimant is asking for USD 729,821,323, the Respondent proposes USD 113,807,000.[704]

- With regard to the surplus cash expropriated together with the expropriated Companies, the figure of USD 16,833,383 proposed by the Claimant, should be reduced, in the Respondent's opinion, to USD 7,738,000.[705]

644. With regard to the four remaining items claimed by the Claimant, the Respondent radically denies any liability.

Rejection of compensation for non-transferability

645. Before conducting an in-depth analysis, the Tribunal can already dismiss *a limine* one of the Claimant's claims: the one that refers to the damages caused by the alleged breach of the guarantee of transferability contained in Art. 5 of the BIT. The Tribunal has already reached the conclusion that the Bolivarian Republic has not breached this provision;[706] therefore, there are no grounds to award compensation for this cause.

[702] CV, pp. 133 and 134.
[703] RV, para. 458.
[704] RV, para. 422.
[705] RV, para. 457.
[706] See para. 631 *et seq.*

Structure of the decision

646. With regard to the remaining items claimed, the Tribunal will proceed in the following manner:

- First, it will analyze the legal basis for requesting compensation for expropriation (2.)

- Second, it will study what the appropriate methodology must be to establish the market value of OIEG's interest in the expropriated Companies, and will apply this methodology to find out that value (3.).

- Third, it will review whether the Claimant is entitled to claim compensation for additional damages, which exceed the market value of the expropriated Companies and will analyses whether there are grounds for the two sums requested by the Claimant—damages caused abroad and inappropriate dissemination of intellectual property (4.).

- Fourth, it will dedicate a section to the request for compensation for moral damages (5.).

- Finally ending with a section dedicated to interest (6.) and another to costs (7.).

2. COMPENSATION FOR EXPROPRIATION

647. Art. 6(c) of the BIT contains a quite detailed regulation of the compensation owed for the expropriation of a protected investment:

> "…(c) The measures shall be taken after fair compensation. Such compensation shall represent the market value of the affected investments just before the measures are taken or before the imminent measures are made public knowledge, whichever occurs first; it shall include interest at a normal commercial rate up to the payment date; and in order to be enforced for the claimants, it shall be paid and made transferable without undue delay to the country designated by the interested claimants in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants."

648. The precept sets three fundamental characteristics that any compensation for expropriation must have:

- With regard to the amount, the compensation must represent the "market value of the affected investments"

- With regard to the relevant date, the compensation has to be calculated as of the date "just before the measures are taken" or if they have been made public knowledge in advance, as of the date on which the public gained knowledge of them

- With regard to the currency in which the compensation must be expressed, the precept grants the expropriated investor an option: it may request it "in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants."

Market value

649. Both parties agree that the "market value" is the appropriate assessment standard for calculating the compensation. Both parties also agree on the theoretical definition of the concept:[707] it is the price in cash that a hypothetical buyer would be disposed to pay a hypothetical seller,

- both parties being interested in making the transaction, but with no obligation to do so;
- both acting in good faith and in accordance with the practices of the market;
- in an open market and without restrictions; and
- both having reasonable knowledge of the subject of the contract and of the market conditions.[708]

650. There is also agreement between the parties on the currency in which the calculation of the market value must be made: it must be the VEB, since this is the currency in which both Venezuelan Companies submitted their annual accounts and in which they developed their business plans.[709]

Relevant date

651. The parties also agree that 26 October 2010, the date on which the Expropriation Decree was published, is the appropriate date for calculating the market value.[710]

Payment currency

652. One issue is the currency in which the calculation must be made—which is the VEB—and a separate issue is the currency in which the payment must be made. The Claimant has opted to submit its claims in USD, an option that is in keeping with the alternative offered to it in Art. 6 *in fine* of the BIT.[711] There is also agreement between the parties on which exchange rate is applicable

[707] CV, para. 137; RV, para. 288.
[708] Kaczmarek I, para. 51; RV, para. 288.
[709] CI, para. 302; Kaczmarek I, p. 19.
[710] Kaczmarek, HT, Day 6, 40:18-26: Mr. Kaczmarek answering a question from Prof. Orrego Vicuña; RV, para. 286.
[711] CV, para. 168.

for converting the market value expressed in VEB into USD: it shall be the official exchange rate in effect on the expropriation date, 26 October 2010, and which was 4.3 VEB for each USD.[712]

3. MARKET VALUE

A. Appropriate methodology

653. The first task that the Tribunal must tackle is to determine the proper methodology for calculating the market value of the expropriated Companies, since the parties' experts disagree on this question.

654. Claimant's expert, Mr. Kaczmarek, applies three valuation methods in parallel[713]:

- First, he uses the discounted cash flow [(DCF)] method, which attempts to capture the value of future cash flows of which the company has been deprived as a result of the expropriation;[714]

- Second, he supplements that valuation with two more methods: one that compares the value of the Companies with other similar companies listed on the stock exchange; and the third that uses as reference the prices paid in sales of comparable companies.[715]

655. Below are the three valuations weighed by Mr. Kaczmarek, applying 40% to the vale calculated by the DCF methodology, 40% to the result of comparable companies and 20% to what is derived from comparable transactions; from this he arrives at a value of the Companies of USD 999,988,111 for 100% of the capital, which corresponds to compensation of USD 729,821,323 in favor of the Claimant[716]:

Method	Weight	Value (USD)
DCF Valuation	40%	1,004,872,625
Comparable companies	40%	977,164,424
Comparable transactions	20%	1,035,866,457
Average weighted valuation		**999,988,111**
Claimant's equity interest		72.983%
Value of Claimant's equity interest		**729,821,323**

[712] Kaczmarek I, para. 122; Guitera I, para. 225.
[713] CI, paras. 275 and 286-290.
[714] CI, paras. 273 and 277-280.
[715] CI, paras. 274 y 281-285.
[716] CI, para. 296.

Methodology of the Respondent

656. Respondent's expert, Mr. Guitera, adopted a somewhat different methodology. In his opinion, the market value should be calculated by applying the DCF methodology only, while the other methodologies should be used as a simple "sanity check," in the words of the expert, in order to corroborate the result achieved.[717]

Comparison of the two methodologies

657. The Tribunal tends to agree with the Respondent's expert.

658. The most widely accepted formula for calculating the market value of a functioning company is unquestionably the DCF methodology—provided that the enterprise can show that it will generate a reasonably foreseeable free cash flow in the coming years. This methodology essentially means the following (using the World Bank's definition):[718]

> *"'[D]iscounted cash flow value' means the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year's expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances. Such discount rate may be measured by examining the rate of return available in the same market on alternative investments of comparable risk on the basis of their present value."*

659. The Tribunal believes that use of a DCF-based model is particularly appropriate in the case of OIdV and Favianca. As Mr. Kaczmarek has said:

> *"In general, what I would say is that this is a very straightforward non-complex DCF analysis."*[719]

660. Indeed, there are a number of elements that facilitate the use of the DCF methodology in this case:

- First, both Companies have devoted themselves for nearly half a century to a stable industrial business in which they use their own technology, which was developed on a worldwide scale and which gives them an advantage over local competitors.

- Second, they rank first among glass manufacturers in Venezuela, far ahead of their closest competitor.

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[717] Guitera I, para. 5.
[718] World Bank (eds.): "Legal Framework for the Treatment of Foreign Investment. Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment," 31 I.L.M. (1992), 1382, p. 7.
[719] TA, day 4 (English), 140:21-22; TA, day 4 (Spanish), 89:15-16.

- Third, they have a captive customer in the Polar Group, the largest agri-food business group in Venezuela and also a minority partner in the Companies.

- Fourth, they have a sophisticated business plan [the "**Business Plan**"],[720] which was prepared prior to expropriation and which the Companies had been developing year by year. This plan contained highly detailed projections of their future development over the 2010–2013 quadrennium and of their capacity to generate free cash flows.[721]

661. There is an additional argument that reaffirms the foregoing. As stated by Mr. Guitera, the Venezuelan business market has special, unique characteristics, making it advisable to use a "stand-alone" valuation, such as the DCF methodology, and unadvisable to use methods based on comparisons to other countries.

> *"... due to the fact that it is very difficult to come to a value by comparison between a company in Venezuela, which is a very specific environment, with other environments, I do not think the multiple approach should be relied [on] as a primary approach to compute the price, but only as a check [...] which is why I have applied the DCF and then the check, and not made a kind of weighted valuation between the two."*[722]

662. However, while recognizing the prevalence of the DCF methodology, prudence dictates that it should not be applied mechanically since this could easily lead to a distorted outcome. Any DCF model is simply the result of plugging some estimated future parameters, as determined by the expert, into a mathematical formula. If the estimates of these parameters turn out to be inaccurate, the results will not reflect the true market value of the expropriated asset. Small changes in the parameters can cause very significant differences in the outcomes.

663. In view of these risks, all experts agree that the results of a DCF-based model must be checked using other valuation methods. Mr. Guitera proposes that they be compared with the value of similar publicly traded companies, or with the actual price at which similar companies have been sold.

The Tribunal's preference

664. The Tribunal agrees with the proposal of Mr. Guitera, as it reflects the most common practice in this type of valuation.

665. Mr. Kaczmarek, meanwhile, also proposes that these methodologies be used, not as a "sanity check," but as independent values that the expert should weigh alongside the value calculated using the DCF. The procedure proposed by Mr. Kaczmarek, though less common in practice,

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[720] Exhibit NAV-20.
[721] *Ibid.*
[722] RV, par. 308.

cannot be described as wrong: If a methodology yields a divergent result, the weighting will moderate its impact. The drawback of this alternative is that the determination of the weighting percentages is highly subjective: There is no objective reason for using a 40/40/20 weighting scheme, as opposed to a 60/20/20 scheme or even a 34/33/33 scheme. Mr. Kaczmarek himself has been unable to provide an objective rationale for why his weighting scheme should be given preference over other alternatives.

666. In summary, the Tribunal sides with the methodology proposed by Mr. Guitera and will use it to determine the market value of the expropriated Companies. To this end it will develop its own DCF model, determine the resulting valuation, and then check this valuation by comparing it to the value obtained through the comparable-companies and comparable-transactions methodologies.

667. In any event, even though the Tribunal has sided on a theoretical level with the methodology proposed by Mr. Guitera, as opposed to the one proposed by Mr. Kaczmarek, the use of one or the other does not have a significant practical impact. Applying Mr. Guitera's methodology to Mr. Kaczmarek's numbers would have the effect of increasing (not reducing!) the market value. In fact, the DCF valuation of US$1.004 billion calculated by Mr. Kaczmarek is slightly below the valuation resulting from the weighted average (US$1.000 billion for 100% of OIdV and Favianca).

Application of the methodology

668. Mr. Kaczmarek has designed a DCF methodology based on the Business Plan of the expropriated Companies, which project the cash flows that the expropriated Companies would have reasonably generated in the 2010–2020 period and which, when discounted at the discount rate deemed reasonable by the expert, would lead to a valuation of US$1.004 billion (for 100% of both Companies). The Respondent's expert, Mr. Guitera, accepts in general terms the model proposed by Mr. Kaczmarek, including the 2010–2020 time framework, but he proposes that certain adjustments be made in the cash flow estimates and discount rate, which would reduce the value to US$195 million (again, referring to 100% of both Companies).[723]

669. Although in absolute terms the results obtained by the two experts are vastly different, these differences can actually be reduced to five parameters on which the experts maintain opposing positions:

- Cost of goods sold;
- Increase in sales price;
- Development of exports;

[723] Joint Matrix, p. 2.

- Investments (capital expenditures, or "capex") required to operate the business;

- Applicable discount rate.

670. Each expert has performed his own calculation of the first four parameters, and the Tribunal must side with the opinion of one or the other (B.). Then, the Tribunal must determine the discount rate to be applied (C.), which will allow for the calculation—with the help of the Joint Matrix prepared by both experts—of the Companies' market value (D.). The Tribunal must then decide whether this market value should be increased on the grounds that excess cash was expropriated (E.) or decreased on the grounds that a discount should apply due to the Companies' specific characteristics (F.). The resulting value will be checked by using other methodologies (G.), which will lead to a final summary (H.).

B. The four points of disagreement

a. The cost of goods sold

671. The first parameter of the DCF model on which the experts disagree is the production cost of goods sold, i.e. the total variable costs incurred by the Companies (raw materials, labor, energy, transport[724]) to make the products that are later sold ["Cost of goods sold"].

Position of the experts

672. In his first report, Claimant's expert calculates the Cost of goods sold using the following methodology[725]:

- Since the Cost of goods sold is variable, he considers it appropriate to determine it as a percentage of total sales;

- For years 2010-2013, the expert takes the percentages of the Cost of goods sold shown for each year in the Business Plan of the Companies;[726]

- For 2014-2020, Cost of goods sold is established as 63.7%[727] of sales—the average of the percentages projected in the Business Plan for each year from 2010-2013.

673. Mr. Guitera disagrees with these calculations in his first report.[728] In his opinion, the percentages proposed by Mr. Kaczmarek are too low, as they rely on the fact that traditionally in Venezuela

[724] There has been some confusion over whether Production Costs should or should not include depreciation; see Kaczmarek II, n. 52; the Tribunal will take the figures without depreciation.
[725] Kaczmarek I, para. 84.
[726] Exhibit NAV-20.
[727] Excluding amortization – see Kaczmarek II, para. 78.
[728] Guitera I, para. 125.

energy costs have been heavily subsidized, a situation that in the long-term would not be sustainable. Therefore, Respondent's expert prepares a different projection:

- During the first five-year period, the Cost of goods sold will increase progressively until reaching 70%[729] of sales in 2015;
- As from 2016, the Costs will stabilize at 70%.

674. The Republic's expert noted that the Companies generate a profit margin that is higher by approximately 5% over that obtained by other companies of the OI group in South America; in his opinion, this increased profitability is due to subsidized energy prices in Venezuela and cannot be maintained in the long-term.[730]

675. In his second report, Mr. Kaczmarek defends his calculation and rejects Mr. Guitera's. In his opinion, the Venezuelan Companies have consistently achieved operating results superior to those of other subsidiaries of the OI group in South America. Having a decade of financial information prior to 2010 that repeatedly shows such advantage, there is no reason to exclude it from future projections.[731]

676. Mr. Guitera in turn reiterated in his second report the same conclusions reached in the first.[732] In his view, it is unrealistic to think that energy costs will remain static until 2020, and therefore he believes that his model, which implicitly includes an increase in energy costs of 2.9% of sales in 2010 to 7.9% in 2020, is more realistic. Even with this increase, energy costs for the Companies would continue to be lower than the typical percentage applied in the glass industry, which would be 15-25%.[733]

677. During the hearing, both experts had the opportunity to explain their positions.[734]

The Tribunal's Decision

678. Both experts are in agreement on the basic philosophy of how the Operating Costs are to be calculated in the model. Because they are a variable expense, it is appropriate to determine them as a percentage of sales. Where the two experts disagree is on the precise formula for calculating that percentage:

[729] Including amortization 75% – see Kaczmarek II, para. 79.
[730] Guitera I, para. 129.
[731] Kaczmarek II, para. 80.
[732] Guitera I, para. 135.
[733] Guitera II, para. 159.
[734] Kaczmarek: HT, day 4 (English), 162:8 *et seq.*; Guitera: HT, day 5 (English), 101:6.

- Mr. Kaczmarek uses the forecasts for the first quadrennium contained in the Business Plan approved by the company, and for the remaining sexennium uses the average of the percentages of the initial quadrennium, which is 63.7%;

- Mr. Guitera, on the other hand, increases the percentage of costs proportionally until it reaches 70% in 2015, and maintains this percentage unchanged until 2020.

679. Although the difference between the two experts is apparently minor, its impact on the market value is very significant: other things being equal, the value of the Companies falls by approximately 30% from USD 1.004 billion to USD 701 million,[735] depending on which forecast is used.

