INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

KOCH MINERALS SÁRL
First Claimant
(“KOMSA”)

KOCH NITROGEN INTERNATIONAL SÁRL
Second Claimant
(“KNI”)

and

THE BOLIVARIAN REPUBLIC OF VENEZUELA
Respondent

ICSID CASE No. ARB/11/19

AWARD

Members of the Tribunal:
V.V. Veeder, President, QC
Hon. Marc Lalonde PC, OC, QC
Professor Zachary Douglas QC

Secretary to the Arbitration Tribunal:
Mairée Uran Bidegain

Date of dispatch to the Parties: 30 October 2017

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ABBREVIATED TERMS

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Bond Offering Circular	Offering Circular - Bond Offering of $250,000,000 between FertiNitro Finance Inc and FertiNitro (8 April 1998) (C-115)
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Expropriation Decree	Decree 7,713 (10 October 2010) (Official Gazette No. 380,113 of 11 October 2010) (C-9)
Expropriation Law	Expropriation Law for Public or Social Benefit (1 July 2002) (Official Gazette of the Republic No. 37,475 of 1 July 2002) (R-9, R-53, C-140)

FertiNitro	Joint venture companies Fertilizantes Nitrogenados de Oriente, SA; Fertilizantes Nitrogenados de Oriente, CEC; Fertilizantes Nitrogenados de Venezuela, SRL, and Fertilizantes Nitrogenados de Venezuela, FertiNitro, CEC
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Historical Claims	KOMSA's claims regarding tax related measures and VAT credits
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965)
ICSID or the Centre	International Centre for Settlement of Investment Disputes
JIA	Joint Investors Agreement by and among Pequiven, Koch Oil SA, Snamprogetti Netherlands BV, and Polar Uno, CA (8 April 1998) (C-18)
KNI	Koch Nitrogen International Sàrl
KOMSA	Koch Minerals Sàrl
KOMSA Draft MOU	KOMSA Draft Memorandum of Understanding (non-dated) (C-92)
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Parra WS1	Witness Statement of Melquíades A. Parra (29 May 2012)
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Urea Resolution	Joint Resolution by the Ministry of the People's Power for Agriculture and Land, the Ministry of the People's Power for Light Industry and Trade, and the Ministry of the People's Power for Energy and Petroleum (Official Gazette No. 38,674) (3 May 2007) (C-82)
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ICSID Convention History	ICSID, Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Documents Concerning the Origin and the Formulation of the Convention, Volume II, Part 1 (1968) (RLA-6)
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Mann - Further Studies	F. A. Mann, Further Studies in International Law - Compound Interest as an Item of Damage (1990) (CLA-60)
Mann – Legal Aspect of Money	F.A. Mann, The Legal Aspect of Money (4th ed, 1982)
Marboe - Calculation of Compensation	Irmgard Marboe, Calculation of Compensation and Damages in International Investment Law, (2009) (CLA-137)
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MHS v. Malaysia	*Malaysian Historical Salvors Sdn Bhd v. Malaysia,* ICSID Case No. ARB/05/10, Decision on Application for Annulment (16 April 2009) (RLA-23)

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The First 50 Years of ICSID	The First 50 Years of ICSID, Zachary Douglas, "Property Rights as the Object of an Expropriation" (2016)
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PART I: THE ARBITRATION

(1) Introduction

1.1 This arbitration concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") on the basis of the Agreement between the Swiss Confederation and the Government of the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments dated 18 November 1993, which entered into force on 30 November 1994 (the "BIT" or "Treaty"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966 (the "ICSID Convention").

(2) The Parties

1.2 *The First Claimant*: Koch Minerals Sàrl is a company incorporated under the laws of Switzerland. It was initially named Koch Oil SA, but changed its name to Koch Minerals SA on 11 April 2003 and its corporate form from S.A. to Sàrl on 20 March 2009.[1] For ease of reference, the First Claimant and its prior designations are here referred to collectively as "KOMSA" or "Koch".

1.3 *The Second Claimant*: Koch Nitrogen International Sàrl is also a company incorporated under the laws of Switzerland. For ease of reference, the Second Claimant is here referred to as "KNI".

1.4 Both KOMSA and KNI are "nationals of another Contracting State" as defined in Article 25(2)(b) of the ICSID Convention. Switzerland signed the Convention on 22 September 1967, deposited its instrument of ratification on 15 May 1968 and the Convention entered into force for Switzerland on 14 June 1968.

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[1] Claimants' Request for Arbitration ("RfA") (28 June 2011), n. 22; Extract from the Registre du Commerce du Canton de Fribourg for Koch Minerals, SA, Historical Data from 5 November 1998 to 1 April 2009, certified on 6 May 2011; Extract from Registre du Commerce du Canton de Fribourg for Koch Minerals, Sàrl, registration date 24 January 1972 and Extract with Potential Deletions (C-3); Request for registration for the Registre du Commerce du Canton de Fribourg for transformation of Koch Minerals, SA to Koch Minerals, Sàrl, registration date 20 March 2009 (C-16).

1.5 *The Claimants' Legal Representatives:* The Claimants were represented in this proceeding by Mr J. Kory Parkhurst, representative of the Koch Companies Public Sector, LLC, of Wichita, Kansas, USA; and by Mr Robert Volterra, Mr Graham Coop, Mr Giorgio Mandelli, Mr Stephen Fietta (until 7 December 2015), Mr Ashique Rahman (until 7 December 2015), Ms. Zuzana Morháčová, Ms Jessica Pineda and Mr Govert Coppens of the law firm Volterra Fietta of London, United Kingdom; and Mr Mark Beckett of the law firm Cooley LLP of New York, NY, USA; and Ms Christina Hioureas of the law firm Chadbourne & Parke LLP of New York, NY, USA (until March 2016). .

1.6 *The Respondent:* The Respondent is the Bolivarian Republic of Venezuela. For ease of reference, the Respondent is here called "Venezuela" or the "Respondent".

1.7 The Respondent is a Contracting State to the ICSID Convention. It signed the Convention on 18 August 1993, deposited its instrument of ratification on 2 May 1995 and the Convention entered into force for the Respondent on 1 June 1995

1.8 *The Respondent's Legal Representatives:* The Respondent was represented in this proceeding by Dr Reinaldo Enrique Muñoz Pedrosa, Procurador General de la República (E) of the Procuraduría General de la República in Caracas, Venezuela; and Mr Christopher Ryan, Mr Thomas B. Wilner, Ms Katia Yannaca-Small (until April 2017) of the law firm Shearman & Sterling LLP of Washington D.C., USA; and Ms. Anna Tevini and Mr Guillermo Salcedo Salas from the same law firm in NYC, NY, USA and Paris, France, respectively; and Mr José Pertierra, of The Law Office of José Pertierra of Washington, D.C., USA.

1.9 *FertiNitro:* The Claimants allege that in March 1998, a series of joint venture companies were formed for the purposes of implementation of their investment in Venezuela. These companies included Fertilizantes Nitrogenados de Oriente, SA; Fertilizantes Nitrogenados de Oriente, CEC; Fertilizantes Nitrogenados de Venezuela, SRL, and Fertilizantes Nitrogenados de Venezuela, FertiNitro, CEC. These joint venture companies are collectively referred to as "FertiNitro" or "the Fertinitro Companies." None of these joint venture companies are parties to this arbitration or legally represented before this Tribunal.

1.10 *Koch José Cayman Limited*: Koch José Cayman Limited is company organised under the laws of the Cayman Islands, as a subsidiary of Koch ("Koch José"). KOMSA held its interest in the FertiNitro Companies through Koch José. Koch José is not a party to this arbitration, nor legally represented before this Tribunal.

1.11 *Petroquímica de Venezuela, SA:* The Venezuelan company Petroquímica de Venezuela, SA (also known as "Pequiven") is a wholly-owned subsidiary of PDVSA, the Respondent's State-owned oil company. Neither of these companies is a party to this arbitration or legally represented before this Tribunal.

(3) The Request for Arbitration

1.12 On 28 June 2011, the Claimants filed a request for arbitration before ICSID (the "Request" or "Request for Arbitration").

1.13 On 19 July 2011, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "ICSID Arbitration Rules").

(4) The Arbitration Tribunal

1.14 On 19 August 2011, the Claimants informed the Secretariat that they maintained their proposal made in the Request that the Tribunal consist of three arbitrators, one arbitrator to be appointed by each Party and the third, who would be the president of the Tribunal, appointed by agreement of the Parties. In this letter the Claimants also appointed the Hon Marc Lalonde, a national of Canada, as arbitrator and requested that the Chairman of the Administrative Council appoint any arbitrators not appointed pursuant to ICSID Convention Article 38 and Rule 4(1) of the ICSID Arbitration Rules.

1.15 On 23 September 2011, the Secretariat confirmed that, in the absence of any agreement between the Parties within 60 days after the registration of the Request, the Tribunal would be constituted pursuant to Article 37(2)(b) of the ICSID Convention and Rule 2(3) of the ICSID Arbitration Rules.

1.16 On 27 September 2011, the Secretariat informed the Parties that Mr Lalonde had accepted his appointment as arbitrator.

1.17 On 13 October 2011, the Respondent appointed Justice Florentino Feliciano, a national of the Philippines, as arbitrator.

1.18 By letter of 18 October 2011, the Secretariat informed the Parties that Mr Feliciano had accepted his appointment as arbitrator and confirmed that, further to the Claimants' request and in the absence of the constitution of the Tribunal within 90 days of the Request's registration, the Chairman of the Administrative Council, under Article 38 of the ICSID Convention, would appoint the President of the Tribunal in consultation with the Parties.

1.19 The Chairman of the ICSID Administrative Council, through ICSID's Secretary-General, proposed three arbitrators for the Parties' consideration by letter dated 28 October 2011.

1.20 On 31 October 2011, the Claimants informed the Secretariat that the Parties had reached an agreement to appoint Mr V.V. Veeder, a national of the United Kingdom, as the President of the Tribunal. On 4 November 2011, Mr Veeder accepted his appointment as President of the Tribunal.

1.21 On 8 November 2011, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore constituted on that date, in accordance with ICSID Arbitration Rule 6(1). Ms Mairée Uran-Bidegain, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

1.22 *First Disqualification Proposal:* On 24 December 2013, the Respondent filed a proposal for the disqualification of Mr Feliciano as a member of the Tribunal (the "First Disqualification Proposal"). This was the first of two separate attempts to disqualify members of the Tribunal.

1.23 On 29 December 2013, the ICSID Secretariat notified the Parties that the proceedings were suspended pursuant to ICSID Arbitration Rule 9(6) and transmitted a schedule for the

Parties to submit further observations on the First Disqualification Proposal. In that same letter, it was noted that according to Procedural Order No. 6, the Respondent's Rejoinder was due by 30 December 2013. The Respondent was therefore invited by the Tribunal to proceed with its written submission on the previously scheduled date in order to minimise any disruption to the arbitration.

1.24 By letter of 30 December 2013, the Respondent stated that it was not in a position to accept the invitation described above.

1.25 The Claimants filed observations on the First Disqualification Proposal on 26 December 2013 and 15 January 2014. The Respondent filed further comments on its proposal on 8 January 2014. On 1 February 2014, Mr Feliciano furnished written explanations pursuant to ICSID Arbitration Rule 9(3). On 1, 6 and 7 February 2014, the Claimants and the Respondent filed additional comments.

1.26 On 10 February 2014, Mr Veeder and Mr Lalonde (the "Unchallenged Arbitrators") notified the ICSID Secretariat that they were "equally divided" within the meaning of Article 58 of the ICSID Convention and ICSID Arbitration Rule 9(4), for reasons "unrelated to [the] merits or demerits" of the First Disqualification Proposal. On the same date, ICSID's Secretary-General transmitted the Unchallenged Arbitrators' notice to the Parties and informed them that the decision on the First Disqualification Proposal would be made by the Chairman of the Administrative Council, in accordance with Article 58 of the ICSID Convention and ICSID Arbitration Rule 9.

1.27 On 24 February 2014, after considering the written submissions made by the Parties and the observations of Mr Feliciano, the Chairman of the Administrative Council decided to reject the Respondent's Proposal to Disqualify Mr Feliciano. The Chairman's written decision was transmitted to the Parties and the Tribunal. These arbitration proceedings resumed on that same day.

1.28 *Second Disqualification Proposal:* On 29 March 2014, shortly before the hearing fixed to take place in Paris, the Respondent proposed the disqualification of all three Members of the Tribunal (the "Second Disqualification Proposal"). On that same date, the ICSID Secretariat notified the Parties that the arbitration proceedings were suspended pursuant to

ICSID Arbitration Rule 9(6). It also transmitted a schedule for the Parties to submit further observations on the Second Disqualification Proposal.

1.29 The Claimants submitted their observations on the Second Disqualification Proposal on 1 and 15 April 2014. The Respondent filed further comments on its Second Disqualification Proposal on 16 April 2014.

1.30 On 8 April 2014, the Secretariat transmitted to the Parties the respective statements of Mr Veeder, Mr Lalonde and Mr Feliciano on the Second Disqualification Proposal (the "Arbitrators' Statements").

1.31 On 30 April 2014, after considering the Parties' observations and the Arbitrators' statements, the Chairman of the Administrative Council issued a Decision rejecting the Respondent's Second Disqualification Proposal. The Chairman decided (inter alia) that:

> *"[A]t the heart of the Respondent's argument is its discontent with a provisional ruling taken by the Tribunal in order to decide on a procedural question. The mechanism set forth under Article 57 of the ICSID Convention and Arbitration Rule 9 seeking to safeguard the integrity of the proceeding is not a mechanism for reconsideration of adverse rulings. Absent any objective circumstances, the mere existence of an adverse ruling in and of itself, is insufficient to prove a manifest lack of impartiality or independence, as required by Articles 14 and 57 of the ICSID Convention."*[2]

1.32 These arbitration proceedings resumed on that same day, namely 30 April 2014.

(5) The Arbitral Procedure

1.33 *First Meeting:* On 21 December 2011, the Tribunal held its First Session with the Parties by telephone conference call. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed (inter alia) that the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish and that the place of these arbitration proceedings would be Washington, DC, USA, with all such matters to be memorialised in a later procedural order

[2] Decision on the Proposal for Disqualification of the Arbitral Tribunal (30 April 2014), Paragraph 100.

including the Minutes of the First Session. The Parties also agreed that these arbitration proceedings would comprise a written phase and an oral phase. The Parties were unable at that time to agree on a full schedule for the jurisdictional/merits phase(s) of these proceedings.

1.34 On 2 January 2012, the Tribunal issued its Procedural Order No. 1 requiring the Claimants to file a full memorial of their case on 2 April 2012.

1.35 On 16 February 2012, in response to the Respondent's written application dated 2 February 2012, the Tribunal issued its Procedural Order No. 2, suspending these arbitration proceedings for a two-month period (starting on 2 February 2012 and ending on 2 April 2012), due to the regrettable death in January 2012 of the Attorney General of Venezuela, Dr Carlos Escarrá. The Tribunal's procedural order also provided that the Claimants' Memorial should now be filed on 2 June 2012.

1.36 On 18 May 2012, the Tribunal sent to the Parties its draft Procedural Order No. 3, Minutes of the First Session and Schedule of Written Pleadings and requested the Parties' written comments on these drafts. Between 31 May 2012 and 28 June 2012, the Parties submitted written comments on the Tribunal's draft schedule.

1.37 On 3 July 2012, having considered the Parties' submissions, the Tribunal issued its Procedural Order No. 3, Minutes of the First Session and Schedule of Written Pleadings, in which it fixed the procedural calendar for the arbitration.

1.38 The Tribunal's schedule for the written phase was subsequently amended on 15 August 2012 by agreement of the Parties, and on 22 November 2012, 18 December 2012, 29 May 2013 and 26 February 2014, pursuant to Procedural Orders of the Tribunal Nos. 4, 5, 6 and 7 respectively, upon the application of a Party or as a result of the Respondent's two disqualification proposals (described above).

1.39 *Bifurcation*. Considering the Respondent's various applications for extensions to the deadline to submit its counter-memorial, the Tribunal further decided in Procedural Order No. 4 dated 22 November 2012, that any jurisdictional objections would be joined to the merits pursuant to ICSID Arbitration Rule 41.

1.40 The schedule for the oral phase was originally fixed by the Tribunal in Procedural Order No. 6 of 29 May 2013 and subsequently amended by the Tribunal following a joint application by the Parties, whereby the Parties agreed to amend the original hearing dates but could not agree on new hearing dates.

1.41 On 13 March 2014, the Tribunal decided that the Hearing would be held in Paris, France, in two separate sessions: the first hearing starting on 31 March 2014 and ending no later than 4 April 2014 (mid-day); and the second session starting on 19 May 2014 and ending no later than 23 May 2014.

1.42 On 29 March 2014, the first part of the hearing scheduled to start in Paris on 31 March 2014 was adjourned as a consequence of the Respondent's Second Disqualification Proposal. The final dates for the oral phase of this proceeding were re-fixed orally by the Tribunal on 19 May 2014, and further confirmed in the Tribunal's Procedural Order No. 9 of 4 August 2014.

1.43 *The Claimants' Submissions:* As regards the written phase of the arbitration, the Claimants filed (i) their Memorial on 4 June 2012, (ii) their Reply on the Merits and Counter-Memorial on Jurisdiction on 2 September 2013 and (iii) their Rejoinder on Jurisdiction on 14 March 2014.

1.44 *The Respondent's Submissions:* The Respondent filed (i) its Counter-Memorial on the Merits and its Preliminary Objections to the Jurisdiction of the Arbitral Tribunal on 28 February 2013, and (ii) its Rejoinder on the Merits and its Reply on Jurisdiction on 3 March 2014.

1.45 *The Claimants' Testimony:* The Claimants adduced signed written statements from the following factual witnesses:

- Brent W. Gwaltney, statements dated 30 May 2012, 20 August 2013 and 23 May 2014;
- Jim Sorlie, statements dated 29 May 2012, 26 July 2013 and 28 May 2014; and
- Melquiades A. Parra, statements dated 29 May 2012 and 12 August 2013.

1.46 The Claimants also adduced signed expert reports from:

- Benjamin Esty, expert reports dated 23 August 2013 and 14 March 2014;
- Tim Giles, export reports dated 2 June 2012 and 30 August 2013; and
- Richard S. Sanders, expert reports dated 30 May 2012 and 27 August 2013.

1.47 *The Respondent's Testimony:* The Respondent adduced signed written statements from the following factual witnesses:

- Anibal Villarroel, statements dated 28 February 2013 and 30 December 2013;
- Carolina Nuñez, statements dated 28 February 2013 and 30 December 2013;
- Edgar Flórez, statements dated 28 February 2013 and 30 December 2013;
- Victor Barrientos, statements dated 28 February 2013 and 30 December 2013, and
- Francisco Toro, statement dated 30 December 2013 (later withdrawn by the Respondent, as explained below).

1.48 The Respondent also adduced signed expert reports from Daniel Flores (of Econ One) dated 28 February 2013 and 3 March 2014.

1.49 *Procedural Meetings:* Further to the Tribunal's Procedural Order No. 5, the Tribunal held a procedural conference call with the Parties on 6 March 2013 to discuss the need, scope and timing of any document production and the dates of the proposed two-week hearing.

1.50 On 19 May 2014, upon the resumption of these arbitration proceedings (following the rejection of the Respondent's Second Disqualification Proposal) the Tribunal held a procedural meeting with the Parties in Paris, at the offices of the World Bank ("the Paris Procedural Meeting"). Mr Veeder, Mr Lalonde and the Parties' legal representatives attended the procedural meeting in person; and Mr Feliciano attended by video-link from the offices of the World Bank in Manila. (Mr Feliciano had recently suffered an accident and had been medically forbidden to travel to Paris). The Paris Procedural Meeting was conducted without objections from the Parties. It was recorded, with the verbatim transcript (corrected) issued to the Parties on 20 May 2014.

1.51 In addition, the President of the Tribunal, with the Parties, and the Secretary of the Tribunal, held pre-hearing organisational meetings by telephone conference calls on 24 March 2014 and 25 August 2014.

1.52 *The First (September) Hearing:* As regards the oral phase of this arbitration, the first hearing on jurisdiction and merits, including the examination of witnesses, took place at the World Bank in Paris, France on 8 September and subsequently from 10-12 September 2014 (the "First (September) Hearing").

1.53 In addition to the Tribunal and its Secretary, the following persons were present at this First (September) Hearing:

1.54 *For the Claimants:* Mr J. Kory Parkhurst, legal representative of KOMSA & KNI; Mr Robert Volterra, Mr Stephen Fietta, Mr Ashique Rahman, Mr Ernesto J. Féliz De Jesús, Ms Zuzana Morháčová, Ms Jessica Pineda, and Ms Zsófia Young, of the law firm of Volterra Fietta. Mr Mark Beckett, Ms Christina Hioureas, Mr Christian Urrutia and Mr Ariel Meyerstien, of the law firm of Chadbourne & Parke LLP. The Claimants' witnesses and experts were also present: Mr Brent Gwaltney, Mr Melquíades A. Parra, Mr Jim Sorlie and Mr Richard Sanders. (Mr Gwaltney, Mr Parra and Mr Sorlie were examined during the First (September) Hearing).

1.55 *For the Respondent*: Mr Christopher Ryan, Ms Katia Yannaca-Small, Ms Anna Tevini, Mr Peik Mäkelä, Mr Guillermo Salcedo Salas, Mr Agustín Acosta Cárdenas, Ms Evelyn Wiese, Mr Ricardo Alarcón Sierra and Ms Victoria Cadiz (all of the law firm of Shearman & Sterling); and Mr Isaias Medina (PDVSA). The Respondent's witnesses were also present: Mr Aníbal Villarroel, Mr Edgar Flórez (FertiNitro); Mr Víctor Barrientos (Pequiven). Messrrs Villaroel, Flores and Barrientos, were examined during the First (September) Hearing, as described below.

1.56 Witnesses examined during the First (September) Hearing were, in alphabetical order:

- Victor Barrientos, Day 3 (11 September 2014), at 09:03:19ff

- Edgar Flórez, Day 4 (12 September 2014), at 10:55:18ff
- Brent Gwaltney, Day 2 (10 September 2014), at 09:17:20ff
- Melquíades A. Parra, Day 2 (10 September 2014), at 11:08:13ff
- Jim Sorlie, Day 2 (10 September 2014), at 12:48:22ff
- Anibal Villarroel, Days 3 & 4 (11 and 12 September 2014), at 14:24:06ff and 09:00:12ff.

1.57 *The Second (November) Hearing:* A second hearing on the merits and quantum, including the examination of the Parties' expert witnesses, took place at the International Dispute Resolution Centre, in London, UK, from 23 to 26 November 2014 (the "Second (November) Hearing").

1.58 In addition to the Tribunal and its Secretary, the following were present at this Second (November) Hearing:

1.59 *For the Claimants:* Mr J. Kory Parkhurst; Messrs. Jeff Brenner and Kevin Barb of KOMSA & KNI; Mr Robert Volterra, Mr Stephen Fietta, Mr Giorgio Mandelli, Mr Ashique Rahman, Ms Zuzana Morháčová, Ms Jessica Pineda, and Ms Zsófia Young, of the law firm of Volterra Fietta; Mr Mark Beckett, Ms Christina Hioureas, and Mr Christian Urrutia, of the law firm of Chadbourne & Parke LLP. The Claimants' expert witnesses were also present: Mr Richard Sanders, Mr Tim Giles and Ms Jessica Resch. (Mr Sanders and Mr Giles were examined during the November Hearing).

1.60 *For the Respondent:* Mr Thomas Wilner, Christopher Ryan, Ms Katia Yannaca-Small, Ms Anna Tevini and Ms Evelyn Wiese of the law firm of Shearman & Sterling. The Respondent's expert witnesses were also present: Mr Daniel Flores, Mr Ettore Komi and Mr Mark Khouzam. (Mr Flores was examined during the November Hearing).

1.61 Witnesses examined during the Second (November) Hearing were, in alphabetical order:

- Daniel Flores, Days 2 & 3 (24 and 25 November 2014), at 12:51:02ff and 09:28:03ff
- Tim Giles, Day 2 (24 November 2014), at 09:30:03ff

- Richard Sanders, Day 1 (23 November 2014), at 14:09:03ff.

1.62 Both the First (September) and Second (November) Hearings were recorded by verbatim transcript in English and Spanish, available to the Parties.[3]

(6) Other Procedural Matters

1.63 *The Submission of Additional Documents*: By letter of 12 March 2014, the Claimants requested that the Tribunal order the Respondent to produce: (a) a witness statement and an expert report submitted by the Respondent in *Gambrinus Corp. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/31) (the "Gambrinus Arbitration"), made by a witness and an expert who also submitted a statement and a report on behalf of the Respondent in this case, and (b) a jurisdictional decision rendered in *Longreef Investments A.V.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/5). The Claimants further requested permission from the Tribunal to introduce into the evidential record ten new documents (the "Additional Documents"), which they sent to the Tribunal and the Respondent along with their request.

1.64 On 14 March 2014, the Respondent objected to the Claimants' request and requested in response that, if the Tribunal were to accede to the Claimants' request, the first week of the hearing (as then scheduled) should be moved to 19 May 2014 so as to give the Respondent sufficient time to prepare a response. The Claimants opposed the Respondent's request on 16 March 2014. The Respondent replied on 17 March 2014, reiterating its request that the first week of the scheduled hearing be postponed to May 2014, and submitting that failure to provide such further time would infringe upon the Respondent's due process and procedural rights. The Respondent further stated that it reserved all its rights in this respect.

1.65 On 18 March 2014, the Tribunal decided upon the Claimants' request of 12 March 2014 (the "18 March Decision"). In this decision, the Tribunal rejected the Claimants' application regarding the *Gambrinus* documentation and the *Longreef* decision.

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[3] References to all transcripts of hearings below are made thus: "First (September) Hearing D1.10" denotes Day 1, page 10 of the transcript.

1.66 As to the Additional Documents, being the third application in the Claimant's request, the Tribunal decided (inter alia) as follows:

> *"As regards the third application, given that this documentation is said by the Claimants to respond directly in rebuttal to the Respondent's (delayed) Rejoinder of 3 March 2014, the Tribunal here orders its admission de bene esse for the purpose only of allowing the Tribunal to read the documentation in order to decide the Claimants' application and the Respondent's opposition (i.e. not as 'evidence').*
> *The Tribunal also orders the Claimant's third application (with the Respondent's opposition) to be argued more fully during the Parties' opening oral submissions at the outset of the first week's hearing in Paris beginning on Monday, 31 March 2014. In the event (which should not here be assumed) that the Tribunal should then decide to admit into evidence any part of this documentation, the Parties should be ready for any consequential order, including any response from the Respondent as regards further submissions and rebuttal evidence."*

1.67 On 21 March 2014, the Claimants made a second request to the Tribunal for permission to submit six additional documents into the evidential record (the "New Documents").

1.68 On 24 March 2014, the Tribunal, represented by its President, held a pre-hearing organisational meeting with the Parties and the Secretary of the Tribunal, by telephone conference call. The Respondent reiterated that it was participating in this call with "full reservation of its rights." The President noted (inter alia) that he could not by himself alone decide the disputed admissibility of the Claimants' application of 21 March 2014 without his co-arbitrators and that the Tribunal expected the Respondent to comment on the Claimants' application regarding Mr Toro on the first day of the scheduled hearing.

1.69 On 25 March 2014, the Respondent objected to the Claimants' 21 March 2014 application and to the 18 March Decision, arguing that it prejudiced its due process rights. The Respondent further alleged that the Tribunal's Procedural Order No. 3 obliged the Claimants to argue the relevance of each document before submitting it to the Tribunal and that the Respondent should be accorded sufficient time to provide counter-arguments and evidence on the relevance of each disputed document. The Respondent requested again that the merits phase of the Hearing be postponed until 19 May 2014, and it further reserved all its rights with respect to the facts surrounding the Claimants' applications and the Tribunal's decisions. The Claimants opposed the Respondent's request on 26 March 2014.

1.70 *The Admissibility of the Written Statement of Mr Toro*: On 19 March 2014, the Claimants requested that the written statement of Mr Francisco Toro (the "Toro Statement") be struck from the evidential record, on the grounds that, *inter alia*, Mr Toro had passed away before his statement was submitted to the Tribunal, and he was therefore not available for cross-examination at the Hearing. The Tribunal invited the Respondent to comment on this application by 24 March 2014.

1.71 On Thursday, 27 March 2014, the Tribunal issued Procedural Order No. 8, deciding (inter alia) the following:

> *"To require all pending procedural applications to be raised with the Tribunal during the Parties' opening submissions on 31 March 2014, including […]: (i) the submission of additional documents into the evidential record; (ii) the hearing schedule and the Claimants' latest application for 15 minutes' direct examination; (iii) the Respondent's application for an adjournment of the hearing; and (iv) the admissibility of the witness statement of Mr Francisco Toro; and without the Tribunal prejudging any of these applications, the Parties shall prepare for the five-day hearing to the fullest extent, including all preparations on the provisional assumption that any or all of these applications may be refused by the Tribunal on 31 March 2014."*

1.72 On 29 March 2014, as already summarised above, the Respondent submitted its Second Disqualification Proposal, which was subsequently rejected by the Chairman of the Administrative Tribunal on 30 April 2014. As also summarised above, the effect of this Second Disqualification Proposal was to cause the abandonment of the scheduled hearing in Paris.

1.73 The Respondent filed additional exhibits and correspondence regarding the Toro Statement on 28 May 2014, followed by the Claimants' supplementary witness statements of Brent Gwaltney and Jim Sorlie on 29 May 2014. The Claimants also submitted correspondence regarding the Toro Statement on 9 June 2014, to which the Respondent replied on 13 June 2014, followed by the Claimants' application on 26 July 2014.

1.74 On 5 September 2014, the Tribunal issued its Procedural Order No. 10, whereby it decided (inter alia):

"a. To permit the Respondent to withdraw from the evidential record the proffered witness statement of Mr Toro dated 30 December 2013 (as a result of which it shall not be treated as evidence in these arbitration proceedings); and
b. To reserve its decision for the time being over any adverse inferences to be drawn from the withdrawal of the Toro Statement and the non-production by the Respondent of Mr Toro's witness statement(s) in the Gambrinus arbitration under Procedural Order No.9."

1.75 On 19 December 2014, the Respondent transmitted to the Secretariat the Parties agreed redactions to the Respondent's Rejoinder and Second EconOne Expert Report that resulted from Respondent's withdrawal of the Toro Statement from the record as indicated above. On 22 December 2014, the Claimants confirmed their agreement with the transmitted redactions, stating in that same communication that they believed further redactions were appropriate and necessary, to which the Respondent replied on 29 December 2014.

1.76 Following the reconstitution of the Tribunal as indicated below, on 17 May 2016, the Claimants submitted an additional application to the Tribunal reiterating their request that additional redactions be applied to the Respondent's Rejoinder and the Second EconOne Expert Report by Dr Flores. This was followed by Respondent's response of 1 June 2016 and the Tribunal's Procedural Order No. 11, of 8 June 2016 ruling on this matter, as explained below.

1.77 *The Advantis Reports*: By letter dated 12 March 2014, the Claimants applied to the Tribunal for permission to introduce into the evidential record a valuation report by Advantis (known as the Second Advantis Report). The Claimants' letter stated, in material part:[4]

"Respondent's Advantis valuation report of FertiNitro: This document was referenced in the Claimant's Reply [paragraph 105] and Mr Brent Gwaltney's Second Witness Statement at paragraph 40 and is clearly relevant to the Respondent's valuation of FertiNitro in this proceeding. In its Rejoinder [paragraph 228], the Respondent makes reference to the alleged good-faith negotiations, in the course of which it presented the document (on a non-without prejudice and confidential basis) to the Claimants. Given that it is already referenced in the Claimants' submissions, was created for the Respondent and, therefore, is already in

[4] Claimants' letter to the Arbitral Tribunal of 12 March 2014, p. 4.

the Respondent's possession, there can be no prejudicial effect in admitting the exhibit at this stage. Furthermore, such evidence of the Respondent's previous valuations of FertiNitro should clearly be relevant to the Tribunal's assessment of the Respondent's purported valuation in this proceeding." (Footnote omitted)

1.78 The Claimants' application was disputed by the Respondent's letter of 14 March 2014, to which the Claimants responded by letter of 16 March 2014 and to which the Respondent responded in turn by letter of 17 March 2014.

1.79 By its instruction letter of 18 March 2014, the Tribunal decided to examine the disputed document for itself, for the time being *de bene esse* only. (The Tribunal there also indicated that the dispute between the Parties would be discussed further with the Parties during the forthcoming hearing, then scheduled to start on 31 March 2014; but later suspended following the Respondent's Second Disqualification Proposal).

1.80 Subsequently, during the Paris Procedural Meeting on 19 May 2014, the Parties agreed upon the admission of this document into the evidential record, with others.[5] This Second Advantis Report was designated as C-157, comprising of three pages under the title "Special Document" with five pages of annexes, submitted in the original Spanish with an English translation. The Respondent submitted, with the Claimants' agreement, the First Advantis Report designated as R-86, comprising of 22 pages of the report, the emails from Advantis to Pequiven and from Pequiven to the Fertinitro shareholders of 18 and 19 May 2011, respectively, transmitting the report, and five pages of annexes in the original Spanish.

1.81 *Post-Hearing and Costs Submissions*: The Parties filed simultaneous post-hearing briefs on 30 January 2015. The Parties filed their submissions on costs on 13 February 2015.

1.82 Mr Feliciano regrettably died in December 2015, at a time when the Tribunal's deliberations had not been fully completed.

[5] *See* Procedural Order No. 9, Paragraphs 17 and 18; Claimants' email message of 28 May 2014; Respondent's email message of 28 May 2014.

(7) The Rule 12 Resumption of the Proceedings

1.83 By letter from the ICSID Secretariat of 16 December 2015, resulting from the death of Mr Feliciano and the vacancy on the Tribunal, these arbitration proceedings were suspended pursuant to ICSID Arbitration Rule 10(2).

1.84 By letter dated 1 February 2016, the ICSID Secretariat notified the Parties that the vacancy created in the Tribunal resulting from the death of Mr Feliciano had been filled with the appointment of Professor Zachary Douglas QC as co-arbitrator made by the Respondent and, further, that, in accordance with ICSID Arbitration Rule 12, these proceedings resumed as from 1 February 2016 from the point it had reached at the time the vacancy occurred.

1.85 By its Procedural Order No. 11 of 8 June 2016, the Tribunal addressed the Claimant's application of 17 May 2016, opposed by the Respondent's letter dated 1 June 2016, to redact certain references to Mr Toro in the Respondent's Rejoinder and its Second EconOne expert report by Dr Flores adduced by the Respondent. The Tribunal decided to order parts of the requested redactions from the Rejoinder and the report, as there set out, subject to further order.

1.86 Before the Third (June) Hearing, the Tribunal sent to the Parties non-exhaustive lists of issues and topics to be addressed at that Hearing. These lists are set out in Part III below.

1.87 *The Third (June) Hearing*: Pursuant to ICSID Arbitration Rule 12, an oral hearing was held at the IDRC in London, United Kingdom on 9 and 10 June 2016, recorded by verbatim transcript available to the Parties. The procedure for this Reconstitution Hearing was set by the Tribunal's letter of 29 April 2016 to the Parties.

1.88 In addition to the Tribunal and its Secretary, the following persons were present at this Third (June) Hearing:

1.89 *For the Claimants:* Mr Jeff Brenner and Mr J. Kory Parkhurst (legal representatives of KOMSA & KNI); Mr Robert Volterra, Mr Graham Coop, Mr Govert Coppens, Ms Jessica Pineda, Ms Zusana Morháčová, Ms Isabella Sif and Ms Chiara Atzeni of the law firm of Volterra Fietta; and Mr Mark Beckett of the law firm Chadbourne & Parke.

1.90 *For the Respondent*: Mr Christopher Ryan, Mr Thomas Wilner, Ms Anna Tevini, Mr David Earnest, Mr Guillermo Salcedo Salas, Ms Evelyn Wiese (all of the law firm of Shearman & Sterling).

1.91 The Third (June) Hearing was recorded by verbatim transcript in English and Spanish, available to the Parties.

1.92 On 30 June 2016, the Parties completed their respective responses to the Claimants' Tables 1 to 4 of agreements and disagreements between Mr Giles and Dr Flores, their expert witnesses on quantum, as requested by the Tribunal at the Third (June) Hearing.[6] The Parties submitted their respective updated claims for costs by written submissions dated 8 and 12 July 2016. By several email messages dated 12 and 26 July 2016, the Parties submitted their respective tables on interest.

1.93 By letter dated 7 July 2016, the Respondent objected to the admissibility of certain parts of the presentational slides used by the Claimants during their closing oral submissions at the Reconstituted Hearing. At the Tribunal's request, the Claimants responded to the Respondent's objections by letter dated 22 July 2016. The Tribunal decided to reserve its decision on the Respondent's objection until this Award. It has decided to reject that objection, conscious also that these objected parts play no material part in the reasons for or result of this Award.

1.94 *Closing:* This proceeding was closed on August 31, 2017, pursuant to ICSID Arbitration Rule 38(1).

[6] Third (June) Hearing D2.110-111.

(8) The Parties' Claims for Relief

1.95 *The Claimants' Requests:* The Claimants claim, as finally pleaded in Section VI of their Post-Hearing Brief (as also confirmed by the Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction, Paragraph 601), requested that the Tribunal render an Award:

a. Declaring that the Respondent has violated Articles 4, 6 and 11 of the Treaty;

b. Ordering that the Respondent pay to KOMSA compensation for the expropriation of its investment and historical losses in the amount of US$ 444.6 million (as at 30 January 2015, subject to adjustment as at the date of the Award); [7]

c. Ordering that the Respondent pay to KNI compensation for the expropriation of its investment in the amount in the amount of US$ 227.8 million (as at 30 January 2015; subject to adjustment as at the date of the Award);[8]

d. Declaring that the Respondent's expropriation of the Claimants' investments was unlawful;

e. Ordering such other damages or relief that the Tribunal deems appropriate for the unlawful character of the Respondent's expropriation and other violations of the BIT;

f. Ordering that the Respondent pay interest on the amounts that the Tribunal awards to the Claimants (including costs and interest), at the LIBOR three-month US Dollar rate plus 2%, compounded on a quarterly basis, from the date of the award until full payment of the amount of the award by the Respondent;

g. Ordering that the Respondent pay the costs of the arbitration, including all the fees and expenses of ICSID and the Tribunal and all the legal costs and expenses incurred by the Claimants, apportioned between the Claimants in the ratio in which

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[7] Updated figure as included in the Claimants' Post Hearing Brief. The compensation requested in Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction for KOMSA amounts to US$ 432.7 million as of 31 August 2013.

[8] Updated figure as included in the Claimants' Post Hearing Brief. The compensation requested in Claimants' Reply on the Merits and Counter-Memorial on Jurisdiction for KNI amounts to USD 220.8 million as of 31 August 2013.

they are awarded compensation, with interest calculated in accordance with paragraph [f], directly above; and

h. Ordering such other and further relief as the Tribunal deems appropriate.

1.96 In their Rejoinder on Jurisdiction,[9] the Claimants requested that the Tribunal "dismiss the Respondent's objections to jurisdiction in their entirety and that the costs for the jurisdictional proceedings be awarded to the Claimants."

1.97 *The Respondent's Requests:* The Respondent, as finally pleaded in its Rejoinder on the Merits[10] and in its Post-Hearing Brief,[11] claims the following relief from the Tribunal:

> *"(i) declaring that KNI's interests in the Offtake Agreement do not constitute an investment within the meaning of Article 25 of the ICSID Convention and/or Article 1(2) of the Venezuela-Switzerland BIT and, thus, are not within the jurisdiction of the Arbitral Tribunal;*
> *(ii) dismissing KNI's claims in their entirety for lack of jurisdiction;*
> *(iii) declaring that the Republic has not breached any of the standards of protection under the Venezuela-Switzerland BIT;*
> *(iv) dismissing all of the Claimants' claims;*
> *(v) awarding the Republic all costs and fees incurred in this arbitration, including reasonable attorneys' fees and expert fees;*
> *(vi) granting the Republic any other relief the Arbitral Tribunal determines to be appropriate."*

[9] Cls. Rej., Paragraph 93.
[10] Resp. Rej., Paragraph 531.
[11] Resp. PHB, Paragraph 273.

PART II: THE PARTIES' DISPUTE

(1) Introduction

2.1 Inevitably, as these arbitration proceedings progressed, the issues arising from the Parties' original dispute became more complex and significantly more numerous, extending originally from an ostensible dispute largely about quantum (in regard to KOMSA's expropriation claim at the First Session) to a major dispute about jurisdiction, liability, compensation, interest and costs by the time of this Award.

2.2 The Tribunal here summarises only the Parties' respective cases as to jurisdiction, liability and quantum. Other parts of the Parties' respective cases are addressed later in this Award.

(2) The Claimant's Case

2.3 *Jurisdiction:* In summary, as to jurisdiction, the Claimants contend that the Tribunal has jurisdiction over the merits of the Parties' investment dispute in this arbitration. The Claimants submit that the dispute arises from several violations by the Respondent of its obligations under the Treaty and the Claimants' corresponding rights (including the Claimants' rights under customary international law) entitling the Claimants to full compensation for the losses that the Claimants have suffered as a direct result of the Respondent's violations of the Treaty.

2.4 The Claimants contend that the Claimants and the Respondent have each consented in writing to refer such an investment dispute to arbitration in accordance with the ICSID Convention, as expressed in Article 25 of the ICSID Convention and Article 9 of the Treaty. The Claimants contend that the Respondent's written consent became effective upon the entry into force of the Treaty on 30 November 1994, duly accepted by the Claimants with their Request for Arbitration of 28 June 2011.

2.5 The Claimants contend that the Parties' dispute comprises an "investment dispute" between a Contracting Party and investors of another Contracting Party and falls within the scope of the Respondent's consent under Article 25 of the ICSID Convention and Article 1(1) (defining "investors"), Article 1(2) (defining "investment") and Article 9(5) of the Treaty.[12]

2.6 The Claimants submit that both KOMSA and KNI are companies constituted under the laws of Switzerland and are accordingly "investors" as defined in Article 1(1)(b) of the Treaty. The Claimants also submit that KOMSA and KNI possessed "investments" in Venezuela, as defined in Article 1(2) of the Treaty. In particular, the Claimants submit that: (i) KOMSA, through Koch José, held an interest in the equity of FertiNitro, thereby constituting an "investment" under the Treaty; and (ii) KNI held an interest in the Offtake Agreement between KNI and FertiNitro,[13] constituting rights to performance under a contract and thereby an "investment" under the Treaty.

2.7 The Claimants contend that there is a "dispute" between the Claimants and the Respondent in respect of the Respondent's failure to comply with its obligations under the Treaty towards the Claimants' investments in Venezuela, including the Respondent's expropriation of KOMSA's interest in FertiNitro and KNI's interest in the Offtake Agreement, together with the Respondent's failure to provide any compensation to the Claimants.

2.8 Accordingly, so the Claimants conclude, there is an "investment dispute" between a Contracting Party and investors of the other Contracting Party that falls within the scope of the Respondent's consent to arbitration under the Treaty and the ICSID Convention.

2.9 The Claimants contend that they requested consultations with the Respondent – to no avail. On 9 November 2010, Mr Steve Packebush (of KOMSA) sent a letter to Mr Saúl Ameliach (President of Pequiven), copied to His Excellency Rafael Ramírez (the Respondent's Minister of Energy and Petroleum) to notify formally the Respondent of the investment dispute between the Claimants and the Respondent relating (as the Claimants contended)

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[12] Agreement between the Swiss Confederation and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments (18 November 1993) ("Treaty") (CLA-1).

[13] Offtake Agreement by and among Pequiven, IPSL, and Koch Oil SA as Buyers and FertiNitro as Seller, dated 8 April 1998 ("Offtake Agreement") (C-19).

to the Respondent's violations of the Treaty.[14] The Claimants there proposed that representatives of the Claimants should meet representatives of the Respondent "to commence discussions and consult as to how Venezuela will compensate Koch for the loss of its investments in Venezuela." The Claimants contend that Pequiven failed to make any offer to the Claimants of compensation for the Respondent's violations of the Treaty. The Claimants then instructed their legal representatives (Latham & Watkins) to submit to the Respondent a further request for consultations, by letter of 20 January 2011 to the Respondent's President, copied to (*inter alios*) the Respondent's Attorney General.[15] Subsequently, according to the Claimants, meetings were held between representatives of the Claimants and the Respondent, producing no satisfactory result to either Claimant.

2.10 Accordingly, the Claimants conclude that they did request and hold consultations with the Respondent in order to arrive at an amicable settlement of the Parties' dispute, as required by the Treaty. The Claimants further conclude that they also waited until the expiry of the 'cooling-off' period required under Article 9(2) of the Treaty, thereupon becoming entitled to submit the Parties' dispute to ICSID for arbitration, as they did with their Request for Arbitration of 28 June 2011 and, further, that this Tribunal has jurisdiction to decide the Parties' dispute.

2.11 *Liability*: In summary, as to liability, the Claimants contend that the Respondent violated its obligations in the Treaty causing loss and damage to each of the Claimants and their investments.

2.12 The Claimants contend that during the 1990s, Venezuela was actively pursuing a policy of encouraging foreign investment, in particular in its hydrocarbon and petrochemicals industries. At this time, Pequiven (as the Respondent's state-owned petrochemical company) was seeking foreign partners to participate in the development of a fertilizer plant in José in the Venezuelan state of Anzoátegui.

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[14] Letter from Mr Steve Packebush, KOMSA to Mr Saúl Ameliach, Pequiven SA (9 November 2010) (RfA, Exh. 6).
[15] Letter from Robert Volterra, Latham & Watkins to President Hugo Rafael Chávez Frías (20 January 2011) (RfA, Exh. 7).

2.13 In 1997, KOMSA was selected as a foreign partner with the requisite expertise to participate in the development of the proposed fertilizer plant and to market the fertilizer to be manufactured by the proposed plant. KOMSA and Pequiven proceeded to enter into a joint venture for the construction and operation of two ammonia and two granular urea plants in José (the "FertiNitro Plant") and the marketing and sale of the ammonia and urea produced at the Plant.

2.14 In March 1998, a series of joint venture companies were formed for the purpose of implementing the project. These were the FertiNitro Companies (here collectively called "FertiNitro"). External funding for the development of the FertiNitro Plant was secured on the understanding that the offtake from the Plant would be sold to KNI, Pequiven and International Petrochemical Sales Limited (a subsidiary of Pequiven) on the terms contained in the Offtake Agreement. According to the Claimants, from the outset, the Offtake Agreement was integral to the Claimants' investments.

2.15 Once external funding for the development of the Plant had been secured, Pequiven, KOMSA, Snamprogetti Netherlands BV ("Snamprogetti") and Polar José Investments, Limited ("Polar") entered into a series of agreements in respect of the project. These agreements included: (i) the "Joint Investors' Agreement" dated 8 April 1998 between Pequiven, KOMSA, Snamprogetti and Polar,[16] which provided (inter alia) that FertiNitro would be 35% owned by Koch José, 35% owned by Pequiven, 20% owned by Snamprogetti and 10% owned by Polar; (ii) the "Offtake Agreement" dated 8 April 1998,[17] which granted to KOMSA the right to purchase a guaranteed quantity of ammonia and urea produced by FertiNitro at a discounted price for a 20-year term (KOMSA, through Koch José, later owned 25% of the equity in FertiNitro; and KOMSA's rights under the Offtake Agreement later vested in KNI) and (iii) the "EPC Contract" dated 8 April 1998,[18] for the

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[16] Joint Investors' Agreement by and among Pequiven, Koch Oil SA, Snamprogetti Netherlands BV, and Polar Uno, CA (8 April 1998) ("JIA") (C-18).

[17] Offtake Agreement (C-19).

[18] Engineering, Procurement and Construction Contract by and between FertiNitro and Snamprogetti (8 April 1998) (C-24).

construction of the Plant between FertiNitro, CEC and Snamprogetti as the main contractor.

2.16 Construction of the Plant commenced in May 1998 and was completed in December 2001 when FertiNitro granted the provisional acceptance certificate to Snamprogetti. Earlier, in May 2001, FertiNitro had commenced commercial production at the Plant. The Claimants submit that, other than certain periods of interruption (for example when PDVSA failed to provide methane gas or Pequiven failed to provide electricity to the Plant), commercial production at the Plant continued until the Respondent expropriated FertiNitro on 11 October 2010, as summarised below.

2.17 The Claimants contend that the Respondent took unlawful measures against the Claimants' investments in violation of the Treaty, which have caused the Claimants to suffer considerable losses. These measures culminated on 11 October 2010 in the expropriation of KOMSA's interest in FertiNitro and the expropriation of KNI's interest in the Offtake Agreement. The Respondent failed to provide to the Claimants any compensation for its expropriation of their investments. In brief, the Claimants list the Respondent's unlawful measures against the Claimants' investments, in violation of Articles 4(1), 4(2), 6, and 11(2) of the Treaty, as follows.

2.18 *New and Increased Taxes:* The Respondent imposed on FertiNitro a series of new taxes and tax increases with the object and effect of diverting its profits to the Respondent. This is the first of KOMSA's "Historical Losses".

2.19 These new taxes eroded the profitability of FertiNitro and deprived KOMSA of the economic benefits of its investments. These taxes and tax increases were directly contrary to KOMSA's legitimate expectations on which it relied when deciding to invest in FertiNitro. For example, in December 2005, the Respondent imposed a Narcotic and Psychotropic Substances Tax on FertiNitro that obliged FertiNitro to allocate funds to specified social programs or to provide to the Respondent 1% of FertiNitro's annual net income. At about this time, the Respondent further enacted the Organic Law on Science, Technology and Innovation.[19] It obliged FertiNitro, beginning on 1 January 2006, to allocate funds to specified scientific development programs or to provide to the Respondent 0.5% of its gross income generated in Venezuela. Further, the municipal tax applicable to FertiNitro was increased in 2006 from 1% to 2% and in 2007 to 2.4% of FertiNitro's turnover. These measures, particularly when considered cumulatively, negatively affected the profitability of FertiNitro at the expense of KOMSA and to the benefit of the Respondent.

2.20 *VAT:* The Respondent failed promptly or at all to provide to FertiNitro VAT rebates to which they were entitled. This is the second of KOMSA's "Historical Losses".

2.21 In May 1999, the Respondent enacted the Value Added Tax ("VAT") Law.[20] This law provided for a zero rate tax for exporters and granted to such exporters the right to recover Special Tax Rebate Certificates ("CERTs") in respect of VAT paid on the purchase or import of goods and services. Under the VAT law, the taxpayer would submit a request to the tax administration of the Respondent, the "SENIAT" (abbreviated from the Spanish "*Servicio Nacional Integrado de Administración Aduanera y Tributaria*"); and the SENIAT would then issue a "CERT" (abbreviated from the Spanish, "*Certificados Especiales de Reembolso Tributario*"). The taxpayer could then use its CERTs to pay any federal revenue taxes (including income tax and VAT) or assign them to third parties for similar purposes. FertiNitro paid substantial amounts of VAT to the Respondent during the course of its operations. In respect of these payments, FertiNitro duly submitted requests to the SENIAT.

2.22 However, from about 2005 onwards, the SENIAT unreasonably and arbitrarily delayed the issue of CERTs to FertiNitro. This delay resulted in losses to FertiNitro particularly when the CERTs were paid after considerable delay during which local inflation - increased and the Venezuelan Bolivar was devalued against hard currencies (including the US Dollar). The Respondent also failed to provide to FertiNitro a substantial amount of VAT rebates

[19] Organic Law on Science, Technology and Innovation (effective as of 1 January 2006) ("Science and Technology Law") (C-43).

[20] Law of Partial Reform of the Law on Value Added Tax (11 August 2004) (C-55).

despite its obligation to do so. This arbitrary conduct by the Respondent further eroded the profitability of FertiNitro at the expense of KOMSA (and its other non-State shareholders), to the benefit of the Respondent.

2.23 *Urea Decree and Urea Resolution:* The Respondent issued a Urea Decree and a subsequent Urea Resolution that obliged FertiNitro to sell urea to the Respondent (through Pequiven) at substantially below production costs and market values, as summarised below. This is the third of KOMSA's "Historical Losses".

2.24 On 26 February 2007, the President of the Respondent signed Decree 5,218 (the "Urea Decree").[21] The Urea Decree was published in the Official Gazette No. 38,638 on 6 March 2007 and took effect on that date. Article 2 of the Urea Decree provided that: "Manufacturers, suppliers […] exporters of nitrogenous fertilizers […] are required to supply these on a priority basis to the national market, in accordance with the price regulations established for their sale." Article 3 provided that the prices would be established by joint resolutions of the Ministries of Agriculture and Land, Light Industries and Trade and Energy and Petroleum.

2.25 Pursuant to Article 3 of the Urea Decree, the Respondent's Ministries of Agriculture, Light Industries and Trade and Energy and Petroleum issued a joint resolution (the "Urea Resolution").[22] It was published in the Official Gazette No. 38,674 on 2 May 2007. The Urea Resolution provided (inter alia) that Pequiven was solely authorised to administer the delivery of urea in accordance with the Urea Decree and that Pequiven could purchase "the urea it requires to cover the needs of the Nation, from any manufacturer established in the country, at the maximum bulk sales price at the plant gate of Bs. 155,200/MT."[23]

2.26 The sales prices at which FertiNitro was obliged to sell urea to Pequiven were substantially less than the costs of production of urea incurred by FertiNitro. Other than Pequiven,

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[21] Decree 5,218 (26 February 2007) ("Urea Decree") (C-80).

[22] Joint Resolution by the Ministry of the People's Power for Agriculture and Land, the Ministry of the People's Power for Light Industry and Trade, and the Ministry of the People's Power for Energy and Petroleum (3 May 2007) ("Urea Resolution") (C-82).

[23] Urea Resolution (C-82), Art. 10.

FertiNitro was the sole manufacturer and exporter of urea in Venezuela. Accordingly, the Urea Decree and the Urea Resolution were aimed by the Respondent directly at FertiNitro and compelled FertiNitro to divert urea to the Respondent (through Pequiven) at prices that were below production costs. The quantity of urea that the Respondent (through Pequiven) could purchase from FertiNitro at the price set in the Urea Resolution was unlimited.

2.27 Subsequently, as required by the Urea Decree and the Urea Resolution, FertiNitro sold substantial quantities of urea to Pequiven at prices significantly below its production costs. These arbitrary and discriminatory measures by the Respondent eroded the profitability of FertiNitro at the expense of the Claimants (and the other non-State shareholders), to the benefit of the Respondent.

2.28 *Interference - FertiNitro:* The Respondent (acting through Pequiven) progressively interfered in the management and operation of FertiNitro.

2.29 KOMSA invested in FertiNitro with the legitimate expectation that its investment was a commercial venture in which KOMSA and Pequiven would be equal partners. KOMSA had a legitimate expectation that any control that Pequiven might have over FertiNitro would be balanced by KOMSA's control over FertiNitro. KOMSA had a legitimate expectation that FertiNitro would be operated as a commercial enterprise for the generation of profits for all its shareholders.

2.30 From around 2006, the Respondent, acting through Pequiven, proceeded to interfere in the management and operation of FertiNitro and ultimately assumed control over FertiNitro. The Respondent's strategy culminated in the expropriation of FertiNitro by the Respondent on 11 October 2010.

2.31 *Expropriation - FertiNitro:* The Respondent expropriated FertiNitro on 11 October 2010 with no compensation, in breach of Article 6 of the Treaty.

2.32 On 10 October 2010, the President of the Respondent announced the expropriation of FertiNitro on his weekly television broadcast "Aló Presidente". During this broadcast, the President signed what appeared to be a decree providing for the expropriation of

FertiNitro.[24] On 11 October 2010, Decree Number 7713 dated 10 October 2010 was published in Official Gazette No. 380.113.34. It provided for the expropriation of FertiNitro (the "Expropriation Decree").[25]

2.33 The Expropriation Decree includes the following provisions: Article 1 provides for the mandatory acquisition by the Respondent of the assets of FertiNitro; Articles 2, 3 and 5 specifically task Pequiven with the role of carrying out the expropriation of FertiNitro and identify Pequiven as the "expropriation entity"; and Article 6 orders Pequiven to occupy the assets. The Expropriation Decree made no provision for the payment of compensation to KOMSA in accordance with the Treaty.

2.34 On 11 October 2010, Venezuelan State television reported that the Respondent's Minister of Energy and Petroleum of the Respondent had visited the Plant in person in order to take it over. In his public address at the FertiNitro Plant, the Minister was reported to have stated, "[W]e are already in control of the Plant and we are carrying out an inspection of our facilities."[26] Also on 11 October 2010, Mr Clark Inciarte (who was at that time both President of FertiNitro and an employee of Pequiven) indicated during a telephone call with the two KOMSA-appointed directors of FertiNitro that FertiNitro was under the complete control of the State and that its board of directors had ceased to function.[27] Following the announcement of the Expropriation Decree, no board of directors or Finance Committee meetings of FertiNitro were convened by FertiNitro.

2.35 KOMSA had received no advance notice that the Respondent's President would make this announcement or that the Respondent would expropriate FertiNitro. KOMSA had no opportunity to object to this expropriation of its investment in FertiNitro. To the contrary, the expropriation was announced by the Respondent's President as a 'fait accompli'.

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[24] Transcript of Spanish language video file, "Minister Ramírez Heads Takeover of FertiNitro" (11 October 2010) (C-107).
[25] Decree 7,713 (10 October 2010) ("Expropriation Decree") (C-9).
[26] Transcript of Spanish language video file, "Minister Ramírez Heads Takeover of FertiNitro" (11 October 2010) (C-107).
[27] Witness Statement of Brent W. Gwaltney (30 May 2012) ("Gwaltney WS1"), Paragraph 122.

2.36 *Expropriation - KNI:* The Respondent also expropriated KNI's interest in the Offtake Agreement without compensation, in breach of Article 6 of the Treaty, on 11 October 2010. Contemporary statements made by representatives of Pequiven, as the expropriating entity for the Respondent which had taken over FertiNitro under the Expropriation Decree, confirmed to the Claimants that KNI's interest in the Offtake Agreement had also been expropriated by the Respondent.

2.37 *Compensation:* In summary, the Claimants contend that the Respondent's several violations of the Treaty have caused considerable losses to the Claimants. Accordingly, the Respondent is obliged to provide to the Claimants full compensation for such losses in accordance with the applicable principles of customary international law.

2.38 The Claimants claim full compensation including (but not limited to) the profits which KOMSA has lost as a result of the Respondent's expropriation of its investment in the equity of FertiNitro, its Historical Losses and the Respondent's expropriation of KNI's interest in the Offtake Agreement.

2.39 As later formulated by the Claimants, the compensation claimed by KOMSA for the unlawful expropriation of its interest in FertiNitro and its Historical Losses amount to US$ 444.6 million (as at 30 January 2015); and the compensation claimed by KNI for the expropriation of its interest in the Offtake Agreement amounts to US$ 227.8 million (also as at 30 January 2015).[28]

(3) The Respondent's Case

2.40 *Jurisdiction:* In summary, the Respondent objects to the competence or jurisdiction of the Tribunal and ICSID to address KNI's claims regarding the Offtake Agreement. The Respondent contends that it is a "foundational principle of international investment law" that the jurisdiction of arbitral tribunals is limited to "investments" within the meaning of the ICSID Convention and the applicable investment treaty, law or agreement. In this arbitration, therefore, KNI may assert a claim only if the Offtake Agreement (a mere

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[28] Claimants' Post-Hearing Brief (30 January 2015) ("Cls. PHB"), p. 99 (Section VI, (b)(c)).

commercial sales agreement) constitutes an "investment" within the meaning of both Article 25(1) of the ICSID Convention and Article 1(2) of the Treaty. The burden of proof lies with KNI, which must prove that it has made a covered investment under the ICSID Convention and the Treaty. The Respondent contends that KNI has failed to do so because no such investment exists with respect to the Offtake Agreement.

