## CONCURRING AND DISSENTING OPINION OF JUDGE CHARLES N. BROWER

1. I agree with the Tribunal's finding (paragraph 908(1)) that Respondent is responsible for a breach of Article 5(1), subparagraphs 2 and 3 of the Agreement between the Government of the French Republic and the Government of the Bolivarian Republic of Venezuela on Reciprocal Encouragement and Protection of Investments (hereinafter "the BIT") in expropriating Claimant's 99.99%-owned Venezuelan subsidiary Norpro Venezuela C.A. (hereinafter "Norpro"), as well as with most of the Tribunal's detailed analysis of the correct elements to guide the discounted cashflow calculation of the compensation to be awarded to Claimant. I must dissent, however, from two aspects of that analysis that, both as an economic matter as well as a matter of the applicable law, deprive the Claimant of much of that to which it is entitled, whether under the BIT or under international law generally. *See Case Concerning the Factory at Chorzów (Claim for Indemnity) (Germany v. Poland)*, P.C.I.J. Series A No. 17 (1928). Specifically, the Tribunal has failed to enforce the BIT and international law generally in that it:

(a) Has included in the country risk portion of the percentage by which the projected cash flow of Norpro is to be discounted (i.e., 10.26% as per paragraph 753) precisely the risk of uncompensated expropriation, as well as other violations of the BIT (paragraphs 713-714), from which this Tribunal has been constituted to rescue Claimant, and which in the instant Decision on Liability and the Principles of Quantum (hereinafter "the Decision") the Tribunal professes to accomplish, resulting in a country risk factor that is 5.76 points above, hence 228% of, 4.5%, the only country risk factor number either Party has placed before the Tribunal as excluding the risk of BIT violations; and

(b) Has excluded 25% of Norpro's export sales profits on the ground that the Claimant, Norpro's 99.99% owner, has by tax-related intercompany transfer pricing or other bookkeeping choices charged Norpro approximately that amount of its profits for Claimant's contributions to Norpro's marketing.

The vices of these two reductions of Claimant's entitlement under the BIT and general international law should be obvious.

2. The first problem, under 1(a) just above, arises from the misunderstanding by the Tribunal of Article 5(1), paragraph 2, which specifies that compensation for an expropriation must be "equal to the actual value of the investment[] concerned," and of general international law, which as per *Chorzów* (page 47 of the Judgment), requires "that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." The Decision has morphed the applicable law into applying a compensation standard of "fair market value," which, as applied by the Decision, unfortunately has led to injustice to the Claimant.

3. By increasing the country risk factor to include precisely the risk against which the Decision undertakes to insulate the Claimant, whom the Tribunal has found to have been injured by the expropriatory breach of the BIT by the Respondent, the Tribunal does an injustice to the Claimant. It takes away with one hand what it has purported to give the Claimant with the other. To reduce the recovery to the injured Claimant by applying a "fair market value" that incorporates the very risk of which the Claimant purportedly is being relieved by the Tribunal is to deny the Claimant the full compensation to which it is entitled. It is like undertaking to restore to the owner of a severely damaged automobile a perfectly repaired and restored vehicle but then leaving parts of it missing because it just might be damaged again in the future. The obvious logic of this was recognized by a very distinguished tribunal in *Gold Reserve, Inc. v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 Sept. 2014) ¶ 841, which should have persuaded my colleagues not to follow the misguided precedent of *Tidewater Investment SRL v. Venezuela*, ICSID Case No. ARB/10/5, Award (13 Mar. 2015). Significantly, the necessity of excluding from the country risk factor the very treaty risk of which a claimant is found to have been a victim was underscored already 27 years ago, in 1989, by the Iran-United States Claims Tribunal in *Phillips Petroleum Company Iran* v. *The Islamic Republic of Iran, et al.*, Award No. 425-39-2 (29 June 1989) ¶¶ 111, 152, *reprinted in* 21 Iran-U.S. C.T.R. 79, and ten years later, in 1999 by the UNCITRAL Rules Tribunal in *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara*, Final Award (4 May 1999) ¶ 357, *in* YEARBOOK COMMERCIAL ARBITRATION, VOL. XXV (A. Jan van den Berg ed., Kluwer 2000).

4. Apart from the fact that the majority's position deprives the Claimant of the compensation to which it is entitled, it fails to adhere to the Parties' agreement as to what constitutes "fair market value." In paragraph 628 of the Decision the Tribunal points out that "[t]he Parties agree that the fair market value is equal to the amount that a willing buyer would pay to a willing seller, *provided that the buyer is informed about all relevant circumstances and none of the parties is under any kind of duress to sell or to acquire the asset*." (Emphasis added.) If a willing buyer is, for example, a national of France (Party to the BIT here), or of another State that has equivalent treaty protection as did and should the Claimant here, is that not a part of the buyer being "informed about all relevant circumstances"? Might not such status possibly lead the purchaser to pay more for the expropriated asset than would a potential buyer that lacks such protection? "Fair market value" cannot as, the Parties to this case have agreed, be determined devoid of "all the relevant circumstances."

5. As to paragraph 1(b) above, awarding the 99.99%-owner of the expropriated concern, namely the Claimant, which is entitled to 99.99% of the profits of Norpro, only the lesser compensation derived from 99.99% minus 25% of Norpro's export sales profits means that to that extent the Claimant is deprived of the compensation to which it is entitled. The intercompany bookkeeping practiced by the parent and the subsidiary has no effect whatsoever on the actual profit created for the parent by the subsidiary. Assuming, as an example, that 25% of Norpro's export sales profits adds up to 10% of Norpro's total profits, then the parent Claimant, which in fact has lost 99.99% of Norpro's profits, receives as compensation, not that 99.99% of which it was deprived, but instead only 89.99%. How can that be considered to lead to "fair market value" by whatever standard?

For the reasons, and to the extent, stated above I respectfully dissent from the Decision.

Charles N. Brower

The Honorable Charles N. Brower

Arbitrator

Date: 2 / DECEMBER 2016