680. After weighing the arguments of both experts, the arbitral Tribunal on this point favors the Claimant's position. The following arguments justify this decision:

681. First, the arguments of the Claimant's expert are strengthened by the fact that his figures are based on the Business Plan prepared by the Companies in 2010, before they were expropriated.[736] In the Tribunal's opinion, this business plan has a high level of reliability:

- It was prepared by the Companies' Venezuelan managers, who, in their forecasts, used historical, audited, and apparently very reliable financial data and their in-depth knowledge of the Venezuelan market;

- It was prepared on a date which had no relationship with the current dispute, when there was no indication that the Companies might be expropriated;

- Its purpose was to prepare a model for the Companies' development and to create a yardstick for judging the quality of management; therefore, they had no incentive to make overly optimistic projections, because if they were wrong it would reflect badly on their judgment.

682. The figures proposed by Mr. Guitera, however, are of his own making, and there is no factual basis to support them (the figure of 70%, which is central to his entire calculation is a simple estimate, and no arguments have been put forward to justify it; nor is there any support for the increase in energy costs from 2.9% of sales in 2010 to 7.9% in 2020).

683. Second, the figures proposed by the Claimant's expert do not assume that the Cost of goods sold, especially energy costs, will remain static throughout the decade. These costs will increase in

[735] Joint Matrix, p. 2.
[736] Exhibit NAV-20.

proportion to sales, which increase as a result of inflation.[737]

684. Third, Mr. Guitera starts from the premise that during the triennium 2007–2009 the Venezuelan Companies obtained profits that consistently outperformed those made by other OI subsidiaries in South America by 4–5% annually.[738] In his opinion, this additional return is exclusively due to low energy costs in Venezuela and it should disappear as the subsidies are reduced.

685. However, Mr. Guitera has not analyzed whether the higher profitability might be partly or wholly due to other causes.

686. It is a fact that the Venezuelan Companies had two factories with the most advanced technology,[739] which had a dominant position in the market,[740] and that the Venezuelan consumer has a clear preference for glass.[741] These factors might explain—at least partly—the superior performance of OIdV and Favianca compared to the other companies in the OI Group. Mr. Guitera has not analyzed this alternative so as to rule it out, and this makes his figures less capable of convincing.

687. Fourth, on the date of the expropriation (26 October 2010, which is the relevant date for making the assumptions underlying the model) there was no indication at all that Venezuela intended to change its energy policy.

688. The Bolivarian Republic is one of the largest producers of oil and gas in the world, and for decades it has been implementing a policy of low prices for domestic and industrial internal consumption—so much so that the low price of fuel is the main (or one of the main) competitive advantages of Venezuelan manufacturing companies. The Respondent's expert has failed to provide proof that in 2010 there was a perceived significant risk of increase in the industrial prices of petroleum products.

689. On the contrary, the records contain an internal OI report of October 2008, which analyses the energy situation in Venezuela, and reaches the conclusion that

> *"We do not foresee any energy price increase in Venezuela"*[742]

690. Fifth, even assuming that the Bolivarian Republic were to decide to change its energy policy and significantly increase fuel prices, the Venezuelan Companies would always have had the opportunity to pass that increase in costs on to the final purchaser by raising prices—especially

[737] TA, day 4 (English), 164:3-9.
[738] Guitera I, para. 123.
[739] See para. 88 *supra*.
[740] C I, para. 38; C IV, para. 23–24.
[741] Euromonitor Glass Returns to Growth: The Outlook in Food and Beverages, Exhibit NAV-02, p. 57.
[742] Exhibit NAV-15, p. 32.

because they had a dominant position in the Venezuelan glass market, which would allow them to set prices. This option is not merely theoretical, since the same internal OI report of 2008 that concludes that the risk of price increases is low also explicitly states that, if an increase were to occur, it could be offset by passing the increased costs on to the customers:[743]

"The cost increment in energy is transferred to our customers thru price increases."

691. For the reasons stated, the Tribunal considers that the Cost of goods sold forecast by Mr. Kaczmarek seem more reasonable than those forecast by Mr. Guitera, and therefore it opts for the former.

b. Increase in sales prices

692. The second point of disagreement between the experts relates to the increase in sales prices of glass.

Position of the experts

693. Mr. Kaczmarek bases his first report on the Business Plan prepared in 2010 by the Companies, which projected an average annual increase in prices in the four years from 2010 to 2013 of 30.6%, which is the result of adding an expected annual inflation rate of 28% plus a real annual increase in prices of 2.6%.[744] The expert considers these projections to be good, but for years 2014-2020 he assumes that prices will not undergo additional real increases and that they would only adjust for inflation (long-term projection of 14% annually).[745]

694. Mr. Guitera analyses these expectations in his first report, agreeing with some of the projections of Claimant's expert, but disagreeing with others. He agrees that from 2014 until 2020 the prices of glass sold by the Companies will increase at the same rate as inflation. But he is not willing to accept the expectation that in the four years from 2011 – 2013, prices will grow at a rate of 2.6% above inflation.[746]

695. In his second report, expert Mr. Kaczmarek stresses that historical results confirm his position: in the five-year period from 2005 to 2009, the Companies were able to raise prices above inflation

[743] Exhibit NAV-15, p. 32
[744] Kaczmarek I, para. 79.
[745] Kaczmarek I, para. 78.
[746] Guitera I, para. 109.

each year adding a margin of 5.2%. These facts would justify an expected increase of 2.6% per year for the first four-year period.[747]

696. Mr. Kaczmarek's arguments did not convince Mr. Guitera. In his second report, he accepts that historically prices had risen above inflation, but he adds that historical comparisons are not a sound basis to justify similar future increases.[748] Specifically, he identifies two reasons why he considers that the projected increases above inflation are unrealistic:

- First, because the projected price increases for the four-year period of 2010 – 2013 contained in the Business Plan show large variations, ranging from -1.8% in 2010 to +9.9% in 2012; the expert particularly disagrees with the latter figure, as he does not find any justification to support such a large increase;[749]

- Second, the expert draws attention to the fact that significant price increases obtained in the five-year period from 2005 – 2009 coincided with a growth phase of the Venezuelan per capita GDP. However, after 2009 this indicator would begin to decline, suffering a decline of - 2.8% that year. Mr. Guitera believes that in such a macroeconomic situation, it would be impossible to raise prices.

697. During the hearing, both experts explained their positions in this regard.[750]

The Tribunal's Decision

698. The two experts disagree on the sale prices of the glass manufactured by the Companies. They agree that in the period 2014–2020 prices will increase in parallel with inflation (which is forecast at 14% per year—a point on which they also agree). They do not agree, however, on the price increases in the first quadrennium (2010–2013). Mr. Kaczmarek takes the figures from the Business Plan prepared by the management, which includes a real increase of 2.6% above inflation, while Mr. Guitera argues that it should not be included.

699. The Tribunal favors the position defended by Mr. Kaczmarek, for the following reasons:

700. First, Mr. Kaczmarek's position is based on the figures contained in the Business Plan, for which, in the Tribunal's opinion, there is a presumption of reasonableness.

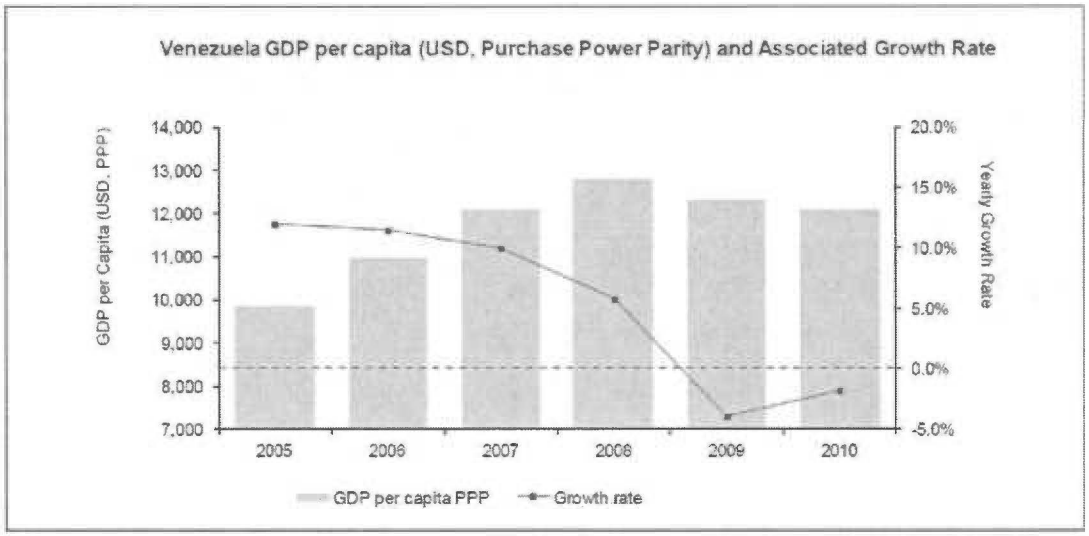
701. Secondly, on this point the Business Plan is pessimistic rather than optimistic. In the preceding quinquennium (2004–2009) the Companies had managed to increase sale prices by 5.2% per year

[747] Kaczmarek II, para. 116.
[748] Guitera II, para. 191.
[749] Guitera II, para. 193.
[750] Kaczmarek: HT, day 4 (English), p. 161 *et seq.*; Guitera: HT, day 5, p. 193 *et seq.*

above inflation. This justifies a forecast for the following quadrennium of 2.6%, which is exactly half the historical percentage increase.

The Respondent's Counter-arguments

702. The Respondent has counter-argued that historical price increases have been possible as a result of the economic boom in Venezuela during the years 2005-2008, but that this situation would have changed in 2009, making a real price increase policy impossible in the future. As evidence of this statement, Mr. Guitera uses the GDP *per capita* index in USD to *purchase power parity* which had declined in 2009 and 2010, as seen in the following chart:



703. The Tribunal cannot agree with this argument.

704. The most common index for measuring a nation's growth rate is the increase in GDP growth (positive or negative)—an index which also appears in the graph prepared by Mr. Guitera.[751] According to this indicator, the Venezuelan economy grew continuously during the sixennium from 2005-2010 (in percentages, ranging from 5% to 15%), with no noticeable slow-down at the end of the sixennium: in 2009 and 2010, growth rates were even higher than in 2005 and 2006. From the graph prepared by the expert, indications are that during 2009 and 2010, GDP growth was greater than 10%.

705. It is evident, according to data from Mr. Guitera that the GDP *per capita* in USD in relation to the *purchase power parity* entered into negative growth in 2009 and 2010. How can real GDP growth be justified while GDP *per capita* in USD in relation to the *purchase power parity* decreases? The expert does not provide any justification and the Tribunal merely notes that one index is calculated based

[751] On the appropriate scale

on VEB and the other on USD, and the differences could be due to the continuous devaluation of the VEB against the USD.

706. In any event, regardless of the macro-economic realities which affect or fail to impact the Venezuelan economy, such facts alone are unable to undermine the reasoning for the forecasts outlined in the Business Plan. As the Venezuelan economy grows more or less at the macro level, it does not necessarily determine the price which Companies receive from the sale of their range of products at the micro level.

707. The same is true with regard to fluctuations in price increases for each year of the quadrennium, another of the counter-arguments advanced by the Respondent's expert. These fluctuations appear to follow the forecasts of the guidelines regarding the introduction of new products into the market, and do not detract from, but on the contrary, confirm the accuracy with which the forecasts were made.

c. The inclusion of imports

708. The third point of disagreement between the experts concerns Companies' expectation of being able to resume their exports.

Experts' Position

709. In its DCF model, Mr. Kaczmarek includes the exportation of glass, an activity which the Companies had carried out up to 2006, which—according to his assertions– there were plans to restart in 2011. The projected exports represent 1.22% of the domestic sales for 2011, 2.44% for 2012 and 3.66% for the years between 2013 and 2020.[752]

710. The expert, Mr. Guitera estimates that it is illogical to envisage exports. In his opinion, exports in the past have been erratic, and were based on promptly taking advantage of opportunities and not on a rational growth strategy. Besides, there were hardly any exports from 2005.[753]

711. In his second report, Mr. Kaczmarek recognizes that from 2005, the export volume fell significantly. In justifying this, he explains that in view of the high demand for glass bottles in Venezuela's domestic market, in 2005, the Companies ceased exporting. Although in 2008 and 2009, they made attempts to resume, administrative restrictions prevented them from doing so. The expert further states that the average figure for exports in the quinquennium 2001 to 2005 was 3.7% of total sales, and he reaffirms that the forecasts were reasonable.[754]

[752] Kaczmarek I, para. 76.
[753] Guitera I, para. 101.
[754] Kaczmarek II, para. 123.

712. Mr. Kaczmarek's line of argument did not satisfy the expert, Mr. Guitera. In his second report, the latter places emphasis on the fact that the Business Plan does not include any export forecast, that the cost structure worked out by Mr. Kaczmarek does not include any forecast whatsoever of additional costs required for exports, and that from a distance of more than 250 miles, the transportation of glass bottles reduces the competitiveness of the product.[755]

713. In his Summary of Conclusions, the Claimant insists that in the years 2007 and 2008, the Companies would have resumed exporting, and that they failed to do so only because administrative restrictions made it impossible. Proof of this resides in the fact that Venvidrio, the public Company which is not subject to administrative restrictions would have resumed exports to Brazil in particular.[756] The Respondent, on the other hand, reaffirms in his conclusions that there is absolutely no basis for including possible exports in the DCF model.[757]

The Tribunal's Decision

714. In this case, the Tribunal adopts position endorsed by the expert, Mr. Kaczmarek, and agrees that it is reasonable to include an exports projection in the DCF model. He reasons as follows:

715. First of all, the Tribunal finds that both experts concur that until 2006, the Companies regularly engaged in exporting, and that in that year they were suspended and not reinstated. However, it finds the claim by the Claimant and its expert is credible in stating that the reason there were no exports in 2008 and 2009 was not for a lack of interest on the part of the Companies but instead for bureaucratic and currency control issues.

716. Secondly, the Tribunal finds it likely that a hypothetical buyer would consider the fact that the Companies previously had successful export activities, and it would assume that they could be reinstated (especially given positive relations with the Administration that would in turn overcome holdups) and it would include in the offer price a small premium to account for this potential additional business. The difference between including and excluding the exports in the market value is approximately USD 17 million, *ceteris paribus*.[758]

717. Good evidence that the Plants had export capacity and that a hypothetical buyer could have recognized it is the fact that, after the expropriation and already under the control of Venvidrio, they immediately began exporting in significant quantities.[759]

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[755] Guitera II, para. 203.
[756] CV, para. 204.
[757] RV, para. 344.
[758] Joint Matrix, pg. 2
[759] CV, para 206: here, it states the problem with the value of the facts occurring after the appropriation. As Mr. Guitera correctly states, what the Court has to calculate is the market value of the Companies as of the date of expropriation that a hypothetical buyer would have paid for them, considering the information available at that time. What is telling are the expectations as of the date of expropriation. Later exports are only an indicator; the determining factor is the expectations of a hypothetical buyer as of the date of valuation.

718. There is still a counter-argument to be analyzed. Though the Business Plan does not provide for any export activity, the Tribunal understands that this exclusion is not an express waiver of the ability to export. Instead, it means that the OI group directors had lost any hope that the Administration would lift the administrative holdups preventing them.

d. Capital expenditures ("*capex*") required to operate the business

719. The fourth and final disagreement between the experts regarding the parameters of the DCF model relates to the need for investment—*capex* in financial jargon.

Experts' position

720. (i) In his initial report, the expert, Mr. Kaczmarek starts from the investments anticipated in the Business Plan prepared in 2010 by the Companies, to determine the *capex* necessary in the quadrennium 2010-2013 (which amounts to 4%, 3%, 5% and 7% of sales anticipated, respectively). For the period 2014-2020, the expert estimates that investments will reach 6.4% of sales. He arrives at this percentage by calculating the average for the decade 2004-2013.[760]

721. (ii) On the other hand, the expert, Mr. Guitera estimates that these forecasts are extremely low.[761] He understands that the Companies have been under-investing in the Plants, which would have resulted in deterioration of their equipment. As evidence of this situation of under-investment, as well as general deterioration of the Plants, the expert refers to

- information that would have facilitated the management of Venvidrio, and
- a report on Envidrio [sic] for 2011, according to which the ovens were showing an elevated level of wear.

722. In order to correct this situation of under-investment, the expert proposes that the investment average for the 2000-2009 decade be used for the 2010-2020 period.