2.41 The meaning of "investment" has an objective and inherent meaning pursuant to both the ICSID Convention and the Treaty. That meaning, in turn, requires the making of a "contribution", over a certain "duration", with an element of "risk" and subject to "territoriality". A mere commercial sales agreement is not an "investment". KNI's failure to fit the Offtake Agreement within the meaning of "investment" strips both ICSID and this Tribunal of any competence and jurisdiction concerning the alleged expropriation of the Offtake Agreement in October 2010 and even more so over the termination of the Offtake Agreement by FertiNitro in February 2012.

2.42 *Liability:* In summary, the Respondent denies any liability to either Claimant under the Treaty. The Respondent is a sovereign state and guarantor of the public interest within Venezuela. The Respondent contends that, as such, it has the obligation and the authority under both national and international law to act in the interest of the people of Venezuela and their general well-being, including the issuance of laws and regulations and the mandatory acquisition of private interests. This right is embedded in the Respondent's Constitution[29] and its Expropriation Law for Public or Social Benefit of 1 July 2002 (the "Expropriation Law").[30] These texts provide the legal framework for expropriation in the public interest, as also under customary international law and the Treaty.

2.43 The Respondent repeatedly confirmed that sovereign control over the domestic production of food and food-related products was a matter of national importance in Venezuela. To that end, in 2007 the Respondent issued the Urea Decree.[31] This Decree declared food production to be in the "national interest," "essential for the economic and social

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[29] Constitution of the Bolivarian Republic of Venezuela (15 February 2009) (R-3) (C-47).
[30] Expropriation Law for Public or Social Benefit (1 July 2002) (R-9, R-53, C-140).
[31] Urea Decree (C-80).

development of the Nation," and "an essential element of national safety and sovereignty." As a consequence, the Urea Decree declared nitrogenous fertilizers as goods of "basic necessity" which were critical to the protection of Venezuela's national interest.

2.44 In 2008, the Respondent issued Decree No. 5,835 ("Decree 5,835") [32] to ensure that the supply of products necessary to food production could continue uninterrupted. This Decree declared goods necessary for food production and products of "basic necessity" to be items in the public utility and social interest.

2.45 Through these measures, and the promulgation of various national plans designed to boost agricultural productivity, the Respondent articulated a public purpose of securing a sufficient supply of nitrogenous fertilizer to achieve its goal of food sovereignty within Venezuela.

2.46 *Historical Losses*: KOMSA asserts, wrongly, that the Respondent breached Articles 4(1), 4(2), and 11(2) of the Treaty in regard to its claims for "Historical Losses." These claims relate principally to the following: (i) the enactment of the Organic Law on Science, Technology and Innovation (the "Science and Technology Law");[33] (ii) the issuance of the Municipal Ordinance by the Municipality of Simón Bolívar increasing a pre-existing municipal tax (the "Municipal Ordinance");[34] (iii) the Respondent's alleged refusal to provide to FertiNitro certain VAT credits; and (iv) the Urea Decree and the Urea Resolution. The Respondent submits that these claims for "Historic Losses" are groundless as described below.

2.47 *New and Increased Taxes:* The Science and Technology Law was a measure of general application that required companies to invest a small percentage of their revenues back into the company through scientifically focused research and development. Nothing in that law conflicts with the Respondent's obligations under the Treaty. The increase in pre-existing municipal tax, from 1% to 2% and ultimately to 2.4%, did not violate any of the

[32] Decree 5,835 (28 January 2008) (R-23).
[33] Science and Technology Law (C-43).
[34] Ordinance for Taxes on Industrial, Commercial, Service or Similar Economic Activities (29 December 2005) (C-45).

Respondent's obligations under the Treaty. This municipal tax is generally applicable to entities operating in the Municipality of Simón Bolívar; it was not directed at FertiNitro; and it was not punitive.

2.48 *VAT:* As regards the Claimants' claim regarding VAT credits, the factual evidence shows that all VAT credits applied for by FertiNitro were, in fact, granted by the Respondent.

2.49 *The Urea Decree and Urea Resolution*: The Urea Decree and Urea Resolution were vital and necessary measures intended to give effect to the Respondent's policy of securing access to materials critical to the production of food in Venezuela. Those measures required FertiNitro to sell limited quantities of urea to Pequiven to cover any domestic demand that could not be met through Pequiven's own production. The Respondent was forced to enact such measures after FertiNitro's refusal to make such sales voluntarily on the basis of need.

2.50 *Interference – FertiNitro*: There is no evidence that the Respondent interfered with the management and operation of FertiNitro. To the contrary, the evidence shows that the Respondent took no steps to interfere with FertiNitro's management or operation. FertiNitro's board of directors consisted of nine directors, of which only three were appointed by Pequiven, with the remaining six appointed by KOMSA and FertiNitro's other shareholders. According to the Joint Investors' Agreement of 8 April 1994 (the "JIA"), no decision could be taken without KOMSA's acceptance.[35]

2.51 *Expropriation - FertiNitro*: The Respondent denies this claim. FertiNitro was a Venezuelan corporation and, as such, operated in Venezuela within the legal, political, social and economic framework of Venezuela. Pequiven was a Venezuelan State-owned petrochemical company and the 35% owner of FertiNitro and, as such, it spent years unsuccessfully attempting to persuade FertiNitro voluntarily to engage in commercial activities that would further the Respondent's legitimate and reasonable policy objectives

[35] JIA (C-18).

relating to food security in Venezuela. When those efforts failed, Pequiven attempted to purchase FertiNitro outright, but Pequiven was rebuffed by KOMSA.

2.52 After it became clear that FertiNitro would not voluntarily undertake commercial activities designed to accommodate the Respondent's interests, the Respondent was left with no option but to set in motion procedures to acquire FertiNitro in accordance with Venezuelan law. Thus, on 11 October 2010, the Respondent published the Expropriation Decree, ordering the mandatory acquisition of FertiNitro's assets. This Expropriation Decree declared that the acquisition was part of the Respondent's long-standing policy to protect Venezuela from the harmful effects of fluctuations in the global food market by securing domestic and sovereign control over industries critical to the production of food within Venezuela.

2.53 Although the Expropriation Decree initiated the acquisition process, it did not in and of itself operate to transfer the ownership of FertiNitro's assets. According to Venezuelan law, such a transfer only occurs following a judgment by the Venezuelan courts. Pequiven, as the designated acquiring entity, initiated the necessary proceedings in the Venezuelan courts on 26 July 2011, after KOMSA withdrew from negotiations over the amount of compensation due following FertiNitro's acquisition.[36]

2.54 The Respondent's actions in relation to the mandatory acquisition of FertiNitro's assets were lawful and did not constitute any breach of the Treaty. The evidence shows that the Respondent's actions surrounding the issuance of the Expropriation Decree and its application were lawful and carried out by the Respondent in accordance with due process. The Claimants' efforts to seek compensation, therefore, must fail as a matter of liability under the Treaty. Moreover, Venezuelan law provides more than adequate procedures to compensate KOMSA. For all these reasons, the Tribunal should dismiss KOMSAs' claim.

2.55 *Expropriation – KNI:* This claim is denied by the Respondent (in addition to its jurisdictional objection). KNI asserts, wrongly, that KNI's interest in the Offtake

[36] Decision accepting jurisdiction to hear the Request of Arbitration, Court of First Instances of the Judicial Circuit Anzoátegui (29 July 2011) (R-63).

Agreement was expropriated by the Respondent. The Offtake Agreement was a commercial sales contract, by which Pequiven, IPSL and KNI agreed to purchase 100% of FertiNitro's production; it was not an "investment" by KNI; and it was not expropriated by the Respondent.

2.56 As submitted in the Respondent's jurisdictional objection, KNI's claim flies in the face of the well-settled principle that sales contracts do not constitute "investments" pursuant to Article 25 of the ICSID Convention; and a commercial sales contract, such as the Offtake Agreement, does not satisfy the definition of "investment" in the Treaty.

2.57 The Expropriation Decree did not address or cover the Offtake Agreement. The factual evidence shows that the Offtake Agreement remained in effect for over 16 months after the date when the Expropriation Decree was issued by the Respondent. Ultimately, FertiNitro's directors (not the Respondent) decided to terminate the Offtake Agreement on 28 February 2012. That decision was made for commercial reasons and was taken solely by FertiNitro. In these circumstances, the Claimants' claim that KNI's interest in the Offtake Agreement was expropriated by the Respondent must fail under the Treaty.

2.58 *Compensation:* In summary, in the event that the Tribunal determines that the Respondent's actions in relation to the mandatory acquisition of FertiNitro's assets did violate Article 6 of the Treaty, the Claimants are entitled only to the "fair market value" of KOMSA's interests in FertiNitro, as provided by both Venezuelan and international law. Despite the clarity of Venezuelan and international law, the Claimants are seeking substantially more than a "fair market value" in this arbitration.

2.59 Further, the Claimants have asserted several additional claims in this arbitration, for which they argue they are entitled to extraordinary, unreasonable and unsupported amounts for KNI's interest in the Offtake Agreement and additional amounts as KOMSA's "Historical Losses" for the alleged breaches of Articles 4(1), 4(2), 6 and 11(2) of the Treaty. There is no support for these claimed amounts; and the Claimants have failed to substantiate any losses associated with those alleged breaches of the Treaty.

2.60 The Respondent concludes that the amount of compensation claimed by the Claimants in this arbitration is obscenely overstated. The Treaty sets forth a precise and exhaustive standard of compensation. Under this standard, the Claimants are entitled only to the "fair market value" of KOMSA's interest in FertiNitro immediately before the issuance of the Expropriation Decree on 11 October 2010. There is no legal basis to support the Claimants' position that they are both entitled to some measure of punitive damages by virtue of the allegedly unlawful nature of the Respondent's acts. In particular, the amount the Claimants seek in relation to the Expropriation Decree is grossly overstated; and the Claimants' "fair market value" calculations are wrongly predicated on untenable assumptions.

PART III: THE PRINCIPAL ISSUES

(1) Introduction

3.1 The Tribunal lists below the six principal issues relevant to this Award. This list is not exhaustive of all issues raised by the Parties in this arbitration.

(2) The Principal Issues

3.2 ***Issue 1 –*** *Jurisdiction: KNI and the Offtake Agreement (not KOMSA):* This jurisdictional issue arises under Articles 1(2) and 2 of the Treaty and Article 25(1) of the ICSID Convention. This jurisdictional issue is addressed in Part VI of the Award below.

3.3 ***Issue 2 –*** *Factual Background:* These factual matters are addressed principally in Part V of this Award below, as also when addressing issues of jurisdiction, liability and compensation in Parts VI, VII, VIII and IX.

3.4 ***Issue 3:*** *Liability:* The issues of liability arise under Articles 4(1), 4(2), 6 and 11(2) of the Treaty, as cited in Part IV of this Award. Liability for expropriation under Article 6 of the Treaty, as regards KOMSA and KNI respectively, is addressed in Part VII of this Award below. Liability under Articles 4(1), 4(2) and 11(2) of the Treaty, as regards KOMSA, is addressed in Part VIII of this Award below.

3.5 ***Issue 4 –*** *Compensation:* This issue arises under the Treaty and, as submitted by the Claimants, customary international law. As regards the former, Article 6 of the Treaty provides, in material part: "… Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier, shall include interest from the date of expropriation, be paid without delay in a freely convertible currency to the person entitled thereto and be freely transferable." Compensation is addressed in Part IX of this Award below.

3.6 ***Issue 5 –*** *Interest:* This issue arises under the Treaty and, as submitted by the Claimants, under customary international law. As to the former, Article 6 of the Treaty provides, in material part that compensation thereunder "shall include interest from the date of expropriation." Interest is addressed in Part XI of this Award below.

3.7 ***Issue 6*** – *Costs*: The issue of legal and arbitration costs arises under Article 61(2) of the ICSID Convention and Rule 47(1)(j) of ICSID Arbitration Rules. Costs are also addressed in Part XI of this Award below.

(3) Detailed Issues, Questions and Related Matters

3.8 During the arbitration, the Parties and (for the Third Hearing) also the Tribunal developed successive lists of issues, questions and ancillary comments on related matters. These are lengthy, repetitive and duplicate much of what already appears in a different form elsewhere in this Award. Nevertheless, the schedule below served as a check-list of matters that the Tribunal addressed during the Hearings and in arriving at its several decisions in this Award. However, it has not been necessary for the Tribunal to decide all these matters. Again, the schedule is not exhaustive of all detailed issues, questions and related matters raised by the Parties during the arbitration.

** Schedule of Detailed Issues, Questions and Related Matters*

Issue 1 *– Jurisdiction: KNI and the Offtake Agreement*

3.9 According to the Respondent, as already briefly summarised above, the Tribunal has no jurisdiction to address the claim made by KNI in respect of the Offtake Agreement. According to the Claimants, the Offtake Agreement was an integral part of the FertiNitro Project; and KNI's interest in the Offtake Agreement qualifies as an "investment" under both the ICSID Convention and the Treaty. The Claimants therefore take issue with the Respondent's jurisdictional objection.

Issue 2 *– Factual Background*

3.10 According to the Claimants, three essential facts were and remain entirely unchallenged on the evidential record adduced in this arbitration. First, the Respondent's 'Apertura' policy, and its other assurances, precipitated the Claimants' investments in Venezuela. Second, starting in 2005, the Respondent progressively interfered with the Claimants' investments. Third, on 11 October 2010, without any formal notice, the Respondent openly and unambiguously expropriated both KOMSA's equity interest in FertiNitro and KNI's interest in the Offtake Agreement. There are thus, according to the Claimants, few (if any) principal issues as to the factual background to the Parties' dispute.

3.11 According to the Respondent, none of the facts alleged by the Claimants establish any breach of its obligations under the Treaty. The Claimants are put to proof of their factual allegations to the contrary.

Issue 3: *Liability*

3.12 *Expropriation:* According to the Claimants, the Respondent breached Article 6 of the Treaty by unlawfully expropriating KOMSA's interest in FertiNitro and KNI's interest in the Offtake Agreement on 11 October 2010; and, to date, the Respondent has failed to compensate the Claimants for its expropriation of the Claimants' investments.

3.13 According to the Respondent, its mandatory acquisition of FertiNitro's assets was lawful because the Respondent complied with the requirements of Article 6 of the Treaty. Also according to the Respondent, it did not mandatorily acquire the Offtake Agreement; FertiNitro terminated the Offtake Agreement in February 2012 for commercial reasons; and FertiNitro's decision to terminate the Offtake Agreement is not attributable to the Respondent under international law.

3.14 *FET*: This issue of liability arises under Article 4(1) of the Treaty. It provides, in material part, that the Respondent "shall provide, in accordance with the rules and principles of International Law, investments in its territory of investors of the other Contracting Party fair and equitable treatment […]" (the "FET standard").

3.15 According to the Claimants, the Respondent breached its obligation under Article 4(1) to accord fair and equitable treatment to the Claimants' investments. According to the Respondent, it did not breach the FET standard of Article 4(1) of the Treaty. The Respondent contends that this FET standard is tied to the minimum standard of customary international law; and that the Claimants have failed to substantiate their claims.

3.16 *FPS:* This issue arises under Article 4(1) of the Treaty. It provides, in material part, that the Respondent: "shall provide, in accordance with the rules and principles of International Law, investments in its territory of investors of the other Contracting Party […] full protection and security […]" (the "FPS standard").

3.17 According to the Claimants, the Respondent breached its obligation under Article 4(1) to accord full protection and security to the Claimants' investments. According to the Respondent, it complied with its obligation under Article 4(1) to afford full protection and security: this FPS standard relates to physical injury only; and the Respondent did not fail to protect KOMSA's investment.

3.18 *Interference:* This issue also arises under Article 4(1) of the Treaty. It provides, in material part, that the Respondent "shall [not] impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, expansion, disposal or liquidation of such investments."

3.19 According to the Claimants, the Respondent breached its obligation under Article 4(1) by putting in place arbitrary and discriminatory measures that impaired KOMSA's management, operation, use and enjoyment of its investment. According to the Respondent, it did not impair the management, operation, use or enjoyment of FertiNitro through any arbitrary or discriminatory measures. The Respondent submits that the Claimants have misapplied the applicable standard; and the Claimants have provided a misleading account of the Respondent's actions to allege a breach of Article 4(1) of the Treaty.

3.20 *National Treatment*: This issue arises under Article 4(2) of the Treaty. It provides, in material part: "The treatment accorded by each Contracting Party to the investment by investors of the other Contracting Party in its territory, or to the investors themselves as regards their investments, shall not be less favourable than that accorded to investments of their own investors […], or to the investors concerned as regards their investments" (the "National Treatment standard").

3.21 According to the Claimants, the Respondent breached its obligation under Article 4(2) to accord to the Claimants and their investments treatment in accordance with the National Treatment standard. According to the Respondent, it did not breach the National Treatment standard in Article 4(2) of the Treaty. The Respondent submits that the Claimants have misapplied the applicable standard; and that it did not treat Pequiven more favourably than KOMSA.

3.22 *Umbrella Clause:* This issue arises under Article 11(2) of the Treaty. It provides: "Each Contracting Party shall observe any obligation it has assumed regarding the treatment of investments in its territory by investors of the other Contracting Party" (the "Umbrella Clause").

3.23 According to the Claimants, the Respondent failed to observe the obligations assumed in Article 11(2) regarding the treatment of the Claimants' investments. According to the Respondent, it has not breached Article 11(2) of the Treaty, particularly because there were no such "obligations".

***Issue 4** – Compensation*

3.24 In brief, the Claimants submit that the Respondent must pay full compensation under Article 6 of the Treaty and international law for all their losses caused by the Respondent's expropriatory and other non-expropriatory violations of the Treaty (namely KOMSA's "Historical Losses"). Such compensation for KOMSA amounts to a total principal sum of US$ 444.6 million (calculated as at 30 January 2015). As to KNI, such compensation amounts to a total principal sum of US$ 227.8 million (calculated as at 30 January 2015).

3.25 In brief, the Respondent submits that the Claimants' quantification of their damages must be rejected by the Tribunal, for several reasons. First, the Respondent contends that the compensation claimed by KOMSA and KNI is vastly overstated. Second, it submits that the relevant standard of compensation is to be found in the Treaty (not in customary international law). Third, the Respondent contends that KOMSA's alleged "Historical Losses" are unfounded.

Issue 5 – Interest

3.26 The Claimants submit that they are they are entitled to compound interest on any sums awarded by the Tribunal. The Respondent contends that the Claimants' claims for compound interest are ill-founded.

Issue 6 – Costs

3.27 The Claimants seek an order requiring the Respondent to pay the costs of the arbitration, including all the fees and expenses of ICSID and the Tribunal and all the legal costs and expenses incurred by the Claimants, apportioned as between the Claimants in the ratio in which they are awarded compensation. The Respondent seeks an order requiring the Claimants to bear all costs and fees incurred in this arbitration, including the Respondent's reasonable attorney's fees and expert fees.

The Third (June) Hearing

3.28 For the purpose of the Third (June) Hearing before the reconstituted Tribunal, so as to allow the Parties to prepare in full their respective oral submissions, the Tribunal sent to the Parties a non-exhaustive check-list of issues on 16 May 2016 and later a further list of issues on 2 June 2016, taken from the Parties' own pleadings. These documents are set out successively below, in relevant part.

**The Check-List of 16 May 2016 (in Three Parts)*

**** Part I (from the Claimants' pleaded case):***

3.29 ***Claimants' Issue 1 -*** Jurisdiction:

3.30 The Tribunal's jurisdiction over KNI's claim is clear, because:

A. The Offtake Agreement was an integral part of the FertiNitro Project;

B. KNI's rights under the Offtake Agreement qualify as an "investment" under both the ICSID Convention and the Treaty (and satisfy the non-jurisdictional indicia), because:

(i) The Offtake Agreement is an "investment" under the ICSID Convention;

(ii) The Offtake Agreement is an "investment" under the Treaty; and

(iii) In any event the Offtake Agreement also satisfies the non-jurisdictional indicia.

3.31 ***Claimants' Issue 2*** - The Principal Facts: The oral testimony at the First (September) Hearing confirmed the central tenets of the Claimants' case and materially undermined the Respondent's Case, because:

A. The essential facts remain entirely unchallenged on the evidential record in this arbitration, as listed under B, C and D below.

B. The Respondent's "Apertura" policy, with its other assurances, precipitated the Claimants' investment in Venezuela.

C. Starting in 2005, the Respondent progressively interfered with the Claimants' investments.

D. On 10/11 October 2010, without any formal notice, the Respondent openly and unambiguously expropriated both KOMSA's equity in FertiNitro and KNI's rights under the Offtake Agreement.

E. The First (September) Hearing showed that the Respondent's claim (that it never expropriated the Offtake Agreement) is a study in contradiction, because

(i) If the Respondent did not expropriate the Offtake Agreement, as it claims, then it could not have had a legitimate purpose for the expropriation of FertiNitro;

(ii) The Respondent always planned to take KNI's offtake; and

(iii) The Urea Decree and the Urea Resolution already guaranteed the Respondent access to FertiNitro's product at significantly below production cost.

F. The First (September) hearing confirmed that Pequiven was, at all relevant times, an agent of the Respondent.

3.32 ***Claimants' Issue 3*** - Liability: The Respondent's conduct violated the Treaty:

A. Expropriation: The Respondent breached Article 6 of the Treaty by unlawfully expropriating KOMSA's equity in FertiNitro and KNI's rights under the Offtake Agreement:

(i) The Respondent's expropriation of the Claimants' investments was not carried out in the public interest;

(ii) The Respondent's expropriation of the Claimants' investments was carried out in a discriminatory manner;

(iii) The Respondent's expropriation of the Claimants' investments was not carried out under due process of law; and

(iv) To date, the Respondent has failed to compensate the Claimants for its direct expropriation of the Claimants' investments.

B. FET: The Respondent breached its duty under Article 4(1) of the Treaty to accord fair and equitable treatment to the Claimants' investments.

C. FPS: The Respondent breached its duty under Article 4(1) of the Treaty to accord full protection and security to the Claimants' investments.

D. Impairment: The Respondent breached Article 4(1) of the Treaty by putting in place arbitrary and discriminatory measures that impaired the Claimants' management, operation, use and enjoyment of its investments.

E. National Treatment: The Respondent breached its duty under Article 4(2) of the Treaty to accord national treatment to the Claimants' investments.

F. Umbrella Clause: The Respondent breached its obligations assumed under Article 11(2) of the Treaty regarding the treatment of the Claimants' investments.

3.33 ***Claimants' Issue 4*** - Compensation*:*

A. The Claimants have demonstrated that the Respondent must pay full compensation under international law:

(i) Recent jurisprudence confirms that the Respondent must pay full compensation to the Claimants in a "but for" scenario for the illegal expropriation of their investments;

(ii) KOMSA is also entitled to full compensation under international law for the losses caused by the Respondent's 'other (non-expropriation) violations' of the Treaty; and

(iii) KOMSA is entitled to compensation for its 'Historical Losses'.

B. Testimony from the First (September) Hearing demonstrated that the Parties' quantum experts have adopted fundamentally different approaches to the valuation exercise:

(i) Mr Giles's valuation (for the Claimants) is supported by contemporaneous documentary evidence and the testimony of the only independent fertiliser industry expert in this arbitration (Mr Sanders); and

(ii) Dr Flores's valuation (for the Respondent) is a coalescence of (i) a series of assertions that are either outside the evidential record or are beyond his expertise; and (ii) a mechanical averaging of data and sources without any appreciation of the contemporaneous and industry evidence.

C. Whilst the Parties' quantum experts agree on a number of compensation parameters, their outstanding differences of fact and expertise on quantum issues remain significant.

3.34 ***Claimants' Issue 5*** - Compound Interest: The Claimants have demonstrated that they are entitled to compound interest.

A. The Treaty confirms that compound interest is payable;

B. The last five years of ICSID jurisprudence (on the record of these proceedings) confirms that compound interest is payable; and

C. Leading commentaries confirm that compound interest is payable.

**** Part II (from the Respondent's pleaded case):***

3.35 ***Respondent's Issue 1*** - Jurisdiction: The Tribunal has no jurisdiction over the claims relating to the Offtake Agreement, because:

A. The Offtake Agreement is a sales contract that does not constitute an "investment" within the meaning of the Treaty or Article 25 of the ICSID Convention:

(i) Sales Contracts are not investments under international law; and

(ii) Complexity, length, project finance implications or the general unity of investment concept do not transform the Offtake Agreement into an investment.

B. KNI has neither made a contribution nor incurred the type of risk necessary to qualify as an investment under the Treaty or under Article 25 of the ICSID Convention, because:

(i) The Term "investment" has an objective and inherent meaning under both the Treaty and the ICSID Convention, which requires the assumption of an investment risk and the making of a contribution; and

(ii) KNI has not incurred an investment risk in connection with the Offtake Agreement.

C. The Offtake Agreement does not have a territoriality nexus with the Republic of Venezuela to qualify for protection under the Treaty.

3.36 ***Respondent's Issue 2*** - Expropriation: The Respondent did not mandatorily acquire the Offtake Agreement, because:

A. The Offtake Agreement granted KNI a right to purchase FertiNitro's product;

B. Decree 7713 did not order the mandatory acquisition of KNI's rights under the Offtake Agreement or of the Offtake Agreement itself;

C. KNI continued to purchase offtake under the Offtake Agreement until February 2012;

D. FertiNitro terminated the Offtake Agreement in February 2012 for commercial reasons; and

E. FertiNitro's decision to terminate the Offtake Agreement is not attributable to the Respondent.

3.37 ***Respondent's Issue 3*** - Expropriation: The mandatory acquisition of FertiNitro's assets was lawful; and the Respondent complied with the requirements of Article 6 of the Treaty, because.

A. The Respondent's acquisition of FertiNitro's assets was in the public interest:

(i) The Respondent should be afforded ample deference regarding its public interest policies; and

(ii) The mandatory acquisition of FertiNitro's assets was carried out pursuant to the public policy of food security.

B. The mandatory acquisition of FertiNitro's assets was carried out in a non-discriminatory manner, because:

(i) Pequiven/IPSL and KOMSA/KNI were not similarly situated;

(ii) KOMSA did not receive differential treatment; and

(iii) Any differential treatment was not improper because it was based on a reasonable justification.

C. The Respondent's actions were carried out under the process of law, because:

(i) "Advance Notice" is not a requirement of due process under the Treaty or international law; and

(ii) The Respondent repeatedly provided notice to KOMSA that it planned to take control of FertiNitro.

D. The Respondent met (and continues to meet) its payment obligation under Article 6 of the Treaty, because:

(i) Article 6 of the Treaty requires the Respondent to make a reasonable offer of compensation – not immediate payment;

(ii) The Respondent made a reasonable offer of compensation, which KOMSA rejected; and

(iii) The Respondent will compensate KOMSA through the Mandatory Acquisition Procedure.

3.38 ***Respondent's Issue 4*** - FET: The Respondent did not breach the FET standard in Article 4(1) of the Treaty, because:

A. The applicable standard is tied to the minimum standard of customary international law;

B. The Claimants have failed to substantiate their claims, because:

(i) The Claimants have failed to establish that they had any legitimate expectations in relation to the Respondent's tax regime;

(ii) The Respondent has provided FertiNitro with VAT Credits in line with the Respondent's obligations;

(iii) The Respondent did not interfere in the management and operations of FertiNitro;

(iv) The Respondent did not frustrate any legitimate expectation by issuing the Urea Decree and Urea Resolution; and

(v) The Respondent provided a stable and predictable legal and business environment, treated the Claimants with transparency and procedural fairness and did not abuse its authority.

3.39 ***Respondent's Issue 5*** - FPS: The Respondent complied with its obligation under Article 4 of the Treaty to afford full protection and security, because:

A. The FPS standard relates to physical injury.

B. The Respondent did not fail to protect KOMSA's investment.

3.40 ***Respondent's Issue 6*** - Interference/Impairment: The Respondent did not impair the management, operation, use or enjoyment of FertiNitro through arbitrary or discriminatory measures under Article 4(1) of the Treaty, because:

A. The Claimants have misapplied the applicable standard; and

B. The Claimants have also provided a misleading account of the Respondent's actions that are alleged to have breached Article 4(1) of the Treaty.

3.41 ***Respondent's Issue 7*** - National Treatment: The Respondent did not breach the National Treatment standard under Article 4(2) of the Treaty, because:

A. The Claimants have misapplied the applicable standard; and

B. The Respondent did not treat Pequiven more favourably than KOMSA.

3.42 ***Respondent's Issue 8*** - Umbrella Clause: The Respondent did not breach Article 11(2) of the Treaty.

3.43 ***Respondent's Issue 9*** - Compensation: The Tribunal must reject the Claimants' quantification of damages, because:

A. The compensation claimed by KOMSA and KNI is vastly overstated:

(i) The relevant standard of compensation is found in the Treaty, not in customary international law;

(ii) Irrespective of the legal standard for compensation, the Parties agree that the expert witnesses on compensation should apply the Fair Market Value (FMV) standard; and

(iii) The Claimants ultimately fail to apply the FMV standard.

B. The Fair Market Value (FMV) of KOMSA's economic interest in FertiNitro was no more than US$ 34.6 million:

(i) While Dr Flores' DCF valuation is reasonable, Mr Giles' DCF analysis is overstated and does not reflect FertiNitro's FMV because:

a. The Claimants' DCF analysis is inconsistent and highly speculative;

b. The Claimants' DCF valuation inappropriately excludes actual production volumes from 2009 and 2010 in projecting future production:

(1) The Claimants inappropriately project a three-year turnaround cycle for FertiNitro;

(2) The number of gas and electricity disruptions and unplanned shutdowns in 2009 and 2010 was not materially higher than in recent prior years;

(3) The Claimants' position that a hypothetical buyer would believe FertiNitro could consistently achieve nameplate production levels is unfounded;

(4) The Claimants' position that the exclusion of the 2009-2010 period is justified by law is entirely baseless;

c. The Claimants' projections of FertiNitro's future costs are understated:

(1) The Claimants unreasonably relied upon budgeted instead of actual turnaround and maintenance costs;

(2) The Claimants' other cost estimates are also understated.

d. The Claimants' proposed discount rate is understated:

(1) The Claimants' reliance upon out-dated global market risk premium data is unreasonable and inappropriate;

(2) The Claimants inappropriately relied upon limited survey data to determine their base country risk rate;

(3) The Claimants inappropriately excluded political risk from their country risk rate;

(4) The Claimants' calculation of a 0.40 *lambda* for FertiNitro is entirely arbitrary and unreasonable;

(5) The Claimants' application of a 1% liquidity discount is contrary to basic valuation principles; and

(6) The unreasonableness of the Claimants' discount rate is confirmed by the two *ExxonMobil* awards and the *Flughafen Zürich* award.

(ii) The Claimants' "Reasonableness Checks" do not support their valuation of KOMSA's 25% Share in FertiNitro:

a. The October 2008 MOU Price, if properly adjusted, confirms Dr Flores' valuation;

b. Construction costs of other plants are irrelevant;

c. The Advantis Reports confirm Dr Flores' valuation;

d. The Claimants' 'new argument' based on FertiNitro's book value is irrelevant.

C. The Claimants' valuation of the Offtake Agreement is overstated, because:

(i) The Claimants make the same inappropriate assumptions regarding sales volumes and discount rate as in their valuation of KOMSA's equity interest in FertiNitro.

(ii) The Claimants' valuation period improperly includes a 16-month period during which KNI suffered no losses.

(iii) The Claimants use the wrong valuation methodology based on unrealistic factual assumptions, because:

a. The Claimants inappropriately calculate KNI's lost profits rather than the value of KNI's alleged rights under the Offtake Agreement;

b. The Claimants fail to prove that they would have been unable to replace the FertiNitro Offtake through purchase on the open market;

c. The Claimants' lost profits calculations are flawed and highly speculative.

D. The Claimants' alleged "Historical Losses" are unfounded.

3.44 ***Respondent's Issue 10*** - Interest: The Claimants' claims for compound interest are ill-founded.

3.45 ***Respondent's Issue 11*** - Costs: The Claimants' claims for costs are denied.

**** Part III: Specific Further Queries (by the Tribunal)***

3.46 The Parties were invited by the Tribunal to summarise at the Third (June) Hearing their respective cases on the relationship between the Offtake Agreement and the FertiNitro Project.

3.47 The Parties were requested to summarise their respective cases on whether or not the Offtake Agreement satisfies the legal and economic characteristics of an investment under the Treaty.

3.48 The Parties were requested to summarise the evidence regarding the impact of Decree 7713 on KNI's rights under the Offtake Agreement.

3.49 The Parties were requested to summarise their respective cases on the attribution under the Treaty or otherwise to the Respondent of FertiNitro's decision to terminate the Offtake Agreement.

3.50 In addition, the Parties were invited to address the following matters:

3.50.1 What steps, if any, did either of the Claimants take to oppose the Urea Decree?

3.50.2 What has happened with actual and projected natural gas price, since the last submissions by the Parties on this subject?

3.50.3 Why should the "expected rate of return" on equities rather than the "required rate of return" be used for the determination of the market risk premium?

3.50.4 Taking into account the fact that sales of product to KNI, after an interruption between October 2010 and January 2011, started again in January 2011 until the termination of the Offtake Agreement in February 2012, how much money, if any, did KNI lose compared to the continuing operation of that Offtake Agreement?

3.50.5 Would the Parties elaborate on their respective views concerning the relevance to this case (if any) of the discount rates used in the two *ExxonMobil* awards and in the *Flughafen* and *Gold Reserve awards* and the Advantis Report of May 2011, referred to by the Parties in their respective submissions?

3.50.6 What is the relevance, if any, of the Booz Allen valuation of FertiNitro made in 2007?

**The Tribunal's Additional Topics of 2 June 2016 for the Parties*

A. Offtake Agreement

3.51 Topic A1: Assuming, arguendo, that the Offtake Agreement was included within the ambit of the Expropriation Decree, what is the legal effect of a Venezuelan decree on the rights and obligations under the Offtake Agreement, which is governed by the laws of the State of New York?

3.52 Topic A2: Assuming, arguendo, that the Offtake Agreement was not included within the ambit of the Expropriation Decree, was the termination of the Offtake Agreement on 28 February 2012 a breach of the Offtake Agreement?

3.53 Topic A3: Was there any exercise of sovereign powers involved in the termination of the Offtake Agreement on 28 February 2012 (assuming, arguendo, that it was not terminated earlier by the Expropriation Decree etc)? If so, what sovereign powers were relied upon and by whom?

3.54 Topic A4: Did KNI respond to Mr Betulio Hernandez's letter of 28 February 2012 (Exhibit C-114)? Was there any subsequent correspondence between the Parties to the Offtake Agreement? If so, where is such correspondence to be found on the record?

B. Negotiations and local procedures relating to compensation

3.55 Topic B1: Do the Claimants agree with the summary provided at paragraph 111 of the Respondent's Post-Hearing Brief? If not, what specific amendments would they wish to make?

3.56 Topic B2: Have there been any developments relating to the local court proceedings (the "Mandatory Acquisition Procedure") since the Post-Hearing Briefs were filed by the Parties?

C. Quantum Issues

3.57 Topic C1: Does the Respondent agree with the presentation of the points of agreement and disagreement between Mr Giles and Dr Flores in the tables on pages 55-60 of the Claimants' Post-Hearing Brief? If not, what specific amendments would the Respondent wish to make?

Projection of Future Cash Flows

3.58 Topic C2: Are there any examples of tribunals adopting budgetary forecasts for production and/or costs for the purposes of calculating the cash flows of an enterprise for a DCF valuation in respect of a time period before the violation of an investment treaty obligation in circumstances where actual data for production and/or costs were available?

3.59 Topic C3. What is the general impact of inflation and the freeze on the exchange rate in Venezuela on FertiNitro's costs between 2008-2010?

Offtake Agreement

3.60 Topic C4: Is the calculation of damages relating to the Offtake Agreement by either quantum expert consistent with the manner in which damages would be calculated on the hypothesis of a breach of the Offtake Agreement under the laws of the State of New York? If not, how are they different?

Market Risk and the Country Risk Premium

3.61 Topic C5: Does the Respondent accept the Claimants' definition of market risk and country risk at paragraph 198 of its Post-Hearing Brief?

3.62 Topic C6: Explain the basis for the market risk and country risk premiums in the Advantis valuation reports of May and July 2011.

3.63 Topic C7: What should be the evidential threshold for the application of a *lambda* factor to an enterprise operating in a particular country? In other words, how common is it in valuation practice to apply a lambda factor to take into account greater or lesser exposure of a particular enterprise to country risk and what degree of certainty is required?

3.64 Topic C8: Are there any examples of tribunals adopting a liquidity discount in investment treaty arbitration?

3.65 Topic C9: Compare and contrast the market risk and country risk premiums adopted by other tribunals in publicly available investment treaty awards involving Venezuela.

3.66 Topic C10: Is an asset that qualifies for Treaty protection analogous to having “insurance-like protection” [Transcript, D6/P66 (Giles)]? Would it be appropriate to discount country risk in relation to a lawful as opposed to unlawful expropriation?

Sanity Checks on Valuations

3.67 Topic C11: Does the book value of KOMSA’s 25% interest in FertiNitro at the time of the valuation date provide an appropriate sanity check on the DCF valuations in this case?

3.68 Topic C12: What adjustments, if any, would need to be made to the MOU valuations in 2007 and 2008 for them to be relevant as a sanity check on a DCF valuation done at the valuation date in 2010?

3.69 Topic C13: What adjustments, if any, would need to be made to the Advantis valuations in May and July 2011 for them to be relevant as a sanity check on a DCF valuation done at the valuation date in 2010?

PART IV: THE PRINCIPAL LEGAL TEXTS

(1) Introduction

4.1 It is necessary to cite in full several of the relevant legal texts at the outset of this Award, for ease of reference elsewhere. This is not to suggest that, to decide the legal issues in dispute between the Parties, the Tribunal may be limited to the sources identified herein or otherwise invoked by the Parties. To the contrary, the Tribunal agrees with the following statement of the *Daimler v. Argentina ad hoc* committee[37]:

> *"This Committee is of the view that an arbitral tribunal is not limited to referring to or relying upon only the authorities cited by the parties. It can, sua sponte, rely on other publicly available authorities, even if they have not been cited by the parties, provided that the issue has been raised before the tribunal and the parties were provided an opportunity to address it. […]. Once such an opportunity was provided the Tribunal was not obliged to confine itself to only those authorities, which had been cited by the parties. No rule of law or procedure or requirement of due process prevented it from referring to or relying upon other authorities that were in the public domain. Such reliance did not violate any rule of natural justice including the right to be heard."*

4.2 Where the original text is Spanish, the Tribunal here cites the English translation, as noted.

(2) The Switzerland-Venezuela Treaty[38]

4.3 Article 1(1) of the Treaty defines "investors" for purposes of the Treaty as follows:

> *"The Term "investor" refers with regard to either Contracting Party to:*
>
> *a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;*
> *b) legal entities, including companies, corporations, business associations and other organizations which are constituted or otherwise duly organised under the law of that Contracting Party;*

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[37] *Daimler Financial Services A.G. v. Argentine Republic*, ICSID Case No. ARB/05/1, Decision on Annulment (7 January 2015), Paragraph 295.
[38] Agreement between the Swiss Confederation and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments (18 November 1993) (CLA-1).

c) legal entities not established under the law of that Contracting Party but effectively controlled by natural persons as defined in (a) above or by legal entities as defined in (b) above."

4.4 Article 1(2) of the Treaty defines the term "investment" as follows:

"The term 'investment' comprises every kind of asset and more particularly, though not exclusively:

a) movable and immovable property as well as any other rights in rem;

b) shares, parts or any other kinds of participation in a company;

c) claims to money or to any performance under a contract;

d) intellectual property rights, technical processes, know-how and goodwill;

e) concessions and other rights granted under public law."

4.5 Article 2 of the Treaty provides:

"The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement. It shall, however, not be applicable to divergencies or disputes the causes of which have arisen prior to its entry into force."

4.6 Article 4(1) of the Treaty provides:

"Each Contracting Party shall provide, in accordance with the rules and principles of International Law, investments in its territory of investors of the other Contracting Party fair and equitable treatment and full protection and security; neither of them shall impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, expansion, disposal or liquidation of such investments."

4.7 Article 4(2) of the Treaty provides:

"The treatment accorded by each Contracting Party to the investment by investors of the other Contracting Party in its territory, or to the investors themselves as regards their investments, shall not be less favourable than that accorded to investments of their own investors or those of any third State, or to the investors concerned as regards their investments."

4.8 Article 6 of the Treaty provides:

"Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is earlier, shall include interest from the date of expropriation, be paid without delay in a freely convertible currency to the person entitled thereto and be freely transferable."

4.9 Article 9 of the Treaty provides:

"(1) With a view to an amicable solution of disputes between a Contracting Party and an investor of the other Contracting Party consultations will take place between the parties concerned.

(2) If these consultations do not result in a solution within six months from the date of the request for consultations, the investor may submit the dispute to the arbitration of the International Center for Settlement of Investment Disputes (I.C.S.I.D.) instituted by the Convention on the settlement of investment disputes between States and nationals of other States, opened for signature at Washington, on 18th March, 1965.

(3) As an alternative to I.C.S.I.D. arbitration the parties to the dispute may, by mutual consent, have recourse to an <u>ad hoc</u> arbitral tribunal which unless otherwise agreed upon by the parties to the dispute shall be established under the arbitration rules of the United Nations Commission on International Trade Law (U.N.C.I.T.R.A.L.). Such arbitration shall in any case take place if for whatever reason I.C.S.I.D. arbitration is not available.

(4) The arbitral award shall limit itself to determine whether the Contracting Party concerned has failed to comply with an obligation under this Agreement, whether such failure has resulted in damages to the investor, and, if this is the case, the amount to be paid by the Contracting Party to the investor as compensation for such damages.

(5) Each Contracting Party hereby consents to the submission of an investment dispute to international arbitration in accordance with the provisions of this article.

(6) The Contracting Party which is a party to the dispute shall not at any time during the procedures, assert as a defence its immunity or the fact that the investor has received compensation under an insurance contract covering the whole or part of the incurred damage or loss.

(7) The arbitral award shall be final and binding for the parties involved in the dispute."

4.10 Article 11(2) of the Treaty provides:

"Each Contracting Party shall observe any obligation it has assumed regarding the treatment of investments in its territory by investors of the other Contracting Party."

(3) The Offtake Agreement[39]

4.11 Article 2.2 of the Offtake Agreement provides:

"<u>Allocation of Products</u>. Subject to the provisions of Sections 11.4 and 11.5, the Parties agree that the allocation of Products to each Buyer hereunder is expected to be fifty percent (50%) of the actual total Plants [sic] Output, with the following provisions to apply to the allocation of Products assuming full production in a given Contract Year:

(a) Koch shall have the exclusive right and obligation to purchase from Seller for resale or its own consumption (i) seventy five percent (75%) of the Plants [sic] Output of ammonia available for sale during each Contract Year (estimated to be approximately 270,000 tons annually assuming full production at Nameplate Capacity) and (ii) forty-four percent (44%) of the Plants [sic] Output of urea for sale during each Contract Year (estimated to be approximately 640,000 annually tons assuming full production at Nameplate Capacity) and

(b) Pequiven Offtaker shall have the exclusive right and obligation to purchase from Seller for resale or its own consumption (i) twenty-five percent (25%) of the Plants [sic] Output of ammonia available for sale during each Contract Year (estimated to be approximately 90,000 tons annually assuming production at Nameplate Capacity) and (ii) fifty-six percent (56%) of the Plants [sic] Output of urea for sale during each Contract Year (estimated to be approximately 820,000 tons annually assuming production at Nameplate Capacity)."

4.12 Article 2.3 of the Offtake Agreement provides:

"<u>Assignment of Markets</u>. Each Buyer agrees that the following territorial restrictions shall apply throughout the Primary Term with respect to the marketing and sale of Products:

[39] Offtake Agreement by and among Pequiven, IPSL, and Koch Oil SA as Buyers and FertiNitro as Seller (8 April 1998) (C-19).

(a) Koch shall have the exclusive right to market and sell Products for delivery to and ultimate consumption in North America.

(b) Pequiven Offtaker shall have the exclusive right to market and sell Products for delivery to and ultimate consumption in South America, Central America, and the Caribbean.

(c) Each Buyer further agrees not to sell Products such Buyer knows or has reason to believe ultimately will be resold in essentially their original form into any of the countries reserved to the other Buyer under paragraph (a) or (b) above, respectively.

(d) Notwithstanding any provision in this Section 2.3 to the contrary, at Koch's sole option, Koch may request that Pequiven Offtaker market, on Koch's behalf, all or a portion of Koch's allocated Products taken hereunder in South America, Central America and/or the Caribbean. Likewise, at Pequiven Offtaker's sole option, Pequiven Offtaker may request that Koch market on Pequiven Offtaker's behalf all or a portion of Pequiven Offtaker's allocated Products taken hereunder in North America. Each Buyer may elect to accept or reject the other Buyer's request under this Section 2.3(d) in its sole discretion. If a Buyer ("Passive Agent") accepts the other Buyer's ("Active Principal") request under this Section 2.3(d), the Buyers shall share equally the difference (whether positive or negative) between: (i) the price obtained by the Passive Agent, on a best efforts basis, from a Third Party (net of all expenses, fees and charges reasonably incurred by the Passive Agent in marketing, selling and/or transporting the Active Principal's Products) and (ii) the applicable FOB Jose Price stated in Section 3.1 below.

(e) Notwithstanding any provision in this Section 2.3 to the contrary, at Koch's sole option, it may make a request to market in North America, on Pequiven Offtaker's behalf, all or a portion of Pequiven Offtaker's allocated Products taken hereunder. Likewise, at Pequiven Offtaker's sole option, it may make request to market in South America, Central America and/or the Caribbean, on Koch's behalf, all or a portion of Koch's allocated Products taken hereunder. Each Buyer may elect to accept or reject the other party's request under this Section 2.3(e) in its sole discretion. If a Buyer ("Passive Principal") accepts the other Buyer's ("Active Agent") request, the Buyers shall share equally the difference (whether positive or negative) between: (i) the price obtained by the Active Agent, on a best efforts basis, from a Third Party (net of all expenses, fees and charges reasonably incurred by the Active Agent in marketing, selling and/or transporting the other Passive Principal's Products) and (ii) the applicable FOB Jose Price stated in Section 3.l below."

4.13 Article 3.1 of the Offtake Agreement provides:

"<u>Purchase price.</u> The purchase price of Products to be sold in North America, Central America, South America and the Caribbean shall be calculated in accordance with the formulae set forth in Sections 3.1(a) and (b). The purchase price of Products to be sold for delivery in other markets ("Alternative Markets") shall be determined in accordance with the provisions of Sections 3.1(d) and (e): […]"

4.14 Articles 3.2 and 3.3 of the Offtake Agreement provide:

"3.2. <u>Failure to Take Delivery of Products</u>. The provisions of subsections (a) and (b), below, shall apply during the time any loans are outstanding under the Loan Agreements. Upon the repayment in full of the loans made to Seller under the Loan Agreements, the provisions of subsection (c), below, shall apply.

(a) <u>Take-or Pay if Tender Obligation Met</u>. If Seller is prepared and able to meet its obligation to tender Product to a Buyer and such Buyer fails to take delivery of its allocation of Products in accordance with Articles II, V or VI ("Non-Taking Buyer") within thirty (30) days after the scheduled delivery date therefor, such Non-Taking Buyer shall nevertheless pay Seller (i) the corresponding price, determined in accordance with the applicable formula in Section 3.1(a) or Section 3.1(b) (without reduction for the relevant marketing fee discount), for all such Products tendered by Seller but not taken by such Non-Taking Buyer and (ii) all costs and expenses of Seller in the event that the Non-Taking Buyer's failure to take the Products contributes to a reduction of Plant production. Notwithstanding the foregoing, no Buyer shall be required to pay for (y) quantities of Products not tendered or not taken by reason of a Force Majeure Event and (z) quantities of Products not tendered by reason of non-performance by Seller in accordance with the terms of this Agreement except to the extent such non-performance was attributable to the Non-Taking Buyer.

(b) <u>Products Not Taken</u>. Seller shall promptly give notice of any Non-Taking Buyer's failure to take any Product to the other Buyer so long as such other Buyer is taking delivery of its allocation of Products in accordance with Articles II, V or VI ("Taking Buyer"). The Taking Buyer shall have a right of first refusal to purchase any Product not taken by the Non-Taking Buyer, for resale or [sic] its own consumption, at the corresponding Product price determined pursuant to Section 3.1. (a) or (b), as the case may be, and upon acceptance, the obligations to purchase and take delivery of such Product shall be binding upon the Taking Buyer. If the Taking Buyer declines or fails to exercise such right of first refusal by giving notice thereof to Seller within five (5) days after the Taking Buyer's receipt of the notice from Seller, Seller shall have the right to sell such Product to a Third Party at any price. Notwithstanding the sale of the corresponding

Products pursuant to this Section 3.2(b), the Non-Taking Buyer shall pay the Seller the amounts set forth in Section 3.2(a) (without reduction for the Ammonia Marketing Fee Discount or the Urea Marketing Fee Discount, as appropriate), together with any sales costs that Seller incurred to sell the Product. Seller shall provide a credit to a Non-Taking Buyer for amounts received by Seller from the Taking Buyer or a Third Party under this Section 3.2(b) if the Non-Taking Buyer has paid the amounts due to Seller pursuant to Section 3.2(a) (together with any sales costs that Seller incurred to sell the Product), such credit to be applied by Seller against future invoices issued by the Seller to the relevant Buyer.

(c) Modification of Certain Provisions Upon Repayment of Loans. Notwithstanding any provision contained herein to the contrary, upon the repayment in full of the loans made by the lenders to Seller under the Loan Agreements, including any refinancing thereof, each Buyer's obligation to take-or-pay for Product if tendered under Section 3.2(a) above shall terminate, and the modifications to this Agreement set forth in Exhibit B shall be effective for all purposes hereunder as of such date.

3.3. Income Taxes. Except as specifically provided in Section 3.1(f), each Buyer shall indemnify Seller against and hold it harmless from any and all taxes assessed or claimed against such Buyer based on or measured against such Buyer's income (including penalties, interest and expenses) imposed by any jurisdiction or political subdivision thereof or therein (other than the Republic of Venezuela or any Venezuelan state or local governmental or taxing authority therein) arising out of or relating to the sale of Products hereunder or the performance by Buyer of its obligation hereunder, whether or not such taxes were correctly or legally assessed."

4.15 Article 11.1 of the Offtake Agreement provides:

"Term of Agreement – Subject to the terms and conditions herein, this Agreement shall be effective as of the date first written above and shall run for a primary term of twenty (20) Contract Years thereafter ("Primary Term"); provided, however, in the event that the Bonds have not been fully paid or redeemed and remain outstanding under their original repayment schedule upon the conclusion of the Primary Term, neither of the Buyers not the Seller shall cancel this Agreement and the Primary Term shall be extended for such period of time as the Bonds remain outstanding under their original repayment schedule. This Agreement shall be automatically renewed following the Primary Term for one or more successive terms of five (5) Contract Years (each a "Secondary Term") unless one of the Parties gives written notice to the contrary to the other Parties at least six (6) months prior to the end of the Primary Term or the then current Secondary Term, as appropriate. If this Agreement is renewed for one or more Secondary Terms, the Parties shall consult with each other at least three (3) months prior to the commencement of any such Secondary Term to

determine whether, under the circumstances then prevailing, the provisions of Section 2.3 shall apply."

4.16 Article 12.2 of the Offtake Agreement provides:

> *"(a) <u>Arbitration Pursuant to ICC Rules</u>. If the Dispute has not been resolved through negotiation within ninety (90) days after the date of the notice of Dispute received pursuant to Section 12.1, the Dispute shall be finally settled and resolved by arbitration in accordance with the ICC Rules, subject to such modifications of the ICC Rules as are set forth in this Article XII."*
> *"(c) <u>Venue and Language</u>. The arbitration proceeding shall be conducted in the City of Miami, Florida, United States of America, or any other location upon which the parties to the arbitration proceeding may agree, in the English language […]"*
> *"(f) <u>Applicable Law</u>. The arbitrators shall be required to apply New York substantive law in ruling upon any Dispute in accordance with the Parties' intent as expressed in Section 13.1."*

4.17 Article 13.1 of the Offtake Agreement provides (printed in upper case):

> *"[…] This Agreement shall be governed by, construed under, and enforced in accordance with the laws of the State of New York, United States of America, without regard to the Conflicts-of-Law provisions thereof."*

(4) The Urea Decree[40]

4.18 The Urea Decree provides (as translated into English), beginning with its Preamble:

> *"WHEREAS the production of food is of national interest and is fundamental for the economic and social development of the Nation, an essential element of national safety and sovereignty, […]"*

4.19 Article 1 of the Urea Decree provides:

> *"Nitrogenous fertilizers and the supplies necessary for their manufacture, in their various formats and presentations, aimed at satisfying the national demand, are declared to be basic necessities throughout the national territory."*

4.20 Article 2 of the Urea Decree provides:

[40] Decree 5,218 (26 February 2007) (C-80).

"Manufacturers, suppliers, merchants, distributors, importers and exporters of nitrogenous fertilizers and the supplies necessary for their manufacture are required to supply these on a priority basis to the national market, in accordance with the price regulations established for their sale."

4.21 Article 3 of the Urea Decree provides:

"The activity for marketing nitrogenous fertilizers and the supplies necessary for their manufacture, conducted by individuals and legal entities, shall be subject to the prices, volumes, controls, regulations and audits established by joint Resolutions by the Ministry of Agriculture and Land, the Ministry of Light Industries and Trade and the Ministry of Energy and Petroleum, which are to be issued within thirty days after the publication of this Decree."

(5) The Urea Resolution[41]

4.22 The Urea Resolution provide (as translated into English), beginning with its Article 1:

"The purpose of this Resolution is to regulate control and inspect the production commercialization, distribution and sales of urea, to guarantee the supply of the national market. Furthermore, it regulates its exports once the internal demand has been satisfied."

4.23 Article 10 of the Urea Resolution provides:

"The State Company, Petroquimica de Venezuela S.A. (Pequiven S.A.) may purchase the urea it requires to cover the needs of the Nation, from any manufacturer established in the country, at the maximum bulk sales price at the plant gate of Bs. 155,200/MT (Bolivars per Metric Ton)."

(6) The Decree 5,835[42]

4.24 Decree 5,835 provides (translated into English), as to Article 4:

"All of the goods necessary to carry out the activities of production, manufacture, importing, gathering, transportation, distribution and sale of foods or products

[41] Joint Resolution by the Ministry of the People's Power for Agriculture and Land, the Ministry of the People's Power for Light Industry and Trade, and the Ministry of the People's Power for Energy and Petroleum (3 May 2007) (C-82).
[42] Decree 5,835 (28 January 2008) (R-23).

declared to be of first need or subject to price controls are hereby declared to be of, and are therefore subject to, public utility and social interest.
The National Executive shall, without other prior formality, initiate expropriation through decree for reasons of food security and sovereignty"

(7) The Expropriation Decree[43]

4.25 The Expropriation Decree provides (as translated into English), beginning with its Article 1:

> *"The mandatory acquisition of movable and real estate assets is ordered, including improvements, installations, facilities, industrial equipment, office and other assets, required or necessary for the production, processing, transportation and warehousing activities of fertilizers (urea and ammoniac) that are owned by, or in the possession of, the business companies Fertilizantes Nitrogenados de Oriente, S.A., Fertilizantes Nitrogenados de Venezuela, S.R.L., Fertilizantes Nitrogenados de Oriente, C.E.C. y Fertilizantes Nitrogenados de Venezuela, C.E.C., or any other company or persons related, with the objective of achieving the absolute and effective realization of the national plans of sowing and production formulated by the National Executive, and that are necessary for the execution of the 'Socialist Plan for Agri-Food Sovereignty'"*

4.26 Article 2 of the Expropriation Decree provides:

> *"The project "Socialist Plan for Agri-Food Sovereignty" will be executed by Petroquímica de Venezuela, S.A. (PEQUIVEN), assigned to the People´s Power Ministry for Energy and Petroleum, as the expropriation entity, or the subsidiary that the entity appoints."*

4.27 Article 3 of the Expropriation Decree provides:

> *"The expropriated goods will be transferred free of encumbrances or limitations to the Venezuelan State by means of the company Petroquímica de Venezuela, S.A. (PEQUIVEN), as the expropriation entity, or the subsidiary that this entity appoints, in accordance to what is stipulated in article 11 of the Expropriation Law for Public or Social Benefit."*

[43] Decree 7,713 (dated 10 October 2010) (C-9).

4.28 Article 4 of the Expropriation Decree provides:

> *"In compliance to what is stipulated in article 12 of the Expropriation Law for Public or Social Benefit, the company Petroquímica de Venezuela, S.A. (PEQUIVEN) is hereby authorized to carry out the necessary steps for the acquisition of real estate and other assets as stipulated in article 1 of the present Law, subrogating its position in all rights and obligations that correspond to the Bolivarian Republic of Venezuela on such matters."*

4.29 Article 5 of the Expropriation Decree provides:

> *"Petroquímica de Venezuela, S.A. (PEQUIVEN) will initiate and carry out the expropriation process as stipulated in the Expropriation Law for Public or Social Benefit until total and definite transfer of the ownership of the properties indicated in article 1 of the present Law takes place."*

4.30 Article 6 of the Expropriation Decree provides:

> *"In compliance with stipulations of article 3 of the Decree with Rank, Value and Force of the Organic Law for Security and Agri-food Sovereignty, the occupancy of the assets indicated in article 1 of the present Law by the company Petroquímica de Venezuela, S.A. (PEQUIVEN) is ordered with the objective of placing these into operation, administration and capitalization."*

(8) The Expropriation Law[44]

4.31 The Expropriation Law provides (as translated into English), beginning with Article 2:

> *"**Concept of expropriation**. Expropriation is an institution of Public Law by which the State acts in furtherance of a purpose having public utility or societal interest, in order to obtain the compulsory transfer unto itself of the right to property or some other private right, by final judgment and timely payment of fair compensation."*

4.32 Article 7 of the Expropriation Law provides:

> *"**Requirements for expropriation**. The Compulsory expropriation of property of any nature may only take effect through compliance with the following requirements:*
> *1. Formal finding declaring the public interest.*

[44] Expropriation Law for Public or Social Benefit (1 July 2002) (C-140). *See also* R-53, containing another English translation of the Expropriation Law. The Parties did not raise the issue of the alternative English translations during the proceeding.

2. *Declaration that carrying out such [interest] necessarily requires the total or partial transfer of the property or right.*
3. *Fair price for the property subject to expropriation.*
4. *Timely payment in cash of fair compensation."*

4.33 Article 31 of the Expropriation Law provides:

*"**Rights of the holder**. The holder has the right to become a party to the expropriation proceeding, in order to seek, from the price of the expropriated property, the portion applicable to him for the value of his improvements and for damages suffered by him."*

4.34 Article 35 of the Expropriation Law provides:

*"**Procedure in the absence of compromise**. In the event that a compromise is not reached, the judge shall call a hearing during the third business day thereafter, for the naming of a Valuation Commission, appointed in accordance with the provisions of Article 19 of this Law, which shall establish the fair price pursuant to the regulations of the Code of Civil Procedure."*

4.35 Article 36 of the Expropriation Law provides:

*"**Elements requiring consideration.** The fair price valuation of any property or right to be expropriated, in whole or in part, shall specifying its type, quality, location, approximate dimensions, its likely production and all other circumstances that bear upon the evaluations and calculations made to determine its fair value. In all cases, the valuation shall represent the equivalent value applicable to the expropriated property. Among the elements of the valuation, in the case of real property, [the following] are required to be considered:*

1. *The taxable value of the property, declared or tacitly accepted by the owner.*
2. *The value set forth in conveyance documents, executed at least six (6) months prior to the expropriation decree.*
3. *The average prices at which similar properties have been sold in the last twelve (12) months, counted as of the date the valuation was prepared.*

In the event that any of these elements, which are required to be considered, are absent, the experts shall provide express reasons therefor in the valuation report. Under no circumstances shall the incremental value of real property be taken into account, attributable to its proximity to the work in progress."