723. He also points out that Mr. Kaczmarek has selected the 2004-2013 decade to calculate the average investment required, without taking into consideration the fact that in the years 2000-2003, the investment percentage had been very high. In summary, in the quadrennium 2000-2003, the *capex* percentage reached 20%, 16%, 16% and 10% of sales. This would support his opinion that the

[760] Kaczmarek I, para. 92.
[761] Guitera I, para. 147.

average selected by Mr. Kaczmarek—the 2004-2013 decade—is not a good reference for establishing the investment levels required for the 2014-2020 period.

724. For this reason, taking into consideration the fact that the investment percentage in sales was 15.5% in the quadrennium 2000 to 2003, and that it fell to 10% during the 2000-2010 period, the expert, Mr. Guitera is exaggerating by using this last figure.[762]

725. (iii) In his second report, the expert, Mr. Kaczmarek reaffirms the correctness of his calculation. Upholding the statements of the directors of the OI, Messrs Machaen and Gómez, he denies that the OI under-invested in their Venezuelan Plants, and in his appendix N, he provides the complete figures in USD invested from 2000 to 2010 which range between a minimum of USD 10.6 million in 2004 and a maximum of USD 23.5 million in 2006. Besides, he points out that in the years 2002 and 2006, there was expansion in the production capacity installed (from 1,356 tons/day in 2002 to 1,433 tons/day in 2006)—which exceeds the capacity required by the DCF model, which goes only to 1,250 tons/day.[763]

726. (iv) In his second report, Mr. Guitera explains that his calculation is based on investments in VEB made in the period 2000-2010, which includes a sub-period of important investments related to sales (2000-2003) and another of less significant investments (2004-2010). Throughout the period, the average amount of investment was 10% of sales, a percentage which the expert proposes to use for the entire period 2010-2020. He emphasizes that for this calculation it is of no importance whether the Plants are in poor condition as regards maintenance (as Venvidrio states), or not (as Mr. Kaczmarek claims).[764]

727. As regards amounts actually invested between 2000 and 2010, Mr. Guitera casts doubt on the USD figures presented in appendix N to Mr. Kaczmarek's report. In his opinion, these figures reflect the investment amounts authorized by the parent company, whereas the relevant figures are in the audited accounts of the Companies which are quoted in VEB. The expert compares both amounts and finds discrepancies between them and those that have not been verified.[765]

728. Mr. Guitera also analyses table 7 in the second report of the expert, Mr. Kaczmarek, in which details of repair work on the ovens, carried out in the period 2000-2010 is set out together with those anticipated for the years 2011-2015. He points out that according to this table, in the quadrennium 2010-2013—the period to which the Business Plan refers—it is anticipated that the ovens will be refurbished three times. In his opinion, these projections require significant investment inputs, without which it would

[762] Guitera I, para. 154.
[763] Kaczmarek II, para. 110.
[764] Guitera II, para. 164.
[765] Guitera II, para. 178.

be impossible to maintain the low ratio level of investment expected in the Business Plan—4%, 3.5%, 4.5% and 6.6% of sales for each year of the quadrennium.[766]

729. (v) During the hearing, the experts had the opportunity to explain their positions.[767]

730. (vi) Mr. Guitera explained what, in his opinion, might have caused OI to under-invest in their Venezuelan Plants:[768]

- The first would be the continuous devaluation of the VEB against the USD, which would oblige the group to devalue investments made in Venezuela;

- The second would be the lack of confidence in the political situation, which also would have caused the OI group to minimize their exposure to country risk.

731. During his examination process, in response to questions relating to the Claimant's attorneys, Mr. Guitera recognized that he had made an error in his calculations: he had calculated the average of the results for the years 2000-2010 in the erroneous belief that these represented 10 years, when, in reality they were 11. In his opinion, in order to calculate the average correctly, he should have excluded a year, and he proposes the exclusion of the year 2010 (since it was in October of this year that the Companies were expropriated). With this correction, the ten-year average would exceed 10% (calculated on an 11-year basis) to 10.8 %—which in turn, would require a reduction of the market value of the Companies by approximately USD 50 million.[769] Mr. Guitera promised to present new calculations in which the error would be corrected and this was done by the Parent company.[770]

732. (vii) In their Summary of Conclusions, the Claimant points out that Mr. Guitera has not taken into consideration the Business Plan prepared by the Companies for the quadrennium 2010-2013, and has changed this by a massive increase in the capital expenditure, amounting to USD 85 million, without explaining what the investment had entailed.[771]

733. (viii) The Respondent, for his part, indicates that his expert has used the data of a complete industrial cycle, so as to be able to correctly forecast future data. As regards the life cycle of the ovens, the witness, Mr. Machen would have referred to 10 years, while the other witness, Mr. Pazos, would have extended this to 14 years. Using historical data for 10 years would then seem to be a reasonable proposal. The duration of the cycle would discredit the methodology used by Mr. Kaczmarek, who used only six years.

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[766] Guitera II, para. 183.
[767] Kaczmarek: HT, day 4 (English), pg. 165; HT, day 5 (English), pg. 18; and HT, day 6 (English), pg. 82; Guitera: HT, day 5 (English) pg. 105; HT, day 6 (English), pg. 3.
[768] HT, day 5 (English), pgs. 105 and 106.
[769] HT, day 6 (English), pg. 3; On the other hand, the Claimant understands that year 2000 should be excluded which indicates a high *capital expenditure* percentage.
[770] Joint Matrix, pg. 1.
[771] CV, para. 193.

The Tribunal's Decision

734. This dispute revolves around the appropriate *capex* level that should be included in the DCF model.

735. Mr. Kaczmarek proposes using two calculations: in the first quadrennium, he selects figures contained in the Companies' Business Plan (some low percentages of 4%, 3.5%, 4.5% and 6.6% on sales) and for the rest of the period (2014–2020) he takes the mean for the period of 2004–2013, which is 6.4%.

736. Mr. Guitera, on the other hand (and after a clear error in his calculation was corrected) uses the mean investment for the decade from 2000–2009 (10.8%) and applies it evenly over the period of 2010–2020.

737. In order to resolve this dispute, the Tribunal will proceed as follows: (i) first, it will gather available data regarding investments in the Companies; (ii) second, it will analyze the credibility of the data used by the Companies in their Business Plan; next, it will do the same with the data proposed by (iii) Mr. Kaczmarek and (iv) Mr. Guitera.

(i) Available Data

738. Historically, the Companies reached the following investment levels (in % on sales)[772]

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	[2010]
20%	16%	16%	10%	6%	9%	9%	9%	6%	7%	[2%]

739. The year 2010 should be excluded from this historical series because that is when the expropriation occurred, and therefore the data is not comparable.

740. Notably, the other data shows that in the first three years of the decade, the investment level was significant (16%–20%), and dropped in the following seven, fluctuating between a 6% low and a 10% high.

741. The Business Plan that the Companies projected for the quadrennium 2010–2013 [showed] significantly lower percentages:

2010	2011	2012	2013
4%	3.5%	4.5%	6.6%

[772] Kaczmarek I, appendix D.

(ii) Credibility of the Business Plan data

742. The Tribunal continually expressed its respect for the data contained in the Business Plan generated by the directors of the Companies, and it has generally accepted its projections as satisfactory. It is questionable whether this acceptance should also be extended to the projected investments.

743. The doubt arises because the projected investments for the quadrennium 2010–2014 are, by far, the lowest since the year 2000, which is when the historical series begins:

- In the decade 2000–2009, which predates the expropriation, the projected investment never dropped lower than 6%; it remained at that level for two years, but was higher in the remaining eight, reaching 16% in two years and even 20% in one;

- however, the Business Plan for the quadrennium 2010–2014 projects that in one year, the 6% (the historical low) will repeat and in the remaining three, the percentage will be approximately 4%, figures that are lower than the minimum in the historical series by one third.

744. What could such low investment projections be attributed to?

745. The expert, Mr. Kaczmarek, has not provided a specific answer to this question. He has limited himself to accepting the figures because they appear in the Business Plan and reflect what the OI group expected to invest in the Companies during the quadrennium.

746. Mr. Guitera, on the other hand, maintains a different interpretation. In his opinion, the Companies were already suffering an under-investment situation, which the Business Plan would only exacerbate. The under-investment would be a decision considered by OI group, which sought to limit its losses and reduce the country risk in Venezuela.[773]

747. In fact, the Business Plan shows that in the next quadrennium OI was actually planning low investment levels in its Venezuelan affiliates.

748. That, however, is not the problem to be addressed.

749. The issue is whether a hypothetical investor that reviewed the Companies' Business Plan would have shared this attitude, agreed to include in its valuation that the investment levels in the first quadrennium after purchase would be the decade's lowest by far. The doubt is bolstered by the fact that OIEG has not justified the low investment levels projected for that quadrennium.

[773] TA, day 5 (English), pg. 105; TA, day 5 (Spanish) pg. 64

750. Mr. Guitera theorizes that OI group would not want to increase the country risk for Venezuela. The Tribunal does not have any elements to validate or reject this theory. However, it finds that a hypothetical buyer would have the Plants undergo an exhaustive review, with results similar to those reached by Venvidrio in the report it prepared for the Venezuelan government. Generally, the latter found the Plants to be in good condition, although it found that certain ovens required additional investments.[774]

751. This conclusion coincides with the Companies' plans themselves, which expected to have four ovens undergo major repairs in the quinquennium 2011–2015.[775] This is shown in table 7 of Kaczmarek's second report:

Table 7 – Furnace Rebuild Schedule for Los Guayos and Valera, 2000 - 2015[79]

YEAR	Los Guayos Furnace Number						Valera Furnace Number		
	102-A	102-B	102-C	102-D	102-E	102-F	145-A	145-B	145-C
Historical Furnace Rebuilds									
2000					Minor				Minor
2001									
2002	Maintenance		Major	Maintenance		Maintenance	Maintenance		
2003									
2004									
2005									
2006									
2007				Minor					
2008									
2009		Minor			Maintenance		Maintenance		
2010					Minor	Maintenance			
Planned Furnace Rebuilds									
2011			Minor				Major		
2012	Minor								
2013				Major		Major			Minor
2014								Minor	
2015			Major						

Major Rebuild and Capacity Expansion | Major Rebuild | Minor Rebuild | Maintenance

752. As Mr. Guitera notes,[776] in the quadrennium 2010–2014 (covered by the Business Plan) three major repairs were projected, while in the sexennium 2004–2009, only three had been completed. Major oven repairs require large investments. It seems contradictory that in the quadrennium 2010–2014:

– On one hand, the investment rate in major oven repairs was projected to double,

[774] Preliminary Report by Envidrio, pgs. 36 and 37, Exhibit R-14.
[775] Kaczmarek II, table 7.
[776] Guitera II, para 108.

– and at the same time, reductions were projected in investment percentages (which would go from a mean of 7.66% in the historical sexennium to 4.65% in the projected quadrennium).

753. In summary, the Tribunal concludes that the investment levels projected in the Business Plan for the quadrennium 2010–2013 reflected the plans of OI, and that it was likely that a hypothetical buyer would have rejected these investment levels, and substituted them for others which were higher and closer to the mean of the historical average.

(iii) Credibility of the data proposed by Mr. Kaczmarek

754. For the first quadrennium, Mr. Kaczmarek proposes using the investment levels included in the Business Plan. For the years 2014–2020, he proposes taking the mean of the percentages for the 10 years immediately preceding (2004–2013), which comes out to 6.4%.

755. The mean proposed by the expert, Mr. Kaczmarek, (6.4%) is clearly too low:

– First, because he excludes the calculation for the four years of the historical series, when the investment was higher (2000–2003: 20%; 16%, 16%; 10%), and replaces them with the projection of the Business Plan for the quadrennium 2010–2013 which, for unsubstantiated reasons, projects minimum investment levels (4%; 3.5%; 4.5%; 6.6%);

– Second, because the 6.4% that he selects is the lowest piece of date in the historical series, equaled only in the years 2004 and 2008; which the eight remaining entries in the historical series are all above 6% (and some significantly higher).

756. Consequently, the Tribunal finds that the projection by Mr. Kaczmarek for the sexennium 2014–2020 (6.4%) is too optimistic, given that, historically, the Companies' investment levels had been significantly higher.

(iv) Credibility of the data proposed by Mr. Guitera

757. The proposal by Mr. Guitera involves two decisions:

– First, it means not considering the projections contained in the Business Plan;

– Second, [it means] establishing a single percentage for the period of 2010–2020, which in the opinion of the expert must be equal to the mean reached in the prior decade (2000–2009), which is 10.8%.

758. Both proposals by Mr. Guitera seem reasonable.

759. The Tribunal has already explained why it finds that the projections in the Business Plan for the quadrennium 2010–2013 must not be considered. It would therefore seem reasonable to assume that a hypothetical buyer would have included in his valuation model for the Companies some higher investment percentages starting with the acquisition period itself.

760. Which ones?

761. Mr. Guitera proposes adopting the mean investment percentage resulting from the historical series of the last decade prior to expropriation (2000–2009) and applying it equally over the period of 2010–2020. This is conflicting data taken from annual audited accounts that cover a long series coinciding approximately with the life cycle of glass manufacturing machinery. The proposal by the expert, Mr. Guitera, seems reasonable and the Tribunal adopts it.

C. Discount rate

762. Once the Tribunal has settled the four points of disagreement regarding the DCF model in discussion with the experts, it remains to establish the rate at which future fluctuations in the funds generated by the Companies will be discounted, so as to bring them up-to-date financially with regard to the expropriation. On this question, the experts are in agreement that the appropriate discount rate is the WACC (the weighted average cost of capital), but they again disagree on the exact quantification: Mr. Kaczmarek proposes 20.39% while Mr. Guitera proposes 25.78% (bear in mind that the greater the discount rate, the less will be the market value of the company).

763. Before analyzing this discrepancy, the Tribunal would like to establish that the calculation of the discount rate is only useful in specific cases, and that the conclusions reached in a particular proceeding cannot be generalized and may not be mechanically extrapolated as regards another situation—even though one is dealing with a company in a similar sector, and one in the same country. The calculation is a specific task, which depends on the individual characteristics of each case, especially given the way in which the Company is being financed, how each DCF model is constructed and alternatives selected by the experts. There is no single formula for calculating the discount rate. Moreover, in each case, the decision of a tribunal is predetermined by the arguments and counter-arguments made and the proof brought forward by the experts and the parties.

a. Model developed by Kaczmarek

764. In his first report, Mr. Kaczmarek concludes that the appropriate discount rate, that is to say, the Companies' WACC, should be 20.39%. In arriving at this total, the expert takes the following steps:[777]

[777] Kaczmarek I, para. 98.

Cost of equity

765. (i) He first calculates the cost of equity, applying the CAPM formula:

Figure 18 – CAPM Formula

$$CAPM = Rf + ß * EMRP + CRP$$

Where:
R_f = Risk Free Rate of Return
ß = Beta
EMRP = Equity Market Risk Premium
CRP = Country Risk Premium

766. In this formula, each of the items has the following values:

- R_f: is the total US bond yield (2.06%), plus the expected rate of inflation in Venezuela (16.45%), totaling 18.85%;
- β: represents the volatility of a particular company with regard to the overall market; since this has not been quoted by the Companies, the expert calculates it based on a number of companies with similar characteristics; after balancing the result, the expert arrives at a figure of 0.613;
- EMRP: is the investment premium for equity; the expert estimates this at 5%.
- CRP: this refers to the country risk premium, which Mr. Kaczmarek establishes to be 2%.

767. Using these values, the expert calculates the cost of equity to be 23.91%.[778]

Debt cost

768. (ii) The next step is to determine the debt cost, after tax. For that, he uses the average rate of interest on loans in VEB to companies in Venezuela over the three-year period prior to expropriation, which is 20.65%. Having deduced that there is a negative impact (at a rate of 34%), the debt cost after taxes remains at 13.63%.

[778] Kaczmarek I, para. 117.