(9) Mr Hernandez's Letter Dated 28 February 2012[45]

4.36 This document is not a legal text; but it merits citing at length here. It is the letter from Betulio Hernández, President of the Temporary *Ad-Hoc* Board of Trustees, to KNI on the impact of the Expropriation Decree (Decree 7,713) on the Offtake Agreement (as translated into English):

> *"I hereby notify you that, in accordance with the Resolution issued by the Board of Temporary Ad-Hoc Trustees of Fertilizantes Nitrogenados de Venezuela, FertiNitro, C.E.C., ("FertiNitro"), as is evidenced by appointment effected by Decrees handed down by the Second Civil, Commercial, Agricultural, and Traffic Court of First Instance of the Judicial District of the State of Anzoátegui on August 8 and 9, 2011 and September 22, 2011, Case BP02-V-2011-000998, the first two of which have been recorded in the First Commercial Registry of the State of Anzoátegui on August 11, 2011, under No. 09, Volume 1; effective from the date of this communication, FertiNitro shall not sell any more nitrogen fertilizers (urea and ammonia) to Koch Oil, S.A. under the marketing agreement entered into between Petroquímica de Venezuela S.A., International Petrochemical Sales Limited, Koch Oil S.A., and Fertilizantes Nitrogenados de Venezuela, C.E.C. on April 8, 1998; all of which is in fulfilment of what is established in Decree 7,713 published in Official Gazette of the Bolivarian Republic of Venezuela No. 39,528 of October 11, 2010, which orders the compulsory acquisition of movable and immovable property, including improvements, facilities, plants, industrial and office equipment and all other assets necessary or required for the production, processing, transport, and storage of fertilizers (urea and ammonia) that belong to or are in the possession of the companies Fertilizantes Nitrogenados de Oriente, S.A., Fertilizantes Nitrogenados de Venezuela, S.R.L., Fertilizantes Nitrogenados de Oriente, C.E.C. and Fertilizantes Nitrogenados de Venezuela, C.E.C., or any other related companies or persons."*

(10) The ICSID Convention

4.37 Article 25 of the ICSID Convention provides:

> *"(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to*

[45] Letter from B. Hernández to Koch Oil SA and Koch Nitrogen Company re: Offtake Agreement (28 February 2012) (C-114).

submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and

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

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary- General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1)."

4.38 Article 41 of the ICSID Convention provides:

"(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

4.39 Article 42(1) of the ICSID Convention provides:

"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."

PART V: THE PRINCIPAL FACTS

(1) Introduction

5.1 The Parties' principal dispute relates to the alleged expropriation by the Respondent of (i) KOMSA's twenty-five per cent (25%) indirect equity interest in FertiNitro, a joint venture project comprising several legal entities, established by three private shareholders (including KOMSA) and Pequiven, the Venezuelan State-owned petrochemical company; and (ii) KNI's interest in the Offtake Agreement between (inter alios) FertiNitro, Pequiven and KNI. FertiNitro was engaged in the production and sale of nitrogen fertilisers (ammonia and urea) through the operation and maintenance of four petrochemical plants at José in Venezuela (also described collectively as the "FertiNitro Plant").

5.2 The FertiNitro project originated in 1998; and the plants commenced commercial operations in 2001. FertiNitro's plants encountered several technical and operational difficulties. These led to an international commercial arbitration between FertiNitro and the project's EPC contractor and minority shareholder, Snamprogetti. The Parties disagree as to the causes and consequences of the Plants' operational and technical difficulties.

5.3 Venezuela's food production and agriculture have been marked by underdevelopment since the 1990s. In response, the Respondent developed a policy to attain greater food security for the people of Venezuela, which included, amongst others matters, laws and regulations to secure State control over the domestic production of food and food-related products, including fertilizer for domestic agriculture.

5.4 On 11 October 2010, the Respondent's Expropriation Decree 7,713 dated 10 October 2010, declaring the compulsory acquisition of the assets of FertiNitro, came into effect. KOMSA did not receive any compensation for the expropriation of its indirect equity interest in FertiNitro.

5.5 The Tribunal includes below in chronological order certain principal facts relevant to its several decisions in regard to the Claimants' two claims for expropriation under Article 6 of the Treaty and to KOMSA's "Historical Claims" under Articles 4 and 11 of the Treaty.

Accordingly, notwithstanding an element of repetition later in this Award, this chronology is not an exhaustive account of all factual issues in dispute between the Parties. The Tribunal has nonetheless considered the evidence in full, as adduced by the Parties in this lengthy arbitration.

5.6 This chronology addresses, as found by the Tribunal on the materials adduced by the Parties: (i) the development of the FertiNitro project; (ii) the construction and operation of the FertiNitro Plant; (iii) Pequiven's negotiations to buy-out FertiNitro's private shareholders (including KOMSA); (iv) Venezuela's legal and regulatory framework leading to the Expropriation Decree dated 10 October 2010; (v) the events following the Expropriation Decree; and (vi) certain other measures taken by the Respondent which, so the Claimants allege, have interfered with their investments in violation of the Treaty.

(2) Factual Chronology

(i) The Development of the FertiNitro Project

5.7 In the 1990s, Venezuela (as also certain other countries in Latin America) pursued economic policies that sought, among other matters, to attract foreign investment and reduce State control over important economic sectors. In the case of Venezuela, such policies covered the petrochemical and hydrocarbon sector.[46]

5.8 By the end of the 1990s, Venezuela imported more than 64% of its food and agricultural products;[47] it had a surplus of non-commercialised natural gas, deriving from its petroleum reserves; and it sought to develop its petrochemical sector.[48]

[46] Daniel Yergin, *The Quest: Energy, Security, and the Remaking of the Modern World* (Penguin Books 2011), (C-10). *See also* Cls. Mem., Paragraph 25; Resp. C-Mem., Paragraph 31, citing R-44. As part of their effort to attract foreign investment to Venezuela, PDVSA and Pequiven participated in promotional conferences on the Petrochemical sector: *See Petrochemical Industry in Venezuela: Investment Opportunity* (Caracas, Venezuela 8, 9, and 10 of April 1997, Hotel Tamanaco Intercontinental (C-15), p. 6.

[47] Christina Schiavoni & William Camacaro, *The Venezuelan Effort to Build a New Food and Agricultural System*, in 61 Monthly Review (1 July 2009) (R-29), p. 3.

[48] Global Forum, Flaring Reduction & Gas Utilisation: *"Venezuelan Experiences and Perspectives about Natural Gas Flaring and Venting in the Oil Industry"* Arcangelo Sena D'Anna & Janeth Lopez de Morena (C-11); *see also* Offering Circular - Bond Offering of $250,000,000 between FertiNitro Finance Inc and FertiNitro (8 April 1998) ("Bond Offering Circular") (C-115), p. 7.

5.9 Pequiven, KOMSA,[49] Snamprogetti Netherlands BV, a company organized under the laws of the Netherlands, ("Snamprogetti"), and Polar Uno CA, a company organized under the laws of Venezuela ("Polar") entered into a series of agreements as "Owners" for the development, construction and operation of two ammonia and two urea plants, to be located in an industrial complex in the Venezuelan State of Anzóategui, in the northeast of the country (the "FertiNitro project"). Ammonia and urea are nitrogen-based fertilisers that are used to increase productivity and crop yield in agriculture.[50] Ammonia is required to produce urea; and therefore "ammonia is the basic building block of the nitrogen fertilizer industry."[51]

5.10 On 8 April 1998, the Owners concluded the Joint Investors Agreement (the "JIA"), providing for the incorporation and capitalisation of four interrelated Venezuelan companies,[52] organised in an investment structure through which the Owners would own, construct and operate the FertiNitro Project.[53] As already indicated above, these four interrelated Venezuelan companies are described as the "FertiNitro Companies" or collectively as "FertiNitro".

5.11 On that same day, in accordance with the JIA,[54] FertiNitro Venezuela CEC, Pequiven, International Petrochemical Sales Limited ("IPSL", a subsidiary of Pequiven) and

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[49] Koch Oil S.A was incorporated in Switzerland on 24 January 1972. On 11 April 2003, Koch Oil S.A. changed its name to Koch Minerals S.A. *See* Extract from the Commerce Register of the Canton of Fribourg, Report (30 June 1999) (C-2), and on 2009, the company changed its corporate form to Koch Minerals Sàrl, one of the Claimants in this case. *See* Request for Registration in the Commercial Register of the Canton of Fribourg (20 March 2009) (C-3). For ease of reference, the company under its different denominations and corporate forms is referred to in this Award as "KOMSA."

[50] Witness Statement of Edgar Alonso Flórez (28 February 2013) ("Flórez WS1"), Paragraph 6.

[51] Flórez WS1, Paragraph 6. According to the Respondent, "Approximately 67% of the ammonia produced by FertiNitro is used to make urea." "Ammonia is made by combining nitrogen and hydrogen with the use of catalysts, high heat, and elevated pressure. Air is the main source of the nitrogen. Natural gas is the most commonly used source of hydrogen." *See also* Resp. C-Mem., Paragraphs 52, 54.

[52] Namely: (i) Fertilizantes Nitrogenados de Oriente S.A.; (ii) Fertilizantes Nitrogenados de Oriente CEC; (iii) Fertilizantes Nitrogenados de Venezuela, SRL; and (iv) Fertilizantes Nitrogenados de Venezuela, FertiNitro, CEC (this last company was the "Operating Company").

[53] Joint Investors' Agreement by and among Pequiven, Koch Oil SA, Snamprogetti Netherlands BV, and Polar Uno, CA (8 April 1998) ("JIA") (C-18), Exhibit A, Investment Structure.

[54] Pursuant to the JIA, the joint investors acknowledged and agreed that certain agreements were "necessary to give effect to [the JIA], and w[ould] be executed and delivered on or following the Effective Date" including, among others, the EPC Contract, the financing agreements, the Equity Contribution Agreement and the Offtake Agreement. JIA (C-18), Article IV.

KOMSA (later succeeded by KNI as described below) concluded the Offtake Agreement.[55] Pursuant to the Offtake Agreement, Koch and Pequiven/IPSL (the "Offtakers") agreed to purchase on a "take or pay" basis a guaranteed quantity of ammonia and urea produced by FertiNitro at a discounted set price,[56] for the Offtakers' own consumption or resale in both the local and export markets, for a 20-year term.[57] The Offtake Agreement could be "automatically renewed" thereafter for five-year terms, unless otherwise notified by any of the parties to the Offtake Agreement.[58]

5.12 On 30 June 2000, KOMSA assigned its rights and obligations under the Offtake Agreement to Koch Oil Marketing S.A. On 3 April 2003 Koch Oil Marketing S.A. assigned its rights under the Offtake Agreement to KNI.[59]

5.13 The Offtake Agreement gave to Pequiven/IPSL the exclusive right to market and sell ammonia and urea domestically, as also in South America, Central America and the Caribbean. Pequiven's sales to the local domestic market were not to exceed 10% of its total volume of purchased product with FertiNitro. That percentage rose to 15% in 2004 and further 1% per year thereafter.[60] KOMSA (later KNI) had the exclusive selling rights for North America, including Mexico. Each of KOMSA/KNI and Pequiven/IPSL bought approximately 50% of FertiNitro's total production of urea and ammonia in any given month.[61]

5.14 In addition to the JIA and Offtake Agreement, numerous contracts were concluded in connection with the FertiNitro project.[62] These included the Engineering, Procurement

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[55] *See* Offtake Agreement by and among Pequiven, IPSL and Koch Oil SA as Buyers and FertiNitro as Seller (8 April 1998) ("Offtake Agreement") (C-19).

[56] The pricing was advantageous for the Offtakers. The purchase price for ammonia was based on published prices for ammonia less a 4% "Ammonia Marketing Fee Discount", and the purchase price for urea was based on published prices for urea less a 3% "Urea Marketing Fee Discount".

[57] Offtake Agreement (C-19), Art. 11.1.

[58] *Id*.

[59] *See* Assignment (30 June 2000) (C-33) and Assignment & Assumption Agreement (3 April 2003) (C-34).

[60] Offtake Agreement (C-19), Art. 2.5.

[61] *Offtake Agreement (C-19), Art. 2.2.* The Ammonia was roughly divided 75% to KNI and 25% to Pequiven/IPSL; As to the urea, the distribution was 43% KNI and 57% Pequiven/IPSL. See Bond Offering Circular (C-115), p. 5. *See also* Resp. C-Mem., Paragraph 85; Cls. Reply, Paragraph 11.

[62] For a list of the projects agreements, see the Common Security Agreement (21 April 1998) (C-137), Appendix G.

and Construction Contract by and between, FertiNitro, CEC, and Snamprogetti for the "turn-key" construction by Snamprogetti of the ammonia and urea plants (the "EPC Contract"),[63] as well as agreements for the supply of gas, electricity and water, among many others.[64] Under these gas agreements, FertiNitro received gas from PDVSA at preferential prices.

5.15 As already indicated, FertiNitro was 35% owned by KOMSA, 35% owned by Pequiven, 20% owned by Snamprogetti and 10% owned by Polar, in accordance with the terms of the Joint Investors' Agreement (the "JIA").[65] KOMSA held its interest in FertiNitro through Koch José, a company organised under the laws of the Cayman Islands.[66] KOMSA transferred 28.571% of its equity in Koch José on 18 February 1998, to the Latin American Infrastructure Fund ("LAIF").[67] As a result, KOMSA and LAIF indirectly owned 25% and 10% of FertiNitro, respectively.

5.16 The FertiNitro project included a project finance lending structure where the lenders "receive[d] a security interest in the project's cash flow and assets";[68] and such lenders and bondholders looked to the assets and income stream of the project for repayment. Under this structure, "the project's debt [was] secured by the receivables owed by Koch [KOMSA] and Pequiven to FertiNitro under the Offtake Agreement".[69] In accordance with this financing structure, the Offtake Agreement was to remain in effect for a period equal to the length of FertiNitro's financing obligations and at least 20 years.[70]

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[63] Engineering, Procurement and Construction Contract by and between FertiNitro and Snamprogetti (8 April 1998) ("EPC Contract") (C-24).
[64] *See* e.g, Methane Gas Supply Agreement by and between PDVSA Gas SA and FertiNitro (8 April 1998) (C-25); Electric Energy Supply Agreement by and between Pequiven and FertiNitro (8 April 1998) (C-26); Industrial Water Supply Agreement by and between Pequiven and FertiNitro (8 April 1998) (C-27); and other related energy supply and technical services agreements.
[65] JIA (C-18), Paragraphs 2.1.1 to 2.1.4; *see also* Bond Offering Circular (C-115), p. 3.
[66] JIA (C-18), Paragraph 2.4 and Recitals.
[67] Register of Members for Koch Jose Cayman Limited (13 May 2011) (C-21).
[68] Witness Statement of Brent W. Gwaltney (30 May 2012) ("Gwaltney WS1"), Paragraph 20.
[69] Memorandum by Davis Polk & Wardwell (18 May 2005) (C-118), p. 2.
[70] Offtake Agreement (C-19), Art. 11.1.

5.17 FertiNitro was organised as a commercial enterprise; and its management was undertaken through a nine-member board of directors of the FertiNitro Companies.[71] After the transfer of shares to LAIF, FertiNitro's board of directors was composed of three directors appointed by Pequiven, two directors appointed by KOMSA, two directors appointed by Snamprogetti, one director appointed by LAIF and one director appointed by Polar.[72] The chairman of the board of directors (who also served as President of FertiNitro) alternated between an appointee of either KOMSA or Pequiven, for a two-year term or as otherwise agreed by KOMSA and Pequiven.[73] According to Clauses 5.4.1 and 5.4.2 of the JIA, decisions of FertiNitro's board and shareholders decisions could only be taken with the majority approval from each of the representatives of Pequiven, KOMSA and Snamprogetti.

(ii) The Construction and Functioning of the FertiNitro Plant

5.18 *1998-2001:* The construction of the FertiNitro Plant began in 1998 and the Plant commenced commercial production in May 2001.[74]

5.19 In accordance with the EPC Contract, each of the ammonia plants was built to have a minimum "nameplate" capacity of 1800 metric tons ("MT"); and each of the urea plants had a nameplate capacity of 2,200 MT.[75] The total cost of the project was US$ 1.1 billion, of which over US$ 740 million was funded by bonds and loans from a consortium of banks.[76]

5.20 *2001-2004:* Between 2001 and 2002 FertiNitro made warranty claims against Snamprogetti under the EPC, regarding "defects, deficiencies and failures" of the Plant's

[71] JIA (C-18), Paragraph 5.2.1.
[72] JIA (C-18), Paragraph 5.2.1*;* Resp. C-Mem., Paragraph 30.
[73] JIA (C-18), Paragraph 5.2.4.
[74] FertiNitro, Financial Statement for the Year Ended Dec. 31, 2004 and 2003 (non-dated) (R-14), Note 1, p. 8. *See also* Cls. Mem., Paragraphs 52-53; Resp. C-Mem., Paragraph 27.
[75] EPC Contract (C-24), Art. 1, Paragraph 1.97, p. 12. "Nameplate" capacity is the projected sustainable capacity of a piece of equipment under specifically defined operating conditions. *See* Resp. C-Mem., Paragraph 56, citing Witness Statement of Anibal José Villarroel García (28 February 2013) ("Villarroel WS1"), Paragraph 11.
[76] *See* FertiNitro 31 December 2000 and 1999 Report of Independent Accountants and Financial Statements (2 February 2001) (C-61); FertiNitro, Financial Statements for the Years Ended Dec. 31, 1999 and 1998 (non-dated) (R-4); Resp. C-Mem., Paragraph 28.

equipment and operations.[77] From 2002 onwards, FertiNitro experienced shutdowns for repairs and maintenance issues. FertiNitro started withholding payments due to Snamprogetti in its capacity as EPC contractor.

5.21 In 2002 Snamprogettti commenced an arbitration under the EPC before the International Court of Arbitration of the International Chamber of Commerce, against FertiNitro (the "ICC Construction Arbitration"), claiming payment of the sums withheld by FertiNitro. FertiNitro advanced counterclaims based on Snamprogetti's alleged breach of warranties in the EPC related to the design, construction and engineering of the Plant. FertiNitro and Snamprogetti settled the arbitration on 14 December 2004. The settlement included (*inter alia*) the forgiveness of certain debts owed by FertiNitro to Snamprogetti and a cash payment by Snamprogetti to FertiNitro of US$ 6.5 million.[78]

5.22 *2004-2009:* The Parties disagreed on the working conditions of the FertiNitro Plant after the settlement of the ICC Construction Arbitration and FertiNitro's corresponding repairs to the Plant. The Claimants assert that: "following the settlement […] in late 2004, and after the necessary construction repairs were made, the plant's performance significantly improved";[79] and that "by 2006, it was achieving 98 percent of the previously anticipated production levels."[80] The Respondent alleges that many critical repairs remained outstanding as more than one third of the critical issues identified by the 2003 Report of

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[77] FertiNitro, Financial Statement for the Year Ended Dec. 31, 2004 and 2003 (non-dated) (R-14), Note 9, p.16. The Parties differ on the number of warranty claims, but at least 77 distinct claims were referred to the ICC Arbitration. *See*, Resp. C-Mem., Paragraph 58; Cls. Reply, Paragraph 34.
[78] FertiNitro, Financial Statement for the Year Ended Dec. 31, 2004 and 2003 (non-dated) (R-14), Note 9, p.16; Gwaltney WS1, Paragraph 40; Villarroel WS1, Paragraph 17.
[79] Cls. Mem., Paragraph 153, Cls. Reply, Paragraph 33.
[80] Cls. Reply, Paragraph 36, citing FertiNitro December 2006 Monthly Report (5 February 2007) (C-97); and Bond Offering Circular (C-115).

the project's independent engineers (Jacobs Consultancy)[81] could not have been completely resolved by 2005.[82]

5.23 The Plant's production levels between 2003 and 2009, as reported by the FertiNitro Monthly Reports for the relevant years, are shown in the table below.[83] The table shows the production of the plant as percentage of the nameplate capacity. According to the Respondent, based on the reports of the Jacobs Consultancy, "on an annual basis, FertiNitro has never in its history succeeded in reaching nameplate production levels."[84] The Claimants contend that these calculations wrongly assume that the plant would operate 365 days of the year.[85]

Year	Ammonia	Urea
2003	66%	58%
2004	84%	77%
2005	72%	71%
2006	91%	86%
2007	83%	81%
2008	77%	74%
2009	78%	74%

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[81] On 12 March 2003, Jacobs Consultancy, the Project's independent engineer, issued a first report. *See* Jacobs Consultancy Report, FertiNitro Fertilizer Project, Plant Improvement Cost Estimate and Revised Production Forecast (March 2003) (C-125) (These reports were addressed to the Project's Senior Lenders with the purpose of "identifying each of the repairs and improvements that would be required in order to allow the plant to achieve the production levels that had been anticipated in the outset of the project." In accordance with the 2003 Jacobs Report, as much as US$ 66.7 million were required at that time for FertiNitro to achieve its projected production levels. Jacobs Consultancy issued a second report in 2006).

[82] *See* Resp. Rej., Paragraph 44, citing Jacobs Consultancy Report titled "Review of Major Maintenance Plan and Organizational Plan for Quarter Ending December 31, 2004" (February 2005) (C-132), indicating that 57% of the 51 critical issues identified in the 2003 report had been solved by the end of 2004.

[83] FertiNitro, Monthly Report, Dec. 2003 (R-12), p. 7; FertiNitro, Monthly Report, Dec. 2004 (R-13), p. 12; FertiNitro, Monthly Report, Dec. 2005 (C-95), p. 15; FertiNitro, Monthly Report, Dec. 2006 (C-97), p. 14; FertiNitro, Monthly Report, Dec. 2007 (C-98), p. 14; FertiNitro, Monthly Report, Dec. 2008 (C-83), p. 14; FertiNitro, Monthly Report, Dec. 2009 (C-102), p. 14; Chart provided by Respondent. *See also* Resp. C-Mem., Paragraph 75, n. 139 Resp. Rej., Paragraph 59.

[84] Resp. Rej., Paragraph 45, relying on Second Witness Statement of Anibal Villarroel, Paragraph 4. *See also* Resp. C-Mem., Paragraph 75.

[85] Second (November) Hearing D5. 68.23-25, 69.1 (Fietta).

5.24 From 2006, there was a clear downturn in production levels.[86] The Parties however disagree as to the causes. According to the Claimants, the operational problems are related to "the repeated failures of PDVSA Gas and Pequiven to supply the contracted levels of gas and electricity to the plant, combined with Respondent's increased interference with and distraction of the management of the plant."[87] For its part, the Respondent admits that there were problems in the supply of raw materials;[88] but it adds that FertiNitro's operational issues "have their roots" in the plant's construction and design flaws attributable to the EPC Contractor.[89]

5.25 FertiNitro was also subjected to and failed a "reliability test", and thereafter continued to experience planned and unplanned shutdowns, relating among others to mechanical failures.[90] In between these tests, FertiNitro underwent "turnarounds." A "turnaround" is a scheduled period of down time in which all production in a plant is stopped; and catalysts and raw materials are removed. FertiNitro had its first turnaround in 2005. Thereafter, turnarounds took place in 2008, 2009 and 2010. The cost of the turnarounds, as well as the annual maintenance costs, significantly exceeded the originally allocated budget and also significantly increased after 2008.[91]

(iii) Pequiven's Negotiations to Buy-Out the FertiNitro Private Shareholders

5.26 *2005-2006:* Between June 2005 and October 2006 the Pequiven-appointed directors submitted to the FertiNitro board of directors Pequiven's proposals to buy additional

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[86] Expert Report of Tim Giles (2 June 2012) ("Giles ER1"), Paragraph 4.21 ("the performance from 2006 to 2008 was below what could be expected from a Plant of this type"). Cls. Reply, Paragraph 36; Cls. Mem., Paragraph 158; Resp. C-Mem., Paragraph 75.

[87] Cls. Reply, Paragraph 36.

[88] Resp. C-Mem., Paragraphs 75, 80, 83.

[89] Resp. C-Mem., Paragraph 76; Resp. Rej., Paragraphs 61-67.

[90] Fertinitro Board of Directors' Meeting No. 75 (31 October 2006) (R-58), p. 2; Fertinitro Board of Directors' Meeting No. 81 (24 May 2007) (R-61), p.4. According to the Respondent, the mechanical failures also created safety risks for workers at the plant. Resp. C-Mem., Paragraphs 64-76.

[91] On 5 August 2010, the FertiNitro Board discussed the Plants' escalating functioning costs and pointed that since 2008, the costs had increased more than "twofold" in terms of US$. The turnarounds were all over budget. The 2005 turnaround cost US$ 21.4 million, approximately US$ 10 million over budget. The second turnaround scheduled for 2008, cost US$ 40.4 million. Further maintenance work was required in 2009 and 2010, and a third, unscheduled turnaround took place in 2010, at a cost US$ 40 million. FertiNitro Board of Directors' Meeting Minutes No. 111 (5 August 2010) (C-105). S*ee also* Resp. C-Mem., Paragraphs 70-74.

amounts of urea from FertiNitro on an annual basis at a reduced price for a period from 2005 to 2007.[92] The amount of urea that Pequiven was to be allowed to purchase under its proposals was capped at 75,000 tons.[93] According to the testimony of Mr Gwaltney, the proposed reduced price was below FertiNitro's production costs.[94]

5.27 During the FertiNitro board meetings, the Pequiven-appointed directors explained that the additional urea was to be used for resale in the domestic market and thereby support the Government's agricultural plans.[95] The Pequiven-appointed directors added that Pequiven's proposals would only take effect "in the event that Pequiven [could not] cover demands with its own production" from plants at el Moron and el Tablazo.[96]

5.28 FertiNitro's board of directors (with its general management) analysed, considered and eventually rejected Pequiven's request.[97]

5.29 During this same period, a commission was created to analyse the Offtake Agreement.[98] It recommended that: (i) the market distribution between the Offtakers should be eliminated; (ii) the limit applicable to domestic sales should be modified; and (iii) the price

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[92] FertiNitro Board of Directors' Meeting Minutes No. 57 (21 June 2005) (C-74), point 3; Pequiven Presentation to FertiNitro's Board of Directors, "Special Price for Urea destined for the national market, for a specified period." (June 2005) (C-75); FertiNitro Board of Directors' Meeting Minutes No. 59 (20 September 2005) (C-77), p. 3-4; FertiNitro Board of Directors' Meeting Minutes No. 65 (5 April 2006) (C-51), p. 17.

[93] Pequiven Presentation to FertiNitro's Board of Directors, "Special Price for Urea destined for the national market, for a specified period." (June 2005) (C-75).

[94] Second Witness Statement of Brent Gwaltney (20 August 2013) ("Gwaltney WS2"); *see also* Cls. Reply, Paragraph 74.

[95] Pequiven Presentation to FertiNitro's' Board of Directors, "Special Price for Urea destined for the national market, for a specified period." (June 2005) (C-75) pp. 10-12; *see also* FertiNitro Board of Directors' Meeting Minutes No. 57 (21 June 2005) (C-74) p. 4; FertiNitro Board of Directors' Meeting Minutes No. 59 (20 September 2005) (C-77) p. 4.

[96] *See* FertiNitro Board of Directors' Meeting Minutes No. 57 (21 June 2005) (C-74), p. 4. *See also* Cls. Mem., Paragraphs 118-119; Resp. C-Mem., Paragraphs 45, 99. According to the Claimants, "FertEcon data on Venezuela fertiliser imports and exports positively disproves [a] fertiliser shortage or fertiliser emergency in Venezuela" (Cls. Reply, Paragraph 86). Venezuela's export figures for Latin America were higher in 2006 than in 2007. *See* Venezuela Urea Imports, FertEcon Urea Outlook, Appendix (C-138).

[97] FertiNitro asked the "General Management" and the "Finance and Offtake Committee" to consider the proposal and present to the board all the legal, operative and economic consequences of accepting the proposal and amending the Offtake Agreement. *See* FertiNitro Board of Directors' Meeting Minutes No. 57 (21 June 2005) (C-74) p. 4 (SP) p. 16 (EN); FertiNitro Board of Directors' Meeting Minutes No. 58 (21 July 2005) (C-76), pp. 18-19 (EN) (rejecting the proposal).

[98] *See* FertiNitro board of directors' Meeting Minutes No. 57 (21 June 2005) (C-74) p. 17-18; FertiNitro board of directors' Meeting Minutes No. 69 (29 June 2006) (C-52) p. 19

limits of the Offtake Agreement should be amended.[99] These recommendations were not adopted by FertiNitro's board of directors.

5.30 In 2005 a draft amended Petrochemical law was submitted to the Respondent's National Assembly. Its effects on FertiNitro were discussed in several meetings of FertiNitro's board of directors, held between 2005 and 2007.[100]

5.31 During those meetings, Mr Toro, a Pequiven-appointed director, informed the other shareholder-appointed directors that, pursuant to the text of the proposed amended law: (i) FertiNitro would be required to supply the domestic demand for urea before exporting urea; and (ii) the Respondent needed to have at least a 51% controlling share of FertiNitro,[101] so as take control of the business, and that "time [was] run[ning] out."[102] Mr Toro further stated that "Pequiven will be bringing specific proposals for the consideration of all the shareholders" and that "all shareholders rights and agreements will be respected."[103]

5.32 *2007:* Further to those discussions, from 2007 onwards, Pequiven entered into buy-out negotiations with all the private shareholders in FertiNitro. On 7 November 2007, KOMSA representatives presented a draft Memorandum of Understanding for the sale to Pequiven of the non-Pequiven shareholders' shares in FertiNitro (the "KOMSA Draft MOU").[104]

5.33 According to paragraph 2.1 of the KOMSA Draft MOU:

> *"The Parties hereby agree that the aggregate purchase price to be paid by Pequiven for the Shares will consist of (a) USD$ 1,210,000,000.00, less the outstanding balance of principal and accrued interest on FertiNitro's existing bank and bond financing as of the Closing Date, plus (b) the Excess Cash (the '<u>Purchase Price</u>'). 'Excess Cash' would be defined as FertiNitro's cash balance on the Closing Date,*

[99] *See* FertiNitro board of directors' Meeting Minutes No. 57 (21 June 2005) (C-74) p. 17-18.
[100] Gwaltney WS1, Paragraphs 64-66.
[101] Gwaltney WS1, Paragraph 65.
[102] Email from T. Parra to F. Toro re: FertiNitro – Future Initiatives (18 January 2007) (C-79).
[103] *Id*.
[104] Email from T. Parra to F. Toro and J. Lazo re: Draft MOU (attaching the KOMSA Draft MOU) (12 November 2007) (C-92).

including all required reserve accounts, less USD$25,000,000."[105] *(Emphasis in original)*

5.34 *2008:* Discussions relating to the buy-out negotiations were halted between January and April 2008.[106] In October 2008, Pequiven presented a revised draft Memorandum of Understanding (the "Pequiven Draft MOU").[107] According to paragraph 1 of the Pequiven Draft MOU:

> *"(a) The purchase price ("Purchase Price") to be paid by Pequiven to Koch Shareholder for the Acquired Shares is US$297,500,000.00, which shall be payable in cash at the closing of the Proposed Transaction (the "Closing").*
> *(b) For reference purposes only and with the agreement by Pequiven and Koch Shareholder that the Purchase Price is a fixed amount and not subject to adjustment the Purchase Price was determined by taking a starting value for 100% of the Companies of US$1,200,000,000.00, and (i) subtracting the outstanding balance of principal and all accrued interest on the Companies' existing bank and bond financing as of October 6, 2008, (ii) adding excess cash, exclusive of reserves, as of such date, and (iii) multiplying the resulting agreed net value of US$850,000,000.00 by the 35% total equity interests in the Companies owned directly or indirectly by Koch Shareholder and LAIF."*[108] *(Emphasis in original)*

5.35 Neither the KOMSA nor the Pequiven draft MOUs were executed. The Parties' disagree as to the cause for such non-execution. According to the Claimants, the drafts were not finalised because Pequiven indicated that the sale was no longer a priority for the Respondent.[109] According to the Respondent, the "[n]egotiations were interrupted in November 2008 due to financing issues."[110]

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[105] KOMSA Draft MOU (C-92), Paragraph 2.1.
[106] Gwaltney WS1, Paragraph 115.
[107] Pequiven Draft Memorandum of Understanding (C-93).
[108] Pequiven Draft Memorandum of Understanding (C-93), Paragraph 1(a)–(b), pp. 2-3. The price referred to in paragraph (b), as it pertains to Koch, would have represented US$ 212.5 million for its 25% share of Fertinitro, after payment to it of some US$ 37.5 million in dividends in April and October 2008.
[109] Cls. Mem., Paragraph 151.
[110] Resp. C-Mem., Paragraph 92 and Resp. Rej., Paragraph 100, citing Gwaltney WS1, Paragraph 118 (stating that "PDVSA was indefinitely suspending any funding to Pequiven for the purchase of KOMSA's shares.").

5.36 In April and October 2008, FertiNitro paid dividends to its shareholders amounting to US$ 150 million.[111]

5.37 *2009:* By the end of December 2009, FertiNitro was in deficit, with its liabilities exceeding its assets.[112]

(iv) The Respondent's Measures and the Relevant Legal Framework

5.38 *1998:* On 6 December 1998, President Chavez was elected as the Respondent's Head of State. He took office in February 1999. During the period leading to his election, Venezuela was importing 64% of its food and was a "net importer" of agricultural products.[113] Article 305 of the 1999 Venezuelan Constitution enacted under the Government of President Chavez enshrined the policy objectives of pursuing food security and food sovereignty.[114] Thereafter, the Respondent engaged in a process to increase its capacity for agricultural production.

5.39 *2001:* In September 2001, the Respondent issued a 2001-2007 "Plan for Economic and Social Development of the Nation."[115] According to paragraph 1.1.3.1-4 of the Plan, the Government was to prioritise improvement in agricultural productivity to meet domestic demands for food. In 2002, the Respondent developed a three-year national programme to develop food security and rural development, with the assistance of the United Nations Food and Agriculture Organization.[116]

5.40 *2002:* On 1 July 2002, the Expropriation Law for Public or Social Benefit entered into effect.[117] In accordance with Article 2 of the Expropriation Law, expropriation is an "institution of Public Law by which the State acts in furtherance of a purpose having public utility or societal interest." Article 7 sets out the mandatory requirements for any

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[111] *See* FertiNitro, Financial Statements for the Year Ended Dec. 31 2009 and 2008 (30 April 2010) (R-30), note 16.
[112] *See* FertiNitro, Financial Statements for the Year Ended Dec. 31 2009 and 2008 (30 April 2010) (R-30)
[113] Christina Schiavoni & William Camacaro, *The Venezuelan Effort to Build a New Food and Agricultural System*, in 61 Monthly Review (1 July 2009) (R-29), p. 3.
[114] Constitution of the Bolivarian Republic of Venezuela (non-dated) (R-3).
[115] Plan for Economic and Social Development of the Nation (September 2001) (R-5).
[116] Food and Agriculture Organization of the United Nations, *Feature: FAO in Venezuela* (2002) (R-7).
[117] Expropriation Law for Reasons of Public or Social Utility ("Expropriation Law") (1 July 2002) (R-53) and (R-9).

expropriation, which include: (i) a "formal finding declaring the public interest; (ii) a declaration that carrying out such [interest] necessarily requires the total or partial transfer of the property or right; (iii) a fair price for the property subject to expropriation; and (iv) timely payment in cash or fair compensation." Article 5 of the Law provides:

> *"The Expropriation Decree consists of a declaration that the execution of a project requires the compulsory acquisition of the totality of a property or various properties, or a portion thereof. […] The Expropriation Decree shall require a prior finding of public utility, in accordance with the provisions of Articles 13 and 14 of this Law."*

5.41 On 2 December 2002, political and civic organisations began a national civic work-stoppage in Venezuela. It "seriously affected many of the country's economic activities, especially the oil industry."[118] Employees of PDVSA took part in the stoppage.[119] It affected Pequiven, whose operations were shut down.[120] The stoppage also brought important changes to the staffing of Pequiven, and consequently to the personnel of FertiNitro.[121] According to the Claimants, subsequent to the stoppage, the Respondent replaced management in PDVSA, Pequiven and FertiNitro with individuals who were deemed loyal to the Government, regardless of their technical qualifications.[122]

5.42 *2004:* In 2004, Pequiven had to import urea to meet local demand.[123] At that time, Pequiven and FertiNitro were the only companies in Venezuela producing urea. Pequiven's production facilities, "El Tablazo" and "Moron", experienced significant problems. According to the Respondent, Pequiven's plants could not meet local demand.

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[118] FertiNitro, Financial Statements for the Years Ended Dec. 31, 2004 and 2003 (10 February 2005) (R-14), p. 9.
[119] ICIS News, Venezuela Strike, crisis enter third and crucial week (16 December 2002) (C-36).
[120] *Id*.
[121] Amongst other workers, its President was fired, allegedly as a result of his support for the strike (*Venezuela's Pequiven boss sacked for backing strike*, ICIS News (16 December 2002) (C-37). *See also, Venezuela Strike, crisis enter third and crucial week*, ICIS News (16 December 2002) (C-36)).
[122] Cls. Mem., Paragrahps 99-100.
[123] *See* Witness Statement of Víctor Daniel Barrientos (28 February 2013) ("Barrientos WS1"), Paragraph 23. According to the Claimants, "FertEcon data on Venezuelan fertiliser imports and exports positively disproves [a] fertiliser shortage or fertiliser emergency in Venezuela" (Cls. Reply, Paragraph 86). Claimants further allege that Venezuela's export figures for Latin America were higher in 2006 than in 2007 (Cls. Reply, Paragraph 87).

5.43 *2005:* In 2005, the Respondent adopted a four-year "National Seed Plan" (*Plan Nacional de Semillas*).[124] At that time, the Respondent was importing over 70% of its food, 100% of its vegetable seeds and over 60%-70% of its corn seed.[125] The national plan sought to reduce import dependency and to increase domestic food production, through (inter alia) seed production and development.[126]

5.44 *2006:* On 28 July 2006, the "Partial Reform Law of the Law on Incentives for Development of the Petrochemical and Carbochemical Activities and other related activities" entered into force.[127] In accordance with Articles 2 and 3 of this law, Pequiven "shall comply and execute the policies dictated by the National Executive […]" and "shall be the exclusive property of […] Venezuela."

5.45 In December 2006, President Chavez was re-elected to a third presidential term.

5.46 *2007:* On 6 March 2007, Decree 5,218 dated 26 February 2007 (the "Urea Decree") came into effect.[128] Pursuant to Articles 1 and 2, nitrogenous fertilizers and the supplies necessary for their manufacture were "declared to be basic necessities throughout the national territory," and manufacturers, suppliers, and exporters of nitrogenous fertilizers were "required to supply [urea] on a priority basis to the national market." In accordance with Articles 3 and 5 of the Urea Decree, the price and production of fertilizers were to be regulated by joint resolutions of the Ministry of Popular Power for Agriculture and Land, the Ministry for Light Industries and Commerce and the Ministry for Energy and Oil.

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[124] National Seed Plan: Cultivating Food Sustainability (*Plan Nacional de Semillas: Cultivando la Sustentabilidad Alimentaria*, 2005-2009 (April 2005) (R-15) ("*National Seed Plan*").
[125] National Seed Plan (R-15) p. 5 (SP), p. 15 (EN).
[126] National Seed Plan (R-15) p. 8 (SPA).
[127] Partial Reform Law of the Law on Incentives for Development of the Petrochemical and Carbochemical Activities and other related activities (1 November 2005) (C-7).
[128] Decree 5,218 (26 February 2007) ("Urea Decree") (C-80).

5.47 Under the Urea Decree, a joint resolution was adopted, coming into effect on 2 May 2007 (the "Urea Resolution").[129] Pequiven was consulted by the Respondent during the drafting process of the Urea Decree and the Urea Resolution.[130]

5.48 The Urea Resolution established the maximum price at which urea manufacturers could sell urea to Pequiven. It authorised Pequiven to purchase from any manufacturer in Venezuela the necessary quantities of urea to satisfy national demand.[131] In addition, urea manufacturers in Venezuela had to inform the relevant ministry of the Respondent as to the amount of urea produced by them, together with the percentages of urea product destined for domestic and international consumption.[132]

5.49 At this time, as was well known to the Claimants and the Respondent, only Pequiven and FertiNitro produced urea in Venezuela.[133] Therefore, apart from Pequiven's production facilities, "El Tablazo" and "Morón", which had encountered difficulties since 2004, the Urea Decree and Urea Resolution, in practice applied only to the FertiNitro Plant (Pequiven being 100% owned by the Respondent).

5.50 Pursuant to the Urea Decree and Urea Resolution, FertiNitro was required to sell urea to Pequiven at below production costs and below the price specified in the Offtake Agreement.[134] After the devaluation of the Venezuelan Bolivar in 2010, the difference in value between the production price and the regulated price increased.

5.51 During that same period, Pequiven's other plant, El Tablazo, was exporting urea to other markets, including Ecuador, which could affect the levels of urea required from FertiNitro to meet the local urea demand.[135] Mr Toro, the then Pequiven-appointed director,

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[129] Joint Resolution by the Ministry of the People's Power for Agriculture and Land, the Ministry of the People's Power for Light Industry and Trade, and the Ministry of the People's Power for Energy and Petroleum (3 May 2007) ("Urea Resolution") (C-82).
[130] Resp. C-Mem., Paragraph 295; Cls. Reply, Paragraph 52.
[131] Urea Resolution (C-82), Art. 10.
[132] *Id.*, Art. 11.
[133] Cls. Mem., Paragraph 131; Resp. C-Mem., Paragraph 50; Barrientos WS1, Paragraphs 16, 23.
[134] FertiNitro March 2007 Monthly Report (13 April 2007) (C-86), p.13; FertiNitro January 2010 Monthly Report (25 February 2010) (C-87), p. 13; *See also* Cls. Mem., Paragraph 136.
[135] Parra WS1, Paragraph 66; Gwaltney WS1, Paragraph 104.

explained that urea was being exported because of "geopolitical reasons" and that those amounts were irrespective of those destined to the local market.[136]

5.52 *2008:* On 31 January 2008, Venezuela's Decree Law 5,835 became effective. In accordance with Article 4 of the Decree:

> *"All of the goods necessary to carry out the activities of production, manufacture, importing, gathering, transportation, distribution and sale of foods or products declared to be of first need or subject to price controls are hereby declared to be of, and are therefore subject to, public utility and societal interest.*
> *The National Executive shall, without other prior formality, initiate expropriation through decree for reasons of food security and sovereignty."*[137]

5.53 On 31 July 2008, the Law on Food Security and Sovereignty entered into effect.[138] Article 3 of the law provided that "[t]he goods that ensure the availability and timely access to foods of sufficient quality […] are declared to be of public interest and social welfare" and that "[w]hen there exist reasons related to food security, the Executive of the Nation may decree the mandatory acquisition in its entirety–with fair compensation and timely payment–of one of several goods needed to carry out projects or activities related to the production […] of foods." In addition, Article 20 granted the Executive the power to, amongst other matters, "pass economic and financial measures that may be necessary for the implementation of national production plans."

5.54 *2009:* On 18 June 2009, the Organic Law for the Development of Petrochemical Activities dated 16 June 2009 came into effect (the "2009 Petrochemical Law").[139] Article 5 of this Law provides:

> *"The basic and intermediate petrochemical activity is reserved for the State, as well as the works, assets and facilities required for its operation. This reserve will be exercised directly by the National Executive or through companies of its exclusive ownership. It can also be exercised by the State through Mixed Companies in which*

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[136] FertiNitro Board of Directors' Meeting Minutes No. 83 (30 July 2007) (C-88), p. 7.
[137] Decree 5,835 (28 January 2008) (R-23), Art. 4.
[138] Decree 6,071 (14 May 2008), Organic Law for Food Security and Sovereignty (R-27).
[139] Organic Law for the Development of Petrochemical Activities (16 June 2009) (C-8).

it has decision control and a participation of not less than fifty percent (50%) of the capital stock.

Mixed Companies will be subject to the prior authorization of the National Assembly, to which effect the National Executive, acting through the Ministry of the People's Power competent for Energy and Oil Matters, will inform the National Assembly of the pertinent circumstances and conditions."

5.55 On 15 July 2009, Mr C. Inciarte, President of FertiNitro and of Pequiven, informed the FertiNitro board of directors that, according to the official policy of the Respondent's Vice-Ministry of Petrochemistry (with which Pequiven agreed), the 2009 Petrochemical Law, and in particular its Article 5, would not apply to FertiNitro, because it was not to be applied retroactively by the Respondent.[140]

5.56 *2010:* On 10 October 2010, President Chavez appeared to sign Decree 7,713, in front of television cameras during his weekly television show called "*Alo Presidente*." ("Decree 7,713"; or the "Expropriation Decree"). As President Chavez signed the Expropriation Decree, he was recorded as stating (as translated into English):

"Look, so as to accomplish the capable and effective carrying out of the national plans of seeding and production, formulated by the National Executive, and that are necessary for the execution of the work of the socialist agro-alimentary sovereignty plan… Approved, that it be expropriated and it pass to the property, to the nation's property."[141]

5.57 This Expropriation Decree dated 10 October 2010, which was published in the Respondent's Official Gazette on 11 October 2010 over President Chavez's signature, provided (inter alia):[142]

"Article 1. The mandatory acquisition of movable and real estate assets is ordered, including improvements, installations, facilities, industrial equipment, office and other assets, required or necessary for the production, processing, transportation and warehousing activities of fertilizers (urea and ammoniac) that are owned by, or in the possession of, the business companies Fertilizantes Nitrogenados de Oriente,

[140] FertiNitro Board of Directors' Meeting Minutes No. 101 (15 July 2009) (C-72), p. 6 (SP), p. 15 (EN).
[141] VTV Broadcast transcript (11 October 2010) (R-33), p. 6.
[142] Decree 7,713 (dated 10 October 2010) ("Expropriation Decree") (C-9).

S.A., Fertilizantes Nitrogenados de Venezuela, S.R.L., Fertilizantes Nitrogenados de Oriente, C.E.C. y [sic] Fertilizantes Nitrogenados de Venezuela C.E.C., or any other company or persons related, with the objective of achieving the absolute and effective realization of the national plans of sowing and production formulated by the National Executive, and that are necessary for the execution of the 'Socialist Plan for Agri-Food Sovereignty'

Article 2. The project 'Socialist Plan for Agri-Food Sovereignty' will be executed by Petroquímica de Venezuela, S.A. (PEQUIVEN), assigned to the People's Power Ministry for Energy and Petroleum, as the expropriation entity, or the subsidiary that the entity appoints.

Article 3. The expropriated goods will be transferred free of encumbrances or limitations to the Venezuelan State by means of the company Petroquímica de Venezuela, S.A.(PEQUIVEN), as the expropriation entity, or the subsidiary that the entity appoints, in accordance to what is stipulated in Article 11 of the Expropriation Law for Public or Social Benefit.

Article 4. In compliance to what is stipulated in article 12 of the Expropriation Law for Public or Social Benefit the company Petroquímica de Venezuela S.A. (PEQUIVEN) is hereby authorized to carry out the necessary steps for the acquisition of real estate and other assets as stipulated in article 1 of the present Law, subrogating its position in all rights and obligations that correspond to the Bolivarian Republic of Venezuela on such matters.

Article 5. Petroquímica de Venezuela, S.A. (PEQUIVEN) will initiate and carry out the expropriation process as stipulated in the Expropriation Law for Public or Social Benefit until total and definite transfer of the ownership of the properties indicated in article 1 of the present Law takes place.

Article 6. In compliance with stipulations of article 3 of the Decree with Rank, Value and Force of the Organic Law for Security and Agri-food Sovereignty, the occupancy of the assets indicated in article 1 of the present Law by the company Petroquímica de Venezuela, S.A.–(PEQUIVEN) is ordered with the objective of placing these into operation, administration and capitalization.
[…]

Article 8. The Minister of the People's Power for Energy and Oil is appointed for the execution of the present Decree"[143]

5.58 There is disagreement between the Parties on whether any notice was provided to the Claimants (or to KOMSA) of the Expropriation Decree. The Claimants contend that no advance notice of the Expropriation Decree was given by the Respondent.[144] The Respondent contends, in turn, "Venezuela provided both constructive and actual notice that FertiNitro could be subject to a mandatory acquisition" through a series of actions starting as early as 2005.[145]

5.59 On 11 October 2010, the day following the televised signing of the Expropriation Decree by President Chavez, the Respondent's Minister of Energy and Oil (Mr Rafael Ramírez) travelled in person to the FertiNitro Plant. He there made the following statement during an interview by journalists broadcast on public television, directed also to employees of FertiNitro, Pequiven and PDVSA assembled at the Plant. This public address merits citing almost in full (as translated into English), with paragraph numbers here added for ease of later reference:[146]

> *"[1]… [Minister Rafael Ramirez unrecorded] …mandate of our laws, of our government, of our revolution, because this is a fundamental plant for agricultural development of our country, our food sovereignty, this is a plant with which we have been meeting with for a long time, without any success whatsoever, to try to have them adapt to our needs in the national development plan. So that we may see the importance that this company [i.e. FertiNitro]*[147] *has in the national agricultural system ... well, first is to announce that at a national level we produce 380,000 tons per year of fertilizers, and urea in particular. But this sole plant produces 1,500,000 tons per year of urea. This is a very large plant, the largest we have in the country.*

143 Article 11 of the Expropriation Law (cited in the Expropriation Decree) relates to "Releases of encumbrances on expropriated property" and Art. 12 to the Right of Subrogation. *See* Expropriation Law (1 July 2002) (R-53).

144 Gwaltney WS1, Paragraph 120; Cls. Mem., Paragraph 163; Cls. Reply, Paragraph 90.

145 Resp. C-Mem., Paragraph 168ff.

146 English translation of VTV Broadcast transcript of the Spanish language interview of Minister Ramírez (11 October 2010) (R-33 & C-107). This English translation cited above is taken from the Respondent's translation in R-33. It was not agreed by the Claimants who submitted their own English translation (C-107). *See also* Video file in mp4 format "Minister Ramirez Heads Takeover of FertiNitro" (11 October 2010) (C-139).

147 The Tribunal's interpretation is here added in square brackets, as also the insertions in square brackets below.

[2] Ok now, this is a plant that, receiving gas produced by the Venezuelan State at as subsidized price, that is to say, between 0.5 and 1.5 dollars per MMBTU, one must consider that outside the country gas is now selling for between 3 and 12 dollars per MMBTU. Notwithstanding this subsidized price, it is impossible that this plant, in which Pequiven had a minority interest, would not adjust to the fertilizer supply requirements for national development.

[3] We currently have a consumption of 600,000 tons of urea, but we are in now in our development plans, the total seeding plan designed by the national government, to cover up to 5 million hectares. We are setting a requirement of more than 1.3 million tons. With the control of this plant that the Venezuelan state will be taking [i.e. the FertiNitro Plant], we now have guaranteed all of the urea that our farm workers may need, all of the urea that our producing sector may need, to sustain this extraordinary seeding plan and to sustain national development.

[4] On another topic, this plant, which had a group of private shareholders, we had serious problems with sales. Being a fertilizer produced with Venezuelan gas, well, we had a limit where we could only acquire up to 10% of its production for the domestic market. And, when they sold it to us, they sold it at a price that was 2.5 to 3 times in excess of the price at which Pequiven sells its fertilizers. [These appear to be references to the Offtake Agreement].

[5] Such that, we are here very satisfied, because we know that this step is a step closer toward our sovereignty. We are with the workers, who are the fundamental actors of this process and, of course, paying attention to the guidelines of Commandant Chavez, of President Chavez, in the deepening of our Bolivarian revolution."
[…]
[6] Well, here we have a plant of about 400 workers. Of course, the private parties were using an outsourcing model. We are going to eliminate the outsourcing and enter upon a process of worker action – regularize all of the relationships with our workers – because socialism is about an economic system where the base, the relationship, the production relationships have to be within the framework of the ethics of socialism. It can't be; we can't have workers here that are being exploited by trans-national companies while they are the ones making the profits outside the country. [These appear to be references (inter alia) to FertiNitro's foreign shareholders, including KOMSA].

[7] So then, now a process is beginning, of course, a legal proceeding; all of the mechanisms are being initiated to complete the legal steps for expropriation. But we

are here with our workers, workers from Pequiven, workers from FertiNitro, and workers from PDVSA, already in control of the plant and making inspections of the installations because, of course, we have to guarantee that all of the assets are preserved, which from here on out belong to the Republic.

[8] Newsperson: The benefits of the countries of ALBA, which FertiNitro will have also? Minister Rafael Ramirez: Well, look. First of all, with this we guarantee our supply to the internal market. And later, we will have the control of sales. Up to this moment, the trans-national that operated here was the one that managed the volumes quoted, in accordance with its own criteria, according to its commercial policy. We, as you all know, in the heart of ALBA in Latin America and in our own domestic market, we have a different view. We have available people and natural resources, such as natural gas, which is the one used in this case, to convert it into inputs for the manufacturing process. In this sense, this plant will allow us to ensure that our policy is carried out in the future. [These appear to be references (inter alia) to the Offtake Agreement].

[9] Newsperson: (Unintelligible). Minister Rafael Ramirez: Well, yes, we are first taking here. We are guaranteeing ... take note that a plant stoppage has been started right now, at the beginning of their work. For that reason, there is a lot of movement... because we are always tending to the maintenance of our installations in optimum condition.

[10] Newsperson: What will be the impact of the nationalization of FertiNitro on the people? Minister Rafael Ramirez: Well, very positive, because it will now allow us to have available the volumes of fertilizers that we may need of urea at national prices. Note that Pequiven sells the 50 kilo sack of urea at 19 Bolivars, and here FertiNitro used to sell it to us at 50 Bolivars. That is to say, a difference of more than 2.5 times. Now we will have available the price that is regulated by the state, of 19.5, and we will be able to have available all of the urea that the domestic market may require. In that sense, between this operation and the nationalization of AgroIsleña, now AgroPatria, we are going to have the entire chain to be able to supply our farm working sector, over there in the Andes so that they may produce coffee, there in the plains so they may produce corn, so that they may produce sorghum. That is to say, all that we have seen is a fundamental element for us to be able to transcend the oil-producing model, and it is a fundamental model for guaranteeing the security and the feeding of our people. In the measure that we have the inputs for the entire chain controlled by the state, such that it guarantees that no speculation will take place with them, that is to say, with the fertilizers, the chemicals, the agro-chemicals, our people we be able to continue to have food available, there will be more work the

fields and, our people, across the socialist distribution network, we will then be able to have secure food at low prices, in abundance for all of our country. [Again, these appear to be references (inter alia) to the Offtake Agreement].

[11] Newsperson: What steps for our national sovereignty? Minister Rafael Ramirez: That's right, I also want to underscore and thank the unwavering support of workers, the support of our FUTEC, which is the confederation of our workers, Socialist Workers Vanguard, all of the peoples' organizations, the worker organizations that from, just yesterday, when the president made the announcements, are here safeguarding these installations, here at FertiNitro, as well as concurrently, our workers are in the State of Carabobo, guaranteeing, safeguarding the installations of Industria Venoco, which has also been nationalized by the revolution. Both steps are very important, because it is a sector in which we have to guarantee sovereignty. In the case of Venoco, we are dealing with a sector fundamental for production of chemicals, lubricants, greases, needed by the electrical and the industrial sectors, where the same situation was being repeated. It being PDVSA, being the State, which supplies the raw materials; well, there is a sale policy that, in a clear way, was impeding the plans to make available the natural resources for service to the people.

[12] Newsperson: How many people? Minister Rafael Ramirez: In FertiNitro, 400 persons. In Venoco we have about 360 persons. Yes, FertiNitro, FertiNitro. In ... national they have about [4]50 persons, that's more or less the number, which is the largest concentration of persons.

[…]

[13] These are very important actions, because these companies, as you well know, were companies and businesses that were remnants of the prior republic. They were companies and businesses of trans-national and national capital that were taking advantage of the supply of raw materials, cheaply, of the Venezuelan state, and of PDVSA in this plant, in particular.

[14] And I want to salute all of the workers and their political organizations. I want to salute the workers of FUTEC. I want to salute the workers of the Socialist Workers' Vanguard. I want to salute all of our workers who, as of just yesterday, came here to secure and guarantee the operations of, and the integrity of these assets that, today, belong to the Venezuelan state. We know that we can always count on the petroleum workers, we can always count on the petrochemical workers, we can count on the working class, we can count on the workers, the engineers, the technicians that make it all possible, that from day to day, we get our energy inputs. You all know that we have waged the battle for full petroleum sovereignty; that battle, that the Bolivarian

government has advanced and consolidated. And today, with Chavez, we can say that we are sovereign in the management of our petroleum resources.

[15] Now we are on the offensive to deepen food sovereignty. Only a few days ago, Commandant Chavez announced the nationalization of the AgroIsleña company, today the AgroPatria company. It is a company that allows us to provide for our farm workers, for our people, the agricultural inputs produced in the country and that the private parties held as a speculative tool, bringing poverty to the fields. This is now under the control of the State.

[16] Yesterday, the nationalization of FertiNitro was announced. So that we can see the importance of this plant we, with our petrochemical industry - Pequiven - produce at a national level two hundred, three hundred eighty thousand tons/year of urea that, as you all know, is fundamental for food production. This sole plant- FertiNitro - produces, on its own, 1,500,000 tons/year of urea. That is to say, five times more than what is produced in all of the plants nation-wide.

[17] But what was the problem? That this plant being, this plant [i.e. the FertiNitro Plant] receives gas produced by Petróleos de Venezuela, gas belonging to all Venezuelans. We sell it to them at a subsidized price, between 0.5 and 1.5 dollars per ton, per MMBTU. One has to consider, that in the world gas sells for 3 and has even gotten as high as 12 dollars per MMBTU. Here there is a subsidized price, 12 times less than it is sold for outside the country. But then these gentlemen, these private capitalists, foreign and national, produce urea fertilizer with that gas in large quantities and the majority of it is exported. That is to say, it doesn't come to supply national needs. [These appear to be references (inter alia) to FertiNitro's foreign shareholders, including KOMSA, and to KNI and the Offtake Agreement].

[18] It has cost us a lot to get these gentlemen to sell some fertilizer to the country. And after many discussions, we were able to secure that they would sell us only 10% of their production. And do you know at what price they would sell it to us? At triple the price at which Pequiven sells fertilizer in the national market. Such that, all of the fertilizer that was produced was at the disposal of the marketing companies, in this case a North American company, Koch, which would grab all of our fertilizer and sell it outside the country at speculative prices. [These appears to be references (inter alia) to KNI and the Offtake Agreement].

[19] With this nationalization action, we are guaranteeing, in the first instance, that all of the fertilizer that our farm workers may need, all of the fertilizer that our national seeding plan may need, all of the fertilizer that we may need to produce food

for our people, will be abundant, cheap and secure for all of our people. That is, that would be, the only reason.

[20] This is what Commandant Chavez has indicated - These large industrial installations located in national territory, which exploit the workers, which speculate with our own resources, should pass into the hands of the Venezuelan state. They should pass into the hands of the people. With the acquisition, with the nationalization of this plant, what we are doing is strengthening our nation's property, the property of all the men and women that live in the national territory. But in addition, and most importantly, the control of a plant like this one, FertiNitro, will enable us to guarantee the National Seeding Plan and the food sovereignty of the country. It will guarantee that the gas produced by our workers over there in PDVSA Gas, that they produce in Anaco with so much effort and what it has cost us to have controlled our oil & gas industry, may then be converted into fertilizer to benefit our people, so that our men, women and children may have a secure food supply.

[21] Also, in the same way that we are gathered here today in the State of Anzoátegui, in the Jose Antonio Anzoátegui complex, our fellow workers are in the State of Carabobo securing the nationalized installations of the Venoco company...

[22] Finally, I want to say in the name of our President, to guarantee to our workers, that all of the despicable capitalist practices, like the outsourcing and exploitation of workers, will end at this company. There can be no outsourcing whatsoever. There can be no exploitation whatsoever of our workers.

[23] We are going to build socialism... we are going to build socialism and in this sense, the Venezuelan state and the working class have an extraordinary role to play. Fellow workers, the future is yours. For you we are building socialism, for the men and women working every day in our national industries, in order to be able to guarantee to our people, to our communities, the communities that live near all of our industrial complexes, the communities of Viñedo, the communities of Barcelona, the communities of Puerto Espirito, that all of the Venezuelan people will receive the benefits that the Venezuelan state and its workers control, then, as important a company as this one that we are controlling - FertiNitro. Companions, workers, the call is to deepen the combat, to continue deepening our revolution, and, under the guidance and orientation of Commandant Chavez, we are sure that we are going to prevail. Country, Socialism or Death! We shall conquer! Thank you, companions."