WACC

769. (iii) Once the costs of equity and the debt have been determined, the expert will then be in a position to calculate the WACC (which equals the discounted rate). To do so, take the capital structure of competitor companies in the packaging sector, as informed by Bloomberg. The average capital structure of these comparable companies was 66% equity and 34% debt. Accepting these weighted averages, the Companies' WACC is established at 20.39%, pursuant to the following chart:

Table 16 – Average Weighted Capital Cost of the Business Company OIdV[107]

WACC Component	Amount
Capital Cost	23.91%
% of Capital	66%
Cost of Debt after Taxes	13.63%
% of Debt	34%
Cost of Weighted Average Capital	**20.39%**

Points of Disagreement by Mr. Guitera

770. Mr. Guitera generally accepts the system for calculating the discounted rate proposed by Mr. Kaczmarek, but he disagrees on the way in which Mr. Kaczmarek has calculated five items:

- First of all, he disagrees with the CRP calculation; this is the country risk in which Mr. Kaczmarek proposes a 2% premium and Mr. Guitera proposes a 6% premium (b).
- Secondly, he disagrees on the amount set for the beta in which Mr. Kaczmarek is alleging 0.613, whereas Mr. Guitera prefers 0.687 and he disagrees on the debt to equity ratio to be used in the calculation (c).
- Third, he disagrees with the cost of the before taxes debt, which Mr. Kaczmarek believes should be 20.65% and Mr. Guitera believes should be 22.42% (d); and
- Fourth, Mr. Guitera wishes to add a specific risk premium due to the Companies' features of 2% that Mr. Kaczmarek rejects (e).

771. In applying these four items to the WACC formula as Mr. Guitera proposes the result is a discounted rate of 25.78%.

b. Country Risk

772. Mr. Kaczmarek proposes applying a country risk rate of 2% to the Bolivarian Republic of Venezuela, whereas Mr. Guitera proposes a rate of 6%.

Finding of the Tribunal

773. The rate of 6% proposed by Mr. Guitera is derived from the country risk table developed by Prof. Damodaran, who is without a doubt an important authority on assessing companies' worth and who publishes tables on country risk for all countries in the world. The proposal by the Defendant's expert is consistent with what the usual practices are for assessing companies: one uses the tables with calculations of risk premiums by countries and one applies the number proposed by the table. These tables generally make the calculation by comparing the public debt spreads of different countries as well as other ancillary factors. Of all of the existing tables, Prof. Damodaran's tables are the most universal.

774. As a result, the Tribunal establishes, as its first finding, that the calculation made by Mr. Guitera is consistent with the normal practice in the financial world of assessing companies.

Mr. Kaczmarek's proposal

775. The rate proposed by Mr. Kaczmarek for Venezuela's country risk is the comparatively low figure of 2%, which on Prof. Damodaran's tables corresponds to the country risk of a country like Italy.

776. How can one justify his proposing to apply to Venezuela a country risk corresponding to Italy, which is a country that at first blush would seem to be more stable and predictable?

777. The explanation that the expert offers is as follows: the government of the Bolivarian Republic of Venezuela has been implementing a policy of expropriations and it has repeatedly expropriated privately owned companies. This government policy causes a general depreciation in the value of Venezuelan companies and this general effect should be excluded from the model. He therefore proposes that the legal, regulatory and policy risks that are controlled by the State be excluded from the calculation of the discounted rate.[779] As a result, Mr. Kaczmarek, even if he agrees that according to Prof. Damodaran's tables the country risk for Venezuela is 6%, believes that for the purposes of calculating the value of expropriated companies this should be lowered to a simple 2%.

778. The Tribunal does not share the expert's position for the following reasons:

779. First of all, because the figure of 2% is simply an estimate made by Mr. Kaczmarek and there is no indication of the methodology used for the calculation, nor has the basis for it been demonstrated in outside sources.

780. Secondly, a risk premium of 2% is one that corresponds to a country like Italy, not to a country like Venezuela. An investor who is considering making the same investment in a developed country or, alternatively, in a developing country, will frequently choose the developed country, unless he is offered an opportunity to obtain higher profits in the developing country. This disadvantage that

[779] CV, par. 211.

developing countries have is what is captured through the country risk premium. It makes no sense for Italy and Venezuela to share the same premium level.

781. Third, Mr. Kaczmarek seeks to justify the 2% premium and dismisses the 6% premium by referring to the "negative messages in the business environment about potential expropriations"[780] that Venezuela would have generated.

782. While it is true that the numerous expropriations that have occurred in Venezuela may be perceived by investors as "negative messages," it has not been demonstrated that those negative messages have managed to cause a four percentage point increase in Venezuela's country risk premium. Prof. Damodaran's calculation is based on the Venezuelan public debt non-compliance spread, which is approximately 4% multiplied by the relative volatility of the stock markets vis-a-vis the debt markets, which is a factor of 1.5.[781] This calculation bears no relation whatsoever with the microeconomic policies implemented by the Republic.

783. In summary, the Tribunal finds that in the CAPM formula, the "CRP" addend, which is Venezuela's country risk, should be equal to 6, as proposed by Mr. Guitera, and not equal to 2, as Mr. Kaczmarek alleges.

c. Calculating the beta coefficient and the debt-to-equity ratio

784. The two experts disagree on technical aspects of the calculation of the β coefficient and the debt-to-equity ratio: Mr. Kaczmarek proposes a β coefficient of 0.613 and a debt-to-equity ratio of 34/66 (52%), while Mr. Guitera prefers a β of 0.687 and a ratio of 29/71 (41%).[782]

Calculation of the β coefficient

785. The disagreement over the calculation of the β has a bearing on a technical point: whether the average of the listed companies used to calculate the β should be weighted or simple. Mr. Kaczmarek has used a weighted average of seven listed companies and given more value to those which he considers most similar,[783] while Mr. Guitera defends a simple average of the same values.[784]

786. The Tribunal opts for Mr. Kaczmarek's solution.

787. Not all the comparable companies that are part of the sample have the same level of similarity to the company being value. Therefore, it seems reasonable to allow the valuer to give a higher weighting to

[780] TA, day 4 (English), 22: 14-15; TA, day 4 (Spanish), 138:29.
[781] Kaczmarek II, par. 158.
[782] In Kaczmarek II, para. 154, Mr. Guitera expresses the ratio as 41%, which, in the alternative formula, is equivalent to 29/71.
[783] Kaczmarek I, para. 101.
[784] Kaczmarek I, para. 101.

those that are most similar. Assuming that the weightings are reasonable, a weighted average will be more accurate than a simple average. At no time has Mr. Guitera said that the weightings given by Mr. Kaczmarek are inappropriate—his line of argument is that weighting is rare in practice.[785]

Debt-to-equity ratio

788. The two experts also disagree on how to calculate the debt-to-equity ratio needed to regear the β and determine the WACC.

789. Mr. Kaczmarek made the calculation by using a sample of 16 companies in the packaging sector, which is a broader sample than that used to calculate the β.[786] The Respondent's expert does not agree. In his opinion, the sample should have been the same.[787]

790. The Tribunal, while recognizing that both approaches are reasonable, opts for Mr. Kaczmarek's solution, not so much because its methodology is more convincing, but because the results obtained seem more accurate.

791. Mr. Kaczmarek adheres to the following methodology: he identifies a sample of seven listed companies that are comparable to the Companies and uses the weighted average of the β coefficients to determine the ungeared β of the expropriated companies. He then regears the β coefficients, using the debt-to-equity ratio not of those seven companies, but of a sample of 16 companies. This same ratio is then used in the calculation of the WACC. The expert justifies the use of the two samples by arguing that the first represents the greatest possible similarity to the expropriated Companies, while the second represents the packaging industry in general.[788]

792. Mr. Guitera disagrees: in his opinion, the same sample should have been used for the calculation of the β, for its regearing, and for the calculation of the WACC. He considers that Mr. Kaczmarek's methodology creates unacceptable inconsistencies and distorts the calculations, and it is something which he has never seen applied.[789]

793. From a strictly methodological point of view, the Tribunal tends to share Mr. Guitera's position. It seems preferable that the same sample be used for the calculation of the β, for its regearing, and for the calculation of the WACC, which are three interrelated calculations. This does not mean that the methodology adopted by Mr. Kaczmarek is erroneous because calculation of the WACC is not an exact science, and the rules of the art allow the use of different methodologies.

[785] Which does not appear to be proven; the use of the weighted average enjoys academic support: Grimblat & Titman, "Financial Markets and Corporate Strategy," 2nd edition, 2002, p. 386; Exhibit NAV-125.
[786] Kaczmarek II, para. 151.
[787] Guitera II, para. 184.
[788] Kaczmarek II, para. 153.
[789] Guitera II, para. 246.

794. In reality, however, the practical application made by Mr. Guitera leads to results that are not reasonable: he takes the same sample of seven values developed by Mr. Kaczmarek (which the latter had chosen, not because they represent the industry, but because they are similar to the Companies) and uses it to make the triple calculation. The result is a debt-to-equity ratio of 29/71 (41%), which indicates that in the global packaging industry more than 70% of funding is obtained from equity capital and less than 30% comes from outside sources; in other words, the level of gearing is very low.

795. Mr. Kaczmarek has provided convincing evidence to show that such a low level of gearing is not reasonable and that the figure which he proposes (34/66 or 52%) is more accurate. For this we refer to *Ibbotson's Cost of Capital Report*, a reputable source, which gives a ratio of 61% for the glass industry in 2010.[790] He has also provides the opinion of an analyst in 2010, which gives one a ratio of 55.9% for the packaging industry.[791]

796. Why is it that Mr. Guitera, while applying a better methodology, reaches inappropriate results? The reason is probably that by mimetically copying the sample of seven companies created by Mr. Kaczmarek he is using an inadequate sample. It would have been appropriate to create his own sample and apply it consistently in the triple calculation.

797. Consequently, the Tribunal considers that the data calculated by Mr. Kaczmarek are more accurate and reasonable, and opts to use a β of 0.613 and a debt-to-equity ratio of 34/66 (52%).

d. Cost of Debt

798. Another point on which the experts disagree is the cost of debt.

799. Mr. Kaczmarek takes as a reference the average cost of financing for companies, expressed in Venezuelan currency, in the three years prior to the date of expropriation and arrives at a figure of 20.65% (which is reduced to 13.63% after tax).[792]

800. Mr. Guitera does not agree with that calculation. Although he accepts that it is normal to use historical data to determine the cost of debt when valuing companies, he considers that this methodology is not appropriate in this case.[793] His reason for considering this is that if market interest rates are taken in the quadrennium 2007-2010 and inflation in Venezuela during these years is deducted, the real rates are negative (varying between - 2% and - 11%). In his opinion, negative real rates cannot be maintained over the long term, and therefore he considers that the rate of

[790] Exhibit NAV-147 – this is data for the year 2010; the average of the past years is significantly less.
[791] Jeffereys & Company, Exhibit NAV-11; not 52% as erroneously stated in Kaczmarek II, para. 154.
[792] Kaczmarek I, para. 118.
[793] Guitera II, para. 198.

20.65%, calculated by Mr. Kaczmarek, is not realistic. He proposes that it be replaced with a rate calculated with a different formula, which give a result of 22.41%.

801. The Tribunal rejects Mr. Guitera's proposal.

802. First, because the interest rate that he proposes—22.41%—does not solve the problem that he hopes to solve: Even if this percentage had been applied, the real rates of interest in the years 2008, 2009 and 2010 would still have been negative (because actual inflation was greater than 22.41%).

803. And secondly because Mr. Guitera is comparing apples to oranges. His objection is based on comparing the 20.65% cost of debt proposed by Mr. Kaczmarek with historical inflation in the quadrennium prior to the expropriation. But that is not the relevant calculation. The proper comparison is with the inflation forecast in the DCF model. And this amounts to 14%. When this is compared to a cost of debt of 20.65% it is found that the model incorporates a positive real interest rate of more than 6%. The problem raised by the expert is not really a problem.[794]

e. Specific risk premium

804. Mr. Guitera also adds a 2% specific risk premium to the cost of equity. He justifies its inclusion by arguing that the Companies are highly dependent on the Polar Group, a single customer which accounts for more than 70% of sales. This risk would not be reflected by the β or by the country risk premium.[795]

805. Mr. Kaczmarek disagrees with that approach. He argues, on the one hand, that the Companies were the largest producer of glass in Venezuela, and, on the other, that the Polar Group was its major customer and at the same time owned a significant (but minority) stake in the Companies. Because of that, OI and Polar were mutually dependent on each other: the Companies could not impose prices on Polar, because it was their largest customer, and conversely Polar needed them so that it could obtain containers in the required quantities, because there were no other manufacturers that could meet the demand.

806. In short, a hypothetical buyer would view the relationship with Polar—the main customer and minority shareholder—as a factor that mitigated, rather than aggravated, the risk. For this reason, Mr. Kaczmarek is opposed to the inclusion of an additional specific risk premium to cover a hypothetical risk which in his opinion does not exist, and which is, on the contrary, a positive factor.[796]

[794] TA, day 5 (English), p. 119; TA, day 5 (Spanish), p. 70; CV, para. 227.
[795] Guitera I, para. 191
[796] Kaczmarek II, para. 144; Kaczmarek: TA, day 4 (English), p.176; TA, day 4 (Spanish), 106:32-107:9.

The Tribunal's Decision

807. The Tribunal considers that on this point Mr. Kaczmarek's approach is convincing for the following reasons:

808. First, because of the highly subjective nature of the 2% adjustment proposed by the expert Mr. Guitera, who recognizes that there is no scientific basis for the calculation:

> *"I have decided to include in the cost of capital a Specific Company Risk Premium, which I believe, based on my experience as a Transaction Service Partner, should amount to 2%"*[797]

809. Secondly, because it does not seem likely that a hypothetical buyer would consider the dual relationship with Polar—the most important customer and a minority shareholder—as a risk factor. Rather, it seems more likely that a buyer would accept the relationship with the main Venezuelan food group—a relationship that had already been in existence for many years and which was always friendly, as a positive factor that would reduce risk and strengthen the stability of the Companies.

810. Third, the relationship between Polar and the Companies has been and still is one of mutual dependence. The Companies need Polar as a buyer, and Polar has no real option that would allow it to purchase containers from other manufacturers in the Bolivarian Republic. Strong evidence of this is seen in what has happened since the expropriation: although Polar too was expropriated, it continues to purchase most of its containers from the Factories.

D. Market Value

811. Having clarified and settled all discrepancies between the two experts, the Tribunal is now in a position to calculate the correct discount rate (WACC). In order to do this it is necessary to calculate the cost of equity and the cost of debt so that they can then be weighted.

Resources owned

812. The cost of equity is obtained by using the CAPM formula:

[797] Guitera II, para. 195.

Figure 18 – CAPM Formula

$$CAPM = Rf + \beta EMRP + CRP$$

Where:
R_f = Risk Free Rate of Return
β Beta
EMRP = Equity Market Risk Premium
CRP = Country Risk Premium

813. The values accepted by the Tribunal are the following:

Rf (Risk Free Rate of Return): 18.85%

ß: 0.613

EMRP (Equity Market Risk Premium): 6%

CRP (Country Risk Premium): 6%

814. Inserting the values in the formula gives a cost of equity of 27.92%.

Discount Rate

815. The cost of the debt and the debt/equity ratio are calculated by Mr. Kaczmarek at 13.63% and 34/66.

816. The following discount rate results from these figures:

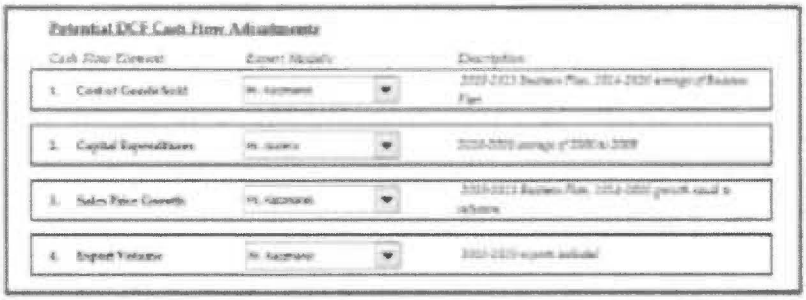
WACC = [27.92 x 0.66] + [13.63 x 0.34]

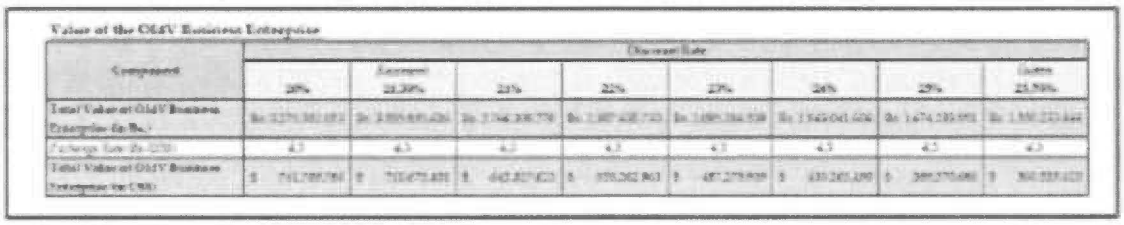
WACC = 23.06% = 23%

817. The Tribunal thus concludes that the correct discount rate is 23%.

Market value of the Companies

818. Once it was calculated that 23% is the appropriate rate for discounting the DCF method for the Companies, the Tribunal can move on to determining their market value. For this, the Joint Matrix prepared by both experts, denominated in USD—as this is the currency in which Claimant is requesting compensation—should be used:





819. The Tribunal has opted for the following solutions:

- COGS (Cost of Goods Sold): Mr. Kaczmarek[798]
- Capex (investments): Mr. Guitera[799]
- Sales (increase in sales prices): Mr. Kaczmarek[800]
- Exports: Mr. Kaczmarek[801]
- Discount rate: 23%

820. Adding these values to the Joint Matrix yields USD 487,275,939 as a value for the Companies, which the Tribunal accepts.

E. Excess Cash

821. It is an established fact that the Bolivarian Republic expropriated not only the Plants, but also all the funds held in cash and in the banks ["**Cash**"],[802] which amounted to VEB 151 million. This amount was very significant and was due to the difficulties encountered by the Companies in repatriating their profits.[803]

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[798] *See* para. 691 *supra*.
[799] *See* para. 761 *supra*.
[800] *See* para. 699 *supra*.
[801] *See* para. 714 *supra*.
[802] See para. 342 *supra*.
[803] Kaczmarek I, para. 149.

Experts' position

822. Both experts accept that the value of the Companies calculated using the DCF methodology does not result in the Cash surplus which the companies may be holding unlawfully, far in excess of the amount required to guarantee their normal operations. It is, therefore, necessary to increase the value of the Companies by an amount that reflects this surplus. Both experts are also in agreement on the most suitable methodology to be used in calculating it by

- Defining a sample of similar companies;
- Determining their Cash to Total Assets Ratio;
- Applying this percentage to the assets of the Companies;
- Using this methodology to calculate the required cash level;

the amount over that minimum represents the Cash surplus that must be paid by the Claimant to the Respondent.

823. Having agreed on the methodology, the experts are however in disagreement on the company sample that must be used for comparison purposes.

824. Mr. Kaczmarek proposes utilizing the same sample of seven similar companies, which he had already used to calculate β.[804] Using this sample, he concludes that the average Cash to Assets Ratio is 5.1%; applying this percentage to the Companies, he concludes that the required amount of cash increases to VEB 52 million, which when converted into USD at the exchange rate of 4.3, results in an amount of USD 23,064,801.

825. Mr. Guitera is taking a different approach. He is of the opinion that of the seven companies in the sample, only one is comparable, namely Rigolleau S.A. Therefore, he only uses the Cash to Assets Ratio of this company as a point of reference, which is 10.5%, and which results in a Cash surplus of VEB 45 million, which is equivalent to USD 10,562,275.[805]

The Tribunal's Decision

826. The Tribunal finds that Mr. Kaczmarek's calculation is appropriate.

827. Mr. Guitera only chooses one company for comparison and that company is, among the seven in the sample, the one with the largest Cash holdings. By choosing this company as a comparison, Mr. Guitera is distorting the result. Mr. Kaczmarek's method, based on the average amount of Cash held

[804] Kaczmarek I, para. 149.
[805] Guitera I, para. 267.

by the same sample that was already used to calculate the ß ensures a result that more faithfully reflects the levels of Cash in entities that are comparable to the Companies.

828. In summary, the Tribunal decides that the excess in Cash that has been taken away must be added to the value of the Companies established by the DCF method (USD 487,275,939), totaling USD 23,064,801, thereby resulting in a total value for 100% of the Companies of USD 510,340,740.

F. Company Specific Discount

829. There is one last point to be analyzed in order to establish the correct market value of the Companies: the proposal from the expert, Mr. Guitera that a discount be applied to the Companies for their specific characteristics.

a. Position of the Experts and the Parties

830. In his first report, Mr. Guitera introduces the notion that the value of the Companies generated by the DCF Model should be the cause for a reduction based on a lack of liquidity ("*lack of marketability*" in English terminology used by the expert).[806] In his opinion, the need to apply such a discount, which he establishes at 20% is based on two reasons:

- Restrictions on the sale imposed by the OIdV and Favianca bylaws, and
- The existence of a series of statutory laws in favor of Polar, which limits the capacity of the potential buyer to manage the Companies.

831. The expert recognizes that in this case the discount is not linked to the total valuation of the Companies, but only to the value of their shares held by OIEG.[807]

832. With regard to the percentage of 20% which he is advocating, the expert explains that pursuant to the *Private Equity Valuation Guidelines*, a discount in the range of between 10% and 30% is appropriate, from which he has selected the middle value.[808]

833. Mr. Kaczmarek on his part advises against the application of the discount. He supports this based on the following major arguments:

- First, he underscores that M&A is intensively involved in the packaging sector; he has managed to identify 113 transactions during the quinquennium preceding the expropriation;[809] it would be unreasonable to apply a discount for reasons of lack of liquidity in this sector;

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[806] Guitera I, para. 250.
[807] Guitera I, para. 253.
[808] Guitera I, para. 258.
[809] Kaczmarek I, para. 163 and Appendix F2.

- Secondly, a discount for lack of liquidity would be particularly inappropriate in the case of Companies which are a part of a group quoted on the Stock Exchange, whose annual accounts are subject to review and scrutiny and by themselves are significant entities, which generate significant amounts of *cash flow*;[810]

- Lastly, he alleges that a discount for a lack of liquidity is not compatible with the market value standard, which is the one that ought to be used in estimating the cost of the Companies; the standard presupposes that there is a purchaser ready to purchase and to pay the market value of the company.[811]

834. During the hearing, both experts had the opportunity to present their arguments.[812]

835. In their Closing Statements both parties expounded on their arguments. For the Respondent, the OIdV and Favianca bylaws restrict the possibilities for the sale of OIEG and its management capacity, and these terms make it difficult to find a purchaser and would also decrease the price.[813] The Claimant, on the other hand, alleges that Polar's only right would be to block the purchase by competitive companies in the beverages sector.[814]

b. The Tribunal's Decision

836. The Tribunal agrees with the Claimant on this point in that in order to determine the market value of the Companies, which is required under article 6(c) of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela, it would not be appropriate to apply a discount for lack of marketability to the value calculated using the methodology accepted by both experts and based on the DCF.

837. The expert, Mr. Guitera, asserts that on certain occasions, it may be appropriate to apply a discount for lack of marketability that reduces the price that must be paid when purchasing equity interest in a company. In this case, the expert has identified two causes that, in his opinion, justify such a discount:[815]

- The first consists of the sales restrictions contained in the bylaws of Favianca and OIdV, and

- The second consists of the joint management rights granted to Polar under such bylaws.

[810] Kaczmarek II, paras. 165 and 168.
[811] Kaczmarek II, para. 170.
[812] Kaczmarek: HT, day 5 (English), pg. 40; HT, day 5 (Spanish), pg. 26. Guitera: HT, day 5 (English), pg. 141; HT, day 5 (Spanish), pgs. 81:33 – 82:14.
[813] RV, para. 418.
[814] CV, para. 243.
[815] Guitera I, p. 250

838. In the expert's opinion, the restrictions contained in the bylaws would result in a willingness by all potential buyers' to only purchase OIEG's 73% interest in the Companies if a 20% discount on the standard market price were applied.

839. In order to determine whether the proposal made by the Respondent's expert is reasonable, the bylaws of OIdV[816] and Favianca[817] must be carefully reviewed. These two documents, while differing in the manner in which their articles are numbered, govern the causes in question in a practically identical manner.

Restrictions on Unrestricted Transfer Contained in the Bylaws

840. The bylaws contain two restrictions on the unrestricted transfer of shares:

- The first consists of a prohibition on transfers: OIEG agrees that it will not transfer Company shares to "any person directly or indirectly involved in any of Polar's main lines of business" (including beer, wine, mineral water, non-alcoholic beverages, and oil) without Polar's permission.[818]

- The second grants Polar the right of first refusal in the event OIEG decides to relinquish control over the Companies. This right must be exercised at the same price ("First Price") offered by the potential buyer.[819]

841. In the opinion of the Tribunal, neither of these two restrictions should significantly affect the price a third party would be willing to pay for the OIEG block of shares:

- The first should not because, as Mr. Kaczmarek has demonstrated, of the 35 purchase transactions involving glass companies that took place during the quinquennium prior to the expropriation, not one involved a purchase by a drink manufacturer. Drink manufacturers are not natural buyers of glass companies.[820]

- The second should not because Polar's right of first refusal is set at the same price as the price offered by third parties (not at book value or a value set by an auditor); therefore, all third parties attempting to purchase the OIEG block of shares must at least offer the market price for such block. Otherwise, Polar (a very strong company) would exercise its right, purchase OIEG's equity interest at below-market price, and then either keep it or resell it at market price and keep the difference. For this reason, Polar's right of first

[816] Exhibit C-1.
[817] Exhibit C-2.
[818] This restriction is present in article 11 of OIdV's and article 13 of Favianca's bylaws. Mr. Guitera makes errors when referring to the articles.
[819] This restriction is present in articles 9 and 10 of OIdV's and articles 11 and 12 of Favianca's bylaws. Mr. Guitera makes errors when referring to the articles.
[820] Closing Brief, paragraph 245; Exhibit F2 of Kaczmarek I.

refusal would not lead to a price reduction and might, in fact, result in an increase. All third parties truly interested in purchasing would end up offering a premium on the market price to decrease Polar's incentive to exercise the right.

Supermajority Voting Rights

842. Article 29 of OIdV's and article 32 of Favianca's bylaws grant Polar certain supermajority voting rights.[821] Both articles state that as long as Polar holds at least 18.49% interest, resolutions adopted regarding "Fundamental Matters" (which include the matters that already require a supermajority vote in accordance with article 280 of the Commercial Code as well as certain financing or related-party transactions) require the consent of both shareholders (regardless of whether a resolution is adopted by the members of the shareholders' meeting or the board of directors).

843. It is the opinion of the Tribunal that a minority shareholder's being granted these rights under the bylaws should not significantly affect the price that a third party would be willing to pay for the OIEG block of shares:

- First, because practically all close corporations with a majority shareholder have provisions protecting the rights of minority shareholders. All potential purchasers of a majority interest in a company with minority shareholders would be fully aware that they could not arbitrarily exercise control.

- Second, because the protection provided by the bylaws to the minority shareholder simply represent rights already granted by law. The main category of Fundamental Matters consists of the matters specified in article 280 of the Commercial Code,[822] which is a provision that establishes a supermajority protection for the rights of minority shareholders.

- Third, because paragraph (c) of articles 29 and 32 of the bylaws includes an escape clause that allows the majority shareholder to adopt capital increases at a fair price

[821] The references provided by Mr. Guitera are again incorrect.

[822] Article 280 of the Commercial Code reads as follows: "When not otherwise provided for in the bylaws, the number of shareholders representing three-fourths of the capital stock and the favorable vote of those representing at least one-half of such capital stock must be present at the meeting when addressing the following matters:
1. Early dissolution of the company
2. Extending its duration
3. Merger with another company
4. Sale of its corporate assets
5. Reimbursement of a capital contribution, or a capital increase
6. A capital reduction
7. A change in corporate purpose
8. A restatement of the bylaws in connection with the matters set forth in the preceding items.
In any other event specifically provided for by law."

when they are necessary to keep the Companies competitive.

844. In summary, the Tribunal concludes that the existence in the bylaws of the Companies of the provisions identified by Mr. Guitera should not cause a significant decrease in the price a third party would be willing to pay for the OIEG block of shares it holds in the Companies.

An additional reason

845. Notwithstanding the foregoing, there is an additional reason for which in any event the discount defended by Mr. Guitera makes no sense in this case.

846. The discount only makes sense in situations in which a buyer purchases a controlling interest in (but not 100% of) a company when there is a minority shareholder with supermajority voting rights. In such cases, the reduction is justified, because the buyer will not be able to freely manage the company and will need to take into account the minority shareholder's opinion—if not for all decisions, then at least for certain important ones.

847. If a buyer purchases 100% of the capital, then there is no logical foundation whatsoever for the discount. In such a case, the minority shareholder will never be able to have the right of first refusal or supermajority voting rights. A buyer that purchases 100% of the capital will in any event have to pay 100% of the market price, with no discount whatsoever, regardless of the bylaws (which in any case he will be able to modify on the day after the purchase).

848. Applying these principles to this case, the discount could only have been proposed had Venezuela only acquired a package of shares that represented 73% of the Companies' capital. Only in such a case could it be debated whether the hypothetical buyer should pay 73% of the market value for the package, or whether it would be appropriate to further discount this price due to the existence of the right to first refusal or of certain supermajority voting rights in Polar's favor.

849. In other words: the application of a discount like the one proposed by Mr. Guitera inevitably presupposes that the transaction will satisfy two requirements:

- That the buyer purchases a controlling equity interest in a company,

- And that after the purchase, the buyer has to get along in the company with a minority shareholder who has supermajority voting rights.

850. Neither of these two requirements is satisfied in this case. The Bolivarian Republic has not purchased 73% of the Companies' capital, but rather the Plants and the manufacturing facilities owned by the Companies and through which they generated their businesses. After the purchase,

the State does not have to get along with Polar as a minority shareholder, because it did not purchase shares, and above all, because it also expropriated the part that corresponded to Polar.

851. In conclusion, and for the aforementioned reasons, the Tribunal decides that Mr. Guitera's proposal of applying a discount to the market price of the Companies should not be admitted.

G. Sanity Checks

852. The Tribunal has reached the conclusion that the Companies' market value on the date of expropriation, calculated using the DCF model developed by the experts, totaled USD 487,275,939. The excess Cash appropriated by the Bolivarian Republic, which totals USD 23,064,801, must be added to this amount, resulting in a total value of 100% of the Companies of USD 510,340,740.

853. Except for the calculation of the excess Cash, this valuation was arrived at through the application of a DCF methodology—a methodology that must be validated. Making calculations using the DCF methodology is not a mechanical exercise, and the use of apparently reasonable parameters can lead to completely irrational results. That is why it is important for the Tribunal to perform this validation and to reach the conviction that the results are reasonable. To do so, the Tribunal will perform three verifications:

- First, it will check its own results against the experts' results (a);
- Then it will calculate the value of the Companies using the EBITDA multiples methodology (b), and
- Lastly, it will check the value of the Companies in relation to the value of the OI group (c)

a. The experts' results

854. In the first attempt at validation, the market value must be compared with the values reached by the parties' experts.

855. The results of the two experts' valuations could not be any more different: Mr. Kaczmarek values 100% of the Companies at USD 1.004 billion, Mr. Guitera at USD 195 million.[823] The Tribunal has decided that the correct figure is USD 487 million (not including Cash). The difference between Mr. Kaczmarek's value and the Tribunal's seems to be highly exaggerated, but in fact it is due to only two factors:

- the *capex* forecasts; and

[823] Joint Matrix, page 2.

- the application of a discount rate of 23% (and not 20.39%).

856. The same can be said of Mr. Guitera's valuation: four factors (the selling price of the products, price increases, exports, and the rate of 23% instead of 25.78%) would bring his value back into line with the one established by the Tribunal.

b. Comparable companies

857. A commonly accepted formula for checking the valuation of a company calculated based on DCF is to repeat the calculation using the EBITDA multiples method. Essentially, the procedure is as follows:

- First, a sample is defined of comparable companies for which the EBITDA and market value are known, and the average multiple that results from dividing the market value by the EBITDA is calculated;

- When this multiple is known, it is multiplied by the EBITDA of the company that is to be valued, yielding the value;

- That value is compared with the value obtained through the DCF methodology.