5.60 The Tribunal finds the following facts established by the events of 10 and 11 October 2010, as recorded above. First, the Minister's visit to and address at the FertiNitro Plant took place in the context of the Expropriation Decree, particularly Article 1 on the "mandatory acquisition of movable and real estate assets"[148] of FertiNitro and Article 6 on the "occupancy" of FertiNitro's assets. Under Article 8 of the Decree, the Minister was responsible for its execution; and the Minister referred expressly to President Chavez's "announcements" of 10 October 2010: see paragraphs [11] and [16] above. Second, pursuant to the Expropriation Decree, the Minister was carrying out or confirming the Respondent's "control" of the FertiNitro Plant: see paragraphs [3], [7], [20] and [23] above. Third, that control, in the Minister's words, derived from FertiNitro's "nationalisation" and "expropriation" by the Respondent under the Expropriation Decree: see paragraphs [7], [10], [16] and [20] above. Fourth, that control necessarily extended beyond the physical and other assets of the FertiNitro Plant to include the abrogation of any existing contractual restrictions on FertiNitro's product being sold otherwise than for the domestic Venezuelan market, or as the Respondent might otherwise decide: see paragraphs [3], [4], [8], [10], [17], [18] and [19]. The Expropriation Decree itself said nothing expressly in regard to the abrogation of FertiNitro's existing contracts; but its effect, read with the Minister's address, leave no room for doubting the Respondent's intentions towards the Offtake Agreement. Fifth, as one motive for the Expropriation Decree, the Minister referred in derogatory terms to "trans-national" companies and "foreign" capitalists: see paragraphs [6], [8], [13 and [17] above. Last, but not least, the Minister was careful to describe the Respondent's actions within the framework of Venezuelan law: see his reference to "legal proceeding" and "legal steps for expropriation" in paragraph [7] above.

5.61 According to the Respondent, there was no physical occupation of the Plant at that point by Pequiven's employees or others. Instead, Mr Ramirez, as the responsible Minister "[took] control of the plant and was inspecting the installations in order to guarantee that

[148] *See* Expropriation Decree (C-9), Art. 1: "*Se ordena la adquisición forzosa de los bienes muebles e inmuebles, incluyendo bienhechurías, instalaciones, plantas, equipos industriales, de oficina y demás activos, requeridos o necesarios para la actividad de producción, procesamiento, transporte y almacenamiento de fertilizantes […]*"

all of FertiNitro's assets had been secured."[149] The Tribunal does not consider this description to be factually complete. By this time, the FertiNitro Plant was occupied by persons answerable to the Respondent (as distinct from FertiNitro) and whose conduct in seizing and physically controlling the FertiNitro Plant was approved and ratified by the Minister for the Respondent, as evidenced by the terms of his public address on 11 October 2010 and the Expropriation Decree cited above.

5.62 *2011:* On 26 July 2011, Pequiven (represented by Mr Barrientos) applied for orders to "request the expropriation of the asset" [of FertiNitro] (in the Spanish text of the application: "*solicitar la expropiación de los bienes*") to the Second Circuit of First Instance of Civil, Commercial, Agrarian and Transit Law of the Judicial Circuit of the Anzoátegui State.[150] As explained by the Respondent's counsel at the Third (June) Hearing, Pequiven thereby sought orders regarding (*inter alia*) the appointment of an *ad hoc* (temporary) board of trustees to run FertiNitro with legal power of control of all aspects of its business.[151]

5.63 As regards its authority to request such orders from the Anzoátegui Court, Pequiven's application read as follows:[152]

> *"By virtue of the Expropriation Decree […] PEQUIVEN is authorized to make the necessary arrangements for the acquisition of the movable and immovable property of FERTINITRO, being granted all rights and obligations pertaining to the Bolivarian Republic of Venezuela for such purposes. PEQUIVEN is also authorized to initiate and execute the expropriation proceedings under the Expropriation Law for Public Benefit or Social Interest, published in the Official Gazette of the Bolivarian Republic of Venezuela No. 37,475 on July 1, 2002 (hereinafter "Expropriation Law") until full and final transfer of ownership of the property listed therein to the Bolivarian Republic of Venezuela, through PEQUIVEN or a designated subsidiary thereof."*

[149] Resp. Rej., Paragraph 158.

[150] Petition for Expropriation and Provisional Relief to the Court of First Instance of the Civil, Commercial, Agrarian and Transit Law of the Judicial Circuit of the Anzoátegui State (26 July 2011). Each Party provided their own translation under R-36 and C-141 (the "Expropriation Petition").

[151] Third (June) Hearing, D1.157.13-16.

[152] *See* Expropriation Petition (C-141), p. 84.

5.64 On 29 July and 8, 9 and 10 August 2011, as requested by Pequiven, orders were made by the Anzoátegui Court pursuant to Article 6 of the Expropriation Decree, with Pequiven treated as the expropriating body under the Decree.[153] These court orders overrode the existing governance by-laws of FertiNitro under Venezuelan law.[154] However, much earlier as a matter of fact, these by-laws were no longer being applied within or to FertiNitro.

(v) Other Events Following the Expropriation Decree

5.65 *2010*: According to the Respondent, at the time of the Expropriation Decree (dated 10 October 2010), KOMSA's personnel at FertiNitro were no longer fulfilling their tasks.[155] The control exercised by FertiNitro's board of directors had ceased, as Pequiven "was given control of the operations, management and capitalization of FertiNitro."[156]

5.66 No meetings of FertiNitro's board of directors or committee meetings were convened subsequent to the Expropriation Decree.[157] On 9 November 2010, the FertiNitro directors appointed by KOMSA formally resigned from their positions.[158] The FertiNitro-appointed directors by Polar formally resigned a few days later, on 22 November 2010.[159]

5.67 On 26 November 2010, Mr Flores (of FertiNitro) sent a letter to Mr Strand (for KNI), stating:

> *"As per our conversation this afternoon, FertiNitro confirms the continuing of the Offtake Agreement under the fulfil of each clause such as: price, allocations of products, assignments of markets, and all the other clauses related in that agreement.*

[153] Judicial Records before Second Circuit of First Instance of Civil, Commercial, Agrarian and Transit Law of the Judicial Circuit of the Anzoátegui State, Resolutions of 8, 9, 10 August 2010 (C-141), pp. 38ff (SP), pp. 116 ff (EN).
[154] Judicial Records before Second Circuit of First Instance of Civil, Commercial, Agrarian and Transit Law of the Judicial Circuit of the Anzoátegui State, Resolutions of 8, 9, 10 August 2010 (C-141), pp. 24, 52-55 (SP), pp. 122, 130-133 (EN).
[155] Resp. C-Mem., Paragraph 69, Resp. Rej., Paragraph 159; Villarroel WS1, Paragraph 27.
[156] Resp. Rej., Paragraph 159.
[157] Parra WS1, Paragraph 73; Cls. Mem., Paragraph 167.
[158] Koch Resignation Letters (9 November 2010) (C-109).
[159] Polar Resignations Letters (22 November 2010) (C-110).

Based on, that FertiNitro will send the FNSTOCK before the workday end in order to each Offtaker can see the volumes available in December".[160]

5.68 On 1 December 2010, Mr Jorge Perdomo, the General Manager of FertiNitro sent a letter to Mr Strand (for KNI) as follows:

> *"After the announcement of Venezuelan government about FertiNitro nationalizing. FertiNitro hereby confirms the continuing and fulfilling of the Offtake Agreement made and entered on April 8, 1998 […]*
>
> *Based on the current start up of the plants, FertiNitro has sent the December and January allocation of products to each Offtakers and it is expected to comply fifty percent (50%) of the actual total plants output, such as it is stipulated in the agreement. Please note that total volume for Koch in December is as follow:*
> *Ammonia: 23.000MT +/- 10%*
> *Urea: 34.345 MT +/- 10%*
> *Please let us know your December program in order to FertiNitro can make all the necessary arrangement with authorities as customs, export permissions, etc."*[161]

5.69 On 3 December 2010, Mr Gwaltney (for KNI) sent an email message to Mr Perdomo (of FertiNitro) replying as follows:

> *"I am in receipt of your letter of December 1, 2010 to Jacob Strand of KNI acknowledging the nationalization of FertiNitro and KNI has authorized me to respond on their behalf. As you are aware, the government's recent action constitutes an expropriation of KNI's, and its affiliates, interests in FertiNitro including, but not limited to, the Offtake Agreement.*
>
> *Mr. Francisco Garcia recently informed me that he has been appointed by Pequiven to lead a commercial team to negotiate and compensate KNI and FertiNitro's shareholders for the expropriation. I also understand that Pequiven has confirmed they have taken the offtake in its entirety, as part of the expropriation, and that they will compensate KNI for that. I further understand that Pequiven has requested that KNI purchase product under terms and conditions similar with the Offtake Agreement for a limited period of time while Pequiven negotiates with the lenders so as to ensure steady cash flow, in large part, for the benefit of the lenders. While we are still analyzing the full impact and ramifications of the government's actions, we*

[160] Email from E. Flores to J. Strand re: Offtake Agreement FertiNitro (26 November 2010) (C-111).
[161] Letter from J. Perdomo to J. Strand (1 December 2010) (C-112).

understand both Pequiven and FertiNitro's desire to continue a commercial relationship with KNI despite having expropriated its and its affiliates' property.

Given this, and on the understanding that Pequiven intends to compensate KNI, and its affiliates, in a manner to which they are entitled for the expropriation of their property under international law, for limited period of time until further notice, KNI agrees to purchase product under terms consistent with the Offtake Agreement. Payment for product shall be to the same historical bank accounts. It is also KNI's expectation that FertiNitro will conduct its business affairs consistent with any and all lending obligations and in full compliance with all relevant laws.

This communication and KNI's action in agreeing to purchase product from FertiNitro is on strictly without prejudice basis. KNI and its affiliates, hereby expressly reserve any and all rights that may exist including under the Offtake Agreement, resulting from, or in any way associated with, governmental actions including, but not limited to, rights under any domestic or international laws."[162]

5.70 *2011:* From December 2010 onwards, Pequiven entered into agreements with the FertiNitro project's bankers and bondholders to settle the debts of FertiNitro. This exercise was apparently completed by January 2012.[163]

5.71 During 2011, representatives of Pequiven and of the other FertiNitro shareholders met on various occasions to discuss the amount of compensation due to these other shareholders (including KOMSA) from the Respondent. Such meetings were held on 16 February 2011 in New York;[164] 6 April and 23 May 2011 in Caracas and 1 September 2011 in Miami.[165] A crucial issue between Pequiven and these shareholders was the study of and methodology for FertiNitro's valuation.

5.72 The negotiations between Pequiven and the FertiNitro shareholders eventually resulted in amicable settlement agreements with LAIF (as a 10% shareholder). Snamprogetti (as a 20% shareholder and EPC Contractor) also reached an inchoate agreement with

[162] Email from B. Gwaltney to J. Perdomo, copying J. Strand, M. Parra, F. Garcia re: KNI Offtake (3 December 2010) (C-113).
[163] Barrientos WS1, Paragraph 44.
[164] *See* Letter from Betulio Hernandez, Executive Director, Pequiven, to Shareholders (28 February 2011) (R-35).
[165] Gwaltney WS2, Paragraph 39; Barrientos WS1, Paragraphs 35-37; Second Statement of Witness Víctor Daniel Barrientos Casanova (30 December 2013) ("Barrientos WS2"), Paragraphs 37ff.

Pequiven.[166] It seems that there was no concluded agreement with Polar. No agreement was made with KOMSA, still less KNI which was not separately privy to these negotiations.

5.73 On 28 June 2011, *i.e.* before the final meeting in September 2011, the Claimants filed their Request for Arbitration before ICSID.

5.74 As already noted above, on 26 July 2011, Pequiven filed a Petition to the Court of First Instance of the Judicial Circuit of Anzoátegui in order to carry out the mandatory acquisition and requesting that a temporary *Ad Hoc* Board of Temporary Judicial Administrators be established to govern FertiNitro, further to the Venezuelan law on domestic expropriation procedure.[167] Shortly thereafter, the Court designated the requested *Ad Hoc* Board.[168] On 29 July 2011, the Court of First Instance of the Judicial Circuit of Anzoátegui issued a decision accepting jurisdiction to hear the Request for Mandatory Acquisition.[169] Thereafter, these legal proceedings continued and, apparently, still continue, without payment of any compensation to the Claimants under the Expropriation Decree.

5.75 In the summer of 2011, during their negotiations, Pequiven presented to FertiNitro's shareholders (including KOMSA) valuation reports prepared by financial consultants called Advantis (also mistakenly called in the evidence "Adventis"). Advantis had been created by former officers of Booz Allen in Venezuela.[170] There were two written reports of May and July 2011, both dated "September 2010."[171] That was not the date of the

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[166] Barrientos WS2, Paragraph 41; Resp. Rej., Paragraph 151.
[167] Expropriation Petition (R-36).
[168] Provisional Measures of the Court of First Instance of the Judicial Circuit of Anzoátegui (11 August 2011) (R-37) (C-141).
[169] Court of First Instance of the Judicial Circuit of Anzoategui, Decision accepting jurisdiction to hear the Request for Mandatory Acquisition (29 July 2011) (R-63). Thereafter, on 28 November 2013, the Court of First Instance, "received the certificate of encumbrances from the Records Office"; and on 12 December 2013, "the judge issued the Edict ordering its publication in two major newspapers pursuant to the Expropriation Law." *See* Records Office, Certificate of Encumbrances and Liens (28 November 2013) (R-70); and Edicts issued by the Court of First Instances of the Judicial Circuit of Anzoátequi (13 December 2013) (R-72). Subsequently KOMSA was to make an appearance in court and then a valuation committee would be established *See* Resp. Rej., Paragraph 152.
[170] Second (November) Hearing D.6. 193 (Flores).
[171] Advantis Valuation Report of FertiNitro (July 2011) (C-157); Advantis Valuation Report of FertiNitro (May 2011) (R-86).

documents' production, but rather (presumably) the end-date of the calculations made by Advantis. Advantis were independent consultants retained by Pequiven to value FertiNitro in their negotiations with (inter alios) KOMSA. Advantis was not advising or howsoever acting for the Claimants. Their reports were not "joint reports;" nor were their valuations ever accepted as correct by KOMSA or (so it appears) by the Respondent itself. Neither valuation was professed by Pequiven as a firm offer by the Respondent capable of acceptance by KOMSA, without further negotiations. Moreover, Pequiven had indicated to the shareholders that it did not have the authority nor the funds - to conclude by itself - any agreement for the Respondent.[172]

5.76 The circumstances whereby these two reports were transmitted to KOMSA in 2011 remain unclear on the evidence adduced in this arbitration. As to the first Advantis report of May 2011 entitled "Valoracíon de FertiNitro", it appears from contemporary email messages dated 18 and 19 May 2011 that it was sent by Advantis to Pequiven and by Pequiven to KOMSA as a shareholder in FertiNitro, [173] presumably for the meeting that took place between their representatives on 23 May 2011 in Caracas.[174] Mr Gwaltney (for KOMSA) sent a letter of 19 May 2011 to Pequiven criticising this first Advantis valuation.[175] As to the second Advantis report of July 2011 also entitled "Valoracíon de FertiNitro", the Claimants accept that, as with the first report, it was transmitted by Pequiven to KOMSA as a shareholder in FertiNitro.[176]

5.77 Mr Barrientos (of Pequiven) explained the background to these Advantis reports in his oral testimony at the First (September) Hearing:[177]

> *"At the first meeting that we had in February 2011, one of the requests that Pequiven tabled was that, working together with the expropriated shareholders, that we would*

[172] Gwaltney WS2, Paragraph 41.
[173] *See* email of 18 May 2011, from Ignacio Pulido of Advantis (Director), to Francisco Garcia of Pequiven, presumably transmitting the First Advantis Report to Pequiven ("18 May 2011 email"); and email of 19 May 2011 from Francisco Garcia to representatives of the Fertinitro shareholders, including M. Parra and G. Waltney of KOMSA/KNI, V. Barrientos and Jorge Luis Perdomo of Pequiven, R. Biondi of Snamprogetti and O. Grossman of Polar, transmitting the Reports from Pequiven to the other shareholders (R-86), p. 2.
[174] 18 May 2011 email (R-86), *see also supra* Paragraph 5.71.
[175] Gwaltney WS2, Paragraph 40.
[176] Third (June) Hearing, D2. 103-104.
[177] First (September) Hearing, D3. 83ff.

hire a third party to come in and give us an evaluation of the company, and then on that basis, establish compensation. But none of the expropriated shareholders accepted that proposal and that is why Pequiven on its own hired a third party to do the evaluation […] Adventis is a company that has provided services to a variety of mixed companies in valuation for Pequiven, in other areas as well, it is a well recognised firm, and of course this is something that we have taken very seriously. It was something that was enshrined in a Government decree. We [Pequiven] were designated as the expropriating entity and we were taking this very seriously. We hired Adventis, we were trying to reach a consensus with the expropriated shareholders in order to get them involved in selecting a single valuation expert and since they didn't agree with this we felt free to go out and work with the company that we felt was the most qualified to do this job, and that was Adventis. It has considerable credentials which give it trustworthiness for this type of valuation and that's why we decided to work with them. […] as part of the negotiation team I met with them, along with the rest of the group […] I can tell you that Adventis is a well recognised company and I don't think they would have jeopardised their reputation by getting involved in that type of valuation."

The witness had been asked whether Advantis had been instructed by Pequiven "to make the valuation as low as possible*."*[178]

5.78 The Tribunal returns to the content of these two Advantis Reports later in Part IX of this Award. For present purposes, it suffices to record that the first report valued FertiNitro at US$ 398 million as at 30 September 2010[179] (thereby valuing KOMSA's 25% interest at US$ 99.5 million); and the second report valued FertiNitro at US$ 452 million as at 30 September 2010 under a first scenario;[180] that report also contained an alternative scenario which contained elements which increased and others which decreased the value of Fertinitro with a total value of US$ 561million (thereby valuing KOMSA's 25% interest at US$ 113 million under the first scenario and US$ 140.25 million under the second).[181] Both reports used a DCF methodology.

[178] The insertion in square brackets is here made by the Tribunal.
[179] Advantis Valuation Report of FertiNitro (May 2011) (R-86), p.11.
[180] Advantis Valuation Report of FertiNitro (July 2011); (C-157), p.3.
[181] Advantis Valuation Report of FertiNitro (July 2011) (C-157), p. 5.

5.79 *2012:* By January 2012, as already indicated, FertiNitro had satisfied the debts owed to its bondholders and banks. As confirmed by the Respondent's counsel at the Third (June) Hearing:

> *"In December 2011, FertiNitro satisfied its obligations with respect to the bond-holders and the banks. At that point, once those obligations were satisfied, there was no longer a commercial requirement to have the offtake agreement in place. As part of its obligation to operate for the commercial purpose of FertiNitro, the ad hoc board of trustees took the decision that by getting rid of the offtake agreement, it would have the opportunity to pursue more lucrative sales agreements with other customers; or, to the extent necessary, to use production to satisfy domestic demand."*[182]

5.80 On 28 February 2012, the President of the *ad hoc* board of trustees of FertiNitro sent a letter to KOMSA and KNI, for the attention of Mr Gwaltney and Mr Parra, stating (inter alia):

> *"I hereby notify you that, in accordance with the Resolution issued by the Board of Temporary Ad-Hoc Trustees of Fertilizantes Nitrogenados de Venezuela, FertiNitro, C.E.C., ("FertiNitro"), as is evidenced by appointment effected by Decrees handed down by [the Anzoátegui Court] […]; effective from the date of this communication, FertiNitro shall not sell any more nitrogen fertilizers (urea and ammonia) to Koch Oil, S.A. under the marketing agreement entered into between Petroquímica de Venezuela S.A., International Petrochemical Sales Limited, Koch Oil S.A., and Fertilizantes Nitrogenados de Venezuela, C.E.C. on April 8, 1998; all of which is in fulfilment of what is established in Decree 7,713 published in Official Gazette of the Bolivarian Republic of Venezuela No. 39,528 of October 11, 2010, which orders the compulsory acquisition of movable and immovable property […]"*[183]

5.81 The Parties disagree as to the nature of the sales transactions of ammonia and urea from FertiNitro to KNI made from the date of the Expropriation Decree (dated 10 October 2010) to the issuance of FertiNitro's letter above (28 February 2012).

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[182] Third (June) Hearing, D1. 167.5-15.

[183] Letter from Mr Betulio Hernández (of FertiNitro) to Koch Oil SA and Koch Nitrogen Company re: Offtake Agreement (28 February 2012) (C-114). This letter is quoted more fully in Part 4 above.

5.82 According to the Respondent, all of FertiNitro's ammonia and urea was sold pursuant to the Offtake Agreement; and that, until February 2012, FertiNitro continued "[complying] with the percentages permitted under the Offtake Agreement to supply the domestic market."[184] It was only after February 2012 that the percentage allocated to the domestic market increased substantially to fulfil the Respondent's needs.[185] Similarly, "KNI and Pequiven received their share of urea and ammonia, at the same discounted price."[186] In addition, Mr Barrientos (as the Project Manager and General Manager of Pequiven) testified that, after Decree 7,713 was issued, FertiNitro entered into a Stand Still Agreement with its banks and bondholders which provided for the further continuation of the Offtake Agreement; and that it was only terminated later for commercial reasons.[187]

5.83 The Tribunal notes that this Stand Still Agreement was apparently made in December 2010 by Pequiven for FertiNitro. It was not adduced in evidence by the Respondent in this arbitration. The Claimants were not parties to this Stand Still Agreement. There is no evidence that its terms were known at the time by KNI, save as Pequiven chose to describe its effect to the Claimants.

5.84 In response to the Respondent's case, the Claimants allege that the "post expropriation product purchases made by KNI from FertiNitro were made pursuant to a new *ad hoc* arrangement".[188] They claim that "after the expropriation, the bondholders and creditors continued to look to the product purchases and the revenues they generated, continued to have power, through the trustee, over the Offshore Accounts, and could have exercised remedies, including assuming control of the plant in the event [of default]."[189]

5.85 The Tribunal finds, on the limited evidence adduced in this arbitration, that the Respondent's conduct was ambiguous, being dependent upon different perspectives. Even from Pequiven's own perspective, as Mr Barrientos acknowledged in his testimony:

184 Resp. C-Mem., Paragraphs 15, 84.
185 Resp. Rej., Paragraph 125.
186 Resp. Rej., Paragraph 126.
187 Barrientos WS1, Paragraph 43.
188 Cls. Reply, Paragraph 17, 92.
189 Cls. Reply, Paragraph 17.

"Without any doubt whatsoever, immediately after Decree 7713, a great deal of uncertainty arose."[190] Towards FertiNitro's banks and bondholders, it became important for the Respondent ostensibly to maintain the continuing efficacy of the Offtake Agreement, as apparently achieved by the Stand Still Agreement, so as to avoid a cross-default under the Common Security Agreement and other agreements with the banks and bondholders. From the Respondent's perspective towards KNI, there was there no such necessity. The Tribunal returns to KNI's position in Part VII below.

(vi) The "Historical Claims" (as regards Taxes and VAT)

5.86 As summarised in Part II above, KOMSA advances claims relating to three tax related measures and VAT credits, as part of its "Historical Claims".

5.87 *New Taxes:* In August 2005, the Respondent enacted the Organic Law on Science, Technology and Innovation (*Ley Orgánica de Ciencia, Tecnología e Inovación*) ("Science and Technology Law").[191] In accordance with Articles 35 and 42 of this Law, "large companies in the country dealing with the activities established in the Organic Law on Hydrocarbons and Gaseous Hydrocarbons" shall donate two per cent of their gross revenue obtained in the Venezuelan territory, to activities that would be "considered to be Contributions and Investments in Science, Technology and Innovations and their Application."[192] According to the Respondent, Article 39 of the Science and Technology Law provides that contributions can be tax deductible.[193]

5.88 This Science and Technology Law, a law of general application, was being implemented before FertiNitro began to operate and upon FertiNitro's initiation of operations it also became applicable to it. After the enactment of the 2009 Petrochemical Law, FertiNitro's contribution rate under the Science and Technology Law was reduced from 2% to 0.5%,

[190] Barrientos WS1, Paragraph 41.
[191] Organic Law on Science, Technology and Innovation, 3 August 2005, effective as of 1 January 2006 (C-43).
[192] Organic Law on Science, Technology and Innovation, 3 August 2005, effective as of 1 January 2006 (C-43), Arts. 35 and 42 (10).
[193] Resp. C-Mem., Paragraph 123.

because petrochemical activities stopped being categorized as an activity within the Hydrocarbon sector.[194]

5.89 According to the Claimants, the total amount that FertiNitro contributed in compliance with the Science and Technology Law in the period 2006-2010 amounted to approximately US$ 22.35 million.[195] According to the Respondent "FertiNitro's contributions were almost exclusively invested internally,"[196] and "on rare occasions, [FertiNitro] contributed to a public project."[197]

5.90 *Increased Taxes:* On 30 December 2005, the municipality of Simón Bolivar, in the State of Anzoátegui (where the FertiNitro Plant is located), issued an ordinance that set or modified the tax rate applicable to all companies considered to be in the "industrial, commercial, service or similar economic activities" in the municipality (the "Municipal Ordinance").[198] The Municipal Ordinance, applicable to FertiNitro for the 2006 fiscal year, established an increase in the municipal tax rate from 1% to 4%.[199]

5.91 Pursuant to the Municipal Ordinance "[a]ll industrial economic activities exercised by consortium or any other kind of association […] of the Energy Natural Gas Production Sector and all activities related to the oil and gas and petrochemical industry […] linked to the activity that is directly or indirectly related to the Jose Petrochemical Complex" would be subject to a 4% tax rate over the company's gross revenue.[200] The Parties disagree on which types of companies are located in the Jose Petrochemical complex and would be affected by the Ordinance.[201]

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[194] FertiNitro, Declarations 2006-2012 (R-40); FertiNitro, Declarations 2006-2013 (R-74); Resp. Rej., Paragraph 165. *See also* FertiNitro, Chart on Contributions (R-47).
[195] Cls. Mem., Paragraph 78 citing Giles ER1, paragraph 3.23.
[196] Resp. C-Mem., Paragraph 122.
[197] Resp. C-Mem., Paragraph 120.
[198] Ordinance for Taxes on Industrial, Commercial, Service or Similar Economic Activities (30 December 2005) (C-45).
[199] *See* FertiNitro 31 December 2005 and 2004 Report of Independent Auditors and Financial Statements, dated 1 March 2006 (C-49), p. 22. *See also* Cls. Mem., Paragraph 82, citing "Municipal Tax Rate Chart for 2005" (C-46).
[200] Ordinance for Taxes on Industrial, Commercial, Service or Similar Economic Activities (30 December 2005) (C-45), Group 1-D, p. 14.
[201] According to the Claimants, all the companies that are located in the Jose Petrochemical complex are partly foreign-owned, and were therefore those affected by the Municipal Ordinance (Cls. Mem., Paragraph 82). The Respondent

5.92 In 2006, before FertiNitro would start paying the taxes at the higher rate, Pequiven engaged in negotiations with the municipality to reduce the municipal tax for all the mixed companies in which Pequiven had equity investments, including FertiNitro, Metor, Superoctoanos and Supermetanol.[202] FertiNitro's Board agreed to entrust Pequiven to handle such negotiations.[203]

5.93 In connection with these negotiations, on 14 November 2006, the Municipality issued a decree pursuant to which FertiNitro would be applied a 2% municipal tax for 2006 and 2.4% for 2007, instead of 4% (the "Municipal Decree").[204] The Decree was formally notified to FertiNitro on 6 December 2006.[205]

5.94 On 14 December 2006, the FertiNitro Board of Directors Meeting issued a Resolution that "ratified the General Management's decision to accept the 2% rate for 2006 and approved accepting the 2.4% rate for 2007."[206]

5.95 *VAT:* As an exporter from Venezuela, FertiNitro had the right under Venezuelan law to recover credits for VATs borne for the acquisition and import of goods and services used in the manufacture of goods for export.[207] Such tax credits were provided in the form of Special Certificates of Tax Refunds (or "CERTS" for the Spanish acronym) and were governed by the Law of May 1999 on Partial Reform of the Law on Value Added Tax (the "VAT Law").[208] CERTS could "be used or assigned for the payment of national taxes […] tax liability, tax penalties and procedural expenses."[209] CERTS are issued in Bolivares and

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rejects this characterisation and asserts that the Ordinance was applicable to "all companies operating in the Municipality of Simón Bolívar", which includes mixed-owned companies, located in the Jose Complex (Resp. C-Mem., Paragraph 125; Resp. Rej., Paragraph 177).

[202] *See* Email from Oswaldo Parilli, Pequiven's legal counsel, to Saul Ameliach and other Pequiven representatives (28 November 2006) (C-48), pp.3-4; and Email from Oswaldo Parilli to Pequiven representatives re: Municipal Taxes (28 November 2006) (C-53) pp. 5-6.

[203] FertiNitro Board of Directors' Meeting Minutes No. 65 (5 April 2006) (C-51).

[204] Decree D.A.M.S.B.-042-A-2006 (14 November 2006) (C-48), pp. 20-22.

[205] *See* Notice No. 1093-06 from SABAT/Alcaldía del Municipio Simón Bolívar to FertiNitro (6 December 2006) (C-48) p. 5 (SP), p. 19 (EN).

[206] FertiNitro Board of Directors' Meeting Minutes No. 76 (14 December 2006) (C-54) (*see also* Resp. Rej., Paragraph 179. According to the Claimants, Pequiven entered into this agreement without consulting the other FertiNitro shareholders and without the authority to do so. (*See* Cls. Mem., Paragraph 84).

[207] Law of Partial Reform of the Law on Value Added Tax (29 July 2004) (C-55) ("VAT Law"), Art. 43.

[208] VAT Law.

[209] *Id*., Art. 43.

the income tax is also levied in Bolivares. The Respondent did not make "actual payments" to FertiNitro pursuant to VAT credit requests.

5.96 Ms Carolina Nunez, a former SENIAT employee, testified that: "[b]etween 2007 to 2012, the process took as long as two or three years from submission of a request to final issuance of a CERT" (even though the Law prescribes a 30-day period); and it affected all tax payers equally.[210]

5.97 During the course of its operations, FertiNitro regularly submitted request for reimbursements to the Respondent's competent authorities. On or around 2007 and thereafter, the Respondent's tax authorities failed to issue certain of the requested CERTS to FertiNitro on a timely basis.[211] FertiNitro complained to the relevant tax authorities.[212]

5.98 The Parties disagree on whether the requested VAT credits were ultimately granted to FertiNitro. According to the Respondent, "each of the VAT credits claimed by the Claimants in this proceeding was provided to FertiNitro."[213] It adds that the amounts issued to FertiNitro could differ from the amount initially requested; and that FertiNitro never complained about those differences.[214]

5.99 *The Comisario Report:* In accordance with Venezuelan law, FertiNitro was required to obtain annual audit reports from a *Comisario*. The Parties agree that "[a] *Comisario*" is an

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[210] Witness Statement of Carolina Nuñez (28 February 2013) ("Nuñez WS1"), Paragraph 16 (*see* Resp. C-Mem., Paragraph 131). According to the VAT Regulations, the request for CERTS was to be addressed to the "National Integrated Service of Customs and Tax Administration" (known as SENIAT, using its Spanish acronym), which would decide to approve it or reject it. All approved requests are then reviewed by the Ministry of Finance, in charge of issuing the CERT to taxpayers (thus adding more time). *See* Partial Regulation No. 1 of the Law that Establishes the Value Added Tax, with regard to Tax Credit Recovery for Exporter Taxpayers (16 September 2003) (C-59), Arts. 8-16, pp. 14-19.

[211] Letter from Ikbal Samad (on behalf of FertiNitro) to Minister of the People's Power for Economy and Finance re: Request to Grant Refund Certificates and Administrative Orders to Fertilizantes Nitrogenados de Venezuela, FertiNitro, CEC. (21 December 2009) (C-60), pp. 11-12.

[212] Letter from Ikbal Samad (on behalf of FertiNitro) to the Minister of the People's Power for Economy and Finance re: Request to Grant Refund Certificates and Administrative Orders to Fertilizantes Nitrogenados de Venezuela, FertiNitro, CEC (21 December 2009) (C-60), pp. 8-10.

[213] Resp. Rej., Paragraph 21.

[214] Witness Statement of Carolina Nuñez (28 February 2013), Paragraph 17 and Annex A; Resp. C-Mem., Paragraph 132.

"auditor that is required under Venezuelan law to review audits conducted by private auditors."[215]

5.100 In accordance with the Venezuelan Code of Commerce, the *Comisarios* are appointed by the company's shareholders; and they have to report to the audited company's shareholders. Along with the report in which they explain the results of their examination of the balance sheets and management practices, the *Comisarios* may include proposals, suggestions and observations. Such recommendations are not binding on the audited company.

5.101 On 7 September 2006, the *Comisario* for FertiNitro issued its report containing certain recommendations and criticisms (the "Comisario Report").[216] It is a document of some four pages, with additional appendices. The Claimants contend that this *Comisario* had a prior relationship with Pequiven and therefore the *Comisario* Report is biased in Pequiven's favour.[217] The Tribunal does not accept this criticism as affecting the relevant contents of the report (to which it returns later in this Award).

[215] Cls. Mem., Paragraph 103; Resp. Rej., Paragraph 75.
[216] FertiNitro Summary Report from the Statutory Auditor and Consolidated Financial Statements (7 September 2006) ("*Comisario* Report") (C-63).
[217] Cls. Mem., Paragraphs 103-110.

PART VI: JURISDICTION ISSUES

(1) Introduction

6.1 The Respondent objects to the jurisdiction of ICSID and the competence of the Tribunal *ratione materiae*, alleging that the Offtake Agreement does not constitute an "investment" under both the Treaty and the ICSID Convention; and that the Tribunal has therefore no competence, or jurisdiction, to decide KNI's claims against the Respondent in this arbitration. As already indicated, the Respondent makes no jurisdictional objection to KOMSA's claims.

6.2 For present purposes, the Respondent's principal submissions can be summarised briefly as follows: (i) there is an inherent meaning of the term "investment," under both Article 25(1) of the ICSID Convention and Article 1(2) the Treaty, which requires among others, a contribution and risk; (ii) KNI has neither made a contribution, nor incurred the type of risk necessary to qualify as an "investment"; (iii) the Offtake Agreement is a simple commercial sales contract and the complexity, length and project finance implications or the general unity of the investment concept don't transform it into an "investment"; (iv) the Offtake Agreement fails to meet the territoriality requirement of Article 2 of the Treaty as it has not provided any benefit in Venezuela; and (v) KNI's claim is covered by the dispute resolution provisions in Article 12 of the Offtake Agreement, providing for the resolution of "any dispute" relating to that agreement, including its termination.

6.3 KNI's principal submissions in response, asserting the jurisdiction and competence of ICSID and the Tribunal, can also be summarised briefly as follows: (i) it is far from well-settled that an "objective and inherent" meaning of "investment" under the ICSID Convention can supplant the scope of the treaty parties' consent as to the meaning of an "investment" in the treaty; (ii) there is no requirement under this Treaty or the ICSID Convention to make a contribution to Venezuela's development; these factors as to contribution and risk are not strict jurisdictional requirements, but simply indicia or "hallmarks" of investments under the ICSID Convention; (iii) in any event, the Offtake Agreement satisfies these factors as to both contribution and risk; (iv) international law prescribes that investment transactions be viewed in their totality; and therefore the Offtake Agreement cannot be considered as a commercial contract in isolation from the entire FertiNitro project, but instead as an integral and critical part of that project's financing, structure, profitability and purpose; (v) Article 2 of the Treaty is a standard clause that "merely establishes the temporal scope and subject-matter of the Treaty", and it cannot be interpreted as incorporating a requirements that the Treaty contribute to the host State's development; and (vi) KNI's rights under the Offtake Agreement and under the Treaty are conceptually distinct; and the dispute resolution provisions in Article 12 of the Offtake Agreement do not cover KNI's claim against the Respondent arising out of the Treaty under international law.

6.4 It is necessary to develop certain of these submissions further below, for the Respondent and KNI in turn. The Tribunal has considered in full the factual and legal materials presented by the Parties relating to the Respondent's jurisdictional objection. The Tribunal here addresses only the materials that it considers to be determinative factors in deciding that objection to KNI's claim.

(2) The Respondent's Case

6.5 *"Investment":* The Respondent submits that the term "investment" has an objective and inherent meaning both under (i) the Treaty and (ii) the ICSID Convention. The burden of proof lies with the alleged investor asserting the alleged investment, who must demonstrate that is has made the alleged investment within the meaning of both the Treaty and the ICSID Convention.[218]

6.6 With regard to Article 25(1) of the ICSID Convention, the Respondent asserts that arbitration tribunals, including *Global Trading v. Ukraine*, *Joy Mining v. Egypt*, and *Saba Fakes v. Turkey*, have recognised that the term "investment" has an objective meaning under the ICSID Convention, or in the words of Article 31(1) of the Vienna Convention on the Law of Treaties ("VCLT"), an "ordinary meaning" which cannot be established only

[218] Resp. Preliminary Objections, Paragraph 14.

by reference to the Treaty, as an instrument of consent.[219] It cites the tribunal's decision in *GEA Group v. Ukraine*, for the proposition that "is not so much the term 'investment' in the ICSID Convention than the term 'investment' *per se* that is often considered as having an objective meaning in itself, whether it is mentioned in the ICSID Convention or in a BIT."[220]

6.7 As to the objective meaning in Article 1(2) of the Treaty, the Respondent asserts that: "[t]he argument that 'every kind of asset' constitutes a protected 'investment' under the [Treaty] is untenable." It concludes: "[the] indicative list of the types of assets which the term may cover […] [is] not intended to mean that every one of the listed asset-type is an investment in all circumstances. This is why the definition uses the phrase 'investment includes' rather than 'investment means.'"[221]

6.8 The Respondent contends that KNI has not "made a contribution" or incurred an "investment risk" in connection with the Offtake Agreement. The term "investment" has the same inherent and objective meaning under both the ICSID Convention and the Treaty.[222] That meaning requires a contribution, duration and risk each of which is a *sine qua non* requirement for the existence of an "investment."[223] The Respondent further

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[219] Resp. Preliminary Objections, Paragraphs 20-27.

[220] Resp. Preliminary Objections, Paragraph 34, citing *GEA Group Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 March 2011) ("*GEA Group v. Ukraine*") (RLA-30), Paragraph 141.

[221] Resp. Reply on Jurisdiction, Paragraphs 49, 50.

[222] Resp. Preliminary Objections, Paragraph 38; Resp. Reply on Jurisdiction, Paragraph 27. Similarly, relying on *Romak v. Uzbekistan*, where the tribunal was faced with an allegedly identical dispute resolution provision in the Switzerland-Uzbekistan Treaty, the Respondent submits that "the term 'investment' in Article 1(2) of the [Treaty] has an objective, inherent meaning." (Resp. Preliminary Objections, Paragraphs 32-33, citing *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. AA280, Award (26 November 2009) ("*Romak v. Uzbekistan*") (RLA-24), Paragraph 207).

[223] Resp. Preliminary Objections, Paragraph 38; Resp. Reply on Jurisdiction, Paragraphs 51-55, relying on *Ulysseas, Inc. v. The Republic of Ec*uador, UNCITRAL, Final Award (12 June 2012) (RLA-108), Paragraphs 251-252; *Abaclat and others (formerly Giovanna A. Beccara and others) v. The Argentine Republic,* ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011) ("*Abaclat v. Argentina")* (RLA-31), Paragraph 371, for the proposition that Article 1 of the Treaty requires these three elements, and *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award (14 July 2010) (RLA-26), Paragraph 110; *Deutsche Bank AG v. The Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award (31 October 2012) ("*Deutsche Bank v. Sri Lanka*") (CLA-100), Paragraphs 294-295, for the proposition that Article 25(1) requires the making of a contribution and an assumption of risk.

contends that these minimum requirements have been identified by both ICSID[224] and non-ICSID Tribunals.[225]

6.9 The Respondent acknowledges, as a fact, that KOMSA was an original party to the Offtake Agreement. However, the Respondent contends that the assignment of rights and obligations under the Offtake Agreement from KOMSA to KNI was part of an intra-company restructuring; and that neither KOMSA nor its assignee, KNI, have made any "contribution" or incurred any "risk" with respect to the Offtake Agreement, for the purposes of Article 25(1) of the ICSID Convention and Article 1(2) of the Treaty.[226]

6.10 *Contribution:* As to a relevant "contribution", the Respondent asserts that KNI was created primarily to sell and distribute offtake from the FertiNitro Plant to North America; but that KNI made no "contribution"; and it did not "engage in the action of investing," when it was assigned KOMSA's contractual interest in the Offtake Agreement.[227] KOMSA's investment, for its part, related to the formation of the joint venture comprising the FertiNitro project; and the Offtake Agreement was an ancillary sales contract signed by the joint venture with KOMSA for the purchase of urea and ammonia. There was never a contribution by KOMSA that related to the Offtake Agreement that could have been transferred to KNI along with KOMSA's interests in that sales contract.[228] The Respondent submits that the performance of the Offtake Agreement does not qualify as a contribution, which must be made at its inception and not with hindsight.[229]

6.11 The Respondent relies on the decision in *Standard Chartered v. Tanzania* for the proposition that "the treaty protects investments 'made' by an investor in some active way,

[224] Resp. PHB, Paragraph 19, citing *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) ("*Electrabel v. Hungary*") (RLA-110), Paragraph 5.43.

[225] Resp. Reply on Jurisdiction, Paragraph 43, quoting *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award (5 June 2012) (RLA-107), Paragraph 360, indicating that non-ICSID and ICSID tribunals require the same minimum requirements.

[226] Resp. Preliminary Objections, Paragraph 8; Resp. Reply on Jurisdiction, Paragraph 57.

[227] Resp. Preliminary Objections, Paragraph 68.

[228] Resp. Reply on Jurisdiction, Paragraph 60.

[229] Resp. Reply on Jurisdiction, Paragraphs 63-64.

rather than simple passive ownership."[230] It concludes that the mere acceptance of contractual rights and obligations, asset and ownership of shares is not sufficient to constitute an investment or prove a contribution of money or assets.[231]

6.12 *Risk:* As to a relevant "risk", the Respondent contends that the risks alleged by the Claimants, such as the demand risk, price risk, counterparty risk and non-performance risk do not go beyond the ordinary risks of a counter-party's non-performance of a commercial contract. These are purely commercial risks generally associated with doing business.[232]

6.13 The Respondent also contends that these commercial risks would be covered and largely mitigated by the provisions of the Offtake Agreement.[233] Moreover, since KNI was guaranteed offtake at a pre-determined discount price, "[t]he entire price risk remained with the producer, FertiNitro." In addition, under the terms of the Offtake Agreement, KOMSA guaranteed KNI's obligation under the Offtake Agreement and any risks associated to it.[234] The Respondent notes that in the unlikely event of a total collapse of the "international demand" for the FertiNitro project's output, "the price mechanism would deprive the take-or-pay provision of the Offtake Agreement of any effect."[235]

6.14 The Respondent submits that the Offtake Agreement was a mere commercial sales contract; and that the complexity, length, project finance implications or the 'unity of investment concept' do not transform the Offtake Agreement into an "investment". The

[230] Resp. PHB, Paragraph 23, citing *Standard Chartered Bank v. The United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award (2 November 2012) (RLA-109), Paragraph 225.

[231] Resp. PHB, Paragraph 24; Resp. Preliminary Objections, Paragraphs 65-68, citing *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction (27 September 2012) (RLA-33), Paragraphs 232-233 ("*while shares or other securities or title may be the legal materialization of an investment, mere ownership of a share is, in and of itself, insufficient to prove a contribution of money or assets*"); Resp. Reply on Jurisdiction, Paragraph 61. The Respondent also asserts that irrespective of whether the terms "contribution" or "make" are incorporated in the Treaty or the ICSID Convention, "a contribution" is a fundamental requirement that is "not only consistent with the weight of authority, but is also dictated by common usage of the term 'investment'." Resp. Preliminary Objections, Paragraph 41.

[232] Resp. PHB, Paragraph 21; Resp. Preliminary Objections, Paragraphs 71-74, citing *Romak v. Uzbekistan* (RLA-24), Paragraph 229; *See also* Resp. Preliminary Objections, Paragraphs 43-44, citing in addition *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction (6 August 2004) ("*Joy Mining v. Egypt*") (RLA-10), Paragraph 57.

[233] Resp. PHB, Paragraph 21.

[234] Resp. Reply on Jurisdiction, Paragraphs 65-68.

[235] Resp. Reply on Jurisdiction, Paragraph 68.

Offtake Agreement was and remained a classical sales contract, in the sense that KNI paid a discounted price (fixed through a purchase price formula) in exchange of ammonia and urea;[236] and payments were due in accordance with normal commercial terms.[237]

6.15 According to the Respondent, myriad legal materials, including the *travaux préparatoires* for the ICSID Convention and scholarly commentators confirm that mere sales contracts, as a type of commercial transaction, do not amount to "investments" within the meaning of Article 25(1) of the ICSID Convention.[238] The Respondent also points to the decisions in *SGS v. Paraguay* and *MHS v. Malaysia*, which confirmed that sale contracts are not investments under international law,[239] and to the ICSID Secretariat's decision to refuse to register a request on the basis that the underlying transaction could not be considered an investment as it arose "out of a sale of goods transactions."[240]

6.16 *Unity of Investment:* The Respondent also asserts that applying the concept of the 'unity of investment' in this case would improperly expand the scope of ICSID jurisdiction. Relying on the decisions in *ATA Constructions v. Jordan* and *CSOB v. Slovak Republic*, the Respondent submits that to be part of an "investment", the specific transactions "cannot be disassociated from all other transactions involving the economic purpose of the investment" and must be "inseparable from [the] others or comparatively free-standing."[241]

6.17 According to the Respondent, the Offtake Agreement relates to the operations of the FertiNitro Plant, but it is not an inseparable element. The JIA's objective was fully

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[236] Resp. Preliminary Objections, Paragraph 9.

[237] Resp. Preliminary Objections, Paragraph 61.

[238] Resp. PHB, Paragraph 13, citing *First (September) Hearing D1. 9*; ICSID, Convention on the Settlement of Investment Disputes between States and Nationals of Other States: Documents Concerning the Origin and the Formulation of the Convention, Volume II, Part 1, Documents 1-43, 54 (1968) (2d prtg. 2001) (RLA-6), Paragraph 54; and Christoph H. Schreuer et al., The ICSID Convention: A Commentary 117 (2d ed. 2009) ("*ICSID Convention: A Commentary*") (citations omitted) (RLA-21).

[239] Resp. PHB, Paragraph 13, citing *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction (10 February 2010) ("*SGS v. Paraguay*") (RLA-25), Paragraph 93; and *Malaysian Historical Salvors Sdn Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Decision on Application for Annulment (16 April 2009) ("*MHS v. Malaysia*") (RLA-23), Paragraph 69; *see also* Resp. Preliminary Objections, Paragraphs 48-50, referring also to *Global Trading Res. Corp. and Globex Int'l v. Ukraine*, ICSID Case No. ARB/09/11, Award (1 December 2010) (RLA-27), Paragraph 45.

[240] Resp. Preliminary Objections, Paragraph 46, referring to Ibrahim Shihata & Antonio Parra, The Experience of the International Centre for Settlement of Investment Disputes, 14 ICSID Rev.–F.I.L.J. 299, 308 (1999) (RLA-4).

[241] Resp. Reply on Jurisdiction, Paragraph 17.

achievable without the Offtake Agreement. The Offtake Agreement was not essential to a single economic goal; and the Tribunal can "parse each component part of the overall transaction" and examine whether it would satisfy the jurisdictional requirements of the Treaty and the ICSID Convention.[242]

6.18 The Respondent contends that the equity interest of KOMSA and FertiNitro's other shareholders in FertiNitro was not impaired by the termination of the Offtake Agreement, which demonstrates that the Offtake Agreement is ancillary and separable from the FertiNitro project - unlike the factual background in the *Inmaris* and *Ambiente Ufficio* decisions.[243] The Offtake Agreement can be easily dissociated from the equity investment: even if FertiNitro had not terminated the Offtake Agreement, KOMSA could still pursue its investment claim in this arbitration.[244] The Offtake Agreement has been critical for the FertiNitro project, but it was not critical that the contract be concluded with KOMSA specifically, just that there had to be a long-term offtake contract to secure payment of the loans to finance the project. The Offtake Agreement was not an incentive to persuade KOMSA to become a shareholder in FertiNitro.[245]

6.19 *Article 2:* The Respondent contends that Article 2 of the Treaty contains a territoriality requirement not met by the Offtake Agreement. Article 2 of the Treaty provides that the Treaty is only applicable to "investments in the territory of one Contracting Party." The territorial nexus is further highlighted by Articles 1, 3, 4, 7 and 8 and by the Preamble to the Treaty, when it states the signatories' intent to "assure favourable conditions for investments [...] *in the territory* of the other Contracting Party." (Emphasis added)

6.20 The Respondent further submits that arbitral tribunals have assessed the territorial nexus by scrutinizing the beneficial value emanating from the investment to the host state.[246] As the Offtake Agreement "permitted less than 5% of total resales to be made domestically,

[242] Resp. Reply on Jurisdiction, Paragraph 22.
[243] Resp. PHB, Paragraph 15.
[244] *Id*.
[245] Resp. Rej., Paragraph 29.
[246] Resp. Reply on Jurisdiction, Paragraph 72.

with the major portion of the offtake designated for re-sale overseas,"[247] the Offtake Agreement's benefit to Venezuela was minimal. Thus, it did not satisfy the Treaty's territorial requirement.

6.21 *Article 12:* The Respondent contends that the Offtake Agreement contains a multi-tier forum selection clause for the resolutions of "any Dispute" relating to the Offtake Agreement, including the present disputed claim made by KNI. Under Article 12 of the Offtake Agreement, "any Dispute", including claims for termination of the Offtake Agreement, "would initially be subject to negotiation […] [followed by] arbitration in accordance with the ICC Rules" if the negotiations failed.[248] Article 12, so it submits, is not overridden by the Treaty.

6.22 The Respondent submits that the decision to terminate the Offtake Agreement was made by FertiNitro's Temporary *Ad Hoc* Trustees on commercial grounds. KNI has, at most, a commercial dispute with FertiNitro concerning the allegedly wrongful termination of a sales contract, which KNI has failed to pursue in accordance with the forum selection clause of Article 12 of the Offtake Agreement.[249] Therefore, so the Respondent concludes, this Tribunal lacks any jurisdiction to decide KNI's claim.[250] Although KNI has asserted a breach of contract claim disguised as an expropriation claim, such a claim remains a commercial dispute referable only to the Offtake Agreement's forum selection clause in Article 12.[251]

(3) The Claimants' Case

6.23 *"Investment":* KNI accepts that the Tribunal's task of interpretation for the treaty and the ICSID Convention should be guided by Article 31 of the VCLT. As to the Treaty, according to KNI, "the ordinary meaning of Article 1(2) of the [Treaty] clearly and unambiguously provides that contractual rights, such as those bestowed by the Offtake

[247] Resp. PHB, Paragraph 28 (citation omitted).
[248] Resp. Preliminary Objections, Paragraph 62.
[249] Resp. Preliminary Objections, Paragraph 83ff.
[250] Resp. Preliminary Objections, Paragraphs 86-87; Resp. Reply on Jurisdiction, Paragraph 12.
[251] Resp. PHB, Paragraph 16.

Agreement, were contemplated as investments by the Contracting Parties."[252] Accordingly, so KNI submits, KNI's rights to the supply of urea and ammonia under the Offtake Agreement fall within the non-exhaustive chapeau of Article 1(2) of the Treaty: "[t]he term 'investment' comprises every kind of asset." It also corresponds to the type of investment defined in Article 1(2)(c) of the Treaty: "claims to money or to any performance under a contract."[253] A *fortiori*, so KNI concludes, "given that 'claims […] to any performance under a contract' constitute an investment under the [Treaty], it follows that contractual rights do as well."[254]

6.24 KNI submits that any interpretation restricting the scope of the very broad, non-exhaustive definition of "investment" in Article 1(2) of the Treaty would be contrary to the Treaty's plain language and its object and purpose, which is to promote investment.[255] This was accomplished, according to KNI, even if the Offtake were considered in isolation:

> "It was a critical component that allowed FertiNitro to raise approximately USD 750 million in debt. This in turn allowed the construction of a substantial fertiliser plant, which in turn allowed the Respondent to monetise natural gas that it would otherwise have flared. Even assuming arguendo [that it was] a 'mere' sales agreement, the Offtake Agreement was a long-term, twenty-year (or longer) agreement that required significant outlays and risks to KNI, not the least because it required KNI to take or pay for half the plant output regardless of actual need [as a purchaser]."[256]

6.25 As to the ICSID Convention, KNI contends that there is no objective and inherent definition of the term "investment" in Article 25(1) of the ICSID Convention; and that the ICSID Convention defers to the parties' consent to define the scope of an investment in the Treaty.[257] According to KNI:

> *"[R]ecent case law confirms the primacy of a [Treaty] over the ICSID Convention when determining the scope of the applicable consent to ICSID arbitration and that*

[252] Cls. Reply, Paragraph 338.
[253] Cls. Mem., Paragraph 182.
[254] Cls. Reply, Paragraph 340; Cls. PHB, Paragraph 29.
[255] Cls. Reply, Paragraph 341; Cls. PHB, Paragraph 30.
[256] Cls. Reply, Paragraph 344 (citations omitted).
[257] Cls. PHB, Paragraph 26; Cls. Reply, Paragraph 305.

a claimant is not required to establish the existence of an 'investment' both under a relevant investment treaty and under Article 25(1) of the ICSID Convention."[258]

6.26 KNI further contends:

> *"[I]n the absence of restrictions to consent under Article 25(4) [affording States the possibility of restricting ICSID jurisdiction ratione materiae to certain type of investments], the scope of the term 'investment' should be construed within the contours defined by the [relevant States in the relevant instrument]."*[259]

6.27 Thus, KNI alleges, in the absence of restrictions under Article 25(4) of the ICSID Convention and considering the primacy of the Treaty definition of "investment," KNI's contractual rights clearly fall within the definition of "investment" under the ICSID Convention.[260] KNI rejects the argument that the definition of investment under Article 25 of the ICSID Convention can be confined to certain "outer-limits," as such a concept would not be faithful to the ordinary meaning, immediate context or object and purpose of this provision.[261] Similarly, so KNI contends, the enumerated definition of investment in Article 1(2) of the Treaty, cannot be substituted by an alleged "objective and inherent" definition as argued by the Respondent. This would transgress the rules of interpretation of customary international law codified in Articles 31 and 32 of the VCLT.[262] KNI thus contends that its rights under the Offtake Agreement qualify as an "investment" under both the ICSID Convention and the Treaty, and that such rights also satisfy non-jurisdictional indicia.[263]

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[258] Cls. PHB, Paragraph 25, citing *SGS v. Paraguay* (RLA-25), Paragraph 93 (tribunal holding that "in most cases—including, in the Tribunal's view, this one—it will be appropriate to defer to the State parties' articulation in the instrument of consent (*e.g*. the [Treaty]) of what constitutes an investment"; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction (8 March 2010) ("*Inmaris v. Ukraine*") (CLA-91), Paragraph. 130. *See also* Cls. Reply, Paragraph 352; Cls. Rej., Paragraphs 51-55.

[259] Cls. Reply, Paragraph 350. *See also* Cls. PHB, Paragraph 28. This interpretation, according to the Claimants, is also supported by the Convention's preparatory work to which the Tribunal may make recourse pursuant to Article 32 of the VCLT. The oft-cited Report of Directors expressly links the lack of a definition of 'investment,' first, to the 'essential requirement of consent by the parties' and, second, to the 'mechanism' of Art. 25(4) of the ICSID Convention (*See* Cls. Reply, Paragraph 349 (citation omitted)).

[260] Cls. Reply, Paragraph 350.

[261] Cls. Reply, Paragraphs 351-364.

[262] Cls. Rej., Paragraphs 56-57.

[263] Cls. PHB, Paragraph 14.

6.28 KNI contends that the ordinary meaning of the term "investment" must also be interpreted in the broader context of the provision in which it is found and the rest of the treaty's text.[264] Even if the Offtake Agreement were considered separately from the rest of the FertiNitro project, instead of an integral part, it would still qualify on its own as an investment under both the ICSID Convention and the Treaty. According to KNI, the *Salini* criteria are not jurisdictional requirements, but instead simple indicia or 'hallmarks' of investments under Article 25(1) of the ICSID Convention, to which tribunals attached a variety of weight.[265] Moreover, it is well established that the *Salini* elements "should be viewed collectively under a balancing test, rather than requiring that all elements be fulfilled or that any one criterion is more important than any other."[266] KNI concludes that it made an "investment" under Article 25(1) of the ICSID Convention; and that its investment fully satisfied the *Salini* criteria of duration, risk, contribution, economic development, territorial nexus and regularity of profit and return.

6.29 *Contribution:* As to a relevant "contribution", KNI contends that KOMSA made a substantial initial contribution of equity to the FertiNitro project, of which KOMSA's original share was thirty-five percent; [267] and that KOMSA later assigned its rights and obligations under the Offtake Agreement to KNI in April 2003. Thus, the same initial investor (KOMSA) made the initial contribution with respect to both the equity investment and the Offtake Agreement and all that later transpired was an assignment of rights and obligations as part of an internal structuring of the investment, to KNI.[268]

6.30 KNI submits that the assignment, as an essential part of restructuring, is completely acceptable under international investment law and does not undermine the subsequent holder's substantive and procedural protection under a treaty, so long as there is an

[264] Cls. Reply, Paragraph 347.

[265] Cls. PHB, Paragraphs 31-32; Cls. Reply, Paragraphs 367-371, citing *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (18 July 2008) ("*Biwater v. Tanzania*") (CLA-24), Paragraphs 312, 314; *Abaclat v. Argentina* (RLA-31), Paragraph 364; and *SGS v. Paraguay* (RLA-25), Paragraph 98; Cls. Rej., Paragraphs 3, 54.

[266] Cls. Reply, Paragraph 373.

[267] Cls. Reply, Paragraph 9.

[268] Cls. Reply, Paragraphs 385-386 (citations omitted).

unbroken continuum in nationality.[269] KNI further submits that KOMSA's (and subsequently KNI's) legal commitment to take half of the FertiNitro Plant's output under the Offtake Agreement was a contribution in its own right; that KNI agreed to purchase vast quantities of output for two decades; and that it was this commitment that enabled the FertiNitro Plant to be financed, constructed and operated with the support of international credit from banks and other lending institutions.

6.31 KNI rejects the Respondent's reliance on the decision in *Deutsche Bank v. Sri Lanka* for the proposition that the existence of an investment must be assessed "at its inception and not with hindsight." According to KNI, the issue whether an investor has made a contribution must be assessed "at the time the proceedings are instituted", as with any other jurisdictional criteria. Whether the contribution existed from the initiation of the investment is irrelevant, as the contribution may extend over a certain period of time.[270]

6.32 KNI also submits that: that "there is no requirement under either the ICSID Convention or the [Treaty] for KNI to have engaged in the 'action of investing' [or make a 'fresh investment'] in order for its rights in the Offtake Agreement to qualify as an 'investment.'"[271] Such an interpretation would be contrary to the terms of the Treaty and the Convention: "[O]nce the Tribunal has satisfied itself that an 'asset' exists in line with the definitions in Article 1 of the Switzerland-Venezuela BIT, it need not inquire further that successors in interest to such assets have made further 'contributions.'"[272]

6.33 KNI further contends that, as decided by the *Salini v. Morocco, Deutsche Bank v. Sri Lanka* and *Jan Ooestergetel v. Slovak Republic* tribunals, a contribution is not limited to financial

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[269] Cls. Reply, Paragraph 388.

[270] Cls. Rej., Paragraphs 79-82.

[271] Cls. PHB, Paragraph 33 ("Tribunals have held that there is: (a) a continuity of investment even when the identity of an investor changes; (b) an 'investment' even when it results from an acquisition of shares made free of charge; and (c) an 'investment' even when the assets or funds have not been contributed by the investor itself"; citing *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction (11 July 1997) (CLA-142), Paragraph 40; *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award (8 May 2008) (RLA-102), Paragraph 542; *Renée Rose Levy de Levi v. The Republic of Peru*, ICSID Case No. ARB/10/17, Award (26 February 2014) (CLA-150), Paragraph 146; and (c) *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001) (CLA-14), Paragraph 418). *See also* Cls. Reply, Paragraphs 382-392; First (September) Hearing D1.58-59.