858. Both experts applied this methodology in order to try to confirm their results—and both came to the conclusion that they had done so (despite the differences in their valuations). Therefore, it is imperative for the Tribunal to critically review their calculations.

Determination of the multiple

859. The first step in any valuation using EBITDA multiples is to define the sample of comparable companies. The only expert who did so was Mr. Kaczmarek, who created a sample of seven listed companies that are similar to the Companies (this sample is the same one used in calculating the unlevered □).[824] It includes OI itself, with a multiple of 6.5, and the weighted average of the eight values yields a multiple of 8.[825]

860. Mr. Guitera does not agree with that conclusion. Nevertheless, he accepts as a starting point that the two companies in the sample that are truly comparable, Rigolleau (Argentine) and CIV (Brazilian), have multiples of 8. However, he considers that the multiple should be reduced to 6.5, since on the one hand the Argentine and Brazilian economies have better prospects for growth than Venezuela

[824] Kaczmarek I, paragraph 119.
[825] Kaczmarek I, paragraph 134.

does, and on the other, because 6.5 is the OI multiple.[826] Finally, he advocates reducing the multiple to 4 in order to reflect the concentration of risk in Polar.[827]

861. The Tribunal does not share this last assessment made by Mr. Guitera, as it has already expressed its opinion that the relationship with Polar does not take away from the value of the Companies.[828] Therefore, the Tribunal concludes that for a company with OIdV's and Favianca's characteristics, a range of EBITDA multiples of between 6.5 and 8 seems reasonable, which is a conclusion that is consistent with the positions held by the two experts.

The EBITDA of the Companies

862. The next step consists in establishing the EBITDA of the Companies.

863. The experts agree that the Companies generated the following EBITDA:

- VEB 244 million in 2008
- VEB 259 million in 2009
- VEB 364 million in 2010

864. The Companies' accounting is performed in VEB, and the EBITDA is calculated in that same currency. However, the experts have discussed whether the EBITDA should be converted to USD and whether the exchange rate of 2.15 (which was in effect in 2008 and 2009) or of 4.30 (which was in effect in 2010) should be used. They have also discussed whether the relevant figures should be the ones from 2009 or the ones from 2010.

865. The Tribunal's position is the following:

866. The calculation should be performed in October 2010, which is when the Companies were expropriated. What is the EBITDA calculation that a hypothetical buyer could have had then? At that time, the most recent audited and approved annual accounts would have been the 2009 ones; for 2010, there would only have been a budget and the data closed at the end of the third quarter.

867. In general, buyers would tend to use the EBITDA derived from the most recent audited and approved accounts, since they are the most reliable—that is to say, the 2009 accounts. But in Venezuela, with its high-inflation economy, this would not be a suitable solution: in October 2010, the 2009 EBITDA figure would already have become outdated, due to inflation.

868. The experts maintained varied positions on how to solve this problem. In the Tribunal's opinion, the most appropriate solution, which hypothetical buyers would have adopted, would be to use

[826] HT, day 6 (English), page 53; HT, day 6 (Spanish), pages 29 and 30; RV, paragraph 391.
[827] Guitera II, paragraphs 293 and 294; RV, paragraph 394.
[828] See paragraph 844 *supra*.

the last figure that was officially approved by the company, the 2009 EBITDA, and adjust it for the inflation that took place in the first nine months of 2010. The rate of inflation for the year 2010 as a whole reached 28.30%,[829] which is approximately equivalent to 21% for the first nine months. Applying this adjustment, the 2009 EBITDA would go from VEB 259 million to VEB 313 million. In the Tribunal's opinion, this figure represents a reasonable estimate of the Companies' EBITDA in October 2010, as it is based on the last audited and approved EBITDA but includes adjustments thereto in order to take interim inflation into account.

869. Taking this EBITDA and applying the minimum and maximum multiples from the range adopted by the Tribunal gives the following results:

- 6.5 x 313 = 2,035

- 8 x 313 = 2,504

870. That is to say, the total value of the Companies that is derived from applying the EBITDA multiples methodology varies from VEB 2,035,000,000 to VEB 2,504,000,000 (depending on the multiple in the range that is chosen).

871. How does this result compare with the value calculated using the DCF methodology? This value is calculated in USD and reaches USD 487,275,939 (not including cash). But in their joint matrix, the two experts also calculated the value in VEB, using the exchange rate in force on the date of expropriation.[830] The value in VEB is 2,095,286,539, that is to say, in rounded figures, VEB 2,095,000,000.

872. The Tribunal confirms that the market value of the Companies, calculated using the DCF methodology, VEB 2,095,000,000, is in line with the calculations made using the EBITDA multiples methodology:

- Using the multiple of the OI group as a whole (6.5), the result is very similar: VEB 2,095 versus VEB 2,025.

- And applying the multiple 8, which results from the weighted average of comparable companies, the result is VEB 2,504—compared to which the result of VEB 2,095 obtained with the DCF methodology is 19.5% lower.

873. The Tribunal therefore confirms that there is a high level of concordance between the results obtained using the DCF methodology and the EBITDA multiples methodology:

- Using the EBITDA multiple most favorable to the Claimant, the results are identical;

[829] Guitera I, paragraph 199.
[830] Joint Matrix, page 1.

- Using the EBITDA multiple most favorable to the investor, the difference is 19.5% (that is to say, the price set based on DCF is less than the one derived from the multiples methodology).

874. The multiples methodology thus confirms that the DCF calculation is correct overall, but tends to be conservative and detrimental to the investor.

875. However, this conservative bias is partially offset by another decision made by the Tribunal, in which it accepts the claim of excess cash on hand and in banks, and grants the investor an additional compensation of USD 23,064,801, which is equivalent to VEB 99 million. The total compensation for 100% of the Companies thus changes from VEB 2,095 (not including cash) to VEB 2,194,000,000 (including cash)[831]—a figure that offsets the conservative bias of the DCF model and brings the total compensation for 100% of the Companies to a (reasonable, but not excessive) multiple of just over 7 times EBITDA.[832]

c. Comparison with the OI group

876. A third verification remains to be performed: since the OI group is a company that is listed on the stock exchange, its market value as of 30 September is known and totals USD 8.595 billion. Furthermore, the company is obligated by United States stock market regulations to publish a Form 8-K on a quarterly basis. In this form, the company breaks down how much the Venezuelan Companies contribute to the group as a whole:[833] their share represents approximately 3% of sales, 4% of assets, and 5.7% of the EBITDA[834] of the OI group.[835] Therefore, it is possible to assign the Venezuelan companies an intrinsic value, calculated as a percentage of the value of the entire group as a whole.

877. Expert Guitera takes the average of sales, gross profit, and EBIT—an average that equals 4.1%—as a criterion for comparison, and applies it to the group's stock market value of USD 8.595 billion. This calculation yields a value for the Venezuelan Companies of USD 352 million.

878. Although the Tribunal accepts the principle proposed by the expert, it considers the most appropriate parameters for comparing the value of the Venezuelan Companies within the OI group as a whole to be the EBITDA and the assets:

[831] Equivalent to USD 510,340,740.
[832] Which is the result of dividing the total price including cash on hand and in banks (2,194) by the adjusted EBITDA (313), giving a result of 7.01.
[833] Guiterra II, paragraph 323.
[834] The experts discuss whether this is EBITDA or simply EBIT; for the purposes of the Tribunal's argument, it is irrelevant whether the percentage represents one concept or the other.
[835] Guiterra II, paragraph 323; RV, paragraph 412.

- According to the Form 8-K, the Venezuelan subsidiaries' portion of the EBITDA is 5.7%; applying this to the stock market value of the group as a whole gives a result of USD 490 million.

- The Venezuelan subsidiaries' share of the group's assets is 4%, yielding a value of USD 344 million.

879. The Tribunal estimates the value of the Venezuelan Companies' share in the OI group to total USD 372 million (73% of USD 510 million, including Cash)—a figure that is within the range of values derived from the OI group's accounting itself (USD 344 million if the assets are used as the distribution criterion, USD 490 million if the EBITDA is used). The comparison confirms that the calculation performed by the Tribunal is reasonable.

H. Final summary

880. In summary, this Tribunal concludes that the market value of the Companies (calculated by the Tribunal applying the DCF method developed by both experts) is reasonable and is confirmed by using alternative methods, such as that of EBITDA multiples or that of the Companies' equity in the OI group as a whole. The value of the companies amounts to USD 487,275,939. The excess Cash of which the companies have been deprived (which amounts to USD 23,064,801) must be added to this sum. Thus, the total value of 100% of the Companies is USD 510,340,740.

881. Since Claimant is the owner of a 72.983%[836] equity interest, it is entitled to compensation in the amount of USD 372,461,982 for the expropriation of the Companies, including excess Cash.

4. Additional Damages

882. In addition to compensation for the value of its participation in the expropriated Companies, Respondent is claiming additional damages for two reasons[837]:

- First, it is claiming the sum of USD 50,566,759 because Respondent made exports to Brazil, causing damage to Claimant's business activity in said country;

- Secondly, it is asking for USD 68,030,092 for the disclosure outside of Venezuela and after the expropriation of proprietary information belonging to the OI group.

883. Claims for additional damages pose two problems:

- On the one hand, whether Claimant has a right to claim them and

[836] Kaczmarek I, par. 57.
[837] Kaczmarek I, Par. 57.

- On the other, whether the damages claimed meet all of the requirements of proof and causality in order to be awarded.

884. With respect to the legal aspect, Claimant argues that when Respondent made an expropriation that does not meet the requirements stipulated in Art. 6 of the BIT, and having incurred other violations of the Treaty, Claimant is entitled to demand not just the market value of the expropriated goods, but also compensation for additional damages suffered. In more legal terms, Claimant considers that it has the right to receive "full compensation" for all of the damages caused by the illegal actions of the Bolivarian Republic in the broadest terms in which customary international law interprets this concept.[838]

885. Respondent, on the other hand, states its disagreement, and in its opinion Claimant only has a right to the compensation provided for in Art. 6 of the BIT, that is, the market value of the expropriated goods, whether or not the expropriation was legal or illegal, in compliance or not with the requirements stated in said norm.[839]

886. The Tribunal shall invert the order of analysis: it will first study whether the damages claimed by Claimant have been proven and meet all of the remaining requirements to be recognized; and if it reaches the conclusion that either one of the two categories complies with these requirements, it will analyses whether or not the BIT or Customary International Law allows damages to be awarded.

A. Damages based on exports to Brazil

887. In his first report, Mr. Kaczmarek analyzed this reason for the claim and reached the conclusion that the damages suffered by Claimant total USD 124 million. This amount represents the "potential damages" that OIEG would suffer in the Brazilian market with the hypothetical association between Envidrio, the Uruguayan manufacturer of containers, and Venvidrio, the Venezuelan state company which has taken over the Plants, an association that would presumably lead to the construction of a joint plant in Brazil.[840]

888. Nevertheless, as the expert himself recognizes in his second report, the construction of a new factory in Brazil has been postponed, and for this reason, Mr. Kaczmarek has modified the bases for his calculation of damages. He takes as his starting point that Venvidrio had started to export to Brazil glass containers manufactured in the expropriated Plants. These exports would represent a new supplier in the Brazilian glass market, in which OIEG is leader, and could potentially erode its

[838] CIV. Par. 392.
[839] RII, Par. 442.
[840] Kaczmarek I, Par. 173.

position as such. Without the exports, Claimant would have obtained higher profits than those actually produced and that would be the base of the damages.[841]

889. In order to calculate it, the expert has proceeded as follows: starting with the customs information, he has confirmed that Venvidrio exported 29,165 tons of glass to Brazil from December 2012 to May 2013. These exports equal 58,330 annualized tons that in turn equal 3.9% of the Brazilian market.

890. Then, the expert calculates the value of 4% of the Brazilian glass market using as a measure the last purchases and sales made by glass container manufacturing companies in that country. Taking the average of the price of those transactions, he estimates that the value of 4% of the Brazilian glass container market is USD 92 million. Given that Claimant has a 55% share of the Brazilian market, the expert multiplies that percentage[842] by USD 92 million, and obtains USD 50,566,759—the amount that Claimant is asking for as compensation.

891. The Tribunal agrees with Claimant that the exports that Venvidrio is making to Brazil may be eroding the profits that OIEG, the country's main glass manufacturer, makes, therefore causing it certain additional damage—damage that would not exist if the Bolivarian Republic had not expropriated the Companies. However, the Tribunal has already taken this information into account in the DCF model in that it has accepted the inclusion of export expectations. This inclusion has had the effect of increasing the market value of the expropriated Companies (*ceteris paribus)* by USD 16 million.[843]

892. Claimant now hopes to obtain additional compensation for this same reason. Its claim cannot prosper because neither the existence nor the quantification of the damages supports a critical analysis:

- In the first place, it has not been proven that Venvidrio has obtained 4% of the Brazilian market for glass containers; the expert simply extrapolates the import data for six months in order to reach this conclusion, but this manner of proceeding does not convince the Tribunal. The exports may have been temporary and not maintained over time;

- In the second place, the expert hopes to give a value to the 4% share of the Brazilian market that Respondent would have obtained through his purely commercial import activity by applying to it the theoretical price that a glass container manufacturing company located in Brazil would have reached had it had a 4% share of the market—an unjustified equalization of values;

[841] Kaczmarek II, Par. 211.
[842] Taking into consideration that OIEG in turn has a 99.5% share of the Brazilian business.
[843] From USD 471,001,780 to USD 487,275,939 – see Joint Matrix, P. 4.

- But even if we accepted that Venvidrio obtained a permanent 4% share of the Brazilian market, and that the value of that share was USD 92 million *(quod non)*, and also accepting (although it has not been proven) that OIEG had a 55% share of that market, which is totally impossible to understand—and Mr. Kaczmarek also does not explain[844]—that is why Claimant would have suffered damages equal to 55% of USD 92 million.[845]

893. In summary, the Tribunal considers that the effect of the exports that Venvidrio has begun is already duly included in the DCF model and that Claimant has not been able to demonstrate the existence of any additional damage for this reason. The burden of proof being on OIEG, the Tribunal rejects the claim.

B. Damages resulting from Disclosure

894. Claimant is also seeking additional compensation for irregular disclosure of its proprietary information in the amount of USD 68 million.

895. As per Mr. Kaczmarek's explanation, Venvidrio made the design of certain ovens, protected by Claimant's proprietary information, to a Chinese manufacturer named Luoyang Dayang Refractory Co, Ltd ["**DY**"]. This disclosure allegedly caused OIEG damages, which it hopes to recover in this arbitration.[846]

896. Mr. Kaczmarek recognizes that the damage is difficult to measure, because the effects of the disclosure are not yet known and these effects will become more important in the future. The estimation of the damage made by the expert assumes that Venvidrio will use the plans to manufacture a new oven and that it will be used for exporting to Brazil. With these assumptions, the expert first calculates that a new oven will represent 5.2% of the Brazilian market.[847] Applying the same methodology used in the previous calculation, the expert reaches the conclusion that 5.2% of the Brazilian market for glass containers has a value of USD 124 million, and applying the 55% share of the market that OIEG has in that market, the resulting damage is USD 68,030,992.[848]

897. The claim cannot prosper:

- As the Tribunal indicated in its Decision on Provisional Remedies,[849] it is a fact that the proprietary information does not belong to Claimant; therefore, Claimant has no standing to claim those damages;

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[844] Kaczmarek II, Par. 214 does not contain any explanation or justification.
[845] Adjusted taking into account that his share is 99.5%.
[846] Kaczmarek II, Par. 215.
[847] Kaczmarek II, Par. 217.
[848] Adjusting for OIEG's 99.5% share in the OI group's business in Brazil.
[849] Decision on Provisional Remedies, Par. 52: "[…] *But this Proprietary Information was not in the ownership of the Claimant, but rather of a different company, OI, which had signed separate agreements – the PI Agreements – for the transfer of the Proprietary Information to the Venezuelan companies. Claimant has never had any entitlement to the Proprietary Information and has in no way participated in its transfer to Venezuela.*[…]"

- It is total speculation that a new oven will be built and that its production will be exported to Brazil;

- Even if it were to be exported, the calculation of the damages is not convincing for the reasons given in the previous section.

C. Legal Basis

898. Having proven that the claim for additional damages must be rejected for lack of evidentiary calculation, Claimant's claim merits no further consideration.

5. Moral Damages

A. The Parties' Positions

Claimant's Position

899. Claimant declares that International Law recognizes that States must compensate for moral damages, as established in the Articles of the International Law Commission, international jurisprudence,[850] and doctrine.[851] It particularly considers relevant the decision in the *Desert Line* case, where the tribunal granted moral damages for the harassment and intimidation suffered by the respondent's executives at the hands of the State's Armed Forces.[852]

900. Therefore, Claimant claims the sum of USD 10 million in moral damages.

Respondent's Position

901. Venezuela defends the inadmissibility of the claim for moral damages because the BIT's "fair compensation" standard and Venezuelan legislation only authorize OIEG to receive compensation equal to the market value of its investment.[853]

902. The Respondent considers that it has been proved that the Companies' staff did not suffer any physical or moral coercion[854] and maintains that Claimant is "light years away" from the strict thresholds that international tribunals require to award moral damages.[855] Arbitral tribunals would

[850] CI, Par. 360, citing Crawford and cases *Lusitania, Desert Line* and others; CV, Par. 298.
[851] CV, Par. 298, citing Ripinsky and Williams.
[852] CI, Par. 362.
[853] RII, Par. 549; RV, Par. 445.
[854] RII, Par. 170-172 and 553; RIV, Par. 70-130; RV, Par. 446.
[855] RII, Par. 552; Respondent's Closing Brief, Par. 446.

require a "special test," that the State's conduct had been contrary to the norms that civilized nations should abide by and that would have caused grave suffering to the investor.[856]

903. Finally, the Respondent argues that an extensive part of the doctrine defends the position that moral damages cannot be awarded to a company, only to its representatives, since a company does not suffer the direct damage caused by the State's abuse.[857]

B. The Analysis of the Tribunal

904. OIEG claims USD 10 million in compensation for moral damages caused by what it calls "egregious behavior"[858] by Respondent during the six months following the expropriation. The Bolivarian Republic, on the other hand, denies OIEG's claim with factual and legal arguments.[859]

905. To solve this matter, the Tribunal will first determine the required standard for the award of damages (a). Then, it will proceed to analyze if such compensation for damages is appropriate, given the proven facts (b).

a. Definition of the moral damages standard

906. The BIT does not make any reference to the possibility that the investor may claim and obtain compensation for moral damages. Article 6 only provides that it has a right to receive "just compensation" for the expropriated assets. Nonetheless, such "just compensation" may, under certain circumstances, include compensation for physical or moral suffering caused by the Government to the investor. The award entered in *Desert Line* admitted the possibility that an arbitral tribunal may grant an investor additional compensation for moral damages, but that was subject to the existence of "exceptional circumstances." The conclusions, shared by the Tribunal, are the following:[860]

> *"Even if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages."*

907. In *Desert Line*, the circumstances were truly exceptional. The claimant had suffered physical ill-treatment and its facilities were besieged by the troops of the Government being sued. The tribunal, indeed, granted compensation for moral damages.

908. The question, then, is not whether a Tribunal may or may not grant compensation for moral damages, because it has been accepted that it has the power to do so as long as exceptional

[856] RII, Par. 552, citing *Lemire (Award)*, Par. 344.
[857] RII, Par. 552, citing I. Schwenzer & P. Hachem, and P. Dumberry.
[858] CI, par. 248(v).
[859] RII, par. 549; RV, par. 445.
[860] *Desert Line*, par. 291; also admitted in *Lemire*, par. 476.

circumstances exist. The real question is: when do these exceptional situations, which merit the grant of compensation for moral damages, take place?

909. In *Lemire*, the tribunal, after an exhaustive analysis of case law, summarized the *status quaestionis* in the following manner:

> *"Summing up the conclusions which can be drawn from the above case law is that, as a general rule, moral damages are not available to a party injured by the wrongful acts of a State, but that moral damages can be awarded in exceptional cases, provided that*
>
> *- the State's actions imply physical threat, illegal detention, or other analogous situations in which the ill-treatment contravenes the norms according to which civilized nations are expected to act;*
>
> *- and cause a deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position; and*
>
> *- both cause and effect are grave or substantial."*[861]

910. The Tribunal agrees entirely with the conclusion in *Lemire*. As a general rule, a party injured by the wrongful acts of a State cannot be awarded additional compensation for moral damages, unless it can prove the following:

- that the State's actions implied physical threat, illegal detention, or other ill-treatments in contravention of the norms according to which civilized nations are expected to act;
- and that such situation has caused serious damage to its physical health, grave mental suffering or a substantial loss of reputation.

b. Application of the standard to the facts

911. Claimant argues that the following facts—which were already reported by Claimant as violations of the standards of Fair and Equitable Treatment [FET] and of Full Physical Safety and Protection [PSP]—amount to "egregious" behavior by Respondent, which should constitute grounds for granting compensation for moral damages:[862]

- Respondent allegedly created an omnipresent atmosphere of fear and intimidation in the Plants;[863]

[861] *Lemire, (Award)*, par. 333.
[862] CI, par. 364.
[863] CV, par. 300 a).

- Such threats and intimidation allegedly forced the Companies' staff to continue working and to facilitate the transfer of technical processes and know-how;[864]

- Respondent allegedly deployed the Venezuelan National Guard [GNB] for it to physically take over the Plants and after the expropriation took place, the GNB continued to be deployed there for weeks;[865]

- Respondent allegedly disclosed overseas the intellectual property used at the Plants;[866]

- The Temporary Administration Boards have allegedly had, on several occasions, threatening and aggressive attitudes towards OIdV and Favianca;[867]

- The supervising authorities, INPSASEL and INDEPABIS, have allegedly subjected OIdV and Favianca to disproportionate inspections and oversight activities.[868]

912. Actually, the facts did not exactly occur in the manner and causing the effects described by Claimant. The Tribunal, after carefully assessing the evidence, has arrived to the following conclusions:

- The warnings by Minister Menéndez that any deliberate action with the intention of paralyzing the Plants would be punished did not amount to a threat or cause an international wrong;[869]

- It was not proved that workers were forced to continue working in the Plants;[870]

- The actions by the GNB at the Plants were not grave enough so as to amount to a violation of the guarantee of Full Physical Safety and Protection set forth in the BIT.[871]

- Claimant has been unable to prove that it has suffered damages for the alleged disclosure of the intellectual property used in the Plants.[872]

- It has not been proved that the Temporary Administrative Boards showed threatening and aggressive attitudes towards OIdV and Favianca.[873]

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[864] CV, par. 300 b).
[865] CV, par. 300 c).
[866] CV, par. 300 d).
[867] CI, par. 364.
[868] *Ibid.*
[869] See par. 548 *supra.*
[870] *Ibid.*
[871] See par. 579 *et seq. supra.*
[872] See par. 897 *supra.*
[873] See par. 543 *supra.*

- It has not been proved that the actions by INPSASEL constituted a violation of the standard of Fair and Equitable Treatment.[874]

- The inspections conducted by INPSASEL and INDEPABIS, even though detailed and probably excessive, did not constitute an ill-treatment of Claimant, neither did it cause distress to Claimant or damage to its reputation.[875]

913. Therefore, Claimant has not succeeded at proving that the behavior of the Republic during the transition period has given rise to a violation of the standards of Full Physical Safety and Protection and of Fair and Equitable Treatment (except for the occupation of the Plants by INDEPABIS, which was arbitrary and constituted a violation of the standard of Fair and Equitable Treatment, as will be analyzed in the following paragraph). The Full Physical Safety and Protection and Fair and Equitable Treatment standards have fewer requirements than those necessary in order to grant moral damages compensation. Since the behavior reported by Claimant could not be qualified as international wrongs, it follows that it may not constitute grounds for awarding compensation for moral damages.

914. Now we shall address the actions by INDEPABIS. The Tribunal has already concluded that INDEPABIS acted arbitrarily and there was a misuse of power, contrary to the Fair and Equitable Treatment standard required in Article 3(1) of the BIT.

915. Is this behavior worthy of an additional compensation for moral damages?

916. The Tribunal concludes that the answer to the question above is negative. Claimant failed to prove that the irregular behavior by INDEPABIS amounted to physical threats, illegal detention or ill-treatment. In addition, it has not been alleged or proved that INDEPABIS behavior caused harm to the health or stress or anxiety, or any other kind of psychological suffering such as humiliation, shame, degradation, or loss of reputation, standing or social position to Claimant or its legal representatives. Therefore, it does not meet the necessary requirements for awarding additional compensation for moral damages.

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917. In summary, the Tribunal denies the Claimant's request to order the Bolivarian Republic of Venezuela to pay compensation for moral damages, because it has not been proven that Respondent's behavior was sufficiently grave and unlawful for this Tribunal to grant such an exceptional measure as additional compensation for moral damages.

[874] See par. 557 *supra*.
[875] See par. 557 *supra*.

6. Interest

918. The parties disagree on the accrual start date, the applicable interest rate and the calculation method.

A. Claimant's Position

919. In order to be completely compensated for damages suffered, including damages caused by the delay in the payment of full compensation,[876] Claimant claims the payment of interest based on Art. 6(c) of the BIT.[877]

920. The expert for Claimant proposes three commercial interest rates which he considers reasonable.[878]

- The yield of USD-denominated Venezuelan sovereign bonds;[879]
- The rate offered on the London interbank market (LIBOR) + 4%;[880]
- The U.S. prime rate + 2%.[881]

921. Claimant requests that interest be accrued between 26 October 2010 and the payment date, and of the three alternatives described by the expert, it chooses the application of the LIBOR plus a margin of 4%, with no distinction being made between pre and post-award interest,[882] except in reference to capitalization.[883]

922. With respect to the calculation method, the investor advocates what it calls "compound interest" because it represents—from its point of view—the most precise way to guarantee full compensation.[884] Concretely, it requests that interest accrued prior to the award be capitalized yearly and interest accrued after the award be capitalized yearly or half-yearly (whichever amount is greater).[885]

B. Respondent's Position

923. Respondent rejects that Claimant's calculation of the interest is correct because the calculation start date is incorrect and the rates proposed are inappropriate. Furthermore, it opposes Claimant's

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[876] CV, Par. 308.
[877] CI, Par, 373; CV, Par. 309.
[878] CV, Par. 309.
[879] Kaczmarek I, Par. 176.
[880] CI, Par. 373 and 374; Kaczmarek I, Par. 178.
[881] Kaczmarek I, Par. 177.
[882] CI, Par. 368; CIV, Par. 555-559; CV, Par. 305.
[883] CV, Par. 323(4).
[884] CV, Par. 313.
[885] CV, Par. 323(4).

request that a compound interest be applied.

924. Respondent maintains that it should not have to pay interest prior to the award and bases its argument on the Venezuelan Civil Code.[886] Alternatively, it argues that if said interest is awarded, they should be calculated as of the date of the Request for Arbitration, 2 September 2011, and not as of the date of expropriation.[887]

925. The Republic rejects the three interest rates proposed by Claimant's expert, arguing that they are applicable for borrowers but not for investors.[888] Therefore, it requests that the following be applied:

- a risk-free rate, such as six-month United States Government Treasury Bonds (0.2%[889]); or
- alternatively, the average of OI's short-term debt for the period ending 30 September 2010, that is, 2.76%.[890]

926. With respect to the interest calculation method, Venezuela opposes the use of "compound interest"[891] because Venezuelan law does not allow it except as otherwise agreed.[892] Subsidiarily, Respondent requests that if the Tribunal grants compound interest, it be capitalized yearly.[893]

C. The Analysis of the Tribunal

927. Article 6 of the BIT contains some regulations regarding the calculation and accrual of interest. It provides that compensation for expropriation

> "shall include interest at a normal commercial rate until the date of payment."

928. Based on this provision as a starting point and supplementing it with the general principles of International Law, this Tribunal must determine all of the elements involved in the calculation of interest:

- the accrual start date;
- the accrual end date;
- the interest rate;

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[886] RV, Par. 449.
[887] RIV, Par. 498 and 499; RV, Par. 450.
[888] RIV, Par. 504-511.
[889] Guitera I, Par. 303; Guitera II, Par. 375; RIV, Par. 510; RV, Par. 452.
[890] Guitera I, Par. 304; Guitera II, Par. 376; RIV, Par. 511; RV, Par. 453.
[891] RIV, Par. 512; RV, Par. 454.
[892] RIV, Par. 513-518; RV, Par. 454.
[893] RV, Par. 456.

- and the calculation method.

929. Respondent seeks to apply Venezuelan Civil Code regulations on this matter; this Tribunal does not agree with this view because the main obligation on which interest must be applied is not subject to Venezuelan legislation but to the BIT, an international treaty, and is therefore governed by International Law.

Accrual start date

930. The parties disagree as to the date of commencement of interest accrual.

931. Claimant proposes the expropriation date, 26 October 2010, while Respondent suggests the date of the award or, alternatively, the date of the request for arbitration, i.e. 2 September 2011.

932. Damages are owed since the moment of the expropriation (26 October 2010) and so this must be the date in which interest starts to accrue. Until that date, Claimant benefitted from the product of its investment and since that date, it must receive the interest accrued on compensation.

933. The Tribunal finds no justification to postpone interest accrual until the date of the request for arbitration, much less until the date of the award.

Accrual end date

934. This shall be the date of effective payment of full compensation by the Bolivarian Republic of Venezuela.

Interest rate

935. The Netherlands-Venezuela BIT provides that compensation for expropriation "shall include interest at a normal commercial rate."[894] Nevertheless, it does not specify the interest rate; as a result, this Tribunal must determine the interest rate at its discretion.

936. Venezuela proposes to apply the median interest rate on the short-term debt incurred by OI for the period that ended on 30 September 2010 or the six-month U.S. Treasury Bills rate.

937. The Tribunal does not agree with Respondent.

938. The rate of interest on the compensation for expropriation, owed since 2010, must be that of a long-term debt. In addition, the United States' credit risk is among the lowest in the market; applying its interest rate to a debt owed by the Bolivarian Republic would lead to unreasonable financial results.

[894] Article 6 of the Netherlands-Venezuela BIT.

939. The expert for Claimant has evaluated the possibility of applying one of the three following alternatives to compute the proper interest rate:

- the yield of USD-denominated Venezuelan sovereign bonds;[895]
- LIBOR plus 4%;[896]
- or the U.S. prime rate plus 2%.[897]

940. However, in its final petition, Claimant did not leave the choice among the three alternatives to the Tribunal but specified that it requested that the Tribunal apply a LIBOR-based interest rate plus a 4% margin.[898]

941. This Tribunal hereby grants Claimant's request.

942. LIBOR is the interest rate used in the London interbank market and it is set by the British Bankers' Association on a daily basis for interbank deposits at various terms and in various currencies. It is universally accepted as a benchmark to set interest rates for loans, deposits and other financial instruments. In financial practice, bank loans to customers accrue interest at LIBOR plus a margin.

943. In the instant case, the Tribunal is inclined to apply the LIBOR rate for one-year deposits plus the surcharge that would be applied to a company similar to Claimant for a loan in the market.

944. Claimant proposes that the margin be 4% and this Tribunal confirms that a recent arbitral award accepted such figure.[899] A LIBOR rate for one-year deposits plus 4% is a "normal commercial rate" that guarantees full compensation to Claimant.

945. The initial LIBOR rate will be the rate published on the accrual start date for one-year deposits; it will be applied for the following year and be recalculated annually.

Calculation method

946. Claimant has requested "compound interest." What Claimant means by this equivocal term is that each year, unpaid accrued interest should be accumulated to the principal (or even every six months after the issuance of the award, if this were more favorable to Claimant), generating in turn interest over the following periods. Respondent opposes this request and considers that

[895] Kaczmarek I, par. 176.
[896] CI, paras. 373 and 374; Kaczmarek I, par. 178.
[897] Kaczmarek I, par. 177.
[898] CV, par. 323.
[899] *Flughafen*, paras. 962–965.

capitalization is not admissible; in the alternative, Respondent requests that, if allowed, interest be calculated annually.

947. As a threshold matter and in order to dissipate any doubt as to the equivocal concept of "compound interest," the Tribunal confirms that both parties agree that interest must be calculated according to the simple interest formula (and not by the compound interest formula or anatocism $[(1 + i)^n]$), as is common practice in all financial transactions based on LIBOR.