[272] Cls. Rej., Paragraphs 67-71.

terms, but it can take a majority of forms, including know-how, equipment, personnel and services. On this basis, "KNI and its personnel made an invaluable contribution to the FertiNitro project through the performance of the Offtake Agreement."[273]

6.34 *Risk:* As to relevant "risk", KNI alleges that KNI's risks under the Offtake Agreement were not limited to the risk of non-performance identified in the *SGS v. Paraguay* and *Romak v. Uzbekistan* cases cited by the Respondent. KNI's risks under the Offtake Agreement included "investment risk" defined by the *Romak* tribunal as: "a situation in which the investor cannot be sure of a return on his investment, and may not know the amount he will end up spending, even if all relevant counterparties discharge their contractual obligations."[274]

6.35 KNI seeks further support from Mr Sorlie's witness statement adduced in this arbitration, where he testified as follows:

> *"KNI took on certain economic risks with respect to the Offtake Agreement; risks that would have been borne by FertiNitro (and indirectly by the equity holders) without the existence of the Offtake Agreement. For example, KNI took on market risk associated with agreeing to a "take-or-pay" obligation. This meant that as long as FertiNitro could produce and tender product, KNI was under the obligation to take and pay or not take, but still pay for the product regardless of the market conditions. These market risks included: demand risk - the risk that the market demand for the product may be very low, resulting in a difficulty finding a counterparty interested in taking the product, price risk - closely related to demand risk, KNI faced the risk of market price fluctuations, and counterparty risk - this is the risk that KNI's ultimate counterparty fails to perform, such as the failure to pay for product in a timely fashion. These market risks apply also to the freight market which would include the additional risks associated with transporting goods, including the increased risks associated with transporting ammonia."*[275]

6.36 KNI also refers to KOMSA's guarantee of KNI's obligations under the Offtake Agreement, annulling any risks associated with the Offtake Agreement because KNI would still be

[273] Cls. Reply, Paragraph 392; *Oostergetel v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction (30 April 2010) (CLA-147), Paragraphs 170-171.
[274] Cls. Reply, Paragraph 379, citing *Romak v. Uzbekistan* (RLA-24), Paragraph 230.
[275] Cls. Reply, Paragraph 380, citing Second Witness Statement of Jim Sorlie (26 July 2013), Paragraph 15.

responsible in the case that KOMSA was insolvent. Moreover, if KOMSA did have to satisfy KNI's obligations at any point, KOMSA could have sought indemnification from KNI:[276] "Once risk pertaining to that investment has been identified, […] there is no cause to search for additional risks born by subsequent assignees as the risks entailed in the original investment have not dissipated." [277]

6.37 *Unity of Investment:* If the Offtake Agreement were not to be viewed as an "investment" in isolation (contrary to KNI's primary case), KNI submits that the Offtake Agreement was an "integral part" of the overall investment and structure of the FertiNitro project and that it cannot be dismissed as a separate sales contract not qualifying as an investment.[278] The Offtake Agreement was not a "one-off" sales agreement; but instead, as is the case for all offtake agreements in project financing, it was a long term, take-or-pay sales agreement for the output of a particular plant put in place to secure financing for the FertiNitro project.[279]

6.38 Under the ICSID Convention and the Treaty, an investment operation must be considered in its totality, without looking at each specific transaction that composes "the overall operation."[280] KNI relies upon the decisions in *Inmaris v. Ukraine* and *Ambiente Ufficio v. Argentina* for the proposition that, for jurisdictional purposes, an investment must be evaluated in a "holistic manner", considering its "economic substance" and its "larger context."[281]

6.39 According to KNI, the "unity of investment" theory does not require that all the underlying contracts share identical economic objectives and rights, but instead, whether the dispute arises directly out of the totality of the investment.[282] The fact that the Offtake

[276] Cls. Rej., Paragraph 86.
[277] Cls. Rej., Paragraph 84.
[278] Cls. Reply, Paragraph 7; *see also* Cls. PHB, Paragraph 13.
[279] Cls. Rej., Paragraphs 45-47.
[280] Cls. Reply, Paragraphs 310-311, citing Schreuer et al, *The ICSID Convention: A Commentary* (CLA-108), Art. 25, Paragraph 104
[281] Cls. Reply, Paragraphs 306-308, citing inter alia, *Ambiente Ufficio S.p.A. and others v. Argentine Republic*, ICSID Case No. ARB/08/9 (formerly *Giordano Alpi and others v. Argentine Republic*), Decision on Jurisdiction and Admissibility (8 February 2013) ("*Ambiente Ufficio v. Argentina*") (CLA-90), Paragraphs 422-34; and *Inmaris v. Ukraine* (CLA-91), Paragraph 98.
[282] Cls. Rej., Paragraph 37, citing *Inmaris v. Ukraine* (CLA-91), Paragraph 98.

Agreement's purpose was the purchase and sale of ammonia and urea, instead of the construction, ownership and operation of the FertiNitro Plant, (as was the purpose of the JIA) is irrelevant. KNI asserts that "the purpose of the project was not simply to build the plant but to operate it and sell its output, an objective KNI helped FertiNitro achieve through the Offtake Agreement."[283] In the present case, the dispute arises out of the totality of the investment, of which the Offtake Agreement is an inseparable part. Relying on the decisions in *Mytilineos*, *Electrabel* and *CSOB*, KNI submits that the Tribunal should take a "holistic view" of the Claimants' investment.[284]

6.40 KNI contends that "KOMSA's equity investment and KOMSA's (later KNI's) offtake commitment were interdependent and inseparable. […] [A]ll parties viewed the equity and offtake investments as a 'package deal.'"[285] Since KOMSA and Pequiven pursued a project finance model, "the Offtake Agreement was essential to properly allocating the project's overall risk and, by extension, to securing financing from international lenders."[286] Besides being an equity investor, KOMSA was interested in FertiNitro as a new source of ammonia and urea for its fertiliser sales and trading business and operations.[287] One of KOMSA's central investment objectives was to obtain offtake at below market price, coupled with the ability to trade that product in assigned geographic areas.[288] Thus, "in addition to mitigating project risk, without the economic value of the Offtake Agreement, 'KOMSA would not have made its investment in FertiNitro;'"[289] "nor

[283] Cls. Rej., Paragraph 35.
[284] Cls. Rej., Paragraphs 38-39, citing *Mytilineos Holdings SA v. State Union of Serbia & Montenegro and Republic of Serbia,* UNCITRAL Partial Award on Jurisdiction (8 September 2006) (CLA-92), Paragraphs 123-125; *Electrabel v. Hungary* (RLA-110), Paragraph 5.44; and *Československá Obchodní Banka, A.S. (ČSOB) v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Objections to Jurisdiction (24 May 1999) ("*CSOB v.Slovak Republic*") (RLA-5), Paragraph 80.
[285] Cls. Rej., Paragraph 13.
[286] Cls. Reply, Paragraphs 12-16; Cls. PHB, Paragraphs 18-19.
[287] The Offtake Agreement contained a 20-year extendable "take-or-pay" commitment for 50 percent of the FertiNitro Plant's output for each of KNI and Pequiven; *see above* at Cls. PHB, Paragraph 19; Cls. Reply, Paragraphs 315-316.
[288] *See* Cls. PHB, Paragraphs 16, 21.
[289] Cls. Reply, Paragraphs 18; *See also* Cls. Reply, Paragraph 315; Cls. PHB, Paragraph 16.

would the [FertiNitro] project have received the necessary financing from international markets necessary to its completion and ultimate success."[290]

6.41 KNI asserts that the FertiNitro project consisted of a bundle of integrated, interwoven contracts signed on the same day and defined as the "Project Documents," each of which did not stand on its own, as is clear from the documentary evidence, the expert evidence and the witness testimony.[291] KNI relies on the expert testimony of Professor Esty who considered the Offtake Agreement to be "a critical, integrated and economically inseparable" of the overall FertiNitro project.[292] In any case, so KNI submits, KNI need not prove that the Offtake Agreement was essential to the realisation of the FertiNitro project for it to be an integral part of the overall economic transaction.[293]

6.42 In project finance, so KNI maintains, because there is no recourse beyond the project itself, the lender and bond holders "look primarily to the cash flow from the project as the source of funds to service their loans."[294] As such, offtake agreements are typically the primary source of project revenues. This Offtake Agreement guaranteed the FertiNitro project's income stream and the payments by the Offtakers were remitted to an escrow account managed by the lenders.[295] In particular, "[t]he lenders relied on the Offtake Agreement to establish an assured distribution channel for the plant's output as well as on the credit support, liquidity and currency risk mitigation inherent in the obligations of the Offtakers to take and pay for product tendered by the [FertiNitro] plants."[296] The Offtake Agreement itself provides for "critical linkages between the project documents and serve to integrate the Offtake Agreement with key rights and obligations of other parties, particularly the

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[290] Cls. Reply, Paragraph 8; *See also* Cls. PHB, Paragraph 20, citing Witness Statement of Brent W. Gwaltney (30 May 2012) ("Gwaltney WS1"), Paragraph 33.

[291] Cls. PHB, Paragraphs 13, 23, n. 4 and Paragraph 24, citing the Offering Circular - Bond Offering of $250,000,000 between FertiNitro Finance Inc and FertiNitro (8 April 1998) ("*Bond Offering Circular*") (C-115), Page 5; and Witness Statement of Victor D. Barrientos (28 February 2013), Paragraphs 41-44; Cls. Reply, Paragraphs 321-325; Cls. Rej., Paragraphs 17-25.

[292] *See* Cls. Reply, Paragraphs 300-320, citing Expert Report of Benjamin C. Esty (23 August 2013) ("Esty ER1"), Paragraphs 25, 37.

[293] Cls. Rej., Paragraphs 26-32.

[294] Cls. Reply, Paragraph 319.

[295] *See* Cls. PHB, Paragraphs 16-18; *see also* Cls. Rej., Paragraphs 10-12.

[296] Citing Memorandum to Offtake Agreement Review Committee of the Board of Directors of FertiNitro (18 May 2005) (C-118) page 2; Cls. Reply, Paragraphs 329-332.

sponsors and the lenders, under the other central project documents."[297] This is confirmed (*inter alia)* by Articles 11.4 and 11.5 of the Offtake Agreement.[298] Pursuant to Article 11.4, if an Offtaker's interest in FertiNitro fell below 20% of the equity, FertiNitro had the right to renegotiate the terms and conditions of the Offtake Agreement with respect to that buyer. Under Article 11.5, if the equity interest fell below 5%, the respective right and obligations of the Offtaker under the Offtake Agreement would be terminated.[299] In addition, the duration of KNI's obligations under the Offtake Agreement was tied directly to the status of the project debt. The original term of 20 years under the Offtake Agreement was to be extended in the event that bonds were still outstanding.[300]

6.43 KNI distinguishes this case from the facts in *Joy Mining* and *Global Trading v. Ukraine* cases, alleging that the Offtake Agreement was a much more important part of the overall FertiNitro project than the contract at issue in *Joy Mining*. In *Global Trading*, the tribunal adopted a pragmatic approach when considering whether the sale of poultry could be an investment; and it did not categorically exclude all purely commercial transactions from the definition of investment.[301]

6.44 *Article 2:* KNI contends that the Offtake Agreement was an "[investment] in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party" in accordance with Article 2 of the Treaty. According to KNI, Article 2 of the Treaty is a standard clause in bilateral investment treaties that "merely establishes the temporal scope and subject-matter of the Treaty."[302] This provision cannot be interpreted as incorporating requirements that the investment contribute to the host State's economic development. Moreover, such a developmental requirement has been dismissed by many tribunals, given its highly subjective nature.[303] In addition, the cases on which the Respondent attempts to rely "focus on *geographical connections* where an

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[297] Cls. Rej., Paragraph 22.
[298] Cls. PHB, Paragraph 22.
[299] Cls. Reply, Paragraph 325; Cls. Rej., Paragraph 14.
[300] Cls. Rej., Paragraph 16.
[301] Cls. Reply, Paragraphs 355-361.
[302] Cls. Reply, Paragraph 394.
[303] *Id*.

investment's impact was felt," and not upon whether the investment benefited the host government.[304]

6.45 In any event, so KNI submits, the Respondent's argument should be dismissed as "the project was forecasted to bring and has indeed brought, considerable benefits to the local population and the country writ large, particularly through its monetisation at considerable prices of natural gas that would otherwise have been flared and payment of various national taxes."[305] Further,

> *"After passing through the off-shore accounts and the project waterfall, a portion of the proceeds of the offtake – the net income – would make their way to FertiNitro in Venezuela. There were also derivative domestic sales in Venezuela. The Offtake Agreement clearly had an impact in Venezuela that more than satisfies any territoriality requirement."*[306]

6.46 *Article 12:* KNI contends that the dispute resolution provisions in Article 12 of the Offtake Agreement do not prevent the Tribunal from deciding KNI's claim against the Respondent under the Treaty. Article 41 of the ICSID Convention empowers this Tribunal to determine its own jurisdiction.

6.47 KNI submits that KNI's rights under the Offtake Agreement and under the Treaty are conceptually distinct. Article 12 of the Offtake Agreement relates only to commercial arbitration for contractual disputes between its contracting parties, that is FertiNitro, Pequiven, IPSL and KNI. By contrast, this dispute involves claims under international law brought by KNI against the Respondent on the basis of the Respondent's consent to ICSID jurisdiction in the Treaty regarding its unlawful expropriation of KNI's investment under the Treaty. Thus, the Offtake Agreement's commercial arbitration clause has no effect on the jurisdiction of this Tribunal.[307]

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[304] Cls. Rej., Paragraphs 90-92.
[305] Cls. Reply, Paragraph 395 (citations omitted).
[306] Cls. Rej., Paragraph 92.
[307] Cls. Reply, Paragraph 397.

(4) The Tribunal's Analysis and Decision

6.48 The Tribunal starts with Article 41 of the ICID Convention. It is not disputed between the Parties, nor could it be, that the Tribunal "shall be the judge of its own competence." As already indicated, this issue of jurisdiction concerns KNI and the Respondent, regarding KNI's claim for the alleged unlawful expropriation under Article 6 of the Treaty of its alleged investment comprising its interest in the Offtake Agreement.[308]

6.49 The Respondent's jurisdictional objections relate only to KNI's claim. In the Tribunal's view, the Respondent was right not to advance any like jurisdictional objection to KOMSA's claims in this arbitration: it is manifest that KOMSA made an "investment" as an indirect shareholder in FertiNitro from the outset of the FertiNitro project, within the meaning of Article 25(1) of the ICSID Convention and Article 1(2) of the Treaty.

6.50 The Tribunal accepts the Respondent's submission that KNI must satisfy the definitions of "investment" in both the Treaty and the ICSID Convention, as to which KNI bears the legal burden of proving its case on the Tribunal's jurisdiction. It is a double test, each limb of which KNI must establish, applying the customary rules of international law for treaty interpretation codified in the VCLT, in particular Article 31 (1), whereby "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

6.51 This double test was described in Paragraph 25 of the Executive Directors' Report on the ICSID Convention:

> *"While consent of the parties is an essential prerequisite for the jurisdiction of the Centre, consent alone will not suffice to bring a dispute within its jurisdiction. In keeping with the purpose of the Convention, the jurisdiction of the Centre is further limited by reference to the nature of the dispute and the parties thereto."*[309]

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[308] Offtake Agreement by and among Pequiven, IPSL and Koch Oil SA as Buyers and FertiNitro as Seller (8 April 1998) (C-19).

[309] Report of the Executive Directors on the Convention for the Settlement of Investment Disputes Between States and Nationals of Other States, pages 43-44. *See also*, Georges R. Delaume, "ICSID and the Transnational Financial Community", (1986) (CLA-96), page 104.

More recently, the editors of *Schreuer* have commented:

> *"If jurisdiction is to be based on a treaty containing an offer of consent, the treaty's definition of investment will be relevant. In addition, the tribunal will have to establish that the activity is an investment in the sense of the [ICSID] Convention. This dual test has at times been referred to as the 'double keyhole' approach or as a 'double-barrelled' test."*[310]

The Tribunal turns to the Treaty, as the first part of this dual test.

6.52 *The Treaty:* The Tribunal accepts KNI's submission that the definition of "investment" in Article 1(2) of the Treaty is very broad. Its opening words succinctly define "investment" as including "every kind of asset.". In the Tribunal's view, this wording does not permit additional requirements not implicit in the meaning of the word "investment". However, in the list that follows, there are five particular, non-exhaustive examples of such assets satisfying the definition of "investment." KNI relies on Articles 1(2)(b) and (c) of the Treaty listing "shares, parts [sic] or any other kinds of participation in a company" and "claims to […] any performance under a contract."

6.53 For the present case, subject to Article 2 of the Treaty and the ICSID Convention (considered below), the Tribunal considers that its jurisdiction as to a covered "investment" under the Treaty is established under Articles 1(2)(b) and (c) of the Treaty. The Treaty expressly there defines shares or participation in a company and contractual performance as an asset meeting its own definition of "investment." The ordinary meaning of these words, in their context and in the light of the Treaty's object and purpose under Article 31 of the VCLT, is unambiguous.

6.54 As was decided in *Rosinvest v. Russia* on the interpretation of a similarly broad definition of an investment:

> *"The very wide wording of that definition does not contain any term limiting 'investment' to something created under applicable national law. The definition states that 'investment' means every kind of asset and goes on to set out a non-exhaustive list of types of asset including 'shares in, and stock, bonds and debentures*

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[310] ICSID Convention: A Commentary (CLA-3), page 117.

of, and any other form of participation in, a company or business enterprise'. In drafting this straightforward and very wide definition, the State parties to the IPPA [the BIT between the UK and the USSR] clearly expressed the intention that any asset should be included and the Tribunal considers Claimant's holding of Yukos shares to be such an asset."[311]

6.55 In these circumstances, it would be inappropriate, under Article 31 of the VLCT or otherwise, to add to this express definition and specific examples any other requirement. However, even if this result were wrong in treating KNI's "investment" on a stand-alone basis, the same result is nonetheless achieved under Article 1(2) of the Treaty by applying the concept of "unity of investment", as considered below under Article 25(1) of the ICSID Convention.

6.56 *The ICSID Convention:* The Tribunal interprets Article 1(2) of the Treaty independently from Article 25(1) of the ICSID Convention, whilst bearing in mind the admonition in the annulment decision in *MHS v. Malaysia*:

"It is those bilateral and multilateral treaties which today are the engine of ICSID's effective jurisdiction. To ignore or depreciate the importance of the jurisdiction they bestow upon ICSID, and rather to embroider upon questionable interpretations of the term 'investment' as found in Article 25(1) of the Convention, risks crippling the institution."[312]

Hence, the issue of the Tribunal's disputed jurisdiction must turn next upon the meaning of Article 25(1) of the ICSID Convention, as the second part of this 'dual test'.

6.57 The Tribunal accepts the Respondent's legal submission that a "pure sales contract" cannot, by itself, satisfy the meaning of "investment" in Article 25(1) of the ICSID Convention. However, as was decided in *Pantechniki v. Albania*: that submission "may quickly lose traction in the reality of economic life."[313]

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[311] *RosInvestCo UK Ltd. v. Russian Federation*, SCC Arbitration V (079/2005), Final Award (12 September 2010) (CLA-9), Paragraph 388. (This award was annulled by the Swedish courts on unrelated jurisdictional grounds).

[312] *MHS v. Malaysia* (RLA-23), Paragraph 73.

[313] *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009) (CLA-97), Paragraph 44.

6.58 In the Tribunal's view, the Offtake Agreement was not a "pure sales contract" legally or economically. It is, on the evidence, impossible to separate it out as a separate stand-alone transaction wholly unrelated to the overall FertiNitro project, which was, by any standards, a legal and economic behemoth. As was decided in *CSOB v. Slovakia*:

> *"An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment […] The foregoing analysis indicates that the term 'directly', as used in Article 25(1) of the Convention, should not be interpreted restrictively to compel the conclusion that CSOB's claim is outside the Centre's jurisdiction and the Tribunal's competence merely because it is based on an obligation of the Slovak Republic which, standing alone, does not qualify as an investment."*[314]

6.59 Other arbitration tribunals have adopted the same holistic approach to the meaning of "investment" in Article 25(1) of the ICID Convention, without necessarily using that term or the similar term "unity of investment". The Tribunal refers to the decisions in *Inmaris v. Ukraine*,[315] where the tribunal considered the "claimed investments as component parts of a larger, integrated investment undertaking"; *Ambiente Ufficio v. Argentina*, [316] where the tribunal stated that "when a tribunal is in presence of a complex operation, it is required to look at the economic substance of the operation in question in a holistic manner"; *ADC Affiliate v. Hungary*,[317] where the tribunal looked "at the totality of the transaction as encompassed by the Project Agreements"; *Electrabel v. Hungary*,[318] where the tribunal decided that "all the elements of the Claimant's operation must be considered for the purpose of determining whether there is an investment under Article 25"; and *Chevron v.*

[314] *CSOB v. Slovak Republic* (RLA-5), Paragraphs 72, 74.
[315] *Inmaris v. Ukraine* (CLA-91), Paragraph 92.
[316] *Ambiente Ufficio v. Argentina* (CLA-90), Paragraphs 428, 453.
[317] *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (27 September 2006) (CLA-16), Paragraph 331.
[318] *Electrabel v. Hungary* (RLA-110), Paragraph 5.44.

Ecuador,[319] where it was said that "[i]nvestments must also be examined holistically and not separated into components." It is thus not permissible to slice up an overall investment into its constituent parts, like a sausage, so as to contend that one part, isolated by itself alone, is not an "investment" whereas as an integrated part of the whole investment, it is.

6.60 The question remains whether the Offtake Agreement was an integral part of KOMSA's original investment in the overall FertiNitro project. The Tribunal notes, again, that the Respondent does not contend that KOMSA was not an investor with an investment under Article 25(1) of the ICSID Convention, as regards its equity interest in the FertiNitro project. (The Tribunal returns to KNI's position as KOMSA's assignee later below.)

6.61 In the Tribunal's view, the economic evidence is overwhelming. Professor Esty (of Harvard University and an expert on business economics) testified that an offtake agreement "is a critical, integrated, and economically inseparable part of a project company, and is viewed this way by all project participants including lenders, sponsors and credit analysts;"[320] this Offtake Agreement "was a critical, integrated and economically inseparable part of the FertiNitro project company;" it was also critical "to the project's success and its ability to pay expenses, service debt obligations and generate returns for the sponsors";[321] and "I do not believe this project [the FertiNitro project] could have been financed without an offtake agreement. In fact, the offtake agreement is precisely what provided the credit support needed to finance the project."[322] The Tribunal notes that the FertiNitro project required credit support from lenders to finance US$ 700 million (in the form of US$ 250 million as Bonds and US$ 450 million as Senior Bank Debt), secured (*inter alia*) on the stream of FertiNitro's revenue under the Offtake Agreement. As a result, at the time, Moody's rating of the FertiNitro project was materially influenced by the Offtake Agreement.[323]

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[319] *Chevron Corp. (USA) v. Republic of Ecuador*, UNCITRAL, Final Award (31August 2011) (CLA-63), Paragraph 19.
[320] Esty ER1, Paragraph 27 (emphasis omitted).
[321] Esty ER1, Paragraphs 28-29.
[322] Second Expert Report of Benjamin C. Esty (14 March 2014) ("Esty ER2"), Paragraph 4.
[323] P. List, A Chemical Storm, 8 Proj. Fin. 35 (June 1998) (C-17), page 36.

6.62 The Offtake Agreement was also legally integrated with the FertiNitro project. Its preamble referred expressly to the JIA; Article 11.1 provided for a term of 20 years or until FertiNitro had repaid its Bonds; and Articles 11.4 and 11.5 provided that output available to offtake buyers was dependent upon continued levels of equity in FertiNitro by such buyers.[324] The Offtake Agreement also referred to other Project Documents: see Articles 3.2, and 4.2. In turn, Article IV of the JIA referred to the Offtake Agreement, where the parties agreed that the Offtake Agreement was "necessary to give effect to this [JIA] […]" and "[…] necessary and appropriate to give effect to the intent of the Owners as expressed in this [JIA] and to enable the construction of the Plants and operation of the Business."

6.63 Section 3.01(b) and (c) of the Common Security Agreement with the Senior Banks recorded FertiNitro's representation that it had authority to enter into the Offtake Agreement and that the Offtake Agreement was legally binding upon FertiNitro; Sections 5.01(b) and 5.03(b) required FertiNitro to give irrevocable instructions to Offtakers (including KOMSA and later KNI) to make payments to offshore accounts in US dollars under the Offtake Agreement, for the benefit of the lending banks (as earlier indicated in the Bond Offering Circular);[325] Section 6.01(a)(iii) recorded FertiNitro's pledge to the lending banks of all its rights in the Offtake Agreement; Section 9.01(c) made the Offtake Agreement a condition precedent to the Common Security Agreement; and Section 10.01(g) made a default by KOMSA (later KNI) under the Offtake Agreement an event of default by FertiNitro under the Common Security Agreement.[326]

6.64 The factual evidence from contemporary witnesses is consistent with this economic and legal analysis. Mr Barrientos (of Pequiven) testified that the purpose of the Offtake Agreement, although (in his legal view) a separate sales contract, "was to provide FertiNitro a continuous revenue stream. This enabled FertiNitro to fulfill its obligations, especially with banks and bondholders […]. The Offtake Agreement was implemented pursuant to this concept: it was not to ensure revenues to KOMSA or any shareholder in

[324] Joint Investors Agreement by and among Pequiven, Koch Oil SA, Snamprogetti Netherlands BV, and Polar Uno, CA (8 April 1998) (C-18).
[325] Bond Offering Circular (C-115).
[326] Common Security Agreement (21 April 2008) (C-137).

particular."[327] At the time, FertiNitro's US lawyers, Davis Polk & Wardwell, advised its board of directors by letter dated 18 May 2005:[328]

> *"As the Board will be aware, the terms of the current Offtake Agreement are the product of extensive negotiations among the offtakers, the FertiNitro shareholders and the FertiNitro creditors, are legally binding and reflect not only the fertilizer market conditions existing or anticipated at the time, but also the overall contractual […] framework for the project and their attendant financial impact on the parties. Therefore, any change to the Offtake Agreement cannot be viewed in isolation as a negotiation between FertiNitro's shareholders and the offtakers but must also account for the creditors as well as the prior and current roles of the participants in capacities other than as shareholders and offtakers (for example, Pequiven and its affiliates as the suppliers of feedstock and other services to the project and Snamprogetti as the construction contractor for the project).*
>
> *In particular, the lenders relied on the Offtake Agreement to establish an assured distribution channel for the plant's output as well as on the credit support, liquidity and currency risk mitigation inherent in the obligations of the offtakers to take and pay for product tendered by the plants. The project's debt is secured by the receivables owed by Koch and Pequiven to FertiNitro under the Offtake Agreement (including a pledge by IPSL of its own receivables from export sales). The attributes of the Offtake Agreement were fundamental to the lenders and the lenders view the financial strength of the project as linked to the financial and marketing strength of the offtakers and their respective commitments to the project."*

6.65 Mr Gwaltney (of Koch, and an alternate director of FertiNitro nominated by KOMSA) testified that Offtake Agreement was "an integral part of the overall investment and structure of the FertiNitro project. It was a 'package deal'. KOMSA would obtain an equity interest in the FertiNitro Companies and would also commit to purchasing offtake on a long-term, take-or-pay basis." He testified further:

> *"The Offtake Agreement was an essential element of Koch's investment. Without these valuable rights, KOMSA would not have made its investment in FertiNitro. Furthermore, given that the Offtake Agreement obligated KNI to purchase product*

[327] Second Witness Statement of Victor D. Barrientos (30 December 2013), Paragraph 28.

[328] Memorandum to Offtake Agreement Review Committee of the Board of Directors of FertiNitro (18 May 2005) (C-118) page 2.

from FertiNitro on a 'take or pay' basis and for an extended period of time, it satisfied a critical requirement of the project finance lenders."[329]

6.66 Based on these materials, the Tribunal considers that the Offtake Agreement was an integral and essential part of the overall investment made by KOMSA. It was not a distinct or separate part, to be considered as a different unrelated transaction. Nor was it a 'pure sales contract', whether judged from an economic, legal or broader commercial perspective. Accordingly, whether KOMSA's interest in the Offtake Agreement was an investment under the ICSID Convention must stand or fall with KOMSA's entire transaction relating to the FertiNitro project.

6.67 In brief, the Tribunal concludes that KOMSA's entire transaction, with its related equity contribution and offtake rights and obligations, were part of a single integrated investment within the meaning of Article 25(1) of the ICSID Convention. Apart from the Offtake Agreement (if a separate transaction which the Tribunal has here rejected), the Respondent does not contend otherwise. As regards this single transaction (including the Offtake Agreement), the Tribunal decides that it meets all the indicia of an investment as to contribution, risk, duration and economic development under the *Salini* test, howsoever applied.[330]

6.68 *Article 2 of the Treaty:* As an integral part of an entire transaction, the Tribunal accepts KNI's submission that the Offtake Agreement was an "[investment] in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party" in accordance with Article 2 of the Treaty.

6.69 *Article 12:* The Tribunal can also address summarily the Respondent's reliance on the dispute resolution provisions in Article 12 of the Offtake Agreement. Whilst possibly relevant to issues of liability under Article 6 of the Treaty (to which the Tribunal returns

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[329] Gwaltney WS1, Paragraph, 33.

[330] *Salini Costruttori S.P.A. and Italstrade S.P.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (16 July 2001) (RLA-7), Paragraphs 50-58. *See also Phoenix Action v. Czech Republic*, ICSID Case No. ARB/06/05, Award (15 April 2009) (RLA-22), Paragraphs 82-85; and *Philip Morris Brand Sàrl et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction (2 July 2013) (CLA-144), Paragraph 200.

below), the Tribunal decides that these provisions do not support the Respondent's jurisdictional objection. KNI's claim is directed in this arbitration to the Respondent and not FertiNitro; KNI invokes the Respondent's obligations under the Treaty and international law (as its applicable law), and not FertiNitro's obligations under the Offtake Agreement and New York law (as its applicable law). The causes of action, the legal texts, the applicable laws and the disputing parties are thus all materially different.

6.70 Lastly, does it make a difference to any part of this analysis that KOMSA later assigned (or novated) its interest in the Offtake Agreement to KNI, whereby (so it could be said) the Offtake Agreement ceased to be part of an entire integrated investment? This question too could have raised difficulties here, but for one important factor. The assignment from KOMSA to KNI was an internal reorganization between associated companies within the same Koch group of companies. It did not introduce an unrelated third party or materially change the transaction. Nor could it have done so given Articles 11.4 and 11.5 of the Offtake Agreement. The Respondent does not challenge the efficacy of the assignment under the Offtake Agreement. Hence, although different in form, given the different legal personalities of KOMSA and KNI, the assignment produced no material economic, legal or commercial difference in substance.

6.71 ***Decision****:* In conclusion, for all these reasons, the Tribunal dismisses the Respondent's jurisdictional objection to KNI's claim in this arbitration under Articles 1(2) and 2 of the Treaty and Article 25(1) of the ICSID Convention.

PART VII: EXPROPIATION ISSUES

(1) Introduction

7.1 As already indicated, the Claimants contend that the Respondent is liable under six provisions of the Treaty; namely: (1) Article 6 ("Expropriation"), (2) Article 4(1) ("FET"), (3) Article 4(1) ("FPS") (4) Article 4(1) ("Arbitrary or Discriminatory Measures"); (5) Article 4(2) ("National Treatment"); and (6) Article 11(2) ("Umbrella Clause"). In this Part VII of the Award, the Tribunal addresses the issue of liability for the Claimants' claims for unlawful expropriation under Article 6 of the Treaty. The issues of liability for the other non-expropriatory claims are addressed in Part VIII below.

7.2 It is again necessary to summarise the Parties' respective cases as to the expropriation issues. As with the jurisdictional issues and indeed all other issues, the Tribunal has considered the Parties' cases on liability in full; and it should not be assumed that the omission from these summaries of any submission or other material invoked by any Party has been overlooked by the Tribunal.

(2) The Claimants' Case

7.3 In summary, the Claimants contend that the wording of Article 6 of the Treaty captures any taking of property, whether tangible or intangible, thus including shares, equity and contractual interests; and that it prohibits expropriation unless a four-prong test is satisfied, namely: (i) the measure must be taken in the public interest, (ii) on a non-discriminatory basis, (iii) under due process of law, and (iv) with payment of compensation.[331] The Claimants then turn to the two alleged unlawful expropriations by the Respondent; namely: KOMSA's interest in FertiNitro and KNI's interest in the Offtake Agreement.[332]

7.4 *KOMSA:* With regard to KOMSA's interest in FertiNitro, KOMSA submits that the Respondent's measure, Decree 7713 (the Expropriation Decree) read with the Minister's public statements, constituted an unlawful indirect expropriation. First, the Respondent

[331] Cls. Mem., Paragraphs 200-214.
[332] Cls. Mem., Paragraphs 215-220.

cannot prove the public interest prong because there was no shortage of fertilizer impacting its domestic food production, and the taking was in any case disproportionate.[333] Second, the measure was discriminatory because it furthered Pequiven's interests to the detriment of all other shareholders in FertiNitro. KOMSA rejects the Respondent's argument that Pequiven and KOMSA were not similarly situated because they operated in different markets and thus were not competitors.[334] Third, the measure breached due process because no advance notice was provided to KOMSA, the expropriation having been notified during the President's weekly television show during which the President signed the Expropriation Decree. KOMSA rejects the Respondent's argument that various channels of information, including earlier threats or unrelated governmental actions, could have constituted proper notice to KOMSA under international law.[335] Fourth, no effective compensation has ever been paid to KOMSA.[336] KOMSA submits that Article 6 requires effective compensation for the Respondent to discharge its obligations, not mere negotiations or lengthy domestic litigation.[337]

7.5 *KNI:* With regard to KNI's interest in the Offtake Agreement, KNI submits that Decree 7713 constitutes an unlawful indirect expropriation for the same reasons as those submitted by KOMSA. KNI contends that the Respondent nullified KNI's rights to performance by FertiNitro of the Offtake Agreement.[338] The fact that the Offtake Agreement was only terminated by FertiNitro in February 2012 (as contended by the-Respondent), many months after the Expropriation Decree and the Minister's statements is irrelevant, according to KNI, because the substance of the Offtake Agreement had already been adversely impacted on 11 October 2010 and, in any event, the later termination was attributable to the Respondent (by its control of Pequiven and, consequentially, FertiNitro).[339] In addition, KNI rejects the Respondent's argument that it did not expropriate KNI's interest in the Offtake Agreement because that argument is incompatible

[333] Cls. Reply, Paragraphs 133-146; Cls. PHB Paragraph 86.
[334] Cls. Reply, Paragraphs 147-161; Cls. PHB Paragraphs 87-91.
[335] Cls. Reply, Paragraphs 162-177; Cls. PHB Paragraphs 92-94.
[336] Cls. Mem., Paragraphs 221-235.
[337] Cls. Reply, Paragraphs 120-132; 178-179; Cls. PHB Paragraphs 95-100.
[338] Cls. Mem., Paragraphs 236-241; Cls. Reply, Paragraphs 180-186.
[339] Cls. Reply, Paragraphs 187-199.

with its public interest defence in defending FertiNitro's expropriation. That defence relies upon Venezuela's alleged food production crisis that could only be mitigated if FertiNitro's performance of its contractual obligations towards KNI to acquire urea was also taken, *i.e*. expropriated, by the Respondent.[340] As with KOMSA, the Respondent has paid no compensation to KNI, as at the date of this Award.

(3) The Respondent's Case

7.6 In summary, the Respondent contends that Decree 7713 ordered the mandatory acquisition of FertiNitro's assets, in accordance with Venezuela's domestic law and as expressly authorised under Article 6 of the Treaty. It denies any liability under Article 6 to either KOMSA or KNI.

7.7 *KOMSA:* The Respondent contends that this acquisition was carried out in the public interest and for a public purpose, as to which States enjoy broad latitude under international law. Specifically, the Respondent wished to ensure sovereign control over the means of domestic food production. The Respondent contends that there is a direct link between the fertilizer sector and food production. It points to the Venezuelan food crisis of 1998 and the potential general impact of malnutrition on a country's social peace.

7.8 The Respondent rejects the Claimants' heightened test according to which the Respondent must also prove the underlying hardship that gave rise to the policy and prove that the new policy is untainted by any political motives. It submits that the proportionality test asserted by the Claimants is misplaced. It is here only relevant to determine whether certain measures can rise to the level of expropriation. It has nothing to do with assessing the Respondent's food policy (which the Respondent submits was reasonable and proportionate in any event).[341]

7.9 The Respondent contends that its acquisition of FertiNitro was carried out in a non-discriminatory manner because Pequiven and KOMSA were not similarly situated. They were not operating in the same markets, particularly with the Offtake Agreement. The

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[340] Cls. PHB, Paragraph 85.
[341] Resp. C-Mem., Paragraphs 144-148; Resp. Rej., Paragraphs 196-203; Resp. PHB, Paragraphs 66-80.

Respondent submits that merely acting in the same sector is not sufficient to be similarly situated. Moreover, Pequiven is a state-owned entity that was in charge of promoting food security (even before Decree 7713 was issued), whereas KOMSA is a private Swiss company. Further, there was a reasonable justification for treating Pequiven and KOMSA differently, given the policy of ensuring Venezuela's food security. In addition, Pequiven did not benefit from FertiNitro's acquisition. That acquisition merely facilitated the administrative process; and (ultimately) Pequiven had also to surrender its own equity interest in FertiNitro, just like all other FertiNitro shareholders. There was thus no intent by the Respondent specifically to target foreigners. Pequiven did not ultimately hold the assets of FertiNitro; and KOMSA did not receive any differential adverse treatment. [342]

7.10 The Respondent contends that the acquisition of FertiNitro was carried out under due process. KOMSA had received multiple notices of the upcoming acquisition. In the absence of any such language in Article 6, the Respondent challenges KOMSA's argument that prior notice is always required under a due process standard under international law. The Respondent had earlier expressed strong interest in the fertilizer sector; and KOMSA had received notice through various channels (including the press, Pequiven employees and other laws or decrees) that showed the Respondent's interest in the sector. Moreover, there were legal remedies available to KOMSA under domestic laws, including amicable negotiations, to challenge the acquisition of FertiNitro.[343]

7.11 The Respondent contends that it met its obligations under international law and Article 6 because it offered to negotiate effective and adequate compensation for KOMSA. At that time, only the amount of compensation, not the principle of compensation, was disputed between the Respondent and KOMSA. Also, according to the Respondent, Article 6 does not require immediate payment of compensation by the Respondent. The Respondent also submits that Pequiven (for the Respondent) always negotiated in good faith and made a reasonable offer of compensation, until KOMSA itself put an end to the negotiations. Under international law, so the Respondent submits, where only the valuation of the asset

[342] Resp. C-Mem., Paragraphs 149-164; Resp. Rej., Paragraphs 204-216; Resp. PHB, Paragraphs 83-97.
[343] Resp. C-Mem., Paragraphs 165-175; Resp. Rej., Paragraphs 217-224; Resp. PHB, Paragraphs 98-104.

remains in dispute, the offer of compensation suffices for the State to discharge its obligation regarding compensation under the treaty. The Respondent also submits that the pending litigation before the Venezuelan courts regarding the amount of compensation will lead to compensation to be paid by the Respondent to the Claimant in due course.[344]

7.12 *KNI:* The Respondent contends that it did not expropriate KNI's contractual interest in the Offtake Agreement, even assuming (contrary to its jurisdictional objection) that such an interest was an "investment" under the Treaty.

7.13 According to the Respondent, Decree 7713 does not include any language regarding KNI's contractual rights to buy urea and ammonia under the Offtake Agreement; KNI's contractual rights were unaffected by the Decree; and those rights were not an "asset" under the Decree.

7.14 In addition, KNI continued to purchase such products under the Offtake Agreement after October 2010. That was not done (as KNI asserts) under an *ad hoc* agreement made by an exchange of letters after the Expropriation Decree 7713 was issued. KNI's interest in the Offtake Agreement was thus not expropriated by Decree 7713. The Respondent challenges the testimony of the Claimants' witnesses according to which KNI was confused by the Decree and had understood the Offtake Agreement to be expropriated, thus requiring products to be delivered under a new *ad hoc* agreement for the future. The Respondent submits that there is no convincing evidence supporting KNI's position. Ultimately, so the Respondent contends, FertiNitro (but not the Respondent) terminated the Offtake Agreement for its own clearly stated commercial reasons in February 2012.[345]

7.15 In any event, so the Respondent further contends, the alleged treatment of KNI's interest in the Offtake Agreement cannot be attributed to the Respondent under international law because FertiNitro was not part of the Respondent's organic structure, does not exercise governmental powers, nor was it under the effective control of the Respondent. Pequiven

[344] Resp. C-Mem., Paragraphs 176-177; Resp. Rej., Paragraphs 225-232; Resp. PHB, Paragraphs 105-115.
[345] Resp. C-Mem., Paragraphs 181-184; Resp. Rej., Paragraph 237; Resp. PHB, Paragraphs 30-63.

was the only entity that administratively managed the acquisition of FertiNitro, without ultimately holding the assets.[346]

7.16 The termination of the Offtake Agreement by FertiNitro in February 2012 was a commercial decision that cannot be qualified as an expropriation under Article 6 of the Treaty; nor can it give rise to any liability under international law because it would be, at most, an ordinary contractual breach by FertiNitro that cannot amount to any "taking" by the Respondent under the Treaty.[347]

(4) The Tribunal's Analysis

7.17 The Tribunal's starting-point is necessarily the Respondent's state policies on food security and domestic food production for the people of Venezuela, pre-dating Decree 7713 (the Expropriation Decree dated 10 October 2010). These policies are ostensibly laudable, with their origins pre-dating the Claimants' investments. In the Tribunal's view, short of the Expropriation Decree of 10 October 2010, there is nothing in these governmental policies that, by themselves, amount to a violation of the Claimants' rights under Article 6 of the Treaty. The Tribunal accepts that these policies were adopted by the Respondent in good faith, for a public purpose in feeding the people of Venezuela, in accordance with Venezuelan law and falling within the boundaries of rationality.

7.18 Moreover, it is not the function of this Tribunal to second-guess the design or existence of those policies under the Treaty, unless their execution by the Respondent actually violates the rights of KOMSA or KNI under the Treaty. As to that, as the Claimants, KOMSA and KNI bear the legal burden of proving their respective allegations in regard to the Expropriation Decree and the Minister's statements.

7.19 The bar for the Claimant's claims is thus high under international law, as confirmed by a '*jurisprudence constante'* established over many years. As was decided by the NAFTA tribunal in *Methanex v. USA*,[348] an intentionally discriminatory regulation against a foreign

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[346] Resp. C-Mem., Paragraphs 185-194; Resp. Rej., Paragraphs 238-249; Resp. PHB, Paragraphs 64-65.
[347] Resp. C-Mem., Paragraphs 195-200; Resp. Rej., Paragraphs 250-251.
[348] *Methanex Corporation v. United States of America*, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits (3 August 2005), Part IV, Chapter D, Page 4, Paragraph 7.

investor can fulfill a key requirement for establishing expropriation. However, it also concluded:

> *"[A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation."*

More recently, the tribunal in *Philip Morris v. Uruguay* decided:[349]

> *"As indicated by earlier investment treaty decisions, in order for a State's action in exercise of regulatory powers not to constitute indirect expropriation, the action has to comply with certain conditions. Among those most commonly mentioned are that the action must be taken bona fide for the purpose of protecting the public welfare, [and] must be non-discriminatory and proportionate."*

7.20 Accordingly, the standard of review of a State's conduct to be undertaken by an international tribunal includes a significant measure of deference towards the State making the impugned measure. Such a tribunal cannot simply put itself in the position of the Sate and weigh the measure anew, particularly with hindsight. In *Lemire v. Ukraine*,[350] the ICSID tribunal referred to "the legitimate right of Ukraine to pass legislation and adopt measures for the protection of *what as a sovereign it perceives to be* its public interest" (emphasis here supplied). It also decided:

> *"As a sovereign State, Ukraine has the inherent right to regulate its affairs and adopt laws in order to protect the common good of its people, as defined by Parliament and Government. The prerogative extends to promulgating regulations which define the State's own cultural policy […]. The 'high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders' is reinforced in cases when the purpose of the legislation affects deeply felt cultural or linguistic traits of the community." (emphasis omitted).*

[349] *Philip Morris Brand Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (8 July 2016), Paragraph 305.

[350] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 January 2010) (CLA-89), Paragraphs 273, 505.

The cited passage was there taken from the NAFTA award in *SD Myers v. Canada*.[351]

7.21 That same passage on deference was adopted by the tribunal in the *Saluka* award:[352]

> *"No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well. As the S.D. Myers tribunal has stated, the determination of a breach of the obligation of 'fair and equitable treatment' by the host State 'must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.'"*

7.22 The Respondent also cited passages from the decisions in *Kardassopolous v. Georgia* and *LIAMCO v. Libya*. The former recorded the tribunal's view that "the Respondent is entitled to a measure of deference" in regard to the expropriation of the claimant's rights "in the Georgian public interest."[353] The latter recorded the tribunal's decision that "motives are indifferent to international law, each State being free 'to judge for itself what it considers useful or necessary for the public good […].'"[354] The Tribunal accepts this general statement as forming the high water mark of a '*jurisprudence constante*" on deference. In this case, the Tribunal prefers a lower tide. Motives are not wholly irrelevant and can be important in determining whether the act of a State was unlawful. Whilst it is inappropriate to second-guess a State's decision-making processes, for example as to issues of public interest, it is appropriate to consider whether such processes took at the relevant time any account of such issues.

7.23 In the Tribunal's view, even with this lower tide, the Claimants (both KOMSA and KNI) have not proven the first part of their four-pronged test, namely that the measures at issue

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[351] *S.D. Myers, Inc. v. Canada*, UNCITRAL, Partial Award (13 November 2000) (RLA-52), Paragraph 263.

[352] *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006) (CLA-19), Paragraph 305.

[353] *Kardassopoulos v. Republic of Georgia*, ICSID Case No. ARB/05/18 and ARB/07/15, Award (28 February 2010) (CLA-20), Paragraph 391.

[354] *Libyan American Oil Company (LIAMCO) v. Libyan Arab Republic,* Award, 20 I.L.M. 1 (12 April 1977) (RLA-37), Paragraph 114.

were not taken in the public interest. As to the second and third prongs relating to discrimination and due process, the Claimants also bear the legal burden of proof. The Tribunal decides that the Claimants have failed to prove their factual allegations relating to discrimination. As to due process, the Tribunal does not consider that it here required advance notice of the Expropriation Decree – not under the Treaty, customary international law or Venezuelan law.

7.24 *KOMSA:* As regards the fourth prong, the Expropriation Decree 7713 and subsequent events speak largely for themselves. The Decree provided for the immediate acquisition of all FertiNitro assets by the Respondent on 11 October 2010. If there were any ambiguity as to its terms or effect (which the Tribunal discounts as regards KOMSA's interest in FertiNitro), the public statements of the Respondent's Minister of Energy and Oil, made at the FertiNitro Plant also on 11 October 2010, confirmed that the Respondent was mandatorily acquiring, nationalising and seizing all of FertiNitro's assets: the Tribunal refers to its findings in Part V above. There was at the time no compensation paid to KOMSA by the Respondent. Despite intimations by the Respondent to the contrary, there has still been no compensation paid to KOMSA more than seven years later.

7.25 In these circumstances, the Tribunal decides that the Respondent indirectly expropriated KOMSA's interest in FertiNitro on 11 October 2010. By that date, the Respondent should have complied with the express proviso in Article 6, requiring it (inter alia) to make "provisions […] for effective and adequate compensation" to be paid "without delay" to KOMSA for its expropriated interest in FertiNitro, then or later. The Respondent did not do so. It does not dispute that no compensation has ever been paid to KOMSA, even as of the date of this Award. As from 11 October 2010, KOMSA's interest in FertiNitro was completely extinguished for all practical purposes: none of the rights associated with its shareholding in FertiNitro (via Koch José) could be exercised with the Respondent controlling FertiNitro's management and seizing all of FertiNitro's assets.

7.26 The Tribunal does not consider that the Respondent's subsequent offers to negotiate compensation with KOMSA (through Pequiven) complied with Article 6's proviso, still less when it is recalled that the Respondent has not tendered or paid even a small part of what it considered to be indubitably due to KOMSA. Nor does the Tribunal consider that the proviso was met by the opportunity afforded to KOMSA to engage in lengthy and uncertain legal proceedings in the Respondent's own courts in Venezuela, under Venezuelan law. These legal proceedings were begun by Pequiven on 26 July 2011 and have reached no conclusion as regards compensation payable to KOMSA.[355] The Tribunal recalls the frank statement made by the Respondent at the first session of this arbitration: "[…] as a State, we're conscious that there is an expropriation and that every expropriation requires a compensation, a fair compensation […]."[356] For KOMSA, the issue was then correctly seen as the amount of compensation properly due to KOMSA, but not whether or not there was a liability by the Respondent to pay compensation to KOMSA under Article 6 of the Treaty. Even then, no compensation was tendered by the Respondent to KOMSA.

7.27 The Respondent cited a passage from the ICSID award in *Venezuela Holdings, B.V. et al (case formerly known as "Mobil Corporation, Venezuela Holdings B.V. et al"), v. Venezuela*, where the tribunal decided:

> *"[…] the mere fact that an investor has not received compensation does not in itself render an expropriation unlawful. An offer of compensation may have been made to the investor and, in such a case, the legality of the expropriation will depend on the terms of that offer. In order to decide whether an expropriation is lawful or not in the absence of payment of compensation, a tribunal must consider the facts of the case."*[357]

This Tribunal does not reject this approach to the wording of Article 6 of the Treaty at issue in this arbitration. However, on the facts of this particular case, there was no such firm offer of compensation made to KOMSA by the Respondent itself, but rather only belated, limited and unsuccessful negotiations with different figures advanced by Pequiven subject to further discussion and prior approval by the Respondent. These were not "provisions […] for

[355] Petition for Expropriation and Provisional Relief to the Court of First Instance of the Judicial Circuit of Anzoátegui (26 July 2011) (R-36).

[356] First Session (21 December 2011), Transcript, p. 103.

[357] *Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014) (RLA-153), Paragraph 301. (This award was partially annulled on different grounds; *see* Decision on Annulment (9 March 2017), Paragraph 196.4.)

effective and adequate compensation" to be paid "without delay" to KOMSA, as required by Article 6 of the Treaty.

7.28 In these factual circumstances, under the approach taken by the *Mobil* tribunal, the Tribunal concludes that the Respondent has not made any meaningful offer of compensation or provided any meaningful procedure for compensation to KOMSA as required by Article 6 of the Treaty.

7.29 For these reasons, the Tribunal decides that the Respondent unlawfully indirectly expropriated KOMSA's interest in FertiNitro on 11 October 2010 in violation of Article 6 of the Treaty, as evidenced by the Expropriation Decree 7713 and the Minister's public statements of 11 October 2010 attributable to the Respondent. Given the terms of Article 9(4) of the Treaty (set out in Part IV above), the Tribunal confirms that such an expropriation, as found by the Tribunal, is unlawful because the Respondent failed to comply with its obligations under Article 6 of the Treaty. It was an indirect expropriation because, as the Tribunal accepts, there was no formal transfer of ownership of FertiNitro's assets until July 2011 under Venezuelan law; but it had, as an expropriatory measure, the same effect as a direct expropriation on 11 October 2010.

7.30 *KNI:* The Expropriation Decree 7713 issued on 11 October 2010 made no express reference to the Offtake Agreement or to KNI. However, on the same day, the Minister responsible for the Decree's execution, explained its immediate effect in public statements inconsistent with FertiNitro's further performance of the Offtake Agreement in accordance with its existing terms. As explained by the Minister, the effect of the Decree extended beyond FertiNitro's physical assets to include the abrogation of any existing contractual restrictions on FertiNitro's products being delivered in Venezuela otherwise than under the complete control of the Respondent, principally for the domestic Venezuelan market. Indeed, that was the motive for the Respondent seizing FertiNitro. In the Minister's own words: "With the control of this plant that the Venezuelan state will be taking, we now have guaranteed all of the urea that our farm workers may need, all of the urea that our producing sector may need, to sustain this extraordinary seeding plan and to sustain national development" (see Part V above). There was no point in the Respondent seizing FertiNitro's assets without the Respondent also seizing full and effective control over all its future production in Venezuela. Hence, Decree 7713 and the Minister's address are to be considered together, as one composite act.

7.31 At the time, that was the understanding of both Pequiven and KNI's officers. In his oral testimony, Mr Barrientos (of Pequiven) testified that the Minister's references on 11 October 2010 to the Respondent's new supply of 1.5 million tonnes of fertiliser to the Respondent referred to FertiNitro's total production of 1.5 million tonnes.[358] Mr Gwaltney (for KNI) also understood, as confirmed on 12 October 2010 by Mr Inciarte (then President of FertiNitro and President of Pequiven), that the Respondent had taken complete control of FertiNitro.[359] Mr Parra (for KNI) also understood from Mr Inciarte that "KNI's offtake would also be taken over by the government."[360] Mr Inciarte was not made available by the Respondent as a witness in this arbitration.

7.32 The Respondent, however, now faced a significant problem with FertiNitro's bondholders and lending banks, for whom sale proceeds paid by KNI under the Offtake Agreement operated as security. To avoid a default, with possibly wide ramifications for FertiNitro and the Respondent at the time, the Respondent (through Pequiven) invited KNI to continue to purchase FertiNitro's product.

7.33 The first relevant exchange between FertiNitro and KNI was the letter dated 26 November 2010 from Mr Edgar Alonso Flóres (FertiNitro's commercial manager) to Mr Strand (for KNI), confirming "the continuing of the Offtake Agreement under the fulfil of each clause […]".[361] It was followed by the letter dated 1 December 2010 from Mr Perdomo (FertiNitro's general manager) also to Mr Strand (for KNI), confirming "the continuing and fulfilling of the Offtake Agreement.[362] (Both letters are cited more fully in Part V above).

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[358] First (September) Hearing, D3.111-112.
[359] Witness Statement of Brent W. Gwaltney (30 May 2012) ("Gwaltney WS1"), Paragraph 122.
[360] Witness Statement of Melquíades A. Parra (29 May 2012) ("Parra WS1"), Paragraph 73.
[361] Email from E. Flores to J. Strand re: Offtake Agreement FertiNitro (26 November 2010) (C-111).
[362] Letter from J. Perdomo to J. Strand (1 December 2010) (C-112).

7.34 As to this first letter, Mr Flóres testified that FertiNitro had no product available for delivery to KNI in October 2010 because the FertiNitro Plant was shut down; and that he had been instructed to send his letter to KNI by Mr Perdomo.[363] As to this second letter, Mr Perdomo was not made available by the Respondent as a witness in this arbitration.

7.35 The next relevant exchange came with a visit by Mr Garcia (for Pequiven and a member of FertiNitro's *ad hoc* board of trustees) to Messrs Gwaltney and Parra (for KNI) on 2 December 2010. Mr Gwaltney testified: "He [Mr Garcia] emphasized that the main goal was to maintain stability at FertiNitro while Pequiven's negotiations with the lenders to repay the outstanding debt were underway. He said that Pequiven wanted KNI to take product from FertiNitro until Pequiven had reached arrangements with the lenders to prevent a default. He added that once a path forward had been agreed to with the lenders, Pequiven would work to compensate the shareholders and would assume KNI's obligation for purchasing the product."[364] Mr Parra testified in similar terms: "He told us that Pequiven wanted KNI to lift product from FertiNitro until Pequiven had reached a solution with the lenders and bondholders. He added that once a path forward had been agreed to with the lenders and bondholders, Pequiven would work to compensate the shareholders and would purchase KNI's share of the offtake."[365] Mr Garcia was not made available by the Respondent as a witness in this arbitration.

7.36 In response to Pequiven's correspondence and Mr Garcia's visit, Mr Gwaltney then wrote KNI's email message of 3 December 2010 to Mr Perdomo (of FertiNitro), recited in Part V above.[366] It can be assumed that, on both sides, lawyers were by now actively involved in drafting or vetting all correspondence between Pequiven and KNI. Words now mattered for all parties; but, in the Tribunal's view, the parties' contemporary conduct is more significant, viewed objectively.

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[363] First (September) Hearing, D4.78ff.
[364] Gwaltney WS1, Paragraph 126.
[365] Parra WS1, Paragraph 75.
[366] Email from B. Gwaltney to J. Perdomo, copying J. Strand, T. Parra, F. Garcia re: KNI Offtake (3 December 2010) (C-113).

7.37 Mr Flóres (of FertiNitro) saw Mr Gwaltney's email to Mr Perdomo "a few days after Mr Perdomo received it."[367] He confirmed that neither he nor anyone else at FertiNitro replied to Mr Gwaltney or voiced any objection to KNI regarding his email.[368] If FertiNitro did not agree with KNI's understanding of the position following the events of 11 October 2010, FertiNitro should have said so at the time before deliveries resumed to KNI in late 2010. There is no evidence before this Tribunal that FertiNitro's omission to do so was due to any inadvertence or mistake. In the circumstances, KNI could reasonably understand, as it did, that FertiNitro shared KNI's understanding of the situation.

7.38 Where their accounts differ as to these several events, the majority of the Tribunal finds more persuasive the testimony of Mr Gwaltney and Mr Parra called by KNI to the factual witnesses called by the Respondent.

7.39 From 3 December 2010 onwards, the majority of the Tribunal finds that KNI took offtake from FertiNitro on the terms of Mr Gwaltney's email message of 3 December 2010 for about 15 months, totalling about 333,000 tonnes of ammonia and 650,000 tonnes of urea. Those offtakes ceased with FertiNitro's letter dated 28 February 2012, signed by Mr Hernández (as the president of FertiNitro's *ad hoc* board of trustees).[369] This letter was drafted with legal advice from Mr Barrientos, as he confirmed in his testimony.[370] Mr Barrientos also testified, somewhat grudgingly, that FertiNitro would have continued selling product to KNI, but for the Expropriation Decree and the resignation of FertiNitro's board of directors.[371] Mr Hernández was not made available by the Respondent as a witness in this arbitration (The relevant terms of this letter are also recited in Part V above).

7.40 FertiNitro's letter dated 28 February 2012 was not expressed as a termination of the Offtake Agreement. It announced that FertiNitro would no longer sell its product to KNI under the Offtake Agreement "all of which is in fulfilment of what is established in the

[367] First (September) Hearing, D4.80.
[368] First (September) Hearing, D4.81-82.
[369] Letter from B. Hernández to Koch Oil SA and Koch Nitrogen Company re: Offtake Agreement (28 February 2012) (C-114).
[370] First (September) Hearing, D3.74.
[371] First (September) Hearing, D3.82-83.

[Expropriation Decree] which orders the compulsory acquisition of movable and immovable property […]". At this time, so it appears, FertiNitro and the Respondent no longer faced the risk of default to bondholders and banks, because FertiNitro had apparently satisfied the debt to its lenders by December 2011, following the Stand Still Agreement of December 2010 (not made available by the Respondent in this arbitration). Hence, so it seems, sale proceeds from KNI were no longer required to prevent an act of default by FertiNitro. It is not clear to the majority of the Tribunal, on the evidence available in this arbitration, that the Offtake Agreement was terminated in February 2012, whether by FertiNitro, Pequiven or the Respondent (it was not terminated by KNI). What was being terminated was the *ad hoc* arrangement described in Mr Gwaltney's email message of 3 December 2010.

7.41 In the majority of the Tribunal's view, there was a material difference between the Parties' positions under the Offtake Agreement before the expropriation on 11 October 2010 and their positions thereafter to 28 February 2012 under the terms of Mr Gwaltney's email message of 3 December 2010.