948. In fact, the matter at issue is whether interest must be periodically accumulated to the principal and from that point on accrue further interest as part of the principal amount. This question has been analyzed in several investment-related awards and, although the traditional view has been rather reticent to accept it, the most recent trend is to accept yearly or half-yearly capitalization.[900]

949. This Tribunal shares the view stated in the most recent decisions because in a LIBOR-based interest calculation, capitalization is financially essential in order to wholly compensate the investor.

950. Indeed, the purpose of interest is to compensate for the external financial cost that Claimant would hypothetically incur to cover the loss caused by the delay in the payment of damages. If Claimant had obtained a one-year LIBOR loan on normal market conditions, it would have had to pay interest annually from the accrual start date; failure to do so would have caused interest to accumulate to the principal amount, thus accruing further interest from that moment on. Thus, in order to maintain Claimant fully indemnified, the award needs to allow for annual capitalization of interest.

951. Specifically, Claimant requests that interest prior to the award be capitalized yearly and interest after the award be capitalized half-yearly or yearly (whichever amount is greater). This Tribunal finds no reason why any such distinction should be made: there is no reason that justifies making a difference between the periods before and after the award. In addition, half-yearly capitalization would require the six-month deposit and the one-year deposit LIBOR rates to be applied depending on the capitalization period, which would introduce unnecessary complexity to the calculation.

952. Therefore, the Tribunal hereby decides that interest shall be capitalized yearly in arrears, on the same date that the LIBOR rate for one-year deposits is recalculated.

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[900] *Siemens*, par. 339; *Enron*, par. 452; *LG&E*, par. 115; *Sempra*, par. 486; *Lemire (Award)*, par. 359.

953. In summary, this Tribunal hereby decides that from 26 October 2010 until the date of payment, the principal amount of USD 372,461,982 will accrue interest at the LIBOR rate for one-year deposits in USD plus 4% and such interest will be capitalized on a yearly basis.

7. COSTS

954. Regulation 47(1)(j) of the Arbitration Rules establishes that "the award must be in writing and must involve [...] the Tribunal's decision on costs pertaining to legal processes."

955. The Tribunal requested that the parties provide details on the amounts being claimed under the costs item. The petitions of the parties are reproduced in the following paragraphs. The Tribunal places on record that neither the matters being counter-argued, nor the veracity of the figures have been questioned by any of them.

A. Claimant's Position

956. The Claimant is requesting the following amounts:[901]

- Costs of the proceeding related to the Centre: USD 500,000;[902]
- Attorneys' fees and expenses: USD 12,612,455;[903]
- Experts' fees and expenses: USD 1,654,824;[904]
- Other costs for representatives and witnesses: USD 39,097.

957. The aforementioned amount to a total of USD 14,806,317.

958. The Claimant is requesting that the Tribunal orders Venezuela to pay all these amounts including interest calculated at a normal commercial rate until the date of their effective payment.[905]

B. Respondent's position

959. The Respondent is requesting the following amounts:[906]

- Costs of the proceeding related to the Centre: USD 500,000;

[901] Claimant's Statement of Costs.
[902] CV, para. 323(5)
[903] USD 4,713,662.69 from Volterra Fietta, USD 287,291.43 from Quadrant Chambers, USD 345,832.81 from the legal offices of Muci-Abraham & Associates, USD 4,716,854.26 from Latham & Watkins and USD 2,548,814.55 from other local attorneys in Venezuela and the Kingdom of the Netherlands.
[904] USD 1,491,104.00 from the financial expert, Mr. Brent Kaczmarek of Navigant Consulting Inc. and USD 163,720.00 from the legal expert, Mr. José Ignacio Hernández.
[905] Claimant's supplementary submission of costs, para. 2; CV, para. 323(5).
[906] Claimant's Statement of Costs.

- Attorneys' fees and expenses: USD 3,874,678;[907]
- Experts' fees and expenses: USD 751,795;[908]
- Costs of the Hearing: USD 128,257;[909]

960. The total sum of the amounts requested by Venezuela is USD 5,254,730.

961. The Respondent is confident that the Tribunal lacks jurisdiction, and alleges that in any event, Venezuela would not have violated the BIT.[910] Therefore, it is requesting that the Claimant be ordered to pay all the costs of this Arbitration.[911]

C. The Analysis of the Tribunal

962. Article 61(2) of the ICSID Convention establishes that:

> "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."

963. Neither the ICSID Convention nor the Arbitration Rules contain any guidelines whatsoever in connection with the apportionment of costs. Therefore, this Tribunal has the discretion to decide how they will be apportioned.

964. This Tribunal looks favorably upon the new trend in investment arbitration by which costs are awarded in a manner that reflects to a certain extent the principle that the losing party is to make a significant contribution to the payment of the arbitration fees, costs and expenses incurred by the prevailing party.[912]

965. Both parties request that this Tribunal impose on their adversary the full amount of the costs arising from this arbitration. Respondent bases its petition for costs on the assertion that Claimant's claims were made arbitrarily as it failed to meet the necessary jurisdictional requirements, and alternatively alleges that OIEG has grossly inflated the value of its equity in the Companies.

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[907] All relate to Sherman & Sterling LLP.
[908] USD 691,795.26 from the financial expert, Mr. Guitera of KPMG and USD 60,000.00 from the legal expert, Mr. Jesús Cabrera. Mr. Guitera's fees have been itemized in Euros, a figure which amounts to Eur. 503,490. The Claimant proposes that this amount be converted to USD at the current rate of exchange on 9 December 2013, which results in the amount of USD 691,795.26.
[909] Bs. 431,768.74 in airline tickets and Eur. 43,498.80 in travel allowances. The Claimant proposes that these amounts be converted to USD according to the applicable rate of exchange on 9 December 2013, which results in a combined amount of USD 128,257.42.
[910] Claimant's Statement of Costs, para. 9.
[911] Claimant's Statement of Costs, para. 7.
[912] *EDF*, par. 327; *Plama*, par. 316; *Phoenix*, par. 151.

966. This Tribunal has already determined that Claimant is to be regarded as an investor inasmuch as it holds an investment protected by the BIT.[913] Further, the Tribunal has concluded that Claimant was a victim of unlawful expropriation by Venezuela and was subjected to unfair and unequal treatment. Finally, this Tribunal has determined that Venezuela must pay damages to Claimant in the amount of USD 372,461,982 as a consequence of the expropriation.

967. Most of Claimant's requests have therefore been granted. For this reason, Respondent shall bear, not all, but part of, Claimant's costs.

968. In apportioning arbitration costs, this Tribunal will consider two large categories of requested costs:

- The provision of funds paid to ICSID. These are known as the costs of the proceedings [the "**Costs of the Proceedings**"];

- The expenses incurred to pay for the parties' defense [the "**Defense Expenses**"].

Costs of the proceedings

969. This Tribunal finds that Claimant has prevailed, not entirely, but to a great extent, in these proceedings: the Tribunal confirmed its jurisdiction over all the claims, it determined three of the five breaches of the BIT alleged by Claimant and it awarded 40% of the requested damages.

970. For this reason, this Tribunal finds that Respondent must bear the Costs of the Proceedings. In other words, Respondent shall reimburse Claimant for a total of USD 500,000.

a. Defense Expenses

971. The Defense Expenses requested by Claimant are of a widely varied nature as they are concerned with attorneys, experts and witnesses, among other elements. In the view of this Tribunal, Respondent cannot be made to bear all the expenses incurred by Claimant, without limitations. Respondent shall only bear the Defense Expenses actually incurred by Claimant that are indispensable to adequately defend its interests ["**Reasonable Defense Expenses**"]. Taking into account the complexity of the case, the amounts in dispute and the work performed by the attorneys and the experts, this Tribunal has determined that the amount of the Reasonable Defense Expenses is USD 6,000,000 for attorneys and USD 1,500,000 for experts.

[913] See paras. 212 *et seq. supra.*

Venezuela's Contribution to the Reasonable Defense Expenses

972. This Tribunal must determine the portion of the Reasonable Defense Expenses to be borne by Respondent based on the time on which they are to become payable by Claimant.

973. The arbitration process has been divided into three large stages: jurisdiction, liability and damages. In order to determine the apportionment of the costs, the Tribunal will assume that Claimant's Reasonable Defense Expenses have been divided as follows during these stages:

- one third of the attorneys' fees and expenses at each of said stages;
- and the total amount of the experts' fees and expenses during the damages stage.

974. Consequently:

- During the jurisdiction stage, all the jurisdictional objections made by Venezuela were dismissed. Therefore, Claimant prevailed entirely and is to be reimbursed for the total amount of its Reasonable Defense Expenses at this stage: USD 2,000,000
- During the liability stage, this Tribunal granted three of the five claims made by Claimant: expropriation, unfair and unequal treatment, and breach of the Umbrella Clause; the Tribunal holds that Venezuela must pay 75% of the Reasonable Defense Expenses incurred at the liability stage: USD 1,500,000.
- During the damages stage, Claimant claimed USD 929,544,714.[914] This Tribunal has determined that the amount of damages owed to Claimant as a consequence of the expropriation is USD 372,461,982.[915] This Tribunal holds that Venezuela must pay 50% of Claimant's Reasonable Defense Expenses incurred at the Damages stage: that is to say, USD 1,000,000 for attorneys' fees and expenses and USD 750,000 for experts' fees and expenses.

975. The total amount owed to Claimant by Venezuela for Reasonable Defense Expenses is USD 5,250,000.

976. In conclusion, Venezuela shall pay USD 5,750,000 for the costs involved in this arbitration. In addition, Claimant has requested that interest be accrued on said amount. This request is hereby granted by this Tribunal, to which end the accrual start date shall be the day on which this award is issued; and the accrual end date, the interest rate and the method of calculation shall be those established in Section 6 of this Chapter.[916]

[914] CV, par. 323.
[915] See par. 881 *supra*.
[916] See par. 927 *et seq. supra*.

VIII. SUMMARY

977. In its written summary of conclusions, Plaintiff asked the Tribunal to:

"(1) order that Defendant's preliminary objections be rejected in their entirety;

(2) declare that Defendant has breached the Bilateral Investment Treaty, including articles 3(1), 3(2), 3(4), 5, and 6;

(3) order Defendant to pay damages to Plaintiff in the amount of no less than USD 929,544,714, including:

a. USD 729,821,323 for the expropriation of Plaintiff's economic interests in the Companies;

b. USD 16,833,383 for the expropriation of Plaintiff's share of the excess cash in the bank accounts of OIdV and Favianca;

c. USD 54,292,257 for the loss of revenue caused by Defendant's wrongful interference with the repatriation of Plaintiff's dividends paid by OIdV and Favianca;

d. USD 50,566,759 for indirect damages caused by the use of property wrongfully expropriated by Defendant to cause harm to Plaintiff's business outside Venezuela;

e. USD 68,030,992 for indirect damages caused by the dissemination outside Venezuela, and as a consequence of the expropriation of the Plants, of the intellectual property of OI and other confidential processes and information by Defendant;

f. USD 10,000,000 for moral damages caused by Defendant's egregious conduct during the six months following the expropriation;

(4) order Defendant to pay interest compounded on the amount that the Tribunal awards to Plaintiff for damages at an interest rate of LIBOR +4%; that amount must be compounded annually from the date of expropriation until the date of the award, and compounded annually or every six months (whichever is greater) from the date of the award until the date when the payment in United States dollars is received by Plaintiff in funds available immediately in a bank account outside Venezuela, designated by Plaintiff for this purpose;

(5) order Defendant to pay all of Plaintiff's arbitration costs, which include but are not limited to the expenses and fees of the International Centre for Settlement of Investment Disputes and the Tribunal, and all costs and legal expenses incurred by Plaintiff (which include but are not limited to attorney fees and expenses), with interest calculated in accordance with paragraph (4) above;

(6) if the Tribunal does not order Defendant to pay all of Plaintiff's arbitration expenses, order Defendant to pay all of Plaintiff's expenses in connection with the preliminary objections and the bifurcation request, which include but are not limited to all of the expenses and fees of the International Centre for Settlement of Investment Disputes and the Tribunal, and all the legal expenses and costs incurred by Plaintiff (which include but are not limited to attorney fees and expenses), with interest calculated in accordance with paragraph (4) above; and

(7) order any other additional compensation that the Tribunal considers appropriate."

978. With regard to its first claim, the Tribunal has rejected the defenses of lack of jurisdiction raised by Defendant and holds that the Centre has jurisdiction and the Tribunal itself has jurisdiction to hear all the issues raised in this proceeding and rule on the substance of the dispute.

979. With regard to its second claim, the Tribunal has ruled that the Republic of Venezuela has breached articles 6, 3(1), and 3(4) of the Venezuela-Netherlands Reciprocal Investment Protection Agreement. However, it has dismissed Plaintiff's request to declare that Venezuela has breached articles 3(2) and 5 of the Reciprocal Investment Protection Agreement.

980. The Tribunal has resolved Plaintiff's requests for damages as follows:

- Plaintiff requested USD 729,821,323 for the expropriation of its economic interests in the Companies; the Tribunal holds that the value of OIEG's interest in the Companies amounts to USD 355,628,599;

- Plaintiff requested USD 16,833,383 for the expropriation of surplus cash in the bank accounts of OIdV and Favianca, and the Tribunal fully grants the request;

- the Tribunal entirely rejects Plaintiff's remaining claims for damages.

981. Therefore, of the USD 929,544,714 requested by Plaintiff for damages, the Tribunal has awarded USD 372,461,982 as compensation for the expropriation of Plaintiff's interest in the Companies and its share in the surplus cash in the bank accounts of OIdV and Favianca.

982. With regard to Plaintiff's request for interest, the Tribunal holds that Defendant must pay interest on USD 372,461,982 at an interest rate of LIBOR +4% for one-year deposits in US dollars; the interest must be compounded annually, accrued from the date of expropriation until the date when the payment in US dollars is received by Plaintiff in funds immediately available in a bank account outside Venezuela, designated by Plaintiff.

983. With regard to Plaintiff's cost request, the Tribunal holds that the Republic must pay USD 500,000 and USD 5,250,000 for Procedural Costs and Defense Expenses, respectively, plus interest from the date of this award until the date when the payment in US dollars is received by Plaintiff, at an interest rate of LIBOR +4%; the interest must be compounded annually. That amount includes the payment of all costs incurred by Plaintiff in its defense in connection with the preliminary objections and the bifurcation request.

IX. THE TRIBUNAL'S DECISION

984. For the foregoing reasons, the Tribunal unanimously rules as follows:

1. It holds that the Tribunal has powers and the Centre has jurisdiction to rule on this dispute.

2. It holds that the Bolivarian Republic of Venezuela illegally expropriated the investment owned by OI European Group B.V. located in Venezuela, in violation of article 6 of the Reciprocal Investment Protection Agreement (BIT.)

3. It holds that the Bolivarian Republic of Venezuela has failed to guarantee the fair and equitable treatment recognized in article 3(1) of the BIT to the investment owned by OI European Group B.V. located in Venezuela.

4. It holds that the Bolivarian Republic of Venezuela has failed to comply with the obligations under article 3(4) of the BIT with regard to the investment owned by OI European Group B.V. located in Venezuela.

5. It orders the Bolivarian Republic of Venezuela to pay OI European Group B.V. USD 372,461,982 in compensation for the expropriation of its investment.

6. It orders the Bolivarian Republic of Venezuela to pay OI European Group B.V. interest on USD 372,461,982, accrued between 26 October 2010 and the date of actual payment, calculated at a LIBOR interest rate for one-year deposits in US dollars, plus a margin of 4%, with annual compounding of accrued interest.

7. It orders the Bolivarian Republic of Venezuela to pay OI European Group B.V. USD 500,000 and USD 5,250,000 for Procedural Costs and Defense Expenses, respectively, plus interest on these amounts, accrued from the date of this award until the date of actual payment, at the interest rate and with the other conditions established in the Decision above.

8. It dismisses all other claims brought by the Parties.

[signature]
Prof. Francisco Orrego Vicuña
Judge

Date: *26 February 2015*

Dr. Alexis Mourre
Judge

Date: *20 February 2015*

[signature]

Prof. Juan Fernández-Armesto
President
Date: *4 MARCH 2015*