7.42 Mr Parra (of the Koch group of companies and a former director of FertiNitro) testified as to this difference for the period from 11 October 2010:[372]

> *"It was not an Offtake Agreement anymore. We continued to purchase product on a spot basis, and my trading experience in crude oil and refined products made this a very, very clear spot type of agreement, and I'm happy to go into the details of why I say that. The conditions under which we were buying were very different from the conditions that existed prior to expropriation in the Offtake Agreement, sir. We were buying on a spot basis without obligation to lift a product. The supplier did not have any obligation whatsoever to supply the product. The fact that the pricing mechanism was agreed between the parties to be the same was a matter of practicality in the sense that there was a formula already existing and the parties said: well, we can carry on with the formula. But the sales themselves were not tied, as they were before the expropriation, they were not tied to a specific time period, they were not tied to an obligation to buy. They were not tied to an obligation to pay if you did not take the product, so it was a completely different character of the contract, sir."*

[372] First (September) Hearing, D2.88-89.

7.43 The change meant that, with the Respondent fully controlling FertiNitro and its production, KNI lost any contractual security of supply from FertiNitro. KNI was thus unable to optimise future sales of product or to optimise future freight arrangements. As Mr Parra testified, the change required KNI to operate, effectively, on the spot market. This diminished operation mitigated KNI's resulting losses up to 28 February 2012; but, whilst relevant to the assessment of compensation (addressed in Part IX below), it cannot affect the issue of liability as at 11 October 2010. In the majority of the Tribunal's view, KNI's interest in the Offtake Agreement was nullified from 11 October 2010 onwards.

7.44 Notwithstanding several intimations otherwise, including Mr Garcia's tentative offer of compensation on 2 December 2010 (as described above), the Respondent has not made any meaningful offer of compensation or provided any meaningful procedure for compensation to KNI as required by Article 6 of the Treaty.

7.45 Just as the Offtake Agreement was an integral part of the Claimants' single investment in the FertiNitro project (initially both made by KOMSA), so too was the object of the Respondent's expropriation, comprised of both KOMSA's interest in FertiNitro and KNI's interest in the Offtake Agreement. From 11 October 2010 onwards, FertiNitro was fully controlled and permanently disabled by the Respondent from complying with its obligations to KNI under the Offtake Agreement, save and insofar as the Respondent might permit FertiNitro to sell product to KNI on terms materially different from those provided by the Offtake Agreement; *i.e.* on the terms of Mr Gwaltney's email message of 3 December 2010. Following the events of 11 October 2010, FertiNitro, its production and sales were subject to the Respondent's full and effective control owing to FertiNitro's Venezuelan nationality and location in Venezuela, with the place of performance by FertiNitro of the Offtake Agreement also in Venezuela.

7.46 On 28 February 2012, by express reference to the Expropriation Decree, the Respondent (through Pequiven and FertiNitro) permitted such sales to KNI no longer. FertiNitro remained fully and effectively controlled by the Respondent, whereby FertiNitro was precluded by the Respondent from making any further *ad hoc* sales to KNI from 28 February 2012, just as it had been precluded from performing the Offtake Agreement from 11 October 2010 onwards. Throughout, FertiNitro (with Pequiven) thus acted under the

Respondent's "direction or control" within the meaning of Article 8 of the ILC Articles on State Responsibility.

7.47 The Tribunal does not consider that the Offtake Agreement can be treated as a mere offshore sales agreement unrelated to KOMSA's interest in FertiNitro. It is necessary to view the Respondent's measures of 11 October 2010 as the indirect expropriation of a single integrated investment. As the ICSID tribunal decided in *Electrabel v. Hungary*:[373]

> *"If it were possible so easily to parse an investment into several constituent parts each forming a separate investment […], it would render meaningless that tribunal's approach [in Tecmed] to indirect expropriation based on 'radical deprivation' and 'deprivation of any real substance' as being similar in effect to a direct expropriation or nationalisation. It would also mean, absurdly, that an investor could always meet the test for indirect expropriation by slicing its investment as finely as the particular circumstances required, without that investment as a whole ever meeting that same test."*

7.48 The majority of the Tribunal considers both KOMSA's original investment and the Offtake Agreement as a unitary package. Just as the original investment would not have taken place without the Offtake Agreement, so too the expropriation of 11 October 2010 was not limited to FertiNitro's physical assets or shareholders, as expressed by the Minister's public statements explaining the intended effect of the Expropriation Decree. KNI's investment cannot be sliced off and isolated, like a piece of sausage.

7.49 Moreover, the majority of the Tribunal does not consider that this is a case where KNI's interest in the Offtake Agreement (by reason of its foreign applicable law and foreign arbitral seat) could not be the subject of any claim under Article 6 of the Treaty against the Respondent because any claim by KNI could only be a contractual claim against FertiNitro, subject to a foreign substantive law and, in theory, with an arbitral remedy in a foreign country. As KNI has made clear from the outset of this arbitration, its claim is advanced against the Respondent under the Treaty and international law and not as a contractual claim against its co-contractor, FertiNitro, under any national law. The Respondent was

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[373] *Electrabel S.A. v. The Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012) (RLA-110) Paragraph 6.57.

never a party to the Offtake Agreement; domestic and international proceedings result from different causes of action with different forms of relief under different applicable systems of law; and there is here no satisfaction of any triple identity test. In this case, such a contractual remedy (if, in practice, it existed at all) does not extinguish KNI's remedy against the Respondent for the indirect expropriation of its interest in the Offtake Agreement under Article 6 of the Treaty, as pleaded by KNI.

7.50 In this regard, it is unnecessary to list here the long line of awards from *Vivendi Annulment I* onwards which consistently distinguishes between a contract claim and a treaty claim in an ICSID or other investor-State international arbitration.[374] KNI's claim under Article 6 is manifestly a treaty claim made under the Treaty against the Respondent and not a contractual claim under the Offtake Agreement against FertiNitro. It is equally unnecessary to list the legal materials establishing that international law general prohibits the unlawful expropriation of contractual rights, both directly and indirectly, as does the Treaty.[375] Under the Treaty, therefore, there is no cause to nullify a foreign investor's interest in the performance of its contract by its counter-party, where such performance has been deliberately thwarted and rendered valueless by the host State at the place of performance by the unlawful exercise of a power *iure imperii* within the State's own territory.

7.51 In these circumstances, the Tribunal decides (by a majority) that the Respondent unlawfully indirectly expropriated KNI's interest in the Offtake Agreement on 11 October 2010 in violation of Article 6 of the Treaty, as evidenced by the Expropriation Decree 7713 and the Minister's public statements both of 11 October 2010 attributable to the Respondent. This was confirmed by FertiNitro's letter dated 28 February 2012 referring to its "fulfilment of what is established in the [Expropriation Decree] which orders the compulsory acquisition

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374 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (21 November 2000); *see also* Christoph H. Schreuer et al., The ICSID Convention: A Commentary (2d ed. 2009), 73ff.

375 *See, e.g.*, *The Norwegian Shipowners' Case (Norway v. USA)*, RIAA (13 October 1922), Volume I, Page 307 (1948), 325; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992), Paragraph 165; and *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) (CLA-11), Paragraph 255.

of movable and immovable property."[376] As with KOMSA, given the terms of Article 9(4) of the Treaty, the Tribunal (by a majority) confirms that such an expropriation is unlawful because the Respondent failed to comply with its obligations under Article 6 of the Treaty.

7.52 It goes without saying, but it is best confirmed expressly, that the Tribunal has done its best to understand, perhaps for too long, its members' different reasoning, both as regards the Respondent's liability for KNI's claim but also (as will appear in Part IX below) the quantum of KNI's claim assuming such liability. Although the minority's dissent raises factors not in the forefront of the Parties' respective cases, unfortunately these differences remain between the Tribunal's majority and minority; and, as is his right, the minority has recorded his disagreement with the majority in a dissenting opinion attached to this Award as required by ICSID Arbitration Rule 47(3).[377]

(5) The Tribunal's Decisions

7.53 *KOMSA:* The Tribunal decides that the Respondent is liable to KOMSA in regard to its claim for the Respondent's violation of Article 6 of the Treaty on 11 October 2010.

7.54 *KNI:* The Tribunal (by a majority) decides that the Respondent is liable to KNI for its claim for the Respondent's violation of Article 6 of the Treaty on 11 October 2010.

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[376] Letter from B. Hernández to Koch Oil SA and Koch Nitrogen Company re: Offtake Agreement (28 February 2012) (C-114).

[377] The genesis of the dissenting arbitrator's dissent can be found in A. Mann 'State Contracts and State Responsibility' in *Studies in International Law* (OUP, 1973), cited in the minority's dissent.

PART VIII: NON-EXPROPRIATION ISSUES

(1) Introduction

8.1 KOMSA's "Historical Losses" are advanced as claims against the Respondent under Article 4(1), Article 4(2) and Article 11(2) of the Treaty. They comprise of losses allegedly suffered by KOMSA from losses allegedly suffered by FertiNitro originally, from: (i) new and increased taxes, (ii) non-payment (or late payment) of VAT credits, (iii) the effect of the Urea Decree and Urea Resolution, and, (iv) interference in FertiNitro's business.

8.2 The total compensation claimed by KOMSA for its "Historical Losses" is US$ 42 million. For KOMSA, Mr Giles calculates the breakdown of this total amount as follows: (i) US$ 4.7 million for the increased Municipal taxes and US$ 5.4 million for the new Science and Technology tax; (ii) US$ 7.7 million for VAT; (iii) US$ 22.4 million for the Urea Decree and Urea Resolution; and (iv) as to interference in FertiNitro's business, no specific figure is advanced by Mr Giles.[378]

8.3 For the Respondent, Dr Flores does not advance any specific figures for "Historic Losses". However, as regards VAT, Dr Flores testified that he included FertiNitro's outstanding VAT credits as working capital within his DCF calculations for KOMSA's expropriated interest in FertiNitro (without arriving at a separate, specific figure). Dr Flores also testified that KOMSA lost nothing from the devaluation of Venezuela's currency in regard to VAT credits because FertiNitro used its VAT credits to pay local taxes in Venezuelan currency.[379]

8.4 The Tribunal summarises below the cases respectively pleaded by KOMSA and the Respondent, as to applicable law and fact. It then addresses in turn the merits of each claim. There is a significant overlap as to the legal and factual bases for KOMSA's claims.

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[378] Cls. PHB, Table 4, "Points of Disagreement – Historical Losses" (set out below in Part IX).

[379] Expert Report of Daniel Flores (28 February 2013) ("Flores ER1"), Paragraph 168; Second Expert Report of Daniel Flores (3 March 2014) ("Flores ER2"), Paragraph 240.

(2) The FET Standard – Article 4(1) of the Treaty

8.5 ***KOMSA's Case****:* In summary, as to law, KOMSA contends that the FET standard under Article 4(1) protects investors' legitimate expectations relating to their investment,[380] citing *Tecmed v. Mexico.*[381] It concludes that States should not frustrate an investor's legitimate expectations that it will not act in an arbitrary manner or inconsistently with its legal framework, and more generally that modifications of the legal, regulatory and business framework on which the investor relied is a breach of the FET standard, further citing *Thunderbird v. Mexico,*[382] *Occidental v. Ecuador,*[383] and *National Grid v. Argentina.*[384] KOMSA also contends that, under the FET standard, the requirement of transparency and procedural fairness includes openness in a State's decision-making process relating to investments, as well as the investors' involvement in that process, [385] citing *Tecmed v. Mexico* and *Waste Management v. Mexico.*[386]

8.6 KOMSA also invokes, under the FET standard, the requirement to maintain a stable and predictable legal and business environment, overlapping with the requirements regarding legitimate expectation and transparency,[387] citing *CMS v. Argentina,*[388] *LG&E v. Argentina,*[389] *PSEG v. Turkey*[390] and *Bayindir v. Pakistan.*[391] KOMSA invokes the

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[380] Cls. Mem., Paragraphs 242-253.

[381] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003) (CLA-28).

[382] *International Thunderbird Gaming Corp. v. United Mexican States*, UNCITRAL (NAFTA), Award (26 January 2006) (CLA-31).

[383] *Occidental Exploration and Production Co. v. Republic of Ecuador,* UNCITRAL (LCIA), Case No. UN 3467, Final Award (1 July 2004) (CLA-27).

[384] *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award (3 November 2008) ("*National Grid v. Argentina*") (CLA-32).

[385] Cls. Mem., Paragraphs 242-245, 278-283; Cls. Reply, Paragraphs 232-233.

[386] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 April 2004) (CLA-34).

[387] Cls. Mem., Paragraphs 293-299.

[388] *CMS Gas Transmission Co v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005) (CLA-36), Paragraph 276 (partially annulled).

[389] *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) (CLA-39), Paragraph. 131.

[390] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007) (CLA-40) Paragraph 254.

[391] *Bayindir Isaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction (14 November 2005) (CLA-11), Paragraph.240.

requirement of consistency, citing *Tecmed*, being applicable to all constituent parts of the State; [392] and the requirement that States must not abuse their authority.[393]

8.7 As to the facts, KOMSA alleges the following breaches of the FET standard in the Treaty:[394]

8.8 *Taxes:* The Respondent imposed a series of new taxes and tax increases on FertiNitro which prejudiced its profitability to the detriment of KOMSA, namely the new Science and Technology Tax (2% of gross income, ultimately causing FertiNitro to pay US$ 22.35 million from 2006 to October 2010) and the increase in Municipal taxes (from 1 to 4%, ultimately causing FertiNitro to pay US$ 18.82 million also from 2006 to October 2010).[395]

8.9 *VAT:* The Respondent repeatedly failed, either promptly or at all, to provide FertiNitro with VAT credits from 2005, ultimately causing FertiNitro to be owed US$ 28.3 million of VAT credits by the Respondent.[396]

8.10 *Urea Decree and Urea Resolution:* These new urea regulations impacted FertiNitro from 2007. The Respondent had given assurances to a third party (METOR) that these new regulations would not apply to existing enterprises, such as FertiNitro. Such compulsion interfered with pricing for FertiNitro's products and, also, the allocation of export markets between FertiNitro and Pequiven under the Offtake Agreement.[397]

8.11 *Interference:* The Respondent progressively interfered with the management, operations and profitability of FertiNitro, whereas KOMSA had received assurances that Pequiven would only act as a "commercial partner". As an example, the Claimants refer to the Comisario Report of 7 September 2006,[398] as evidence of the Respondent's improper interference in FertiNitro's business. The Respondent ultimately expropriated KOMSA's

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[392] Cls. Mem., Paragraphs 311-313.
[393] Cls. Mem., Paragraph 316.
[394] Cls. PHB, Paragraphs 103-108.
[395] Cls. Mem., Paragraphs 256-260, 285, 315, 318; Cls. Reply, Paragraphs 220-225, 236-240.
[396] Cls. Mem., Paragraphs 261-267, 285, 286-288, 300-304, 315, 318; Cls. Reply, Paragraphs 226-227, 241-242.
[397] Cls. Mem., Paragraphs 268-277, 305-310, 315, 319-324; Cls. Reply, Paragraphs 228-231, 243-244; Cls. PHB, Paragraph 103.
[398] FertiNitro Report from the Statutory Auditor and Consolidated Financial Statements (7 September 2006) ("*Comisario Report*") (C-63)

interest in FertiNitro unlawfully in October 2010.[399] (The Tribunal has already addressed this claim for expropriation under Article 6 of the Treaty, in Part VII above, and it is therefore unnecessary to do so again here.)

8.12 ***The Respondent's Case****:* In summary, as to law, the Respondent contends that KOMSA relies upon an overbroad definition of the FET standard, ignoring both the text of the Treaty and international law.[400] The Respondent emphasises the wording "in accordance with the rules and principles of international law" in Article 4(1) of the Treaty. It also cites the decisions[401] in *Lauder v. Czech Republic,*[402] *Glamis Gold v. USA*[403] and *El Paso v. Argentina.*[404] It submits that the similarly worded FET standards in these cases were correctly interpreted as the minimum standard under international customary law. The Respondent also relies on the decision in *Flughafen v. Venezuela* (where the same Treaty was analysed), submitting that the tribunal there interpreted Article 4(1) of the Treaty as the minimum standard under customary international law.[405]

8.13 The Respondent challenges KOMSA's reliance on *Tecmed*'s broad formulation of the FET standard. It asserts that the *Tecmed* award has been widely criticised and also runs counter to the express wording in Article 4(1) of the Treaty. It rejects also other decisions cited by KOMSA as inapposite because the FET standards in those cases did not refer expressly to customary international law, as here. The Respondent concludes that, even adopting a broad interpretation of the FET standard, KOMSA does not articulate the evidential sources for its expectations or how those expectations were in fact legitimate.[406]

8.14 Generally, as with all KOMSA's "Historical Losses", the Respondent contends that KOMSA's alleged losses are not recoverable under the Treaty, unless KOMSA proves that

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[399] Cls. Mem., Paragraphs 289-292, 315; Cls, PHB, Paragraph 103.
[400] Resp. C-Mem., Paragraph 202.
[401] Resp. C-Mem., Paragraphs 204-207.
[402] *Ronald S. Lauder v. Czech Republic*, UNCITRAL, Final Award (3 September 2001) ("*Lauder v. Czech Republic*") (CLA-45).
[403] *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award (8 June 2009) (RLA-83).
[404] *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) ("*El Paso v. Argentina*") (CLA-52).
[405] *Flughafen Zurich A.G. and Gestion e Ingenieria IDC S.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/19, Award (18 November 2014) ("*Flughafen v. Venezuela*") (RLA-154).
[406] Resp. C-Mem., Paragraphs 204-217; Cls. Rej., Paragraphs 252-274; Resp. PHB, Paragraphs 116-121.

the Respondent's allegedly wrongful actions impacted KOMSA's own financial position (as "flow-through damage"), and not only impacted FertiNitro (which, as to both, the Respondent denies). The Respondent contends that KOMSA has failed to prove that it suffered any losses of its own, such as lost dividends as a minority indirect shareholder in FertiNitro.

8.15 The Respondent denies the factual allegations advanced by KOMSA, as follows:

8.16 *Taxes*: The Respondent contends that the new and increased tax measures do not breach the FET standard because KOMSA could not have had any legitimate expectations that tax rates would remain unchanged in the absence of specific representations or commitments from the Respondent. There were no such representations or assurances; nor any stabilisation agreement concluded between KOMSA (or FertiNitro) and the Respondent.[407] In addition, the Respondent submits that the increase of such taxes was neither egregious nor shocking. The Respondent refers to the decisions in *Paushok v. Mongolia,*[408] *EnCana v. Ecuador,*[409] *EDF v. Romania*[410] and *El Paso v. Argentina*.[411]

8.17 The Respondent further contends that the tax measures were transparent and not procedurally unfair, with KOMSA failing to point to any evidence that would prove otherwise. In addition, the Respondent contends that the FET standard under customary international law imposes no such requirement as to transparency.[412]

8.18 *VAT:* The Respondent contends that its treatment of FertiNitro's VAT credits did not breach the FET standard because: (a) VAT credits were issued for each application filed by FertiNitro, albeit subject to delays which are common in Venezuela; (b) credit refund processing was transparent and procedurally fair, in compliance with Venezuelan law; (c) the Respondent's delays in the treatment of VAT credits did not create an inconsistent,

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[407] Resp. Rej., Paragraphs 279, 515.

[408] *Sergei Paushok, CJSC Golden East Co. and CJSC Vostokneftegaz Co v. Govt of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011) ("*Paushok v. Mongolia*") (RLA-94).

[409] *EnCana Corporation v. Republic of Ecuador*, UNCITRAL, Award (3 February 2006) ("*EnCana v. Ecuador*") (RLA-71).

[410] *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award (8 October 2009) (RLA-85).

[411] Resp. C-Mem., Paragraphs 225-235; Cls. Rej., Paragraphs 276-287; Resp. PHB, Paragraphs 124-129.

[412] Resp. C-Mem., Paragraphs 236-239; Cls. Rej., Paragraph 291; Resp. PHB, Paragraph 144.

unstable or unpredictable legal framework, because such delays applied generally to any applicant in Venezuela, including FertiNitro. Further, so the Respondent alleges, FertiNitro had legal remedies to challenge delays before the Venezuelan courts, which FertiNitro chose not to do.[413] The Respondent also rejects KOMSA's assertion that the VAT credits could be refunded directly to KOMSA, as a minority shareholder of FertiNitro (the VAT taxpayer).[414]

8.19 The Respondent also submits that KOMSA is incorrect that part of the outstanding recoverable VAT was 'written off' by the Respondent during 2006-2010. Rather, so the Respondent alleges, FertiNitro simply took accounting provisions (or allowances) in its balance sheet following reporting standards. The Respondent contends that the financial documentation shows that the credits were indeed recovered, so that ultimately no damage was suffered by FertiNitro. The Respondent submits that Mr Giles' approach, in contrast, is flawed since it results in double, triple, and quadruple counting.

8.20 *Urea Decree and Urea Resolution:* The new urea regulations did not frustrate any of KOMSA's legitimate expectations because they were not entitled to any regulatory stabilisation in the absence of any specific contractual commitment by the Respondent to KOMSA. The regulations were in any case issued to further a legitimate policy of the Respondent relating to food safety; and they could be challenged before the Venezuelan courts if FertiNitro (with KOMSA) so wished; but they were not so challenged.[415]

8.21 *Interference:* The Respondent contends that Pequiven's participation in the management and operations of FertiNitro did not violate the FET standard because Pequiven was run as a commercial, not political, entity; Pequiven was a shareholder in FertiNitro; it was a party to the Offtake Agreement; and FertiNitro was not controlled by Pequiven. In addition, KOMSA had legal remedies, under Venezuelan corporate law, to challenge certain

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[413] Resp. Rej., Paragraph 107.
[414] Resp. C-Mem., Paragraphs 240-248; Cls. Rej., Paragraph 287; Resp. PHB, Paragraphs 133-139.
[415] Resp. PHB, Paragraphs 140-143; Resp. Rej., Paragraph 107.

measures such as the appointment of new directors by Pequiven, which it chose not to pursue.

8.22 The Respondent submits that the Comisario report (alleged by KOMSA to stand as evidence of the Respondent's interference in FertiNitro's business) is irrelevant to that issue. This Comisario was appointed as FertiNitro's statutory auditor by the entire board of FertiNitro and thus, as the Respondent contends, with KOMSA's support. Likewise, Pequiven's proposal to acquire more fertilizer (allegedly under the Respondent's instructions) followed a normal procedure under Venezuelan corporate law; and it was rejected by FertiNitro. Moreover, the alleged assurances given to a third party (METOR) that the new laws would not apply to foreign companies are irrelevant. They are not attributable to the Respondent. They are also derived from a letter sent a decade after the event and hinge upon an erroneous interpretation of that letter. Finally, so the Respondent submits, Pequiven only participated in the drafting of the urea regulations in an advisory capacity based on its experience in fertilizers, without thereby unlawfully interfering in FertiNitro's business.[416]

(3) The FPS Standard – Article 4(1)

8.23 ***KOMSA's Case****:* In summary, KOMSA contends that the FPS standard protects investments from both physical and non-physical interference by the Respondent,[417] citing the decisions in *ELSI*[418] and *Azurix v. Argentina.*[419] The FPS standard, so KOMSA contends, obliges the Respondent, as the host State, to ensure that it provides a secure and stable legal and regulatory environment to the investor, namely KOMSA.[420]

8.24 KOMSA contends that (i) the failure to pay VAT credit, (ii) the regulations forcing the sale of urea by FertiNitro to Pequiven, and (iii) the progressive interference with the

[416] Resp. C-Mem., Paragraphs 249-254; Cls. Rej., Paragraphs 288-290; Resp. PHB., Paragraphs 130-132.
[417] Cls. Mem., Paragraphs 325-330.
[418] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgment, (20 July 1989) (CLA-41).
[419] *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award (14 July 2006) (CLA-43).
[420] Cls. Mem., Paragraphs 256-261; Cls. Reply, Paragraphs 253-261; Cls. PHB, Paragraph 109.

management and operation of FertiNitro ultimately leading to the expropriation of contractual rights, each constitute a breach of the FPS standard by the Respondent.[421]

8.25 ***The Respondent's Case****:* In summary, the Respondent contends, as with the FET standard, that the FPS standard in Article 4 of the Treaty refers to the minimum standard under customary international law.[422] The Respondent interprets that standard as referring to physical security, citing[423] the decision in *Saluka v. Czech Republic,*[424] *Lauder v. Czech Republic,*[425] *Noble Ventures v. Romania,*[426] and *Paushok v. Mongolia*.[427] It submits that this standard only imposes "a level of diligence in attempting to ensure that foreign investments are not harmed during periods of strife or violence". The Respondent also invokes[428] *Gold Reserve v. Bolivarian Republic of Venezuela,*[429] where the tribunal interpreted an identical clause in the Canada-Venezuela BIT and found that the FPS standard was limited to physical harm to persons and property.[430] The Respondent thus dismisses KOMSA's argument that the standard extends to legal protection. It submits that, if it did, that would wrongly conflate the FPS standard with the FET standard.

8.26 The Respondent then turns to the alleged breaches of the FPS standard. It submits that the treatment of VAT credits could not breach the FPS standard because the refund applications were ultimately approved; and that any processing delays (that applied to all taxpayers in Venezuela) could not amount to a breach of the FPS standard. The enactment of the Urea Decree and Urea Resolutions did not breach the FPS standard because they were reasonably created under the Respondent's food and security policies and could be challenged in Venezuela's courts, if KOMSA had so wished (which it did not do). The

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[421] Cls. Mem., Paragraphs 331-339; Cls. Reply, Paragraphs 262-265.
[422] Resp. C-Mem., Paragraph 257.
[423] Resp. C-Mem., Paragraphs 256-258.
[424] *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 March 2006) ("*Saluka v. Czech Republic*") (CLA-19).
[425] *Lauder v. Czech Republic* (CLA-45).
[426] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005) (RLA-67).
[427] *Paushok v. Mongolia* (RLA-94).
[428] Resp. PHB, Paragraph 148.
[429] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (CLA-156).
[430] Resp. C-Mem., Paragraphs 255-261; Resp. Rej., Paragraphs 292-310.

Respondent at no point interfered with the management and operations of FertiNitro's business; and its conduct could not amount to any breach of the FPS standard.[431]

(4) "Arbitrary and Discriminatory Measures" – Article 4(1)

8.27 ***KOMSA's Case***: In summary, KOMSA contends that the standard for arbitrary and discriminatory measures under Article 4(1) of the Treaty imposes a requirement on the Respondent not to treat investors in an arbitrary or discriminatory manner, including "inconsistent and confusing" measures.[432] Such measures can constitute a breach of Article 4(1) if they are arbitrary *or* (not "and") discriminatory.[433]

8.28 KOMSA contends that: (i) the imposition of the tax measures on FertiNitro had a discriminatory impact on KOMSA because the new and increased taxes targeted entities that were majority foreign-owned or were large companies (conversely, these tax measures exempted public sector entities such as Pequiven or applied lower rates to other companies); (ii) the Urea Decree and Urea Resolution compelled FertiNitro to sell urea to Pequiven at prices below market value (these measures were discriminatory measures because KNI did not benefit from preferential prices, nor did KOMSA (or KNI) participate in the drafting of these Urea regulations, unlike Pequiven); and (iii) the Expropriation Decree No. 7713 was discriminatory because it furthered Pequiven's interest to KOMSA's detriment.[434]

8.29 ***The Respondent's Case****:* In summary, the Respondent contends that the test for arbitrary conduct consists in determining whether the measures were a wilful disregard of due process of law that shocks or surprises a sense of juridical propriety. It extends also to whether the measures can be defended as reasonable, *i.e.* where the State's actions can be linked to a reasonable policy. The test for discrimination consists in whether the State treated differently, without justification, entities otherwise similarly placed. The

[431] Resp. C-Mem., Paragraphs 262-266; Resp. Rej., Paragraphs 311-324; Resp. PHB, Paragraphs 149-150.
[432] Cls. Mem., Paragraphs 340-343.
[433] Cls. Reply, Paragraphs 266-274
[434] Cls. Mem., Paragraphs 344-356; Cls. Reply, Paragraphs 275-280; Cls. PHB, Paragraphs 110-111.

Respondent rejects KOMSA's test of inconsistent or confusing measures in the absence of malign prejudice or preference.[435]

8.30 The Respondent submits that the tax measures were neither arbitrary nor discriminatory as they applied to all similarly situated entities, both domestic and foreign. One of the taxes was a contribution intended to be re-invested in FertiNitro for research and development purposes, thus benefiting FertiNitro and not harming KOMSA at all.[436] Further, the urea regulations could not be discriminatory because KOMSA and Pequiven were not similarly situated. They operated in distinct markets and were not competitors, even if they were involved in the same sector of the Venezuelan economy. In any event, the measures were passed pursuant to the Respondent's food policy and were not discriminatory.[437]

(5) National Treatment – Article 4(2)

8.31 ***KOMSA's Case:*** In summary, KOMSA contends that the National Treatment standard in Article 4(2) of the Treaty entitles investors to treatment no less favourable than that accorded by the State to its own nationals. It submits that this question turns on the particular facts of the case, making it necessary to take into account all circumstances.[438] KOMSA contends that by seeking to add the wording "in like circumstances" that is not found in Article 4(2), the Respondent wrongly makes that standard less protective of the investor.[439]

8.32 KOMSA submits that the Respondent's discriminatory measures constitute breaches of the National Treatment standard. KOMSA contends that: (i) the tax measures favoured Pequiven, a national entity, because it was exempt, and the urea regulations, drafted to appear facially neutral, targeted foreign companies and, in turn, KOMSA; (ii) the urea regulations granted Pequiven advantageous purchasing terms as it could buy urea below market price, an option that was not available to KNI; and (iii) the expropriation of October

[435] Resp. C-Mem., Paragraphs 267-277; Resp. Rej., Paragraphs 326-331; Resp. PHB, Paragraphs 151-153.
[436] Resp. C-Mem., Paragraphs 278-281; Resp. Rej., Paragraphs 332-335.
[437] Resp. C-Mem., Paragraphs 382-384; Resp. Rej. Paragraph 337; Resp. PHB, Paragraphs 154-158.
[438] Cls. Mem., Paragraphs 357-359.
[439] Cls. Reply, Paragraphs 281-286.

2010 transferred assets and rights to Pequiven, a national entity thus enjoying benefits to the detriment of KOMSA.[440]

8.33 ***The Respondent's Case****:* In summary, the Respondent determines that the standard is necessarily one of comparison between the treatment afforded to foreigners and the treatment afforded to nationals in similar positions, considering the entirety of the circumstances. The Respondent objects to KOMSA's test according to which it would not be necessary to find a national comparator similarly situated. The Respondent contends that the test of "in like circumstances" always applies under international law, whether or not language to that effect is found in the BIT. It adds that States can always resort to sovereign discretionary rights to implement certain policies.[441]

8.34 The Respondent contends that no Venezuelan national benefited from a more favourable treatment because Pequiven, although exempt itself as to certain taxes, was impacted no less than KOMSA, as a direct shareholder in FertiNitro (the actual tax payer). As for the urea regulations, they were rational in furthering the Respondent's food policy. Finally, the Expropriation Decree No. 7713 did not favour Pequiven because Pequiven did not ultimately hold any of the assets acquired thereunder. [442]

(6) Umbrella Clause – Article 11(2)

8.35 ***KOMSA's Case****:* In summary, KOMSA contends that the Respondent undertook to comply with any obligation, whether contractual or derived from its domestic law.[443] KOMSA then submits that the Respondent's failure to comply with its domestic law (with regard to the VAT refunds to FertiNitro) constitutes a breach of this standard by the Respondent.[444]

8.36 ***The Respondent's Case****:* In summary, the Respondent contends that no obligation was breached regarding the VAT credits as the latter were ultimately issued and paid.[445]

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[440] Cls. Mem., Paragraphs 360-366; Cls. Reply, Paragraphs 287-291; Cls. PHB, Paragraph 112.
[441] Resp. C-Mem., Paragraphs 285-290; Resp. Rej., Paragraphs 338-347; Resp. PHB, Paragraphs 159-163.
[442] Resp. C-Mem., Paragraphs 291-296; Resp. Rej., Paragraphs 350-358; Resp. PHB, Paragraphs 164-165.
[443] Cls. Mem., Paragraphs 367-369; Cls. Reply, Paragraphs 292-295.
[444] Cls. Mem., Paragraphs 370-374; Cls. PHB, Paragraph 113.
[445] Resp. C-Mem., Paragraphs 297-301; Resp. Rej., Paragraphs 359-363; Resp. PHB, Paragraphs 166-168.

(7) The Tribunal's Analysis and Decisions

8.37 As summarised above, KOMSA's non-expropriatory claims for "Historical Losses" under Articles 4 and 11 and the Treaty derive from new and increased taxes, non-payment (or late payment) of VAT credits, the effects of the Urea Decree and Urea Resolution and interference with FertiNitro's business. Although advanced under five distinct provisions of the Treaty, each claim is subject to certain common factual factors.

8.38 ***Articles 1(1) and (2):*** The alleged harm was suffered by FertiNitro directly and only consequentially by KOMSA, as an indirect minority shareholder in FertiNitro. In this arbitration, KOMSA is asserting its own claim for its own losses and not as any derivative claim for losses suffered by FertiNitro only. If it were otherwise, KOMSA's claim would face obvious jurisdictional difficulties under Articles 1(1) and 1(2) of the Treaty and Article 25 of the ICSID Convention. KOMSA is legally distinct from FertiNitro (and also Koch José). FertiNitro is a juridical person of Venezuelan nationality; and it is not a covered investor with protected investments under the Treaty.[446]

8.39 Accordingly, KOMSA can only claim compensation for loss actually suffered by it arising from its own indirect minority investment in FertiNitro. In principle, a minority shareholder, even with shares held indirectly by an associated company, can claim compensation for proven indirect loss. As was decided in *Rosinvest v. Russia:* "modern investment treaty arbitration does not require that a shareholder can only claim protection in respect of measures that directly affect shares in their own right, but that the investor can also claim protection for the effect on its shares by measures of the host state taken against the company."[447] However, the investor must still prove actual crystallised loss from the indirect effect on its equity interest, as distinct from loss by the company.

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[446] *See HICEE B.V. v. Slovak Republic*, UNCITRAL, Partial Award (23 May 2011).

[447] *RosInvestCo UK Ltd. v. Russian Federation*, SCC Arbitration V (079/2005), Final Award (12 September 2010) (CLA-9), Paragraph 608. (This award, as already indicated above, was annulled by the Swedish courts on unrelated jurisdictional grounds). For a more guarded approach, see *GAMI Investments, Inc. v. United Mexican States*, UNCITRAL, Award (15 November 2004) (RLA-64). One member of the Tribunal does not accept that the broad statement on the admissibility of shareholder claims in *RosInvestCo* is correct, however, given the Tribunal's ultimate conclusion on these claims, the member sees no utility in expanding upon the point of disagreement in this Award.

8.40 In the Tribunal's view, there is no cogent evidence that KOMSA, as regards its own indirect interest as a minority shareholder in FertiNitro, suffered a loss sufficiently quantifiable in money terms from any of its "Historical Claims". There was no sufficient evidence of any simple "pass through" of loss suffered by FertiNitro, so as to become a pro-rated loss to KOMSA as a partial indirect shareholder of FertiNitro. KOMSA also adduced insufficient proof of its own actual direct losses, as distinct from losses sustained by FertiNitro. The position could be different if FertiNitro was wholly owned by KOMSA; but it never was.

8.41 This approach would suffice for the Tribunal to dismiss KOMSA's claims "for Historical Losses" *in limine*. However, the Tribunal considers that this approach could unfairly impose too high an evidential hurdle for KOMSA in this case; and, given the efforts made by the Parties and their expert witnesses on quantum, it would be discourteous to stop the analysis here. Hence, for present purposes, it is prepared to assume that some part of FertiNitro's alleged losses did "pass through" to KOMSA as regards taxes, VAT, the Urea Decree and the Urea Resolution. However, given the absence of any separate quantifiable figure for interference in FertiNitro's business, no assumption as to loss is there made by the Tribunal. Further, if and to the extent that KOMSA is advancing a claim for loss to KNI (unquantified) resulting from "Historical Losses", separately from KNI's claim for expropriation, the Tribunal dismisses that claim also as lacking any evidential justification.

8.42 ***Article 4(1):*** The FET and FPS standards accorded to covered investments in Article 4(1) of the Treaty are prefaced by the words: "[i]n accordance with the rules and principles of international law". In the Tribunal's view, as explained below, these words import the customary international law minimum standards, rather than any autonomous higher standards, applying the rule of interpretation codified in Article 31(1) of the VCLT as to "the ordinary meaning to be given to the terms in their context."

8.43 The Tribunal need not here debate the jurisprudence or doctrinal writings, so neatly captured by Dr Mann long ago. As is well known, in his 1982 publication, Dr Mann concluded that a FET standard: "[…] in essence, is a duty imposed by customary international law […] which in law is unlikely to amount to more than a confirmation of the obligation to act in good faith, or to refrain from abuse or arbitrariness."[448] It was perhaps a more considered conclusion than his earlier opinion to the contrary:

> *"The terms 'fair and equitable treatment' envisage conduct which goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. A tribunal should not be concerned with a minimum, maximum, or average standard. It will have to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words is likely to be material. The terms are to be understood and applied independently and autonomously."*[449]

This debate has continued in later arbitral decisions, as cited in the Parties' submissions to different effect; but that debate is not relevant here.

8.44 The FET and FPS standards in this Treaty are prefaced with the express qualification: "in accordance the rules and principles of international law." In the Tribunal's view, this additional express wording is conclusive in confirming the meaning of the FET and FPS standards as the duties imposed by customary international law and in precluding an independent or autonomous meaning. In *AAPL v. Sri Lanka*, it was the "non-reference to international law" which led that tribunal to adopt an autonomous FPS standard; and (with the dissent), it is clear the tribunal would have decided otherwise with the express additional wording in this Treaty.[450]

8.45 The Tribunal also adopts the reasoning of the decision in *Flughafen v. Venezuela*, cited by the Respondent, on the same wording of Article 4(1) of the Treaty.[451] That case also concerned (inter alia) the same Switzerland-Venezuela BIT, where the express additional qualification was translated into English as: "in accordance with the norms and criteria of international law". The tribunal there decided:

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[448] F.A. Mann, *The Legal Aspect of Money* (4th ed, 1982), p. 510.

[449] F.A. Mann, British Treaties for the Promotion and Protection of Investments, 52 *British Yearbook of International Law* 241 (1981) (CLA-86), page 244.

[450] *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award (27 June 1990) (RLA-42), Paragraph 52.

[451] *Flughafen v. Venezuela* (RLA-154), Paragraph 573 (non-official translation provided by counsel).

"If the BITs must be interpreted in accordance with Customary International Law, and if the minimum treatment is part of that set of uses and customs, then one has to reach the inevitable conclusion that an interpreter, when determining whether or not a particular action violates Article 4 of the BITs, must take into consideration the manner in which Customary International Law defines FET. Therefore, the Tribunal considers that the provision included in the BITs, requiring that FET be defined in accordance with International Law necessarily incorporates a reference to the level of protection that International Law provides to foreigners, that is, to what is known as the customary minimum standard."

8.46 The Tribunal's interpretation suffices to dismiss KOMSA's claim under the FPS standard on the facts alleged by KOMSA. Under its meaning well-settled in customary international law, the FPS standard is confined to physical protection to aliens against acts of third persons not attributable to the host State.[452] As such, it can give rise to a limited form of liability in factual circumstances where the host State has failed to exercise reasonable diligence to prevent such acts. That is manifestly not this case.

8.47 As regards the FET standard under customary international law, the factual evidence remains relevant, to be addressed below. However, as to such evidence, the Tribunal does not consider that the result in this case would be materially different under an FET's autonomous standard. There was no cogent evidence of KOMSA's legitimate expectations induced by any specific undertaking or representation made to KOMSA by the Respondent to induce KOMSA's investment. It is well settled that provisions of general legislation or state policies applicable to a plurality of persons do not suffice generally to establish legitimate expectations required under an FET autonomous standard.

8.48 As to the third limb of Article 4(1) of the Treaty, namely the protection against "arbitrary or discriminatory measures", the issue arises whether it means what it says *tout court*; or whether, because the use of a semi-colon (as opposed to a full stop or a separate sub-clause), this further limb should also be read subject to the express additional wording. In the Tribunal's view, this third limb must be read separately, without reference to a customary international law minimum standard (if any exists). However, its meaning is

[452] *BG Group Plc. v. Republic of Argentina*, UNCITRAL, Final Award (24 December 2007) (CLA-37), Paragraphs 326-328; *El Paso v. Argentina* (CLA-52), Paragraph 522.

clearly directed at "the management, operation, maintenance, use, enjoyment, expansion, disposal or liquidation" of KOMSA's "investment", namely KOMSA's indirect minority equity interest in FertiNitro, as distinct from FertiNitro itself. KOMSA is not here advancing a claim for any direct interference with its own equity interest in FertiNitro, as such. In the Tribunal's view, KOMSA's claim under this limb of Article 4(1) is better (or not worse) advanced under the FET standard, as to which its claim succeeds or fails on the relevant evidence. Accordingly, the Tribunal proceeds on that basis below.

8.49 ***Article 4(2):*** The Tribunal does not consider that Pequiven as a local state-owned and state-controlled company, is an appropriate 'comparator' to KOMSA under Article 4(2) of the Treaty. It is true that both were shareholders in FertiNitro and that both were engaged, directly or indirectly, in the fertiliser business in Venezuela; but the similarities stop there. Pequiven was a direct and active participant in that local business, whereas KOMSA was an indirect foreign investor. KOMSA cannot here be assimilated to FertiNitro. Accordingly, in the absence of any appropriate comparator, the Tribunal dismisses KOMSA's claims regarding "National Treatment" under Article 4(2) of the Treaty.

8.50 ***Article 11(2):*** KOMSA does not assert any "stabilisation" clause as regards its investment in FertiNitro; and, as Mr Parra (of KOMSA) testified, KOMSA received from the Respondent no "specific assurance, written document, letter, other than what existed in the law at the time."[453] The Tribunal has indeed not seen any cogent evidence of any material representation, assurance or undertaking made by the Respondent to KOMSA in regard to its interest in FertiNitro, whether explicit or even necessarily implicit, in any contemporary document or agreement. Accordingly, the Tribunal dismisses KOMSA's claim under Article 11(2), the "Umbrella Clause", of the Treaty.

8.51 ***The FET Standard:*** The Tribunal begins with certain general observations. First, from the outset, the FertiNitro project was known by all participants, including KOMSA, to be subject to significant political, economic and other uncertainties in Venezuela. As recorded

[453] First (September) Hearing, D2.81-82 (Parra).

in the 1998 Bond Offering Memorandum for the FertiNitro project,[454] these uncertainties included "changes in taxation policies", whereby FertiNitro's results "are expected to be affected generally by […] changes in Venezuelan governmental leadership, policy and taxation […]". It was also known that the next Presidential elections in Venezuela would take place later in December 1998. In those elections, Mr Chavez was elected President of Venezuela and subsequently re-elected until his death in 2013.

8.52 Second, the protections accorded to investors and their investments under the Treaty do not operate as an insurance against normal business risks, changes in domestic laws or regulatory action by the host State. As was decided in *Saluka v. Czech Republic* (already cited in Part VI above): "[i]t is now established in international law that States are not liable to pay compensation to a foreign investor when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that are aimed at the general welfare."[455] Such regulatory powers extend to taxation. As was decided in *EnCana*; "[i]n the absence of a specific commitment from the host State, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage, during the period of the investment."[456] As the Bond Offering Memorandum expressly stated (cited above), this is no more than business common sense, as would have been well understood by KOMSA at the time.

8.53 The question therefore is not whether the Respondent has exercised its regulatory or other powers causing loss to KOMSA, but whether in so doing, the Respondent has violated its obligations to KOMSA under the Treaty. As to that question, as already explained above, the Respondent's measures are to be weighed, with due deference, on the factual evidence adduced in this arbitration.

8.54 Third, FertiNitro was, long before the events of October 2010, a troubled and unhappy company (or, rather, "companies"). The Tribunal refers to the Comisario Report of 7

[454] Offering Circular - Bond Offering of $250,000,000 between FertiNitro Finance Inc and FertiNitro (8 April 1998) (C-115), page 50.
[455] *Saluka v. Czech Republic* (CLA-19), Paragraphs 255ff.
[456] *EnCana v. Ecuador* (RLA-71).

September 2006, made by FertiNitro's statutory auditor reporting to all its shareholders. It identified (as translated into English) "conflicts of interest between the Directors making swift-decision-making difficult"; "excessive disputes, particularly the problems concerning the Plants and the Offtake Agreement"; "uncertainty regarding the safety and operational continuity of the Plants"; "the union claims for work benefits which […] have not been solved"; an "absence of handbooks, approved by the Management Board, on the policies, norms and procedures for technical, operative, administrative and accounting functions and duties"; and the necessity for "revising the Company's organization structure in accordance with existing needs […]".[457] After 2006 and by 2010, FertiNitro's condition worsened significantly. In these circumstances, confirmed by other contemporary evidence, FertiNitro's business difficulties cannot be lightly attributed to effects for which the Respondent might be legally responsible under the Treaty or international law.

8.55 ***Taxes**:* Ostensibly at least, the impugned taxes were of general application. As to Municipal taxes, the classifier for Group 1-D identified:[458] "[a]ll industrial economic activities exercised by […] legal […] entities of the Energy, Natural Gas Production Sector and all activities related to the oil and gas and petrochemical industry, which is linked to the activity that is directly or indirectly related to the Jose Petrochemical Complex […]." As to the Science and Technology tax, Article 37 of the Law targeted generally "[t]he large companies in the country dealing with other sectors of production of goods and provision of services […]."[459] Moreover, this Law conferred direct benefits on FertiNitro.

8.56 The Tribunal does not consider that KOMSA, on the factual evidence, has established a violation of the FET standard by the Respondent (or Article 4(1)'s third limb). In particular, these were not tax measures proven to have been made in bad faith, arbitrarily, irrationally or with an improper intent to discriminate directly against FertiNitro (or indirectly against KOMSA). Given later events in October 2010, it could be tempting to use hindsight in evaluating these tax measures; but the Tribunal thinks it inappropriate to

[457] FertiNitro Report from the Statutory Auditor and Consolidated Financial Statements (7 September 2006) (C-63).
[458] Ordinance for Taxes on Industrial, Commercial, Service or Similar Economic Activities (29 December 2005) (C-45), page 14.
[459] Organic Law on Science, Technology and Innovation (effective as of 1 January 2006) (C-43), page 8.

do so. These measures must be assessed at the time of their enactment, when different circumstances existed.

8.57 ***VAT:*** As to VAT, the Respondent maintains that all the VAT credits requested by FertiNitro have been paid, as shown by its VAT tables from 2001 to 2010.[460] At the Third (June) Hearing, the Respondent acknowledged that VAT credits were paid late, as is also evidenced by its own VAT tables.

8.58 There is no cogent evidence of any specific monetary loss suffered by FertiNitro from the Respondent's delays, still less of any resulting specific monetary loss to KOMSA. Mr Giles, albeit not a factual witness, testified that for each year from 2006 to 2010, "part of the outstanding recoverable VAT was written off" by the Respondent. Dr Flores testified that this was incorrect; and that FertiNitro's accounting provisions had no "real cash flow effects" as Mr Giles suggested.[461] Dr Flores was likewise not a factual witness.

8.59 The Tribunal regrets the paucity of cogent evidence on this issue. It is clear that the Respondent issued VAT credits late to FertiNitro; but that was the usual practice in Venezuela suffered by all VAT taxpayers entitled to tax credits. The evidence was all one way as regards such regular delays. In the circumstances, the Tribunal does not consider that KOMSA, on the factual evidence, has established a violation of the FET standard by the Respondent (or Article 4(1)'s third limb). In particular, these delays were not proven to have been made in bad faith, arbitrarily, irrationally or with an improper intent to discriminate directly against FertiNitro (or indirectly against KOMSA).

8.60 ***Urea Decree and Urea Resolution****:* The Urea Decree and Urea Resolution were issued in March and May 2007 respectively.[462] The Respondent submits that the Urea Decree and the Urea Resolution were issued by the Respondent as part of its regulatory role in ensuring

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[460] FertiNitro, VAT Credits 2001-2010 (updated to December 2010) (R-73).

[461] Expert Report of Tim Giles (2 June 2012), Paragraph 3.14; Flores ER1, Paragraphs 165-168; Flores ER2, Paragraphs 229ff.

[462] Decree 5,218 (26 February 2007) (C-80); Joint Resolution by the Ministry of the People's Power for Agriculture and Land, the Ministry of the People's Power for Light Industry and Trade, and the Ministry of the People's Power for Energy and Petroleum (Official Gazette No. 38,674) (3 May 2007) (C-82).

food supply and security for the people of Venezuela.[463] At the time, KOMSA did not actively oppose the Urea Decree or Urea Resolution by litigation or like administrative action within Venezuela's legal system; nor did FertiNitro itself.[464]

8.61 As already found in Part VII above, the Tribunal, in the exercise of the deference due to the Respondent, considers these urea regulations to have been made in pursuit of the Respondent's policies on food security and supply for the people of Venezuela. Ostensibly, albeit causing direct loss to FertiNitro, the Tribunal does not consider that KOMSA, on the factual evidence, has established a violation of the FET standard by the Respondent (or Article 4(1)'s third limb). In particular, these urea regulations were not proven to have been made in bad faith, arbitrarily, irrationally or with an improper intent to discriminate directly against FertiNitro (or indirectly against KOMSA). Similarly, given the later events in October 2010, although it could be tempting to use hindsight in evaluating these urea regulations (as KOMSA suggests), the Tribunal again thinks it inappropriate to do so. These urea regulations must also be assessed at the time of their enactment.

8.62 ***Decisions:*** For these reasons, as to liability, the Tribunal decides to dismiss KOMSA's claims against the Respondent for "Historical Losses" under Articles 4(1), 4(2) and 11(2) of the Treaty.

[463] Resp Rej., Paragraphs 319-320.
[464] Cls. Mem., Paragraph 85.

PART IX: COMPENSATION ISSUES

(1) Introduction

9.1 In the light of the Tribunal's decisions on jurisdiction and liability above, it is now necessary to consider the appropriate quantum of compensation payable by the Respondent to each of the Claimants, namely KOMSA for its expropriated interest in FertiNitro and KNI for its expropriated interest in the Offtake Agreement. The Tribunal begins with an outline of its general approach to compensation, turning then to a summary of the Parties' attempts to negotiate compensation due by the Respondent to KOMSA, which has already been addressed in greater detail in the chronology set out in Part V above. It is appropriate next to summarise the Claimants' quantum submissions and the Respondent's submissions in response, before turning to the Tribunal's consideration of those competing submissions and its decisions as to the appropriate amounts of compensation.

9.2 Given the evolutionary development of the Parties' respective cases on compensation during this arbitration, the very significant differences between the testimony of their respective expert witnesses (Mr Giles and Dr Flores) and the complexities of the issues relating to compensation (for both KOMSA and KNI), the Tribunal has found it necessary to summarise at some length the Parties' successive submissions on compensation. That summary may also provide a useful reference as to what was and what was not submitted by the Parties on such issues in this arbitration to be read with the lists of issues in Part III above. Inevitably, however, parts of this summary are duplicative and (given the evolution of the Parties' cases) not fully consistent.

9.3 As to its general approach, the Tribunal bears much in mind, as contended by the Respondent, that the Claimants generally bear the legal burden of proving their respective cases on compensation. This general principle is well established under international law: *onus probandi actori incumbit*.

9.4 The Tribunal also bears in mind that complex issues of compensation, dividing the disputing parties and their expert witnesses, can require a margin of appreciation by an arbitral tribunal applying the wording of a BIT and international law. The required exercise can be therefore less than an exact science. The Tribunal refers to the approach taken by international arbitration tribunals, such as the awards in *Sistem v. Kyrgyz Republic*[465] and *ADC v. Hungary.*[466]

9.5 As was decided in *Sistem v. Kyrgyz Republic*:

> *"154. The Tribunal is conscious of the desirability for conceptual clarity in valuing assets for the purposes of calculating compensation payable; and it is conscious of the criticism of 'triangulation' methods, which select a figure that lies somewhere in the middle ground of estimates put forward by the parties.*
> *155. The Tribunal is also aware of the fact that all valuations in the absence of an actual sale are estimates, and is mindful of the fact that the Tribunal has a legal duty to render an award under a process which the Respondent has freely agreed to establish and the Claimant has freely chosen to pursue, and to do so on the basis of the material that the parties have decided to put before it. That is, necessarily, an exercise in the art of the possible; and the Tribunal has sought to arrive at a rational and fair estimate, in accordance with the BIT, of the loss sustained by the Claimant rather than to engage in a search for the chimera of a sum that is a uniquely and indisputably correct determination of the value of what the Claimant lost. The Tribunal derives some comfort from Immanuel Kant's observation that 'Out of the crooked timber of humanity no straight thing was ever made.'"*

9.6 In *ADC v. Hungary*, the tribunal likewise decided that:

> *"[T]he assessment of damages is not a science. True it is that the experts use a variety of methodologies and tools in order to attempt to arrive at the correct figure. But at the end of the day, the Tribunal can stand back and look at the work product and arrive at a figure with which it is comfortable in all the circumstances of the case."*

9.7 Under international law, there is thus by now a well-established *'jurisprudence constante'* to the effect that, however difficult, an international tribunal must do its best to quantify a loss, provided that it is satisfied that some loss has been caused to the claimant by the

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[465] *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award (9 September 2009) ("*Sistem v. Kyrgyz*").

[466] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 October 2006) (CLA-16), Paragraph 521. *See also Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) ("*Gold Reserve v. Venezuela*") (CLA-156), Paragraph 832.

wrongdoing of the respondent.[467] In the Tribunal's view, there is no doubt that the Claimants have both suffered some loss caused by the Respondent's violations of Article 6 of the Treaty.

9.8 The difficulties in this case arise from the quantification of the monetary damages required from the Respondent to compensate each of the two Claimants. As already indicated, international tribunals have traditionally resolved such difficulties applying a rule of reason, rather than a rule requiring certainty in calculating compensation based upon precisely calculated figures. Almost invariably, this approach now requires tribunals to reject the full extent of the parties' primary cases on quantum and the often wildly differing results of their respective expert witnesses' methodologies, assumptions and instructions. For tactical reasons, a claimant may not wish to discount downwards the full amount of its pleaded claim; and a respondent denying loss similarly may not wish to offer a methodology resulting in any significant damages being awarded in a claimant's favour. A tribunal must then work by itself in the rational no man's land left vacant by the parties and their expert witnesses, as best it can. In the present case, the Tribunal has faced grave difficulties in understanding how the Parties and their respective expert witnesses on quantum can have presented such very different figures.

(2) The Negotiations for Compensation

9.9 In brief, as described in Part V above, negotiations were held between Pequiven for the Respondent (as the expropriating body designated under the Expropriation Decree) and FertiNitro's foreign shareholders, including KOMSA, between February and September 2011. These negotiations did not include KNI, which had been led to expect separate but not dissimilar treatment. At the time, these negotiations with FertiNitro's shareholders were described by Pequiven (for the Respondent) as encompassing amicable settlement talks for compensation "contemplated by both the applicable Venezuelan law, as well as the Bilateral Investment Protection Treaties".[468]

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[467] See, for example, *Sistem v. Kyrgyz*, Paragraphs 154 and 155.

[468] Letter from Betulio Hernández, Executive Director, Pequiven, to Shareholders (28 February 2011) (R-35), Paragraph 1.

9.10 All four meetings were attended by Mr Barrientos (for Pequiven). Mr Barrientos testified at the First (September) Hearing that he was privy to Pequiven's decision to engage Advantis, as consultants to advise on the amount of compensation payable to FertiNitro's foreign shareholders.[469] Mr Barrientos was unable to explain to the Tribunal the difference between Advantis' valuation of KOMSA's interest in FertiNitro of about US$ 113 million (which he considered to be at the time a fair valuation and a "genuine estimate of what the company was worth") and Dr Flores' valuation (as the Respondent's expert witness in this arbitration) of US$ 34.6 million.[470] However, as Mr Barrientos confirmed, the person working with Advantis was Mr Garcia (who was not called as a witness by the Respondent in this arbitration).[471]

9.11 The Tribunal returns to the two Advantis Reports of May and July 2011 below.

(3) The Claimants' Quantum Submissions

9.12 In summary, the Claimants' case on quantum is comprised of ten main submissions, each addressed separately in the sub-sections below. These are:

(a) First, the Claimants have demonstrated that the Respondent must pay full compensation under international law;

(b) Second, testimony from the Second (November) Hearing demonstrated that the Parties' quantum experts have adopted fundamentally different approaches to the valuation exercise;

(c) Third, the Parties' quantum experts agree on a number of compensation parameters, but the differences of fact and expertise on quantum issues remain significant;

(d) Fourth, the central points of agreement and disagreement in relation to future cash flows at FertiNitro have been identified;

(e) Fifth, the central points of agreement and disagreement in relation to the valuation of the Offtake Agreement have been identified;

(f) Sixth, the central points of agreement and disagreement in relation to the discount rate and the country risk premium have been identified;

[469] First (September) Hearing D3.83-84.
[470] First (September) Hearing D3.87-88.
[471] First (September) Hearing D3.85-86.

(g) Seventh, the award in *Gold Reserve v. Venezuela*[472] supports the FertiNitro-specific country risk premium adopted by the Claimants' quantum expert, Mr Giles; and it discredits the generic country risk premium adopted by the Respondent's quantum expert, Dr Flores. By contrast, the two awards in the *ExxonMobil* and *Mobil* cases[473] do not identify any country risk premium for Venezuela and are clearly distinguishable;

(h) Eighth, the adjusted MOU price of US$ 360 million for KOMSA's equity share as at 30 September 2010 (as submitted by Mr Giles in his first report and based on the Pequiven draft MOU of October 2008)[474] is an effective reality check on the Parties' valuations for KOMSA's interest in FertiNitro; it demonstrates that Mr Giles' equity valuation is conservative and that, by contrast, Dr Flores' purported fair market valuation is less than 10% of the price that was agreed by the Parties in 2007/2008 under threat of expropriation;

(i) Ninth, there are multiple additional reality checks that validate the reasonableness of Mr Giles' valuations of KOMSA's equity investment and KNI's interest in the Offtake Agreement; and

(j) Tenth, there are multiple further "lower bound" reality checks that discredit Dr Flores' valuation as an unsupportable outlier.

(i) The Claimants Have Demonstrated That the Respondent Must Pay Full Compensation Under International Law

9.13 As submitted by the Claimants, the threshold issue is the determination of the appropriate standard by which compensation is to be calculated by the Tribunal.

9.14 The Claimants contend that, as a matter of customary international law, the full reparation standard articulated in the *Chorzów Factory Case*[475] is the appropriate standard of compensation for the Respondent's unlawful conduct.

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[472] *Gold Reserve v. Venezuela* (CLA-156).

[473] Namely, *Mobil Cerro Negro Ltd v. Petróleos de Venezuela, S.A. and PDVSA Cerro Negro, S.A.*, ICC Case No. 15416/JRF/CA, Final Award (23 December 2011) ("*Mobil v. PDVSA*" or "*Mobil*") (EO-45); *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, Award (9 October 2014) ("*Venezuela Holdings v. Venezuela*" or "*ExxonMobil*") (RLA-153).

[474] Expert Report of Tim Giles (2 June 2012) ("Giles ER1"), Paragraphs 4.88-4.89; *see also* Cls. Mem., Paragraph 150.

[475] *Chorzów Factory Case (Germany v. Poland)*, PCIJ Series A, No 17, Decision on Merits (13 September 1928) (CLA-49).

9.15 On the other hand, as explained in more detail below, the Respondent contends that the compensation standard in Article 6 of the Treaty should apply in respect of its allegedly unlawful expropriation of the Claimants' investments and its other treaty violations.

9.16 In response, the Claimants submit that the standard in Article 6 of the Treaty is inapplicable where an expropriation has been carried out unlawfully, as here. Accordingly, the Claimants submit that they are entitled to full compensation under the customary international law standard in order to wipe out all of the consequences of the Respondent's unlawful conduct.

9.17 The Claimants accept that, in principle, there is a distinction in the standard of compensation for a "lawful" expropriation and the standard of compensation for an "unlawful" expropriation. That is, as they say, the standard of compensation for a lawful expropriation is provided in Article 6 of the Treaty; but the standard of compensation for an unlawful expropriation is full reparation under customary international law.

9.18 Notwithstanding this distinction, the Claimants accept that, in this case, there is no material difference in result between the standard applicable under customary international law for an "unlawful expropriation" and the standard applicable under the Treaty for a "lawful expropriation". Indeed, so the Claimants submit, both standards result in the calculation of the "fair market value" of the expropriated investments absent the Respondent's multiple violations.

9.19 The Claimants contend that the application of the proper standard supports its three submissions as to the appropriate compensation. These include, but are not limited to recent arbitral decisions confirming that the Respondent must pay full compensation to the Claimants in a "but for" scenario for the unlawful expropriation of the Claimants' investments.

9.20 The Claimants submit that recent decisions support the principle of full compensation in a "but for" scenario for the unlawful expropriation of their investments. The Claimants cite

Hulley Enterprises Limited (Cyprus) v. The Russian Federation,[476] where the tribunal, referring to Article 35 of the ILC Articles on State Responsibility, explained that a "State responsible for an illegal expropriation is in the first place obliged to make restitution by putting the injured party into the position that it would be in if the wrongful act had not taken place." Similarly, they point to *ConocoPhillips v. Venezuela*[477], where the tribunal decided:

> *"The Tribunal, coming back to the terms of the BIT, does not consider that the extent of the compensation payable in respect of an unlawful taking of an investment, for instance because it is in breach of an 'undertaking' in terms of Article 6(b), is to be determined under Article 6(c): that provision establishes a condition to be met if the expropriation is in all other respects in accordance with Article 6. So, in the Chorzów case, the Court did not determine reparation in accordance with the provisions of the Convention before it, because it was concerned with a dispossession in breach of those provisions. It decided in accordance with 'the essential principle' quoted earlier, that is a principle of customary international law, not dependent on the Convention provisions."*

9.21 Accordingly, the Claimants contend that arbitral jurisprudence confirms that KOMSA is entitled to full compensation under international law for the losses caused by the Respondent's non-expropriation violations of the Treaty.

(ii) Testimony from the Second (November) Hearing Demonstrated That the Parties' Quantum Experts Have Adopted Fundamentally Different Approaches To the Valuation Exercise

9.22 The Claimants note that there is a difference of more than US$ 518 million between the Parties' experts' evidence in relation to the equity valuation, offtake valuation and KOMSA's Historical Losses (the latter of which have already been addressed in Part VIII above). The Claimants contend that this large gulf between the two quantum experts' valuations can, in large part, be explained by their fundamentally different approaches to

[476] *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, Final Award (18 July 2014) (CLA-152), Paragraph 1766 (annulled by the Hague District Court on other grounds, but currently under appeal).

[477] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits (3 September 2013) ("*ConocoPhillips v. Venezuela*") (CLA-155), Paragraph 342.

the valuation exercise. The Claimants rely on their quantum expert, Mr Giles, who they contend has adopted a forensic approach to the determination of his valuation parameters in contrast to Dr Flores.

9.23 Specifically, the Claimants contend that Mr Giles' valuation reflects the available contemporaneous documentary evidence surrounding the revenues earned and the costs incurred at the FertiNitro Plant. As such, so the Claimants contend, Mr Giles was able to determine whether the revenues and costs that appear in FertiNitro's accounts are reliable for the purposes of projecting future revenues and costs at the Plant, in a "but for scenario".

9.24 The Claimants further contend that Mr Giles was right to ignore the serious irregularities and a lack of transparency with respect to important cost data recorded in FertiNitro's accounts to arrive at a fair market valuation. That approach is, it is contended, consistent with what a willing buyer and willing seller would do, namely analyse the historical output at the FertiNitro Plant to determine if that data is a reliable source for the forecasting long-term output at the Plant.

9.25 According to the Claimants, Mr Giles' evidence is also supported by the evidence of Mr Sanders, who at the Second (November) Hearing, confirmed that, in October 2010, a willing buyer would have viewed FertiNitro as a plant with substantial opportunities for improvement on both the costs and production side. The Claimants describe Mr Sanders as "the only independent industry expert in this arbitration".[478] The Claimants submit that Mr Sanders' evidence is consistent with what the Respondent itself has realised since the expropriation, overseeing a number of improvements to the FertiNitro Plant. Indeed, the Claimants specifically point to Mr Sanders' evidence that his analysis of the contemporaneous documents revealed:[479]

> *"Prior to the expropriation, the FertiNitro board expressed serious concern about this out of control spending, and they requested some additional documentation that would, through comparative charts and explanations of the costs, fully explain and allow a transparent look at what the money was being spent on. These costs have no*

[478] Cls. PHB, Paragraph 136.
[479] Second (November) Hearing D5.142 (Sanders).

documentary support. The requested documents that should explain the complete cost breakdown of this out of control spending was again requested, but however was never provided by Venezuela."

9.26 According to the Claimants, the expert evidence of Mr Giles, insofar as it demonstrates that the FertiNitro Plant was not a "flawed plant", is supported not only by Mr Sanders, but also by the admissions of the Respondent's witness, Mr Anibal Villarroel. In particular, the Claimants point to the ammonia trains at the FertiNitro Plant having operated at almost 100% of nameplate capacity on an annualized basis in 2006,[480] and to the fact that the urea trains at FertiNitro were capable of producing 2,200 tonnes per day.[481]

9.27 The Claimants conclude that the cash flow inputs adopted by Mr Giles are supported by contemporaneous documents, the independent expert testimony of Mr Sanders and admissions by the Respondent's witness, Mr Villarroel, under cross-examination.

9.28 The Claimants also point to various deficiencies in the Respondent's evidence. In particular, the Claimants contend that the Respondent has not provided any credible account of the irregular and escalating maintenance and turnaround costs incurred at FertiNitro since 2008. Under cross-examination, Dr Flores stated that he had relied on Mr Villarroel's account of turnaround and maintenance costs at the Plant:[482]

> *"Q. [Y]ou relied on Mr Villarroel because you assumed that he had a good understanding of the maintenance and turnaround costs, correct?*
> *A. Yes, I did assume that he has a good understanding of maintenance and turnaround costs. He works at FertiNitro."*

9.29 Yet, the Claimants point to the fact that Mr Villarroel admitted that, as Operations Manager, he was not responsible for, nor did he even know about, costs at FertiNitro:[483]

> "I only worry about the technical day-to-day reality of the plant, but obviously this type of thing costs, and at that degree of detail and whether or not they were duly

[480] First (September) Hearing D3.142-143 (Villarroel).
[481] First (September) Hearing D3.144 (Villarroel).
[482] Second (November) Hearing D6.230 (Flores).
[483] First (September) Hearing D4.34 (Villarroel). The Claimants also point to Mr Villarroel's admission that he had "no time to devote to costs at all": First (September) Hearing D4.31 (Villarroel).

authorized, I've got nothing to do with that, and in the day-to-day business, I'm miles away from that."

9.30 The Claimants contend that the expert evidence of Dr Flores cannot be relied upon because it is a mistaken coalescence of:

(a) a series of assertions that are either outside the evidential record or are beyond his expertise; and

(b) a mechanical averaging of data and sources without any appreciation of the contemporaneous and industry evidence.

9.31 As to (a), the Claimants' criticism is far ranging. They contend that Dr Flores sought to testify on subjects such as: security and safety on Venezuelan roads; Venezuelan legal procedure; and Venezuelan labour markets and contracting processes. During his testimony, he also assumed what the Claimants describe as:

> *"[T]he mantle of fertiliser plant, commodities trading and legal expert, opining on issues such as (1) turnarounds, maintenance and plant operations; (2) engineering and construction of fertiliser plants; (3) costs incurred at fertiliser plants; (4) arbitral procedure and decisions; and (5) ammonia and commodities trading"*.[484]

9.32 As to (b), the Claimants submit that, in contrast to Mr Giles, Dr Flores has "adopted a mechanical average of production and costs data without considering whether a willing buyer and willing seller would have adopted such data to project future cash flows at the FertiNitro plant".[485] In particular, the Claimants point to Dr Flores' failure to consider the available contemporaneous documents or investigate the exceptionally high maintenance and turnaround costs incurred at FertiNitro from 2008. It follows, the Claimants say, from the failure to investigate the irregularities, that his valuation is "abjectly depressed."[486]

[484] Cls. PHB, Paragraph 144 (citations omitted).
[485] Cls. PHB, Paragraph 146.
[486] Cls. PHB, Paragraph 148.

(iii) The Parties' Quantum Experts Agree on a Number Of Compensation Parameters; However, the Outstanding Differences of Fact and Expertise on Quantum Issues Remain Significant

9.33 At the Second (November) Hearing, the Parties were asked, in the course of their further submissions, to identify any points of agreement and disagreement between their respective quantum experts; and in relation to each point of disagreement, indicate whether the quantum experts disagreed because of a factual matter or because of a difference of expertise.

9.34 The Claimants' later submissions adopted that structure, their Tables 1 to 4 at Paragraph 149 of their Post-Hearing Brief identifying, respectively:

(a) *the relevant issues subject of agreement between Mr Giles and Dr Flores and the nature of their agreement (Table 1);*

(b) *the points of disagreement in relation to the Equity Valuation (Table 2);*

(c) *the points of disagreement in relation to Offtake Valuation (Table 3); and*

(d) *the points of disagreement in relation to the Historical Losses (Table 4). (The Tribunal has already addressed and dismissed these "Historical Losses" in Part VIII above).*

9.35 These Tables are reproduced on the following pages.[487] The Respondent subsequently added its comments to the Claimants' Tables 1 to 3 at the Third (June) Hearing,[488] to which the Claimants in turn added their responses by email message dated 30 June 2016. These comments and responses are included in the Tables overleaf, as "Respondent's Comment" and "Claimants' Comment" respectively. To the extent relevant, despite the Parties' procedural controversies, the Tribunal has nonetheless taken account of their contents,

[487] For the sake of completeness, Table 4 on "Historical Losses" is here included, although the Tribunal has already addressed these claims by KOMSA in Part VIII above.

[488] Third (June) Hearing D2.34ff.

which it decided to admit into the arbitration's files as part of the Parties' respective pleadings, but not as expert testimony from Mr Giles or Dr Flores.[489]

[489] Third (June) Hearing D2.111ff.

TABLE 1: Points of Agreement between Mr Giles (for the Claimants) and Dr Flores (for the Respondent)

Issue	Mr Giles	Dr Flores	Comment	Respondent's Comment	Claimants' Comment
Fair market value standard	Giles Second Report, §1.9	Flores Second Report, §157	The experts agree that fair market value is the appropriate standard of value to use in this case.	Although the experts agree on the applicability of the fair market value in this case, there is disagreement over the interpretation as Mr. Giles makes assumptions that are incompatible with the fair market value definition (such as using a liquidity premium to reduce the discount rate). D.Flores Second Expert Report, paras. 159-160.	The relationship between fair market value and liquidity has already been addressed by Mr Giles. See: T. Giles Second Expert Report, para. 5.21-5.28. Quantum Hearing, Day 6, page 11, lines 20-21; page 35, lines 12-22. Reconstitution Hearing Day 1, page 221, lines 8-25.
Equity Valuation method	Giles First Report, §4.73	Flores First Report, §94	Both experts use a discounted cash flow analysis projecting free cash flows to the firm (or capital cash flows) to arrive at the enterprise value and then deduct the debt to determine equity value.		
Plant lifetime	Giles First Report, §4.70	Flores First Report, §136	Cash flows for Equity Valuation are projected into perpetuity.		
Exclusion of the 2001 to 2005 period	N/A	N/A	Although commercial production commenced in May 2001, the Parties' experts do not use output or cost data from 2001 to 2005 to project future output and costs at FertiNitro.		

Issue	**Mr Giles**	**Dr Flores**	**Comment**	**Respondent's Comment**	**Claimants' Comment**
Return on Assets used as the discount rate	Giles First Report, §4.46	Flores First Report, §94	The discount rate formula is agreed between the two experts. The return on assets is used as the discount rate in both the Equity Valuation and the valuation of the Offtake Agreement. Although, the methodology and formula are therefore agreed, the inputs are not (as to which, see Tables 2 and 3 below).		
Inclusion of country risk premium in discount rate	Giles First Report, §4.50	Flores First Report, §94	Both experts add a country risk premium to the return on assets to account for country risk, although the experts disagree on the appropriate amount of the country risk premium (as to which, see Tables 2 and 3 below).		
Application of lambda factor in country risk premium	Giles First Report, §§4.54-4.55	Flores First Report, §96 and Figure 10	Both experts apply a lambda factor to the country risk premium to account for the exposure of FertiNitro to country risk in Venezuela, although the experts disagree on the appropriate level of lambda (as to which, see Tables 2 and 3).	Dr Flores applies a Lambda of one, meaning that Lambda does not affect its calculations, whereas Mr Giles' Lambda lowers the country risk premium substantially. D. Flores Presentation, slide 18.	The relationship between country risk on average and lambda (the measure of a firm's exposure to that country risk) has already been addressed by Mr Giles. See: T. Giles First Expert Report, Annex B. paras B.43-B.46 and paras 4.64-4.66. T. Giles Second Expert Report, paras 5.29-5.61. Quantum Hearing, Day 6, page 11, lines 8-15; page 15 lines 7-25. Reconstitution Hearing Day 1, page 213, line 18 to page 221, line 6; Day 2, page 67, line 1 to page 68, line 10 and Day 2, page 81, line 16 to page 82, line 8.

Issue	Mr Giles	Dr Flores	Comment	Respondent's Comment	Claimants' Comment
Ammonia and Urea price forecasts used in Equity Valuation and Offtake Agreement valuation	Giles First Report, §4.14	Flores First Report, §18	FertEcon forecasts for Tampa, NOLA and Caribbean prices.		
Application of Methane Gas Supply Agreement formula in Equity Valuation	Giles First Report, §§2.13 and 4.26	Flores First Report, §37	The experts agree on the gas formula as provided in the Methane Gas Supply Agreement, although their projections for the base price differ (as to which, see Tables 2 and 3).		
Offtake Agreement pricing formula	Giles First Report, §5.1	Flores First Report, §154	The experts agree on the pricing formula used to determine the pricing at which KNI could purchase offtake from FertiNitro.		
Historical Urea Decree volumes	Giles First Report, Table 3	N/A	The historical volumes affected by the Urea Decree included in Mr Giles' analysis of historical Urea Decree losses are unchallenged by Dr Flores.		

TABLE 2: Points of Disagreement – Equity Valuation

Issue	Mr Giles	Dr Flores	Nature of disagreement	Valuation impact[490]	Comment	Respondent's Comment	Claimants' Comment
Historical period on which base production volume forecasts	Actual production 2006-08: Giles First Report, §2.11	Actual production 2006-10: Flores First Report, §32	Expertise	-US$ 25.7 million		Mr Giles uses different time periods to project different variables. This inconsistency results in an overestimation of FertiNitro's value. D. Flores Presentation Slide 6.	The selection of data/time periods by Mr Giles has already been addressed. T Giles Second Expert Report, para. 1.13, paras 2.11-2.22 and paras 6.6-6.11. Reconstitution Hearing Day 1, page 197, lines 1-23; Day 1, page 200, lines 13-21; Day 2, page 72, line 15 to page 75, line 5.
Maintenance costs	FertiNitro management 2006-08 budgeted amounts: Giles First Report, §4.34	Historical average 2006 – September 2010 and forecast 2010 – December 2010: Flores First Report, §58	Expertise	-US$ 35 million	-		
Turnaround costs	FertiNitro management 2008 budget and Mr Sanders' estimate: Giles First Report, §4.33	Annualised average of 2008 actual cost and FertiNitro management 2010 budget: Flores First Report, §54	Expertise	-US$ 13.3 million	The impact does not include the difference between the experts in relation to turnaround frequency.		

[490] The column headed "Valuation Impact" is the stand-alone decrease in Mr Giles' Equity Valuation of FertiNitro when changing his assumption to that of Dr Flores for each point of disagreement.

Issue	**Mr Giles**	**Dr Flores**	**Nature of disagreement**	**Valuation impact**[490]	**Comment**	**Respondent's Comment**	**Claimants' Comment**
Turnaround frequency	Turnaround every three years per EPC Agreement and Mr Sanders' testimony: Giles First Report, §2.10; Giles Second Report, §6.11	Turnaround every 2 ½ years based on historical frequency between 2006-10: Flores First Report, fn 45	Expertise	-US$ 2.5 million	-		
Capital expenditure	US$ 10 million/year after first ten years of operation per Mr Sanders: Giles Second Report, §7.34	US$ 10.6 million per year based on historical average 2006 – September 2010 and forecast October 2010 – December 2010: Flores First Report, §89	Expertise	-US$ 4.4 million	-	Mr Giles' assumption runs counter to the historical record, even for the periods that he relies upon for other assumptions. D Flores First Expert Report, para 89, Figure 7.	The level of capital expenditure has already been addressed by Mr Giles. See: T. Giles Second Expert Report, para. 7.34. Quantum Hearing Day 6, page 51 line 5 to page 52 line 19. Reconstitution Hearing Day 2, page 75, line 6 to page 76, line 22.
Base gas cost	FertiNitro 2010 budget checked against market futures curve: Giles Second Report, §§7.3, and 7.13.	Average of three forecasts: Flores First Report, §42.	Expertise	-US$ 17.0 million	The base gas cost account for only about 25% of total gas costs: Giles First Report, Table 26. As mentioned in Table 1 above, the two experts agree on the gas formula provided in the Methane Gas Supply Agreement.		

Issue	Mr Giles	Dr Flores	Nature of disagreement	Valuation impact[490]	Comment	Respondent's Comment	Claimants' Comment
Gas cost – efficiency factors	Mr Giles: 40.0 mmbtu of natural gas / 1MT of ammonia, 2.2 mmbtu / 1 MT of urea. Dr Flores First Expert Report para. 46.	Dr Flores: 40.7 mmbtu of natural gas / 1MT of ammonia, 2.4 mmbtu of natural gas / 1 MT of urea. D. Flores First Expert Report, para. 46.	Expertise	-US$ 4.5 million			Mr Giles has already explained the reason for choosing gas efficiency assumptions that are consistent with other production assumptions. See: T. Giles Second Expert Report, para. 7.16. Quantum Hearing, Day 6, page 9, line 9 to page 11, line 4.
The post-expropriation effect on the Urea Decree	Assumes no Urea Decree volumes: Giles First Report, §1.3; Giles Second Report, §6.4.	Assumes Urea Decree volumes continue based on 2006 – 2010 average volumes sold under Urea Decree: Flores First Report, §35.	Legal instructions	-US$ 72.0 million	Dr Flores assumes that the Urea Decree is in place indefinitely, while Mr Giles assumes no Urea Decree for the purposes of forecasting the future cashflows.		
The post-expropriation effect of the Municipal tax	1%: Giles First Report, §1.3.	2.4%: Flores First Report, §67.	Legal instructions	-US$ 13.9 million	Mr Giles assumes a Municipal tax rate of 1% post-expropriation. Dr Flores assumes a Municipal tax rate of 2.4% post-expropriation.		

Issue	**Mr Giles**	**Dr Flores**	**Nature of disagreement**	**Valuation impact**[490]	**Comment**	**Respondent's Comment**	**Claimants' Comment**
The post-expropriation effect of the Science & Technology tax	No Science & Technology tax included in valuation: Giles First Report, §1.3.	0.5%: Flores First Report, §67.	Legal instructions	-US$ 4.8 million	Mr Giles assumes no Science & Technology tax post-expropriation. Dr Flores assumes a Science & Technology tax rate of 0.5% post-expropriation.		
Non-income Taxes (VAT, Municipal Tax, and Anti-Drug contribution)	VAT: 12% on all non-gas/non-personnel expenses and then subtracting an estimated recoverable amount; Municipal Tax: 1% of revenues; Anti-Drug Contribution: 1% of pre-tax income. T. Giles First Expert Report, para. 4.38, 4.39.	VAT: N/A; Municipal Tax: 2.4% of revenues; Anti-Drug Contribution: 1% of pre-tax income. D Flores First Expert Report, para. 67.	Legal Instruction	-US$ 10.1 million			
Discount rate assumptions:							
Risk-free rate	3.42% based on 20 year US bond – 10/10/10: Giles First Report, §4.57.	3.38% based on 20 year US bond – 30/09/10: Flores First Report, §98.	Factual / Expertise	+US$ 2.3 million	-		
Beta (adjusted)	0.99 based on comparable companies: Giles First Report, §4.58.	0.86 based on comparable companies: Flores First Report, §§105-108.	Expertise.	+US$ 39.1 million	-		
Market risk premium	4.75% based on Dimson, Marsh and Staunton estimate of expected future return: Giles	6.7% based on Ibbotson historical data: Flores First Report, §§102-103.	Expertise	-US$ 87.3 million	Respondent suggests this is a factual difference but Mr Giles argues that Dr Flores' source is	Mr Giles' global market risk premium is outdated and inconsistent with its country risk	Mr Giles has already explained that: (1) His market risk premium is consistent with the

Issue	Mr Giles	Dr Flores	Nature of disagreement	Valuation impact[490]	Comment	Respondent's Comment	Claimants' Comment
	Second Report, §§4.5-4.6.				not appropriate for an expected return calculation.	premium based on the U.S. D. Flores First Expert Report, para. 100; D. Flores Second Expert Report, para. 106.	valuation date and not "outdated". See: T. Giles Second Expert Report, paras 4.4 - 4.14. (2) His estimate was in the middle of a range of potential estimates T. Giles Direct, Slide 15. (3) Why a US-centric premium is not appropriate: T. Giles Second Expert Report, paras 4.6-4.8. Reconstitution Hearing Day 1, page 189, line 17 to page 195, line 18.
Generic Country Risk Premium	6% based on Professor Damodaran's estimate and benchmarked to survey results: Giles First Report, §B.36.	11.26%: Flores First Report, §117. Based on average of two estimates (Damodaran and Ibbotson Country Risk Rating) and one adjusted estimate (Ibbotson Country Spread increased by 150%).	Expertise	-US$ 93.4 million	-US$ 93.4 million is the difference between a generic country risk premium at 6% and 11.26%.	Mr Giles adjusts Professor Damodaran's method downward to arrive at this country risk premium, whereas Dr Flores averages three estimates. D. Flores First Expert Report, paras. 111, 114-117.	Mr Giles has already explained that he relied on data provided by Professor Damodaran and compared that to survey data illustrating country risk premiums actually applied by practitioners to estimate what rate would be applied in a market transaction and is therefore consistent with the

Issue	**Mr Giles**	**Dr Flores**	**Nature of disagreement**	**Valuation impact**[490]	**Comment**	**Respondent's Comment**	**Claimants' Comment**
							fair market value standard. See: T. Giles Second Expert Report, paras 1.21 - 1.22 and 5.14 - 5.19. Quantum Hearing Day 6, page 63, lines 9-23. Reconstitution Hearing Day 2, page 58, line 9 to page 68, line 10.
Liquidity adjustment	1% reduction to country risk premium to exclude the impact of less liquidity in emerging financial markets which is not relevant to fair market value: Giles First Report, §B.38.	N/A	Expertise	-US$ 21.5 million	A 1% reduction to the generic country risk premium increases Mr Giles' valuation by US$ 21.5 million.	Counter to Mr Giles' discount, the literature universally supports a liquidity premium for private companies. In other words, instead of increasing the valuation by US$21.5 million, a liquidity premium would decrease the valuation (an adjustment that Dr Flores does not make). D. Flores First Expert Report, paras. 120-122.	As set out in the first row of Table 1, the relationship between fair market value and liquidity has already been addressed. See: T. Giles Second Report, paras 5.21 - 5.28. Quantum Hearing Day 6, page 11, lines 20-21; page 35 lines 12-22. Reconstitution Hearing Day 1, page 221, lines 8-25.
Lambda	0.25-0.40: Giles First Report, §§B.39-B.82.	1.0: Flores First Report, Figure 10.	Expertise	-US$ 122.1 million	Mr Giles applies a lambda of 0.40 to the valuation. The US$ 122.1 million valuation impact results from substituting Mr	Dr Flores applies a Lambda of one, meaning that Lambda does not affect its calculations, whereas Mr Giles'	The relationship between country risk *on average* and lambda (the measure of a firm's exposure to that country risk)

Issue	Mr Giles	Dr Flores	Nature of disagreement	Valuation impact[490]	Comment	Respondent's Comment	Claimants' Comment
					Giles' lambda of 0.40 with Dr Flores' lambda of 1.0.	Lambda lowers the country risk premium substantially. D. Flores Presentation, slide 18.	has already been addressed by Mr Giles. See: T. Giles First Expert Report, Annex B. paras B.43-B.46 and paras 4.64 - 4.66. T. Giles Second Expert Report, paras 5.29-5.61. Quantum Hearing Day 6, page 11, lines 8-15; page 15 lines 7-25. Reconstitution Hearing Day 1, page 213, line 18 to page 221, line 6; Day 2, page 67, line 1 to page 68, line 10 and Day 2, page 81, line 16 to page 82, line 8.
Risks covered by BIT to be excluded from the country risk premium in the FertiNitro Equity and Offtake Valuations	Some country risks can be excluded from the valuation due to existence of BIT protections: Giles First Report, Table 23.	BIT protection is irrelevant to country risk for valuation purposes: Flores Second Report, §124.	Legal instructions	There is no valuation impact as the 0.40 lambda used by Mr Giles does not specifically account for risks protected under the BIT: Giles Presentation Slides, slide 20.	Mr Giles' lambda would be reduced to 0.25 if the risks were deemed to be covered by the BIT protections:[491] §B.39		

[491] Mr Giles' equity valuation would increase to US$ 408.1 million if Mr Giles used a *lambda* of 0.25 instead of 0.40. ("*Lambda*" is a factor measuring a particular enterprise's exposure to country risk).

TABLE 3: Points of Disagreement – Offtake Valuation

Issue	**Mr Giles**	**Dr Flores**	**Nature of disagreement**	**Valuation impact**[492]	**Comment**	**Respondent's Comment**	**Claimants' Comment**
Valuation basis	Valuation of Offtake Agreement at valuation date of 10 October 2010: Giles First Report, §5.4.	Damages model based on replacing offtake volumes after the expropriation: Flores First Report, §157.	Legal instructions / Expertise	N/A	-		

[492] This is the stand-alone decrease in Mr Giles' Offtake Valuation when changing his assumption to that of Dr Flores for each point of disagreement.

Issue	Mr Giles	Dr Flores	Nature of disagreement	Valuation impact[492]	Comment	Respondent's Comment	Claimants' Comment
Market for replacement tonnes	The only viable market in which the product could be replaced is the US Gulf at US Gulf prices.	Calculation based on replacing tonnes at a mid-Caribbean price: Flores First Report, §157.	Factual	N/A	Dr Flores relies on his unsupported assertion that KNI could purchase replacement tonnes at a mid-Caribbean price; the Claimants reject the existence of any such market: Day 6.2.	Claimants and Mr Giles have failed to present any data or documents to support the argument that KNI has been and will be completely unable to profitably replace the quantities it used to offtake from FertiNitro. On the contrary, the fundamental change in the fertilizer market in North America in recent years (low gas prices and no transportation costs) has made producing overseas less attractive. D. Flores Second Expert Report, paras. 198, 210-211.	Mr Giles has already explained that: (1) there was no replacement tonnage available at comparable prices, and (2) if there had been replacement tonnage available KNI would have purchased it whether the Offtake agreement was operative or not. T. Giles Second Expert Report, para 10.6. Quantum Hearing Day 6, page 82, lines 11-19. This was also addressed by J. Sorlie, in his second witness statement, para 12. Reconstitution Hearing Day 2, page 77, line 23 to page 81, line 15.
FertiNitro production volumes	Same as Equity Valuation	Same as Equity Valuation	Expertise	-US$ 9.2 million	See references at Table 2 above.		

Issue	Mr Giles	Dr Flores	Nature of disagreement	Valuation impact[492]	Comment	Respondent's Comment	Claimants' Comment
Discount Rate Inputs	Same as Equity Valuation	Same as Equity Valuation	Expertise	-US$ 67.3 million (Offtake Valuation alone)	See references at Table 2 above. Valuation impact here relates to the combined effect of all discount rate disagreements between the experts on the Offtake Valuation.[493]		
Lambda applied to Offtake discount rate	0.25-0.40 *lambda*, same as Equity Valuation.	1.0 *lambda*, same as Equity Valuation.	Expertise	-US$ 23.1 million.	If *lambda* were assessed for the Offtake Agreement alone, Mr Giles states that it would be less than the 0.25 - 0.40 applicable to Equity Valuation because of the Offtake Agreement is even less exposed to Venezuelan country risk: Giles Second Report, §5.62.		

[493] Mr Giles' Offtake Valuation would to US$ 213.0 million if Mr Giles uses a *lambda* of 0.25 instead of 0.4.

Issue	Mr Giles	Dr Flores	Nature of disagreement	Valuation impact[492]	Comment	Respondent's Comment	Claimants' Comment
Freight costs	Based on KNI sampled actual freight costs: Giles First Report, §5.7.	N/A.	Expertise / Factual	N/A	Dr Flores' analysis does not include freight costs.	Claimants' approach hinges on a reliable estimation of shipping costs, which Claimants have failed to provide. D. Flores Presentation, slides 40-42.	Mr Giles has already explained that he relied on actual shipping costs incurred in 2010 and the data was provided to the Respondents. See: T. Giles First Expert Report, para. 5.7. Quantum Hearing Day 6, page 89, line 7 to page 93, line 6.
Ad hoc tonnes from October 2010 through February 2012	Mr Giles' valuation is of October 2010 so any later shipments under a new *ad hoc* arrangement are ignored for valuation purposes at that date.	Dr Flores treats *ad hoc* tonnes as replacement tonnes and thus reduces his Offtake Valuation accordingly: Flores First Report, §158.	Expertise / Legal instructions	N/A	If the expropriation of the Offtake Agreement is deemed to have taken place upon termination of the *ad hoc* arrangement in February 2010, Mr Giles' Offtake Valuation would be reduced to US$ 190.9 million: Giles Second Report, §10.9.		

TABLE 4: Points of Disagreement – "Historical Losses" [with the Claimants' footnotes]

Issue	Giles	Flores	Nature of Disagreement	Valuation Impact[494]
Urea Decree	Calculates historical losses due to Urea Decree[495]	n/a	Legal Instructions	US$ 22.4 million
Municipal tax	Calculates losses due to historical application of municipal tax above 1%[496]	n/a	Legal Instructions	US$ 4.7 million
Science & Technology tax	Calculates losses due to historical application of Science & Technology tax[497]	n/a	Legal Instructions	US$ 5.4 million
VAT	Includes losses from non-recovery of VAT prior to expropriation[498]	n/a	Legal Instructions / Expertise	US$ 7.7 million

[494] The Valuation Impact of this table shows each element of the historical loss as calculated by Mr Giles.
[495] CRAIEF – Summary of Changes to the Claimants' Valuation following Second Econ One Report.
[496] *Id*.
[497] *Id*.
[498] *Id*.

9.36 The Claimants identified the Parties' most significant points of disagreement in relation to: the quantum expert witnesses' projections of future cash flows at FertiNitro (sub-section (d) below); the Offtake Agreement (sub-section (e) below); and the discount rate and country risk premium applicable to the equity and offtake valuations (sub-section (f) below).

(iv) Central Points of Agreement and Disagreement in Relation to Future Cashflows at FertiNitro

9.37 According to the Claimants, as indicated above, the Parties' quantum experts agree that the estimate of future output at the FertiNitro Plant should be based on the actual levels of ammonia and urea production achieved at the Plant over a certain period. However, beyond this bare agreement, the experts disagree about which historical period of time should be used to forecast future output at FertiNitro. That disagreement is significant, as submitted by the Claimants.

9.38 As set out at Table 2 above, Mr Giles uses the average of production achieved at FertiNitro between 2006 and 2008. Dr Flores, on the other hand, uses the average of production achieved at FertiNitro between 2006 and 2010. The difference between the quantum experts on this point reduces Mr Giles' equity valuation by US$ 25.7 million and the Offtake Valuation by a further US$ 9.2 million.

9.39 While both experts agree that the 2006 to 2008 period is an appropriate benchmark for forecasting future output at FertiNitro, their disagreement turns largely on whether or not the reduced output at FertiNitro during the years of 2009 and 2010 should also be included in the benchmark period.

9.40 Mr Giles' explanation at the Second (November) Hearing about the disfunctionality of the 2009 and 2010 years was as follows:

> *"[The] 2009 and 2010 [period] is a particularly unsuitable period to use as a basis [for estimating future production at FertiNitro]. There are one-off costs, one-off curtailments caused by the start of the METOR 2 project, which just can't be included in an estimate, an ongoing estimate of performance. And clearly, it is well documented, [there was] a distracted board, severe cost controls and management issues, until late 2010. In my view, in my judgment, 2006 […] to 2008 represents a*

balanced view. I am not idealising the plant, nor am I creating the worst possible picture."[499]

9.41 Mr Giles testified that the 2006 to 2008 period (which he uses) was far from an "ideal" production scenario as the FertiNitro Plant achieved production that was "virtually 10% below the EPC level." It follows, so the Claimants submit, that his evidence is conservative: the Plant had demonstrated an ability to meet nameplate production. In this regard, the Claimants again point to the evidence of Mr Villarroel under cross-examination that the urea plant at FertiNitro could be expected to achieve 100% EPC level.[500]

9.42 In relation to Dr Flores' expert evidence, the Claimants submit that he does no more than mechanically adhere to his averaging approach. Specifically, he ignores the factors that depressed output in 2009 and 2010. He forecast a level of future output that is, in fact, even lower than the Respondent's own post-expropriation forecast. By contrast, the Claimants point to the valuation prepared by Advantis for the Respondent's settlement negotiations, which showed that the Respondent expected that, in the future, FertiNitro would produce higher figures.[501] (Dr Flores, on the other hand, forecast only 1,730 MT/day of ammonia and 2,150 MT/day of urea).[502] The Claimants contend that the fact that Advantis' valuation for the purposes of post-expropriation negotiations is higher than Dr Flores' output forecasts fatally undermines his evidence.

9.43 According to the Claimants, the second major source of disagreement between the Parties' quantum experts turns upon the maintenance and turnaround costs at the FertiNitro Plant. The Claimants, on one hand, say that Mr Giles has evaluated the documentary record and has determined that the most reliable source for forecasting future maintenance costs is the budgets prepared by FertiNitro's plant management between 2006 and 2008. Mr Giles testified that the most reliable source for forecasting future turnaround costs is the budget

[499] Second (November) Hearing D2.9-10

[500] First (September) Hearing D.3.142-143 (Villarroel) (for an explanation of the "nameplate" concept *see* Second (November) Hearing D5.65-66 (The Claimants' Opening on Quantum).

[501] Advantis Report entitled "Valoracíon de FertiNitro" (May 2011) ("*First Advantis Report*") (R-86), page 4.

[502] Updated Econ One Model. By way of comparison, the Claimants point to Mr Giles' production forecasts for ammonia of 1,708 MT/day and for urea of 2,058 MT/day. The Claimants contend that Mr Giles' production forecasts are more conservative than the Respondent's own forecasts in the valuation prepared by Advantis.

prepared by FertiNitro's plant management for the 2008 turnaround. On the other hand, the Claimants contend that Dr Flores has adhered to his mechanical averaging of the actual maintenance costs incurred at FertiNitro between 2006 and September 2010. More specifically, with respect to his projection of future turnaround costs, Dr Flores has averaged: (1) the cost of the 2008 turnaround; and (2) the budgeted cost prepared by FertiNitro's plant management in respect of the 2010 turnaround.

9.44 The Claimants make four main submissions in support of their position:

(a) *First, they submit that the FertiNitro budgets are the only reliable source for the projection of future maintenance and turnaround costs at the Plant;*

(b) *Second, there are what Mr Giles describes as "serious irregularities" with the actuals that render them unreliable for the purposes of projecting future maintenance and turnaround costs at FertiNitro;*

(c) *Third, Dr Flores' maintenance and turnaround cost assumptions are based on a mechanical approach that ignores contemporaneous evidence of "serious irregularities" with maintenance and turnaround costs at FertiNitro; and*

(d) *Fourth, the Respondent's purported "inflation" theory does not explain the high maintenance and turnaround costs incurred at the Plant.*

9.45 It is again necessary to describe further each of these submissions.

9.46 As to (a) – the "reliability of the FertiNitro budgets": Mr Giles explains that the management budgets provide the most reliable indicator for future maintenance and turnaround costs at the Plant.[503] Indeed, so the Claimants say, such budgets have been regularly adopted by ICSID tribunals to project future costs. They point to *Venezuela Holdings v. Venezuela* (also referred to as *ExxonMobil* case),[504] where, having been presented with a number of options (one of which included a 2006 business plan containing the budgeted operating expenses for 2007), Venezuela argued that the 2007 budget required

[503] Second (November) Hearing D6.7 (Giles).
[504] *Venezuela Holdings v. Venezuela* (RLA-153).

"various adjustments in order to develop the operating costs projections."[505] The tribunal rejected this argument and held that the "[budgeted expenses were] the best indicator of what the Project participants expected to happen in the future in the absence of any adverse measures taken by the Venezuelan authorities."[506]

9.47 The Claimants contend that exactly the same rationale applies here. It follows that the reasons for utilising management budgets in forecasting future costs at FertiNitro are overwhelming. This is so particularly with regard to the unreliable nature of the alleged actual costs prior to the expropriation in October 2010.

9.48 As to (b) – the "serious irregularities": the Claimants contend that the budgets are the only reliable source available to the Tribunal for the purposes of projecting future maintenance and turnaround costs at the Plant.

9.49 The Claimants point, in particular, to the August 2010 minutes of FertiNitro's board of directors. There, the costs were described as spiralling "out of control."[507] The Claimants contend that, by 2010, it was clear to the Board that the costs at FertiNitro had become grossly inflated through the award of unauthorised contracts by Pequiven's plant management personnel. Indeed, the Minutes of that Board meeting record:[508]

> *"[…] five (5) contracts that collectively implied obligations for FertiNitro of approximately US$ 56 million, and that the new Management proceeded to rescind, since these contracts did not comply with suitable bidding procedures and lacked some of the qualified contractors that justify their selection. Additionally, it was reported that in all of these contracts, the General Manager acted in violation of the limits of authorization and financial delegation approved by the Board of Directors."*

9.50 The Claimants contend that these unauthorised contracts undoubtedly contributed to the exceptionally high maintenance and turnaround costs incurred at the Plant.

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[505] *Venezuela Holdings v. Venezuela* (RLA-153), Paragraph 343.
[506] *Venezuela Holdings v. Venezuela* (RLA-153), Paragraph 342 (citation omitted).
[507] FertiNitro Board of Directors' Meeting Minutes No. 111 (5 August 2010) (C-105), page 12.
[508] FertiNitro Board of Directors' Meeting Minutes No. 111 (5 August 2010) (C-105), page 13.

9.51 While resolutions were passed at the FertiNitro board of directors' meeting of August 2010 setting out specific procedures and a timeline for the selection of external auditors and the appointment of an internal audit department, none of those resolutions or requests of the board were carried out, because (so the Claimants contend) the Respondent expropriated FertiNitro in October 2010.

9.52 As to (c) – ignorance of the "serious irregularities": the Claimants contend that Dr Flores himself accepted that there were irregularities to which regard should have been had in undertaking the valuation exercise. In particular, they refer to his admission that "[i]f you had […] very serious concerns, then maybe yes, maybe those costs would have to be excluded."[509] Irrespective of these matters, Dr Flores calculated the costs on a simple average. The Claimants say that these matters are significant and require the rejection of his evidence.

9.53 As to (d) – the "inflation" theory: the Claimants contend that no credible explanation has been given by the Respondent as to the maintenance and turnaround costs incurred at the Plant. In what the Claimants described as a "last-ditch attempt to explain these costs,"[510] the Respondent put forward an explanation that the significant maintenance and turnaround costs were the result of inflation. Dr Flores adopted that theory for the first time at the Hearing. The Claimants submit that it should be rejected, pointing to Mr Giles' rejection of inflation,[511] together with its absence from any of the contemporaneous documents.[512]

9.54 According to the Claimants, the third major source of disagreement concerns the turnaround periods. The Claimants contend that, consistent with Mr Giles' evidence, the EPC Basis for Proposal confirmed that the project sponsors expected that there would be a turnaround at FertiNitro every three years. The Claimants criticise the approach adopted by the Respondent, on the basis of Dr Flores' evidence, namely that a simple average

509 Second (November) Hearing D7.61 (Flores).
510 Cls. PHB, Paragraph 173.
511 Second (November) Hearing D6.17 (Giles).
512 The Claimants place particular reliance on minutes of the board of directors' meeting of 5 August 2010, which omit any reference to "inflation". FertiNitro Board of Directors' Meeting Minutes No. 111 (5 August 2010) (C-105)

should be applied. That is to say, rather than adopt a three-year turnaround, Dr Flores' use of a turnaround of 2 ½ years is flawed, being based on the occurrence of two turnarounds in the period from 2006 to 2010. It follows, so the Claimants contend, that Mr Giles' assessment is the only one that is supported by the contemporaneous evidence, international benchmarks and the independent opinion of Mr Sanders.

(v) Central Points of Agreement and Disagreement in Relation to Valuation of the Offtake Agreement

9.55 The Claimants identify the central point of disagreement between the Parties' quantum experts in relation to the Offtake Agreement as the methodology that should be used for the valuation of KNI's interest in the Offtake Agreement.

9.56 The Claimants point to what they contend is the preferable approach of Mr Giles, namely three steps, as follows:

(a) *calculation of the sales price for urea and ammonia in the USA (based on FertEcon projections as at October 2010);*

(b) *the purchase price of ammonia and urea under the Offtake Agreement (again, based on FertEcon projections as at October 2010); and*

(c) *the cost of shipping between FertiNitro and the USA.*

9.57 Mr Giles then applies his discount rate to calculate the net present value of the Offtake Agreement.

9.58 The Claimants point to the evidential support for this approach by Mr Jim Sorlie, who testified as to the Caribbean fertilizer market, such evidence being "unrebutted" by the Respondent and also discrediting Dr Flores' assumption of a spot market for fertilizer products at the so-called "mid Caribbean" price.

9.59 The Claimants contend that Dr Flores has undertaken no valuation of the Offtake Agreement as at October 2010. Instead, the Claimants submit that the use of the replacement value employed by Dr Flores is contrary to the standard for compensation under customary international law. Such approach requires a determination of fair market value (not replacement value) as at the date of expropriation.

9.60 In relation to Dr Flores' approach, the Claimants also point to a number of matters which undermine it, namely (as contended by the Claimants):

(a) *His unsupported assumption that KNI could replace the tonnes lost at a "mid Caribbean price", such assumption being contrary to the unrebutted evidence of Mr Sorlie that there is virtually no product available for KNI to purchase in the Caribbean market;*[513]

(b) *His unsupported factual assumptions, including his statement that "Ammonia produced in Venezuela doesn't taste or doesn't look any different from ammonia produced in the Black sea";*[514] *and*

(c) *His failure to mention that almost of all of the articles upon which he relied post-date the expropriation of October 2010.*

9.61 Finally, in relation to the Respondent's contention that the discovery and exploitation of shale gas in the USA has an impact, the Claimants contend that the post-2010 US shale gas developments cannot influence the fair market value of the Offtake Agreement as at October 2010. Indeed, as a matter of fact, so the Claimants contend in reliance on Mr Sorlie's evidence, even in 2014 (four years after the expropriation), the USA was expected to remain a very large net importer of fertilizer products.[515] On the other hand, Mr Sorlie's evidence confirmed that the exploitation of shale gas in the USA would not materially affect Mr Giles' valuation of the Offtake Agreement, even as at 2014. That evidence, so the Claimants contend, is unrebutted by the Respondent.

9.62 In summary, therefore, the Claimants contend that Mr Giles' Offtake Valuation complies with the applicable legal standard, is based on reliable documentary and witness evidence and reflects a clear understanding of the Caribbean fertiliser market. This is to be

[513] First (September) Hearing D2.119-20 (Sorlie).
[514] Second (November) Hearing D7.174 (Flores).
[515] First (September) Hearing D2.173 (Sorlie).

contrasted, so the Claimants say, with Dr Flores' Offtake Valuation, which is factually and legally flawed, betrays a misunderstanding of the Caribbean fertiliser market and is undermined by documentary and witness evidence.

(vi) Central Points of Agreement and Disagreement in Relation to the Discount Rate and the Country Risk Premium

9.63 It is necessary now to turn to two further matters of disagreement between the Parties, namely the discount rate and the country risk premium components of the DCF model.

9.64 As to the discount rate, the Claimants rely on Mr Giles' rate of 10.1% in preference to Dr Flores' rate of 20.4%.

9.65 Noting that each expert has incorporated a market risk premium and a country risk premium into his expert rate, the Claimants point to Table 5 at Paragraph 197 of their Post-Hearing Brief (which is reproduced below) as demonstrating the downward effect of market and country risk assessments upon their respective valuations:

TABLE 5: Valuation Scenarios

Valuation scenarios	**Mr Giles' Equity Valuation**	**Dr Flores' Equity Valuation**
Valuation with no market risk and no country risk	US$ 3,445.8 million	US$ 2,615.4 million
Valuation with market risk but no added Venezuela country risk (as if FertiNitro were in the US)	US$ 514.1 million	US$ 250.0 million
Valuation with market risk and added Venezuela country risk	US$ 361.0 million	US$ 34.6 million

9.66 The Claimants emphasise that Mr Giles has incorporated both market risk and country risk into his Equity Valuation and Offtake Valuation. They contend, accordingly, that Mr Giles has thus adopted a discount rate that takes into account all market and country risks that potentially affect the Claimants' investments in Venezuela, even though this results in a very substantial reduction to his valuation.

9.67 On the other hand, the Claimants describe Dr Flores' discount rate as being a "contrived" higher discount rate.[516] In brief, the Claimants criticise Dr Flores for selecting an exaggerated market risk premium and an inflated generic country risk premium that fails to take into account FertiNitro's specific exposure to Venezuelan country risk. According to the Claimants, there are several elements in such criticism.

9.68 First, the Claimants contend that Dr Flores has adopted an inflated market risk premium that depresses the valuation of the Claimants' investments. That market risk premium was 6.7%. At the Second (November) Hearing, Mr Giles explained that, out of 12 possible sources of market risk premia on the record of this arbitration (ranging from 3% to 6.7%), Dr Flores has selected the source that yields the highest possible market risk premium.[517] The Claimants contend that this stands in stark contrast to Mr Giles' market risk premium, which falls around the mid-point of the range of possible sources of market risk premium. The Claimants submit that the selection of an exaggerated market risk premium is a "blatant demonstration of reverse financial engineering by Dr Flores."[518] The Claimants point, in this regard, to the fact that the market risk premium selected by Dr Flores is almost twice as high as the market risk premium of 3.5% adopted by the Respondent from the post-expropriation equity valuation commissioned from Advantis for the purposes of settlement negotiations.[519] In brief, the Claimants contend that Dr Flores' approach is not a realistic representation of what a willing buyer and willing seller would have agreed in a transaction as at October 2010.

9.69 Second, despite starting at the same generic starting point (namely, Professor Damodaran's generic country risk premium for Venezuela), the Claimants say that Dr Flores' analysis takes three measures of Venezuelan country risk, averages them, and then fails to analyse the individual attributes of FertiNitro to determine exposure to country risk. The Claimants focus on the fact that Dr Flores has not explained why the averaging of multiple sources

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[516] Cls. PHB, Paragraph 200.
[517] Second (November) Hearing D6.12 (Giles).
[518] Cls. PHB, Paragraph 203.
[519] First Advantis Report (R-86), page 23.

(each of which provided vastly different country risk rates) provides an accurate methodology for calculating the country risk rate for Venezuela.

9.70 It follows, so the Claimants submit, that Mr Giles' methodology should be preferred. He used a generic country risk premium of 6%, which he then adjusts: (1) to eliminate the impact of illiquidity (since the fair market value standard requires an assumption that there are no liquidity issues); and (2) to reflect FertiNitro's specific exposure to Venezuelan country risk i.e., the *lambda* factor.

9.71 The Claimants contend that Mr Giles' analysis is to be preferred because he acknowledges that FertiNitro, like every investment, is unique. He based his generic country risk premium on Professor Damodaran's estimate of 6.75% for the generic country risk in Venezuela. He then reduced Professor Damodaran's estimate by 0.75% to take into account survey data that is representative of what market participants use in what he says are "real world" transactions.

9.72 It follows, so the Claimants contend, that the Tribunal should use the only source that both experts in the arbitration agree is an appropriate source for assessing the generic country risk for Venezuela; that is, the estimates provided by Professor Damodaran - with the adjustments made by Mr Giles.

9.73 On this latter point, the Claimants conclude that the appropriate rate should be adjusted by reference to a liquidity adjustment. That is, the generic country risk must be reduced to remove the risk of an illiquid market. This results, so Mr Giles testifies, in a reduction of 1% (from 6% to 5%).

9.74 Third, the Claimants point to the fact that the experts agree in principle on the application of a FertiNitro-specific country risk adjustment in the form of a *lambda*. The experts are agreed that, in principle, a *lambda* factor should be applied in order to determine an investment-specific country risk premium. As Mr Giles explained:[520]

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[520] Second (November) Hearing D6.15 (Giles).

"It must be uncontroversial, and I think even Dr Flores accepts that an investor would pay more for an investment that is more insulated from risk than a typical company. It must be uncontroversial, it's set out in Dr Damodaran's work and elsewhere. So we need to assess, make a judgment about the relative exposure of FertiNitro to Venezuelan country risk."

9.75 The Claimants complain that Dr Flores has not, in fact, calculated a *lambda* factor. The end result, say the Claimants, is that Dr Flores agrees with the application of a *lambda* factor, but he has failed to undertake the detailed investment-specific analysis that this approach requires.

9.76 Fourth, the Claimants conclude that Mr Giles is the only quantum expert witness who has actually applied the agreed *lambda* approach and thereby assessed the extent to which FertiNitro is exposed to Venezuelan country risk.

9.77 The Claimants contend that, although Dr Flores later claimed to have applied a *lambda* factor, the evidence at the Second (November) Hearing confirmed that only Mr Giles has conducted a proper examination of FertiNitro's exposure to Venezuelan country risk. They point to Mr Giles' detailed analysis of the extent to which FertiNitro is exposed to 22 distinct risk factors that comprise the country risk for Venezuela. Ultimately, Mr Giles determined that an appropriate *lambda* factor of 0.4 was to be applied. As Mr Giles explained:[521]

"[First], on the revenue side, there is no specific price risk in Venezuela. Absent the Urea Decree, all prices are set internationally under the Offtake Agreement. So it doesn't matter what happens in the Venezuelan economy, the prices are set internationally.
The demand, the demand is entirely set internationally. The international markets – the international price can take any volume FertiNitro can produce, so irrespective of what's happening in the Venezuelan market, FertiNitro can sell its product. Now that's actually quite different from a typical firm, a farm, a bakery, a hotel. Typical firms are very exposed to local economic conditions."

[521] Second (November) Hearing D6.16 (Giles).

9.78 The Claimants point to the fact that Mr Giles has implemented a forensic approach that looks at a host of country risk factors. The Claimants also point to the fact that Mr Giles emphasises that the FertiNitro Plant is located in a secure location, and has low exposure to risks associated with social disorder, political strikes and organised crime. It has access to a dedicated dock to export its products; and FertiNitro does not require external funding for its operations. Further, it has low exposure to Venezuelan infrastructure and transportation risks.

9.79 The Claimants submit that Mr Giles is to be contrasted with Dr Flores, who admitted under cross-examination at the Second (November) Hearing that he had not independently studied the 22 country risk elements analysed by Mr Giles when calculating the *lambda* factor.[522]

9.80 The Claimants further contend that Mr Giles' assessment of, and conclusions about, the *lambda* factor are consistent with those of the international credit rating agency, Moody's, in its contemporaneous determination of the risks associated with FertiNitro's corporate debt. At the commencement of the project, Moody's undertook a comparative analysis of the risk ratings of Venezuela and the FertiNitro project. The analytical approach undertaken by Moody's in determining the bond rating of FertiNitro's corporate bonds is, so the Claimants submit, similar to the approach taken by Mr Giles in determining the *lambda* factor. Moreover, international credit rating agencies rated FertiNitro's bonds as being less risky than Venezuela's sovereign debt.

9.81 In contrast, the Claimants contend that Dr Flores' *ad hoc* implementation of a *lambda* of 1.0 is contradicted by the contemporaneous assessments of the international credit rating agencies. Under cross-examination, Dr Flores agreed that the Moody report (Exhibit BE-19) confirms the accepted position that country risk needs to be measured with respect to the specific asset or investment concerned. In this regard, he explained:[523]

[522] Second (November) Hearing D7.97-98 (Flores).
[523] Second (November) Hearing D7. 133 (Flores).

"Q. So again the analysts from Moody's here are saying when you're making these kinds of assessments, you have to look at every project on an individual basis, correct? A. Yes, generally yes."

9.82 The Claimants contend that, notably, Dr Flores acknowledged that, at the commencement of the FertiNitro project, Moody's had confirmed that FertiNitro was less exposed to Venezuelan country risk than other companies operating in Venezuela.[524] The Claimants point to similar analytical criteria used by other agencies, such as Fitch[525] and Duff & Phelps.[526] It follows, so the Claimants contend, that these contemporaneous conclusions corroborate the conclusions reached by Mr Giles on the *lambda* and, equally, confirm that Dr Flores' conclusion is an outlier.

9.83 Further, the Claimants note that Moody's noted that foreign investors can abate their exposure to country risk by structuring their transactions in order to benefit from the protections afforded under investment treaties. Yet Dr Flores has assumed the opposite, assuming that the existence of the Treaty does not, in any way, mitigate the country risk with respect to the Claimants' investments. This demonstrates what the Claimants suggest is another flaw with Dr Flores' assumption that a willing buyer and seller would view FertiNitro and the Offtake Agreement as being as exposed to Venezuelan country risk as the average asset located in Venezuela, resulting in a *lambda* of 1.00.

9.84 The Claimants contend that the arbitrariness of Dr Flores' *lambda* of 1.00 is further illustrated by the fact that he has entirely ignored the Offtake Agreement in his analysis. Mr Giles confirmed in his second report that "the Offtake Agreement is immune to changes in local costs in Venezuela, thus making it even less akin to a typical firm in Venezuela."[527] And yet, as he confirmed at the Second (November) Hearing, Dr Flores has simply applied

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[524] Second (November) Hearing D7. 114 (Flores).
[525] Fitch rating press release (30 March 1998) (C-119).
[526] Duff & Phelps Credit Rating Co., FertiNitro Finance Inc. – Credit Analysis Update (September 1998) (BE-23), page 188.
[527] Second Expert Report of Tim Giles (30 August 2013) ("Giles ER2"), Paragraph 1.26.

the same 1.00 *lambda* to the Offtake Valuation without any separate assessment of the Offtake Agreement's exposure to Venezuelan country risk.[528]

9.85 The Claimants again point to the fact that Dr Flores' analysis is contrary to the contemporaneous record and real-life valuation practice. International rating agencies, for example, have confirmed that the existence of an offtake agreement mitigates exposure to country risk.[529]

9.86 In summary, therefore, the Claimants contend that Dr Flores' opaque, superficial and self-serving exposition of the *lambda* issue is egregiously wrong, given the dramatic effect that the *lambda* has on both the Equity and Offtake Valuations.

(vii) The Award in <u>Gold Reserve Inc v. Venezuela</u> Supports The Fertinitro-Specific Country Risk Premium Adopted By The Claimants' Quantum Expert, Mr Giles, And Discredits The Generic Country Risk Premium Adopted by the Respondent's Quantum Expert, Dr Flores; By Contrast the Awards in the Exxonmobil And Mobil Cases Do Not Identify Any Country Risk Premium For Venezuela And Are Clearly Distinguishable

9.87 In relation to the issue of country risk, the Claimants contend that the award in *Gold Reserve v. Venezuela*[530] supports the FertiNitro-specific country risk premium adopted by Mr Giles and discredits the generic country risk premium adopted by Dr Flores. Further, the Claimants contend that the two awards in *ExxonMobil* and *Mobil*[531] do not identify any country risk for Venezuela and are clearly distinguishable.

9.88 The Claimants contend that the *Gold Reserve* award is of central relevance because of its treatment of the discount rate and Venezuelan country risk. The tribunal in that case adopted a discount rate based on a weighted average cost of capital ("WACC"), of

[528] Second (November) Hearing D7. 170 (Flores).
[529] *See, e.g.,* Duff & Phelps Credit Rating Co. – Rating Approach to Project Finance (BE-18), page 13; Thomas Coleman, Moody's Investors Service – Piercing the Sovereign Ceiling: Issues in Oil and Gas Project Financing – (23 February1998) (BE-11), page 9.
[530] *Gold Reserve v. Venezuela* (CLA-156).
[531] Namely, *Mobil v. PDVSA* (EO-45); *Venezuela Holdings v. Venezuela* (RLA-153).

10.09%[532] (which is virtually identical to Mr Giles' like-for-like discount rate of 10.1%). In doing so, the tribunal incorporated a country risk premium of 4% to the cost of equity.

9.89 The Claimants make four arguments in this regard which (as they contend) support their approach, namely:

9.90 First, the *Gold Reserve* tribunal concluded that a 4% country risk premium "appropriately considers political risks, together with other risks, but has not been over-inflated on account of expropriation risks."[533] In that tribunal's view "it is not appropriate to increase the country risk premium to reflect the market's perception that a State might have a propensity to expropriate investments in breach of BIT obligations."[534] The Claimants further contend that this aspect of the tribunal's reasoning accords with the established international law principle of *nullus commodum capere de sua injuria propria*.[535]

9.91 This principle has been reaffirmed by the tribunal in *Flughafen v. Venezuela*, where the tribunal explained: "A State that increases country risk via the adoption of new political attitudes, adopted after an investment has materialized, cannot benefit from an unlawful act attributable to it in order to reduce the compensation to be paid out."[536]

9.92 Second, the country risk premium adopted by the tribunal in *Gold Reserve* confirms that an investment-specific approach to measuring country risk is required for the purposes of valuation. The tribunal specifically rejected Venezuela's "generic" country risk calculation because it was "based on both full and 'generic' country risk for an investment in Venezuela."[537] It referred instead to an RBC Capital Markets valuation that was investment-specific to *Gold Reserve* for the purposes of arriving at its 4% country risk premium.

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[532] *Gold Reserve v. Venezuela* (CLA-156), Paragraph 842.
[533] *Gold Reserve v. Venezuela* (CLA-156), Paragraph 842.
[534] *Gold Reserve v. Venezuela* (CLA-156), Paragraph 841.
[535] No State, it is said, can take advantage of its own wrongful acts.
[536] *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) ("*Flughafen v. Venezuela*") (RLA-154), Paragraph 905.
[537] *Gold Reserve v. Venezuela* (CLA-156), Paragraph 840.

9.93 Third, in the *Gold Reserve* award, the country risk premium of 4% related to the cost of equity. This resulted in a total cost of equity of 11.92% and a WACC of 10.09%. The country risk premium element of the WACC was accordingly lower than 4%, as the WACC is a measure not just of equity, but also debt (which would have a lower or no country risk premium attached to it). The Claimants contend that the Parties' experts agree that the appropriate discount rate to be applied in this case is the return on assets. This rate is effectively identical to the WACC (with the exception of the treatment of debt tax shields). The return on assets is, like the WACC, the return to both debt and equity holders. As such, in order to compare the country risk premium applied in the *Gold Reserve* award to the country risk premium to be applied to FertiNitro, it is necessary to look not at the 4% added by the *Gold Reserve* tribunal to the cost of equity, but to the premium that was applied to the WACC. While the award does not specify what premium was applied to the WACC in *Gold Reserve*, it must be lower than the 4% that the tribunal applied to the cost of equity.

9.94 Fourth, as explained by Mr Giles (see above) FertiNitro is far less exposed to country risk in Venezuela than the gold mine at issue in *Gold Reserve*. The mine was located in the "environmentally fragile Imataca Forest Reserve" in the interior of Venezuela.[538] This area in southeast Venezuela is not easily accessible and has poor transportation links, even compared to other remote locations in Venezuela.

9.95 Unlike *Gold Reserve*, the Claimants submit that the *ExxonMobil* and *Mobil* cases are distinguishable from the present arbitration and the resulting awards offer no meaningful precedent on the assessment of country risk and discount rate. *ExxonMobil* obtained these awards in two separate arbitrations against Venezuela and its State-owned companies. These awards relate to Venezuela's expropriation of an extra-heavy oil project and other investments formally held by the *ExxonMobil* group in Venezuela.

9.96 In relation to the ICC arbitration, Mobil Cerro Negro ("*Mobil*") initiated arbitration proceedings against PDVSA Cerro Negro SA ("PDVSA-CN") and Petróleos de Venezuela

[538] *Gold Reserve v. Venezuela* (CLA-156), Paragraph 283.

SA ("PDVSA") pursuant to two inter-related agreements: (i) the "Association Agreement" and (ii) the "PDVSA Guaranty".[539] The ICC tribunal's task was to "apply the common intention of the Parties reflected in the [Association Agreement]".[540] In particular, the ICC tribunal was required to award compensation according to an indemnity formula provided in the Association Agreement. In such circumstances, the ICC tribunal did not endorse any particular country risk calculation for Venezuela. Instead, the ICC tribunal analysed the valuation of future cash flows under the indemnity formula provided in the Association Agreement. When analysing this issue, the ICC tribunal emphasised that "there is a difference between valuing future cash flows under an indemnity formula and valuing the potential cash flows from a project".[541]

9.97 In these circumstances, the Claimants contend that the factors considered by the ICC tribunal in order to determine the appropriate discount rate applicable to contractual damages are demonstrably not relevant to the calculation of the discount rate for the DCF valuation of an investment. The Claimants argue that neither Party nor expert in the present case has advanced any discount rate analysis comparable to that undertaken in the ICC award.

9.98 The Claimants also point to the fact that another distinguishing feature of the *ExxonMobil* and *Mobil* cases is that the claimant had consistently argued for a risk-free rate (namely, a discount rate that excluded any market risk premium and country risk premium). In contrast, the Claimants' discount rate formula includes a substantial market risk premium (4.75%) and country risk premium (2%). The customary international law standard of full reparation played no part in the ICC tribunal's analysis.

9.99 In parallel with the ICC arbitration, a number of *ExxonMobil* subsidiaries brought an ICSID arbitration against Venezuela under the Netherlands-Venezuela BIT.[542] As in the ICC case, in the ICSID case there was no evidence of any country risk calculation. The

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[539] *Mobil v. PDVSA* (EO-45).
[540] *Mobil v. PDVSA* (EO-45), Paragraph 767.
[541] *Mobil v. PDVSA* (EO-45), Paragraph 774.
[542] *Venezuela Holdings v. Venezuela* (RLA-153).

claimants had argued that country risk is largely comprised of "uncompensated expropriation, which cannot be taken into consideration in order to valuate such an expropriation." In those circumstances, the Claimants submit that the ICSID award contains no analysis whatsoever of Venezuelan country risk, let alone any analysis of investment-specific risk or any final calculation for country risk. The ICSID tribunal instead adopted a discount rate of 18% for the purposes of its DCF valuation.

9.100 It follows, so the Claimants contend, that, unlike the *ExxonMobil* and *Mobil* cases, the evidence presented in this arbitration involves detailed arguments in support of the Claimants' country risk approach. In contrast to the *ExxonMobil* and *Mobil* cases, so the Claimants contend, both Parties' experts have advanced arguments focused on country risk and both experts agree that the country risk premium to be adopted by the Tribunal must be investment-specific (that is, using a *lambda*). The *ExxonMobil* and *Mobil* cases can therefore be of no utility to the Tribunal in its assessment of country risk and *lambda* in this arbitration.

9.101 The Claimants point to another example of a country risk assessment involving Venezuela in the award made in *Flughafen v. Venezuela*.[543] There, the respondent proposed a country risk premium of 7.9% and a discount rate of 14.4%.[544] The tribunal adopted the respondent's country risk premium based on the specific facts of the case: specifically, that, when the claimants made their investments in 2004, the country risk already existed, the investors were well aware of it and the risk had not changed by the time of the expropriation soon afterwards, in December 2005.

9.102 Therefore, by way of summary, the Claimants conclude that the ICSID tribunal's award in *Gold Reserve v. Venezuela* is the most relevant legal authority in connection with country risk (and particularly expropriation risk) and *lambda* analysis that the Tribunal is required to undertake in the present case. That decision endorses the FertiNitro-specific country risk premium adopted by Mr Giles and discredits the generic country risk premium adopted by Dr Flores. In contrast, so the Claimants say, the awards in the *ExxonMobil* and *Mobil*

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[543] *Flughafen v. Venezuela* (RLA-154).
[544] *Flughafen v. Venezuela* (RLA-154), Paragraphs 899-902.

cases are clearly distinguishable. As for *Flughafen* award, it is of relevance to the extent that it endorses the proposition that no respondent should be allowed to benefit from its own expropriatory conduct; but it is otherwise distinguishable on its facts.

(viii) The Adjusted MOU Price is an Effective Reality Check on the Parties' Valuations; It Demonstrates That Mr Giles' Equity Valuation Is Conservative And That, By Contrast, Dr Flores' Purported Fair Market Valuation Is Less Than 10% Of The Price That Was Agreed By the Parties In 2007 Under Threat of Expropriation.

9.103 In further support of the application of their proposed valuation, the Claimants point to Mr Giles' adjusted MOU price in 2007 as an effective reality check. They submit that it demonstrates that Mr Giles' Equity Valuation is conservative and, by contrast, that Dr Flores' purported fair market valuation is less than 10% of the price that was (allegedly) "agreed" by the Parties in 2007 under the threat of expropriation.

9.104 In this regard, the Claimants contend that the evidence confirms that Mr Giles' Equity Valuation (namely, US$ 361.0 million for KOMSA's 25% interest) is almost the same as the MOU price as adjusted in a "but-for" scenario (US$ 360.8 million).[545] For this comparison, the Claimants contend that Mr Giles has simply calculated the MOU price in the absence of the Respondent's pre-expropriation violations of the Treaty (that is, "but for" the economic impact of the Urea Decree and the unlawful taxes). As a result, the Claimants contend that the adjusted MOU price confirms that Mr Giles has produced a conservative Equity Valuation that very likely understates the value of KOMSA's equity investment in a "but-for" scenario.

9.105 In contrast, the Claimants point to the fact that Dr Flores has made a series of arbitrary adjustments to the MOU price that have the effect of reducing the enterprise value listed in the 2008 MOU by 55%. The Claimants describe this approach as a "piece of financial reverse engineering".[546]

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[545] *See*, for example, Giles ER1, Paragraphs 4.86, 4.88. The Claimants note that Mr Giles increases the MOU price (namely, US212.5 million) by "25% of the expected impact, over the life of the Plant, of the Urea Decree and unlawful taxes (namely, KOMSA's share of this loss)" – it is this increase that results in an adjusted MOU price of US$ 360.8 million as at 30 September 2010.

[546] Cls. PHB, Paragraph 265.

9.106 The Claimants contend that the evidence of Dr Flores is to the effect that the distortion of the MOU price is based on the fact that the draft MOU of November 2007 was only "a first offer by Koch".[547] This allows him to assert that the only moment in time that the MOU was "agreed" was almost a year later in October 2008. The Claimants contend that this evidence is contrived, and that such contrivance is exposed by the contemporaneous evidence. The Claimants point to the fact that during his cross-examination, Dr Flores was taken to an email from Mr Toro (as a director of Pequiven), to Messrs Parra and Gwaltney (for KOMSA) dated 9 October 2007 (that is, approximately one month prior to the date of the 2007 MOU), which stated:[548]

> *"In accordance with an independent valuation carried out by Boo[z] Allen, hired by Pequiven,*[549] *and additional valuations carried out and discussed with the rest of the partners, we have estimated a fair amount of one billion, one hundred and seventy-five [million] U.S. dollars […] for 100% of the shares [in FertiNitro]."*

9.107 The Claimants contend that Mr Toro's email message, sent only one month prior to the November 2007 MOU, unequivocally confirms that the "first offer" was, in fact, made by Pequiven. Thus, the November 2007 MOU (drafted by Koch) contained a price that was agreed between the Parties in November 2007. The Claimants conclude that Dr Flores' evidence should, therefore, be rejected. [550]

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[547] Second Expert Report of Daniel Flores (3 March 2014) ("Flores ER2"), Paragraph 169.
[548] Email from F. Toro to B. Gwaltney and T. Parra re: FertiNitro Negotiations (9 October 2007) (C-90).
[549] Later known as Advantis.
[550] In the Tribunal's view, there is no cogent evidence that any MOU price was "agreed" in 2007 between Pequiven and KOMSA. The first offer came via an email of 9 October 2007 from Mr Toro of Pequiven (C-90) with a valuation of US$ 1.175 billion for 100% of the equity of FertiNitro, less the amount outstanding to its banks and bondholders (which he put at US$ 450,000, presumably US$ 450 million). On 7 November 2007, KOMSA came back with its draft MOU with a valuation of US$ 1.210 billion less the debts to the banks and bondholders plus the Excess Cash in FertiNitro. Discussions were halted in early 2008. However, Pequiven came back again in October 2008 with a revised draft MOU (C-93) which provided for a payment of US$ 212.5 million to KOMSA for its share of FertiNitro's equity. Ultimately, no MOU was ever agreed or signed. Pequiven contended that the purchase of the private shareholders of FertiNitro was no longer a priority. However, Mr Parra (of KOMSA) testified in his witness statement (Paragraph 69) that KOMSA's representatives understood that there was no real alternative but to accept Pequiven's proposal (*See also* Cls. Mem., Paragraphs 144-153).

(ix) There Are Multiple Additional Reality Checks That Validate The Reasonableness of Mr Giles' Valuations of The Equity Investment and the Offtake Agreement

9.108 The Claimants also point to "multiple additional reality checks that validate the reasonableness of Mr Giles's valuations of the Equity Investment and the Offtake Agreement,"[551] namely:

9.109 First, the Claimants point to the "project investment" for identical new fertiliser plants at Guiria and the José Complex, whereby Pequiven (in its 2007-2013 Strategic Plan) announced that it intended to invest US$ 2.8 billion to build each plant, each having an equivalent nameplate capacity as FertiNitro's Plant. Mr Giles' evidence was that "[r]eplacement value must be the minimum that an investor considers the plant to be worth," and that such value is a well-understood economic indicator of value.[552]

9.110 Second, the Claimants point to FertiNitro's 2011 actual net profit of US$ 116.2 million compared to a budgeted 2011 net profit of US$ 117.2 million. If (as Mr Giles explained) the DCF methodology "involves projecting revenues and costs into the future", these amounts are a simple post-expropriation reality check, which undermines the credibility of Dr Flores' equity valuation and demonstrates the conservativeness of Mr Giles' forecasts. As to the former, Dr Flores forecasts that FertiNitro would have made net profits in 2011 of US$ 36.3 million, being approximately one third of the net profit that FertiNitro achieved in 2011. In relation to the latter, Mr Giles forecasts net profits in 2011 of US$ 92.1 million, being 20% less than what FertiNitro's managers expected and then ultimately achieved.

9.111 Third, the Claimants refer to the dividend payment to FertiNitro's shareholders of US$ 150 million in 2008 (of which US$ 37.5 million was distributed to KOMSA). They note that this dividend was paid out of profits that had already been reduced by the Respondent's pre-expropriation violations but that, nevertheless, the amount is more than Dr Flores' entire Equity Valuation.

[551] Cls. PHB, Paragraphs 272-284.
[552] Second (November) Hearing D6.25 (Giles).

9.112 Fourth, the Claimants point to the net present value of the profits foregone by KNI of US$ 172 million if Dr Flores' own calculation of KNI's profits during the period of the *ad hoc* arrangement is applied over the remaining term of the Offtake Agreement. This reality check rests on the "volumes offtaken" identified by Dr Flores himself at the Second (November) Hearing. If the profit per month during the period of the *ad hoc* arrangement, namely US$ 2.49 million, is applied over the remaining term of the Offtake Agreement (being 123 months), the total net profit forgone is US$ 306 million. Applying Mr Giles' discount rate, the net present value of the lost profits is US$ 172.7 million. That figure is approximately US$ 33.8 million less than Mr Giles' valuation of the Offtake Agreement, and, so the Claimants contend, further corroborates its reasonableness.

9.113 The Claimants contend that these four factors should be considered by the Tribunal as other tribunals have found it instructive to refer to "reality checks" to test the reasonableness of disputed valuations placed before them.

(x) There Are Multiple Further "Lower Bound" Reality Checks That Discredit Dr Flores' Valuation as an Unsupportable Outlier

9.114 In addition to these factors, the Claimants point to further "lower bound" reality checks to discredit Dr Flores' valuations as an unsupportable outlier, namely:

9.115 First, the book value of FertiNitro as at the date of the expropriation equated to US$ 168.1 million for KOMSA's 25% equity in FertiNitro, after deduction for debt. That figure is five times Dr Flores' Equity Valuation. Book value is almost always less than fair market value, especially when valuing a profitable going concern.[553]

9.116 Second, the construction costs alone of FertiNitro equated to US$ 273 million for 25% of FertiNitro. Once again, the Claimants point to the multiple of Dr Flores' valuation, in this case the construction costs being eight times his valuation.

9.117 Third, the Respondent's own post-expropriation position for the purposes of settlement negotiations prepared by Advantis equated to US$ 113 million for 25% of FertiNitro. The

[553] *See ConocoPhillips v. Venezuela* (CLA-155), Paragraphs 400-401.

Claimants again point to this amount as a "reality check," contending that it shows that Dr Flores adopted an inflated discount rate and country risk premium, and an overly pessimistic forecast of future output levels at FertiNitro. This Advantis valuation was more than three times the figure reached by Dr Flores.

9.118 Fourth, the Respondent's "estimated project investment" for the smaller fertiliser plant located at Móron was US$ 1.55 billion and the construction costs of that plant were US$ 2 billion. As the Móron plant has a urea output of 726,000 metric tonnes per year, this means that U$ 2,755 of construction costs will give one metric tonne of urea for the foreseeable future.[554] As Dr Flores' Equity Valuation equates to US$ 355 per metric tonne of urea, Mr Giles explained that no reasonable buyer would consider it possible to purchase FertiNitro for US$ 355 per metric tonne when a commercial entity has plans to build a plant that will cost US$ 2,755 per metric tonne.

9.119 Having regard to all these factors, the Claimants contend that Dr Flores' valuations do not even meet lower bound reality checks. The Claimants submit that, like *Flughafen v. Venezuela*,[555] the Tribunal should reject any valuation outside those bounds. In short, so the Claimants conclude, Dr Flores' valuation is an outlier that cannot be supported. It is, so the Claimants say, "a striking demonstration of the unreasonableness of Dr Flores' depressed valuations."[556]

(4) The Respondent's Quantum Submissions

9.120 The Respondent contends, primarily, that the Tribunal need not arrive at the point of determining any quantum issues. Indeed, the Respondent's submissions are explicitly made "solely for reasons of precaution."[557] However, the Tribunal has confirmed its jurisdiction; and the Respondent is liable to the Claimants under Article 6 of the Treaty, as decided above by the Tribunal in regard to KOMSA and, as regards KNI, by the majority

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[554] Relying on Tim Giles' presentation, Slide 26.
[555] *Flughafen v. Venezuela* (RLA-154).
[556] Cls. PHB, Paragraph 295.
[557] Resp. PHB, Paragraph 169.

of the Tribunal. Hence, the Respondent's submissions on quantum must now be considered by the Tribunal.

9.121 In summary, the Respondent's case on quantum is comprised of four principal submissions. These are:

(a) *Its general submissions as to the flaws in the Claimants' quantum submissions;*

(b) *The compensation claimed by KOMSA and KNI are both vastly overstated;*

(c) *The fair market value of KOMSA's interest in FertiNitro was not more than US$ 34.6 million; and*

(d) *KNI's valuation of its interest in the Offtake Agreement is overstated.*

(i) The Respondent's General Submissions

9.122 The Respondent makes, as already indicated, seven general submissions as to the appropriate treatment of the issues of quantum for both KOMSA and KNI.

9.123 First, the Respondent contends that the Claimants have proposed a highly inflated value that far exceeds what the Claimants' claims would be worth in the absence of the disputed acts. This is not compatible with the fair market value ("FMV") standard that both Parties agree applies to quantum. The FMV standard is an objective standard that leaves no room for what, so the Respondent contends, is the arbitrary, highly speculative and policy-based valuation that the Claimants ask the Tribunal to conduct in this case.

9.124 Second, as regards KOMSA, the Respondent contends that the Claimants disregard standard DCF valuation principles by "cherry-picking" data that increases their valuation outcome and by using out-dated budgeted data, even where more current actual data is fully available. The Respondent criticises what it says is the Claimants' only support for its case, namely Mr Sanders' experience with two plants based, respectively, in Oklahoma and Trinidad & Tobago, both of which Mr Sanders himself concedes are not comparable to the FertiNitro Plant. Moreover, the Respondent contends that the Tribunal should not rely on cost assessments of a witness who is unaware of significant differences in key economic indicators, such as inflation rates, between the three countries relevant to his comparative cost assessment.

9.125 Third, the Respondent contends that the Claimants suggest, wrongly, an entirely unreasonable discount rate. That suggestion is directly contradicted by three recent international arbitration awards against the Respondent, two of which[558] regard a project located in the exact same industrial complex as FertiNitro and which share other important commonalities with FertiNitro. Moreover, the Respondent submits that the country risk rate of 2% contained in the Claimants' discount rate is misplaced since it is based, amongst other things, on an admittedly unrepresentative survey, an unprecedented application of a liquidity discount and an arbitrary and unsupported *lambda*. A country risk rate of 2% is, so the Respondent contends, the rate normally applied to such countries as Italy. Moreover, such rate finds no support in the award made by the tribunal in *Gold Reserve Inc v. Venezuela*[559] which the Claimants claim – also incorrectly – supports their view.

9.126 Fourth, the Respondent submits that the Claimants' original "reasonableness" checks do not support their valuation. Further, the additional comparisons that the Claimants introduced for the first time at the Second (November) Hearing, such as FertiNitro's book value or the estimated project investments for new plants at Guiria and José, do not alter that conclusion.

9.127 Fifth, the Respondent submits that KNI's valuation of its interest in the Offtake Agreement uses an incorrect valuation methodology, is based on insufficient evidence and ignores fundamental changes in the USA and global fertilizer industry that were already taking place at the valuation date.

9.128 Sixth, the Respondent contends that the Claimants' expert witness, Mr Giles, has, in various instances, blindly relied on the purported expertise offered by others, such as Mr Sanders or Mr Sorlie, without applying his own critical judgment. In contrast, the Respondent contends that its expert witness, Dr Flores, has carefully considered the

[558] Namely, *Mobil v. PDVSA* (EO-45); *Venezuela Holdings v. Venezuela* (RLA-153).
[559] *Gold Reserve v. Venezuela* (CLA-156).

FertiNitro Plant's history, with its actual operating conditions in Venezuela, in his valuation exercise. The Claimants' repeated attempts to discredit Dr Flores by soliciting his testimony on factual issues related to the valuation should fail before this Tribunal. It is Dr Flores' particular familiarity and personal experience with the conditions and processes in Venezuela that make his valuation especially convincing and, at the same time, distinguishes it from Mr Giles' "blind reliance"[560] on any information provided to him by the Claimants.

9.129 In short, and for the reasons set out more fully below, the Respondent contends that the Claimants' damages claims in the amount of approximately US$ 672.4 million are vastly overstated.

(ii) The Compensation Claimed by KOMSA and KNI is Vastly Overstated

9.130 The Respondent makes three main submissions as to, in its submission, the vast overstatement of compensation by the Claimants. Those submissions are:

(a) *First, the relevant standard of compensation is found in the Treaty, not in customary international law;*

(b) *Second, irrespective of the legal standard for compensation, the Parties agree that the quantum experts should apply the FMV standard; and*

(c) *Third, the Claimants ultimately fail to apply the FMV standard.*

9.131 As to (a) – the relevant standard of compensation: the Respondent, in contrast to the Claimants, contends that the relevant standard of compensation for the Claimants' claims is set out in Article 6 of the Treaty, and not in customary international law. It submits that Article 6 of the Treaty is *lex specialis* to the customary international law standard of full reparation. As such, under the Treaty standard, the Claimants' claims are limited to "the market value of the investment immediately before the expropriatory action was taken or became public knowledge, whichever is earlier." Being an objective standard, the market

[560] Resp. PHB, Paragraph 177.

value standard here means that the valuation of KOMSA's share in FertiNitro should not exclude the alleged effects of certain Government measures predating the announcement of the mandatory acquisition.[561] The Respondent notes that all of the Respondent's measures about which the Claimants complain were of a general nature and not specific to FertiNitro.

9.132 The Respondent contends that the Treaty standard applies irrespective of whether the Respondent's acquisition was lawful or unlawful.

9.133 As to (b) – the Parties' agreement that the FMV standard should apply: the Respondent points to the agreement between Mr Giles and Dr Flores that the Claimants' claims should be valued based on the FMV standard as at the valuation date of 30 September 2010.[562]

9.134 As to the FMV standard, Dr Flores relies on the well-known definition in the World Bank Guidelines that refer to "an amount that a willing buyer would normally pay to a willing seller."[563] This definition is, so the Respondent contends, essentially identical to the FMV definition Mr Giles provides at the outset of his First Report, in which he referred to "the value at which a willing buyer and willing seller would exchange an asset."[564] Further, the Respondent contends that it is consistent with the definitions of FMV used by the International Valuation Standards Council.[565] The Respondent contends that Mr Giles misinterprets the meaning of FMV as meaning a market devoid even of purely commercial sales limitations. The Respondent adopts Dr Flores' analysis, which it says shows that Mr Giles' interpretation turns the FMV standard "upside down", since it improperly permits a valuation of an asset at a value higher than one in the absence of the disputed acts.

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[561] These are to be identified by reference to the Second (November) Hearing, Claimants' Opening Statement, slide 31, suggesting that the effects of the Urea Decree, the Municipal tax, the Science & Technology tax, the delay in VAT rebates and the interference by the Respondent with the management and operations of FertiNitro should be excluded. The Respondent contends that these alleged measures did not violate any international law obligations of the Respondent.

[562] Giles ER1, Paragraph 1.3; Giles ER2, Paragraph 1.9.

[563] Flores ER2, Paragraph 154, citing the World Bank Guidelines, pp. 41-42.

[564] Giles ER1, Paragraph 4.78.

[565] IVS Framework, International Valuation Standards Council (2011), Paragraphs 30, 32. *See also*, Flores ER2, Paragraphs 155-156.

9.135 As to (c) – the Claimants' failure to apply the FMV standard: the Respondent contends that whilst the Claimants agree on the use of the FMV standard, Mr Giles has ultimately failed to apply that standard. Indeed, the Respondent submits that Mr Giles' DCF valuation is "entirely one-sided, full of inconsistencies, and – based on arbitrarily cherry-picked data – evidently directed not at establishing the plant's 'fair' market value but rather at creating an 'arbitration value' which impermissibly ignores the troubled realities of the plant."[566] Further, the Respondent contends that Mr Giles arbitrarily deviates from standard valuation practice, including by relying on survey data which he himself recognizes "cannot be considered representative"[567] for his country risk rate calculation. He also reduces his discount rate through a liquidity discount whereas such discount in standard valuation practice is applied only to increase the discount rate. The Respondent, instead, relies upon Dr Flores' testimony, to the effect that no prospective sales transaction would ever have been based on projections that are so obviously fabricated.

(iii) The Fair Market Value (FMV) of KOMSA's Interest in FertiNitro Was no More Than US$ 34.6 million

9.136 The Respondent contends that KOMSA's 25% interest in FertiNitro was no more than US$ 34.6 million. (This figure does not include interest and assumes the Urea Decree would have continued to apply). On the other hand, so the Respondent submits, Mr Giles' (corrected) valuation at US$ 361 million is vastly overstated and far exceeds the FMV of KOMSA's equity share in FertiNitro.

9.137 The Respondent rests these submissions on flaws in Mr Giles' DCF valuation which are said to be four-fold.

9.138 First, the Claimants' DCF analysis is inconsistent and highly speculative. It involves the "cherry-picking" of different time periods (that is, 2006-2008, 2006-2010 and the

[566] Resp. PHB, Paragraph 183. These matters, according to the Claimants, include a history of construction defects, poor maintenance decisions in the Plant's early years, an above-average number of unplanned shutdowns, persistent gas and electricity supply problems beyond FertiNitro's and the Respondent's control, and high maintenance and turnaround costs as a result of past defects and shutdowns and the Respondent's special economic situation.
[567] Giles ER1, Paragraph B.32.

individual years of 2008 and 2010), as well as actual versus budgeted data. His valuation depends on which alternative is chosen, thus enabling him to arrive at a higher valuation. In contrast, Dr Flores consistently applies the same data period, namely the data period of 2006-2010, and accordingly ensures consistency. The Respondent points to the fact that this is appropriate because it encompasses the two turnarounds conducted at the Plant in the five years prior to the mandatory acquisition (that is, 2008 and 2010), consistently with the forecast that turnarounds are to occur every 2½ years.

9.139 Further, the Respondent relies on Dr Flores' demonstration of the inappropriateness of Mr Giles' valuation: First, Mr Giles ignores the interrelatedness of the individual valuation criteria. That is, maintenance and turnaround costs impact capital expenditures; both, in turn, impact production levels, which, in turn, affect revenue and variable costs and ultimately working capital. Mr Giles' ignorance of these relationships is one of the factors causing him to overvalue the Claimants' alleged compensation claims. Second, Mr Giles' approach bases his valuation on very short data periods of only three years of actual data (2006-08) or, in some cases, only one year of actual (or budgeted) data, which contradicts the fundamental principle underlying any DCF valuation to project future income streams based on a reasonable quantity of historic data as available in a going concern.

9.140 Next, the Respondent contends that it is inappropriate to rely on budgeted data in this case due to the inherent uncertainties and flaws in the budgeting process. As Mr Sanders noted in his evidence, detailed records are necessary to properly prepare budgets, so deficiencies in record keeping would likely affect the accuracy of a budget because it necessarily would not reflect the true state of the equipment or the work to be performed during that year.[568] It is not possible for the Claimants to rely on the ICSID award in *Venezuela Holdings v. Venezuela*[569] to argue that budgets are a reliable basis for forecasting. Rather, in that award, using budgets for the year in which the expropriation took place was appropriate since

[568] Second (November) Hearing D5.156-157 (Sanders).
[569] *Venezuela Holdings v. Venezuela* (RLA-153). *See* Second (November) Hearing, Claimants' Opening Statement, Slide 39.

actual data was not available for the full year.[570] Here, however, Mr Giles seeks to use budgets during years when actual data was available.

9.141 Second, the Respondent contends that the Claimants' DCF valuation inappropriately excludes actual production volumes from 2009 and 2010 in projecting future production. Indeed, the Respondent says that the Claimants' approach "represents nothing but a calculated attempt to present a rosier picture of the plant's production volumes than the available actual data indicates."[571] The Respondent points to several factors showing why this approach is inappropriate, as follows.

9.142 Mr Giles' approach does not comport with FertiNitro's turnaround cycle, since that cycle was less than three years. His approach is flawed because Mr Sanders (and, in turn, Mr Giles) based his cycle upon an (improper) alleged similarity between the FertiNitro Plant and the plants of Terra OK and Point Lisa.[572] Rather, the Respondent contends that Dr Flores' turnaround cycle of 2½ years reflects the FertiNitro Plant's actual history of turnaround cycles; and it is conservative in the light of FertiNitro's major construction defects and history of frequent unplanned shutdowns.

9.143 Gas and electricity disruptions, as well as unplanned outages, were not materially higher in 2009 and 2010 than in previous years.[573]

9.144 A hypothetical and realistic buyer in 2010 would not have assumed that FertiNitro could consistently achieve nameplate production in the future. According to the Respondent, this is because FertiNitro had never consistently achieved nameplate production levels. The evidence at the Hearings did not provide any basis to assume that this would change in the

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[570] *Venezuela Holdings v. Venezuela* (RLA-153), Paragraphs 342, 307.
[571] Resp. PHB, Paragraph 192.
[572] cf. Expert Report of Richard Sanders (30 May 2012) ("Sanders ER1"), Paragraphs 9-11, 43-45.
[573] The Respondent points to the following evidence: For the ammonia plant, there were 30 total shutdowns in 2006 (with the plant in production for 332 days); 22 total shutdowns in 2007 (with the plant in production for 309 days); 21 total shutdowns in 2008 (with the plant in production for 299 days); 32 total shutdowns in 2009 (with the plant in production for 308 days); and 17 total shutdowns in 2010 (with the plant in production for 304 days). Likewise, for the urea plant, there was not a significant increase in shutdowns from the 2006-2008 period to the 2009-2010 period; in 2006 the plant was in production for a total of 315 days, in 2007 for 306 days, in 2008 for 289.7 days, in 2009 for 292 days, and in 2010 for 284.25 days. *See* Niveles de Produccion y Dias Operativos 2003-2010 (EO-41).

foreseeable future. In particular, the Plant's machinery and equipment were not sufficient to produce at nameplate levels consistently.

9.145 The Respondent relies upon Mr Villarroel's evidence that the urea trains could achieve daily nameplate capacity on a consistent basis, but not the ammonia trains.[574] Mr Sanders' opinion that FertiNitro "should be able to achieve nameplate capacity on a consistent basis"[575] should be rejected because it is, again, based on a comparison of the FertiNitro Plant with the plants at Terra OK and Point Lisa, which (as Mr Sanders admitted on cross examination) are not comparable to FertiNitro. The Claimants' allegation that FertiNitro's actual nameplate capacity can be assessed based on the 2003 Jacobs Report should be rejected, since that report was evidently overtaken by the 2006 Jacobs Report, the latter suggesting that it was not realistic to expect that FertiNitro would be able consistently to produce at nameplate levels.

9.146 Further, the Respondent points to the Claimants' failure to prove their allegation that annual nameplate production could be achieved through process improvements. The Respondent describes that allegation as "mere wishful thinking."[576] The Respondent contends that the FertiNitro Plant's equipment was so degraded that operational fixes could do little to resolve the low reliability of the Plant's machinery and equipment. The Respondent contends that the reliance on "two short marketing publications" created by Honeywell (which are not, contrary to the Claimants' nomenclature, "position papers") is irrelevant, and, further, those documents are prone to exaggeration and oversimplification.[577] According to the Respondent, the Claimants' focus on operational errors is also misleading, since the majority of unplanned shutdowns at FertiNitro were caused by mechanical failures, water and gas leaks and fire, in addition to supply disruptions beyond FertiNitro's control.[578] Furthermore, the 2007 KBC Report, which

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[574] First (September) Hearing D3.144 (Villarroel).
[575] Sanders ER1, Paragraph 13.
[576] Resp. PHB, Paragraph 201.
[577] Resp. PHB, Paragraph 202.
[578] Indeed, the Respondent contends that an evaluation of the causes of the Plant's shutdowns between 2003 and 2010 does not once cite operational errors as a significant cause of shutdowns in any of the years during this period. (*See* Niveles de Produccion y Dias Operativos 2003-2010 (EO-41)). Likewise in a section entitled "FertiNitro's Complex History of Unplanned Shutdowns," Jacobs Consultancy does not so much as mention operational errors

examines the origins and consequences of process failures, does not consider unplanned shutdowns to be a consequence of any of the operational or process-based shortcomings it finds.

9.147 As a result, the Respondent contends that, while later process improvements may have reduced the limited number of shutdowns caused by operational mistakes, the far greater number of shutdowns was due to mechanical failures and external outages, which continued to hamper the Plant's productivity. In any case, the Respondent contends that there is no evidence that the implementation of the recommendations of the KBC Report would have allowed FertiNitro to achieve nameplate production on a consistent basis. As Mr Villarroel testified, any improvement in production levels would require "strong investment and a not short period of time as well".[579] After over ten years in operation without sufficient preventative maintenance, simply reforming the Plant's leadership and improving its operational planning would do little to enhance production at FertiNitro given the severely degraded state of the Plant's equipment. Finally, the valuation exercise must take into account the fact that this case concerns the acquisition of a 25% stake in FertiNitro, and thus only KOMSA's minority share in the business.[580]

9.148 In relation to the exclusion of actual production volumes from 2009 and 2010, the Respondent contends that the Claimants' submission, that such exclusion is justified by law, is unfounded. The Respondent makes six main arguments why this submission should be rejected. First, the Claimants have provided no evidence that the stoppages were entirely due to supply disruptions by PVDSA and Pequiven. Second, Pequiven would not be responsible for any breaches of PVDSA's and Pequiven's supply contracts with FertiNitro. Third, PVDSA Gas did not breach its supply obligations toward FertiNitro. Fourth, the Claimants' exclusion of 2009 and 2010 from the valuation is contrary to the basic assumption of DCF valuation methodology. Fifth, the existence of the Treaty does

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as a cause for the Plant's historically high rate of unplanned shutdowns. (*See* Jacobs Consultancy Report, Deferred Second Reliability Test Report FertiNitro Complex, Jose Venezuela Reasons for Non-certification (October 2006) (R-57)).

[579] First (September) Hearing D3.148 (Villarroel).

[580] Second (November) Hearing D7.11 (Flores).

not justify excluding the 2009-2010 data. Sixth, the Respondent is not responsible for FertiNitro's operational difficulties in 2009-2010 which were primarily the result of original construction defects.[581]

9.149 The third matter invoked by the Respondent (in support of its contention that Mr Giles' valuation is flawed) is the Claimants' understated projections of FertiNitro's future costs.

9.150 In this regard, the Respondent points to the Claimants' unreasonable reliance on budgeted, instead of actual, turnaround and maintenance costs. In contrast, the Respondent contends that Dr Flores' use of FertiNitro's actual cost data, as available on the valuation date, makes sense, since such actual data properly reflects the state of the Plant and its operating conditions in Venezuela. The Respondent also characterizes his approach as being justifiable, since such data appropriately reflects the state of the Plant and the operating conditions in Venezuela. Rejecting the Claimants' allegations which, so the Respondent contends, seek to attribute blame to the Respondent for the increased costs, the Respondent submits that these allegations distract from the fact that it is the Claimants who have failed to discharge their burden of proving that they can legitimately ignore FertiNitro's actual costs (and thus deviate from standard valuation practice) and can instead use budgeted data.

9.151 The Respondent points to the reason for these costs, being the need for increased maintenance and turnaround costs arising from the early aging of machinery and equipment.[582] Contrary to the Claimants' allegations, these initial construction defects were not largely resolved by the Major Maintenance Plan ("MMP") in 2005, as Mr Villarroel's oral evidence proved.[583] Moreover, the Respondent contends that the Plant suffered from an above-average number of unplanned shutdowns.[584] Further, the damage suffered from unplanned shutdowns was often magnified by the absence, or

[581] Resp. Rej., Paragraphs 414-420.
[582] *See* Jacobs Consultancy Report, Deferred Second Reliability Test Report FertiNitro Complex, Jose Venezuela Reasons for Non-Certification (October 2006) (R-57), pages 10-11; Second (November) Hearing D5.190, 200-201.
[583] First (September) Hearing D3.150 (Villarroel).
[584] *See* Jacobs Consultancy Report, Deferred Second Reliability Test Report FertiNitro Complex, Jose Venezuela Reasons for Non-Certification (October 2006) (R-57), pages 10-11.

malfunctioning, of standard protective systems that automatically take control of operations when power outages occur and that shield the main equipment from damage.[585]

9.152 The Respondent also points to the increasing inflation rates in Venezuela that resulted in increased costs in local currency, which (so it contends) the Claimants have ignored.[586] The Respondent also contends that increasing inflation also significantly impacted FertiNitro's turnaround costs. In fact, between 2007, when FertiNitro's second major turnaround was budgeted, and 2008, when such turnaround took place, Venezuelan annual inflation increased by as much as 11.7 percentage points, going from 18.7% to 30.4%.[587] Rising inflation inevitably led to a sharp increase in turnaround costs, since turnarounds require the use of hundreds of external local workers, who are paid in Bolivars.

9.153 Turning to Mr Giles' expert evidence, the Respondent contends that Mr Giles is wrong to allege that FertiNitro's exposure to domestic inflation is "extremely low" since only "a very small proportion of its costs are denominated in bolivars."[588] The Respondent characterises this as a "[h]ighly simplistic assessment of the plant's local costs […] based on an opportunistic choice of cost data (using, e.g., the 2008 budgeted turnaround costs, rather than the much higher actual costs) and is limited to the period 2006-2008 (thus precisely excluding the years in which inflation skyrocketed)."[589] The Claimants' contention that inflation is a "new purported explanation" for FertiNitro's higher than budgeted costs should, so the Respondent contends, be rejected by the Tribunal.[590]

9.154 Next, the Respondent points to the fact that the high maintenance and turnaround costs are not primarily due to operational mistakes in recent years. Rather, in reliance on various reports[591] (all of which the Respondent contends show that the processes at the Plant were

[585] First (September) Hearing D3.174-175 (Villarroel).
[586] The Respondent points to the acknowledgement of this issue by Mr Villaroel: First (September) Hearing, D4.28, 30.
[587] The Respondent points to the International Monetary Fund Inflation Rates 2004-2011 (R-90).
[588] Second (November) Hearing D6.17 (Giles).
[589] Resp. PHB, Paragraph 218.
[590] *See* Second Witness Statement of Aníbal Villarroel (30 December 2013), Paragraph 13.
[591] Resp. PHB, Paragraph 220, citing Haldor Topsoe, Effect of the Natural Gas Composition on the Production of Ammonia (26 August 2003) (R-54), Jacobs Consultancy Report, FeriNitro Fertilizer Project, Plan Improvement Cost Estimates and Revised Production Forecast (14 March 2003) (C-125) (See the results of the 2006 Thielsch

not ideal from the outset), the evidence of Mr Gwaltney establishes that there was a "breakdown in the organization structure"[592] after KOMSA's exit from the Plant's management in October 2007. The Respondent also points to the Claimants' own acknowledgement that there had been a frequent change in managerial staff at FertiNitro even in the Plant's early years.[593] The Respondent concludes that the processes were not ideal from the outset.[594]

9.155 As to the Claimants' understated projections of FertiNitro's future costs, the Respondent points to the understatement of other costs, describing them as not only "clearly understated" but also "highly speculative."[595] With respect to capital expenditures, after not considering them at all in his first report, Mr Giles projects an amount of US$ 10 million in his second report, based on Mr Sanders' suggestion.[596] But the Respondent points to the fact that neither Mr Sanders, nor Mr Giles, explain this amount. Indeed, Mr Sanders ultimately admitted on cross examination that "[d]epending on what […] new pieces of equipment have to be installed" it is "certainly" possible that FertiNitro would require more capital expenditure than the US$ 10 million benchmark he provided, based on his experience at the Terra OK plant.[597]

9.156 With respect to gas costs, Mr Giles based his projection of the base price for natural gas on a single data point: FertiNitro's budgeted natural gas price for 2010, which, the Respondent emphasises, is the lowest base price for all the budget years that he reviewed.[598] Mr Giles' attempt to defend this choice as "conservative"[599] should be rejected by the Tribunal, as he ignores both FertiNitro's longer historical pricing record and the predictions of well-

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Engineering report). Resp. PHB, Paragraph 220 referring to KBC Report, Plant Performance Optimization Assessment Report (18 May 2007) (C-158).

[592] Witness Statement of Brent W. Gwaltney (30 May 2012) ("Gwaltney WS1"), Paragraph 60.

[593] First (September) Hearing D4.8 (Villaroel).

[594] The Respondent contends that the one admitted operational mistake – the failure to establish a cost-effective maintenance plan – was made at the outset of the Plant's history when KOMSA was charged with running the Plant.

[595] Resp. PHB, Paragraph 222.

[596] Giles ER2, Paragraph 7.34; Second Expert Report of Richard Sanders (27 August 2013) ("Sanders ER2"), Paragraph 69.

[597] Second (November) Hearing D5.223-224 (Sanders).

[598] Flores ER2, Paragraph 49.

[599] Giles ER2, Paragraphs 7.2-7.4; Second (November) Hearing D6.47 (Giles).

respected forecasters. Dr Flores' forecast, based upon three such long-term forecasters, should be preferred by the Tribunal.[600]

9.157 Fourth, the Respondent contends that the Claimants' proposed discount rate of 10.12% is understated, whereas Dr Flores' proposed rate of 20.37% is fully justified. It contends that Mr Giles' discount calculations are unreasonable in at least the following respects, namely:

9.158 Mr Giles inappropriately uses global market risk premium data. The market premium is intended to measure the additional return over the risk-free rate required by equity investors in the USA. (This market risk reflects risks unrelated to Venezuela.) Mr Giles calculates a rate of 4.75% relying on *global* market risk estimates published in 2006 (that is, four years before the mandatory acquisition). Mr Giles' market rate is inappropriate because the data he relies on is out-dated and the use of global market risk estimates is incompatible with Mr Giles' additive method of calculating the discount rate.

9.159 Under the additive method, the valuation expert must (as Dr Flores has) calculate the elements of the discount rate, including the market risk rate, as if they applied to a company based in the USA and then apply a country risk premium reflecting the additional risks of operating in any other country, here Venezuela.[601] Hence, Mr Giles should have used USA market risk data instead of *global* data. Further, the Fernandez Paper (on which Mr Giles relies) contradicts his very own market risk rate.

9.160 Mr Giles improperly relies on limited survey data to establish Venezuela's country risk premium. In this regard, the Respondent points to the fact that Dr Flores calculated a country-risk rate of 11.26% based on the average of three well-recognised methods: (i) Morningstar/Ibbotson's country-spread model (12.75%); (ii) Ibbotson/Morningstar's country risk rating model (14.27%); and (iii) Professor Damodaran's estimate (6.75%).[602] According to the Respondent, Dr Flores did not apply other recognised models, such as JP

[600] Flores ER2, Paragraph 55.
[601] Flores ER2, Paragraph 106.
[602] Flores ER1, Figure 11.

Morgan's Emerging Market Bond Index (EMBI), which would have resulted in a comparatively higher country risk premium for Venezuela of 12.41%.

9.161 The Respondent contends that Mr Giles' reliance on a survey (rather than established premium risk models), such survey suggesting a country risk premium for Venezuela of 5.5%, is entirely unfounded. Again, the Respondent points to Mr Giles' own evidence that the survey cannot be considered representative.[603] Further, it points to the fact that the Ibbotson/Morningstar country spread model is identified *by the survey itself* as the primary and preferred source among survey participants for determining country risk.[604] The Respondent also contends that Mr Giles' reliance on the survey is inappropriate since he has not made any adjustments for potential bias arising from the fact most survey participants assessed country risk for their own countries, with respect to which they were naturally not neutral, and the authors themselves have no methodology to correct for this type of bias in the survey.

9.162 Mr Giles arbitrarily excludes political risk from his country risk rate. The Respondent contends that, without giving any economic justification, Mr Giles excluded "many of the risks normally associated with the concept of country risk (e.g., expropriation),"[605] "where [he was] instructed that the Treaty offers potential protection."[606] The Respondent contends that this approach is unreasonable and contrary to recent ICSID decisions, including the award in *ExxonMobil* where the tribunal held that "the confiscation risk remains part of the country risk and must be taken into account in the determination of the discount rate."[607] The tribunal there decided that:

> *"[I]t is precisely at the time before an expropriation (or the public knowledge of an impending expropriation) that the risk of a potential expropriation would exist, and*

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[603] Giles ER1, Paragraph B.32.

[604] Resp. PHB, Paragraph 229. Fernandez, Aguirreamolla & Corres, *Market Risk Premium Used in 56 Countries in 2011: A survey with 6,014 Answers* 7 (May 2011) (CRA-27), Table 4. Ibbotson/Morningstar was the most cited source with 256 responses, while surveys were the tenth most cited source with only 33 responses. In fact, as Dr Flores noted, even though "the surveys tell you everyone is using Ibbotson/Morningstar […] Mr Giles doesn't use it". Second (November) Hearing D6.129 (Flores).

[605] Giles ER1, Paragraph B.8; Second (November) Hearing D6.64 (Giles).

[606] Giles ER1, Paragraph B.77.

[607] *Venezuela Holdings v. Venezuela* (RLA-153), Paragraph 365.

this hypothetical buyer would take it into account when determining the amount he would be willing to pay in that moment."[608]

The Respondent contends that the risks of expropriation or nationalisation were clearly known from the outset, since they were specifically addressed in the 1998 Offering Circular.[609] *Further, contrary to the Claimants' approach that BITs lower exposure to country risk (an approach described by the Claimants as "trite")*[610] *the Respondent contends that investors generally do not perceive BITs to lower country risk,*[611] *nor is there any basis for the Claimants' speculation that "surely a buyer would be expected to have BIT protection in a hypothetical arm's length transaction".*[612]

9.163 Mr Giles applies an unreasonable *lambda* factor. The Respondent contends that it is based on "pure speculation".[613] The Respondent relies upon Dr Flores' evidence, in which it says that he has considered FertiNitro's exposure to Venezuelan country risk, but (in contrast to Mr Giles) he has concluded that it is not justified to deviate from the standard *lambda* factor of 1 since, in order to do so, "we need to have very convincing evidence that it is really lower than the average and not higher".[614] Dr Flores says that no such evidence exists. The Respondent characterises Mr Giles' risk assessment as "entirely vague, inaccurate and unbalanced",[615] citing four factors, as listed below.

9.164 First, the Respondent points to the fact that Mr Giles has not provided any calculations or methodology to explain how he arrived at a risk exposure of 40%. It says that, while Mr Giles has identified 22 risk factors, he has failed to explain their relative importance.[616] The Respondent again points to the fact that Mr Giles' exclusion of risk factors allegedly

[608] *Venezuela Holdings v. Venezuela* (RLA-153), Paragraph 365.
[609] Offering Circular – Bond Offering of $250,000,000 between FertiNitro Finance Inc and FertiNitro (8 April 1998) (C-115), page 38.
[610] Second (November) Hearing, Claimants' Opening Statement, Slide 56.
[611] Resp. PHB, Paragraph 232. *See* Lauge Skovgaard Poulsen, "The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence", Yearbook on International Investment Law and Policy (2010), pages 539-542; Jason Webb Yackee, "Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence", 51(2) *Virginia* Journal of International Law (2010) (EO-49), page 397; Second (November) Hearing D6.64-65 (Flores); Flores ER1, Paragraph 126; Flores ER2, Paragraph 122.
[612] Second (November) Hearing D8.33.
[613] Resp. PHB, Paragraph 233.
[614] Second (November) Hearing D7.161 (Flores).
[615] Resp. PHB, Paragraph 234.
[616] Flores ER2, Paragraph 149.

protected by the Treaty has no economic justification but is based, instead, on the instruction of the Claimants' counsel.[617]

9.165 Second, the Respondent says that Mr Giles has underestimated FertiNitro's risk exposure, including risk factors that are entirely unrelated to expropriation risk. For example, the Respondent rejects Mr Giles' evidence that FertiNitro be ranked as "low" for all six risk factors associated with social disorder.[618] Mr Giles makes this ranking because he believes that "it is easy to see how the strategic location of the FertiNitro Plant in a secure industrial complex on the coast would be less risky than a plant located in central Caracas when considering the potential effects of social unrest."[619] However, Dr Flores points to the facts that the Plant is located in an unsafe area, and that while no FertiNitro personnel live at the Plant, social unrest in nearby communities will directly affect FertiNitro since that is where managers and workers commute to and from the Plant. He concludes, on the basis of safety alone that, "if you tell an investor, you can make a dollar of profit investing in a fertilizer plant in Wichita or investing in a fertilizer plant in the José Complex, I think that one dollar in the José Complex would be heavily discounted."[620] Further, due to having all of its production facilities in Venezuela, FertiNitro was inevitably heavily exposed to Venezuelan country risk, despite it receiving most of its revenue from abroad.

9.166 Third, the Respondent points to that the fact that Mr Giles has ignored risk factors that increase FertiNitro's exposure to Venezuelan country risk, including FertiNitro's dependence on a single supplier for natural gas and the fact that, while smaller companies in Venezuela are exempted from certain taxes, as a large company in the formal sector of the economy FertiNitro is exposed to the full range of taxes and hence faces greater risks in the event of tax increases.

9.167 Fourth, the Respondent contends that common sense also speaks against Mr Giles' 0.4 *lambda* factor, which results in an alleged country risk rate for FertiNitro of only 2%. That

[617] Giles ER1, Paragraph B.77.
[618] Second (November) Hearing D7.98 (Giles).
[619] Giles ER 2, Paragraph 1.26.
[620] Second (November) Hearing D6.132 (Flores).

rate corresponds to the rate normally applied to investments in such countries as, for example, Italy.[621] However, as the Respondent poses the question, if you had one dollar to invest would you really be indifferent to investing it in Venezuela or in Italy for the same expected return?

9.168 Mr Giles deducts a 1% liquidity discount from his country risk rate, which the Respondent contends finds no support in standard valuation practice. Dr Flores explained that he has "never seen an expert do what Mr Giles has done here". Indeed, the Respondent contends that Mr Giles' application of a liquidity discount on the country risk rate is based on a misguided interpretation of the market value standard provided in *CMS v. Argentina*, which calls for "an open and unrestricted market."[622]

9.169 However, the requirement of an "open and unrestricted market" does not allow excluding *de facto* restrictions on the sale of the relevant asset that would have existed even irrespective of the disputed acts; and it does not permit the valuation expert to create a world where KOMSA's interest in FertiNitro is worth more than it would be in the absence of the disputed acts. Further, the Respondent contends that Mr Giles' valuation, and his application of a liquidity discount, ignores the fact that KOMSA's equity in FertiNitro is a minority stake in a closely-held company in a small, developing market.

9.170 Further, and moving beyond the flaws in the rate itself, the Respondent contends that the unreasonableness of the Claimants' discount rate is confirmed by the awards in the *ExxonMobil* and *Mobil* cases[623] and the award in *Flughafen v. Venezuela*.[624] The Respondent points to these three awards, all of which applied discount rates similar to those proposed by Dr Giles, namely 18% in the case of the *ExxonMobil* and *Mobil* awards[625] and

[621] *See* Resp. Rej., Paragraph 458.
[622] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (12 May 2005) ("*CMS v. Argentina*") (CLA-130), Paragraph 402. Further, the Respondent contends that the requirement that the market be "open and unrestricted" is not a standard element of FMV definitions. For example, it points to *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012) ("*Occidental v. Ecuador*") (CLA-129), where the FMV definition (cited by the Claimants on Slide 24 of their Opening Statement on Quantum) does not contain this element.
[623] Namely, *Mobil v. PDVSA* (EO-45); *Venezuela Holdings v. Venezuela* (RLA-153).
[624] *Flughafen v. Venezuela* (RLA-154).
[625] *Mobil v. PDVSA* (EO-45), Paragraphs 768, 777; *Venezuela Holdings v. Venezuela* (RLA-153), Paragraphs 367-368.

a nominal discount rate of 17.28% in the case of the *Flughafen* award.[626] In addition, as the ICSID tribunal in *ExxonMobil* stated, "[o]ther arbitral tribunals […] in circumstances comparable to the present case […] have used rates ranging from 18.5% to 21%."[627]

9.171 The Respondent then makes submissions on *Gold Reserve v. Venezuela,*[628] noting that a comparatively lower discount rate than the *ExxonMobil* tribunal was there applied. It explains that "it is not appropriate to increase the country risk premium to reflect the market's perception that a State might have a propensity to expropriate investments in breach of BIT obligations."[629] In any event, the Respondent contends that the Tribunal should not view the *Gold Reserve* award as relevant to the present case since that award concerns a project that has hardly anything in common with the FertiNitro project. The *ExxonMobil* project, in contrast, is very comparable, or even identical, to the FertiNitro project.[630] Due to the similarities of FertiNitro to the project valued in the *ExxonMobil* and *Mobil* awards (and the absence of such similarities with respect to the *Gold Reserve* project), the Respondent submits that the Tribunal should look to the *ExxonMobil* and *Mobil* decisions in determining the reasonableness of the experts' discount rates.

9.172 In contrast to Mr Giles' evidence, the Respondent contends that Dr Flores' approach is straightforward. It points to the fact that, in calculating his discount rate, he consulted the most broadly-accepted sources and applied them in an objective manner. It submits that Dr Flores' approach is certainly not arbitrary, nor "merely a tool that Dr Flores uses to

[626] *Flughafen v. Venezuela* (RLA-154), Paragraph 839. The Respondent notes that the tribunal in *Flughafen* ultimately did not apply a nominal discount rate of 17.28%, but a discount rate in real terms of 14.4% (i.e. not counting inflation) to be consistent with the cash flow projections which (in contrast to the present case) were also conducted in real terms.

[627] *Venezuela Holdings v. Venezuela* (RLA-153), Paragraph 367.

[628] *Gold Reserve v. Venezuela* (CLA-156).

[629] *Gold Reserve v. Venezuela* (CLA-156), Paragraph 841.

[630] In this regard, the Respondent relied on the similarity demonstrated by the following common key aspects: (a) production facilities located in the José Complex; (b) production primarily for export; (c) revenues primarily in US dollars; (d) use of an offtake agreement; (e) project started during "Apertura" period; (f) use of bond offering memorandum from 1998; (g) use of project financing; and (h) the existence of multiple shareholders, including PDVSA.

depress the valuation of the Claimants' investments substantially;"[631] rather, it reflects standard valuation practice.

9.173 Next, the Respondent contends that the Claimants' alleged "reasonableness checks" do not support their valuation of KOMSA's 25% share in FertiNitro. In this regard, the Respondent makes four principal submissions.

9.174 First, the Respondent contends that the October 2008 MOU price, if properly adjusted, confirms Dr Flores' valuation, not Mr Giles' valuation. That is, the October 2008 MOU price (US$ 212.5 million) for KOMSA's interest in FertiNitro, if properly adjusted for purposes of a FMV valuation as at 30 September 2010 (to US$ 55.3 million), supports the Respondent's valuation. Since the value of the Plant depends on its future cash flows, any valuation that relies on earlier value determinations in this regard must be adjusted to account for changes in the price of the goods sold, here ammonia and urea. Thus, the Plant's value in September 2010 cannot be the same as in October 2008, when prices and price projections were significantly higher.

9.175 Second, the Respondent contends that the construction costs of other plants are irrelevant. More specifically, the construction costs of the Morón plant are irrelevant for the valuation of FertiNitro, since these costs say nothing about the value of the FertiNitro Plant. The same is true for the projected construction costs of the Guiria and José plants, which the Claimants raised at the Second (November) Hearing.[632] In fact, due to construction delays or market changes, the value of a construction is not infrequently less than what it cost the owner to build.[633]

9.176 Third, the Respondent contends that the two Advantis reports confirm Dr Flores' valuation. At the same time, they show that Mr Giles' valuation of KOMSA's Equity Valuation at US$ 361 million is clearly overstated. The First Advantis valuation, prepared in the context of settlement negotiations, valued KOMSA's 25% interest at

[631] Second (November) Hearing D8.42.
[632] Second (November) Hearing D6.24.
[633] Second (November) Hearing D5.120.

US$ 30-48 million (or US$ 120-194 million for 100%), assuming the Urea Decree continued to apply, and at US$ 99 million (or US$ 398 million for 100%), in the event that domestic Urea Decree sales ended in 2012.[634]

9.177 The second Advantis report calculated a higher value of US$ 113 million for KOMSA's 25% interest in FertiNitro (or US$ 452 million for 100%) in the event the Urea Decree sales ended in 2012. However, under the assumption that domestic Urea Decree sales would continue (and assuming the same impact as in the First Advantis Valuation), Dr Flores has shown that the second Advantis Valuation decreases to US$ 43.5-62 million (KOMSA's 25% share) or US$ 248-174 million (100% of FertiNitro).[635]

9.178 It follows, so the Respondent contends, that Dr Flores' valuation of KOMSA's interest at US$ 34.6-64.3 million is within the range of, or at least close to, the outcomes of the two Advantis valuations in the range of US$ 30-113 million, whereas Mr Giles' valuation of US$ 361 million is a clear outlier and exceeds the Advantis valuations by approximately three to ten times. Further, Mr Giles makes the new argument that the applicable discount rate would be 13.1%, using Advantis' market risk premium and country risk premium (which are lower than Dr Flores' respective assumptions), together with Dr Flores' risk free rate and beta (which, in turn, are respectively lower than those used in the Advantis reports). The Respondent contends that this arbitrary and unexplained approach makes no sense, describing it as "yet another example of Mr Giles' inappropriate cherry-picking approach that considers only those elements that increase his valuation, while excluding elements that decrease his valuation."[636]

9.179 Fourth, the Respondent contends that the Claimants' new argument based on FertiNitro's book value is irrelevant. The Respondent contends that, at the Second (November) Hearing, the Claimants raised the new argument that Dr Flores' valuation of KOMSA's share in FertiNitro at US$ 34.6 million is understated since the book value of KOMSA's

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[634] *See* First Advantis *Report* (R-86), pages 5, 9 and 19.
[635] Advantis Report entitled "Valoracíon de FertiNitro" (July 2011) (C-157) ("Second Advantis Report"). See Dr Flores' presentation at the Second (November) Hearing, Slide 55.
[636] Resp. PHB, Paragraph 252.

25% of FertiNitro in 2010 allegedly was US$ 168.1 million.[637] However, the book value is irrelevant when valuing a company based on the FMV standard. Indeed, the Respondent points to what the Tribunal queried at the Hearing, namely that "the willingness of the seller to sell is not necessarily connected in any causal or existential way with the 'value', understood as an objective factor, of the assets that were taken."[638]

(iv) KNI's Valuation of its Interest in the Offtake Agreement Claim is Overstated

9.180 The Respondent contends primarily that KNI's contractual rights under the Offtake Agreement are not an "investment" and/or that there has been no expropriation of such rights so that no compensation is therefore due to KNI. The Tribunal has however decided otherwise the issue of jurisdiction and the majority of the Tribunal as regards liability: see above. In these circumstances, the Respondent here contends that the Tribunal should determine such compensation based on Dr Flores' valuation of US$ 56.2 million and not based on Mr Giles' overstated valuation of US$ 206.5 million. Neither Dr Flores nor the Respondent contend that, assuming jurisdiction and liability decided in favour of KNI, that KNI has suffered no loss at all from its expropriated interest in the Offtake Agreement.

9.181 First, the Respondent contends that the Claimants make the same inappropriate assumptions regarding sales volumes and the discount rates as in their valuation of KOSMA's interest in FertiNitro.

9.182 Second, the Respondent contends that the Claimants' valuation period improperly includes a sixteen-month period during which KNI suffered no losses. It says that the valuation of KNI's rights under the Offtake Agreement must necessarily, for reasons of both law and fact, exclude the volumes of production that KNI obtained between October 2010 and February 2012 under the Offtake Agreement. This is so because (so the Respondent contends) it is undisputed between the Parties that KNI continued purchasing fertilizer product from FertiNitro at Offtake Agreement prices during those sixteen months. The Respondent points to the fact that Mr Giles performs his valuation as if these purchases

[637] Resp. PHB, Paragraph 253, referring to Second (November) Hearing D5.24 (Fietta).
[638] Second (November) Hearing D5.36 (Feliciano).

never happened and hence calculates damages for production volumes that KNI never lost. Such double-compensation must be rejected irrespective of which valuation method is applied. In contrast, the Respondent submits that Dr Flores looks at "what actually happened" and accordingly excludes KNI's purchases during October 2010 to February 2012 from his valuation.

9.183 Third, the Respondent submits that the Claimants' valuation is based on unrealistic factual assumptions, namely:

(a) *The Claimants inappropriately calculate KNI's lost profits rather than the value of KNI's alleged rights under the Offtake Agreement;*

(b) *the Claimants fail to prove that they would never have been able to replace the FertiNitro Offtake through purchases on the open market; and*

(c) *the Claimants' lost profits calculations are flawed and highly speculative.*

9.184 As to (a), Mr Giles calculates KNI's lost profits, rather than the value of KNI's alleged rights under the Offtake Agreement. He further assumes that, following the termination of the Offtake Agreement, KNI could then and forever replace its Offtake Agreement quantities only through purchases at NOLA and TAMPA prices, thus losing any and all opportunities to resell ammonia and urea replacement quantities at a profit. The Respondent contends, however, that Dr Flores properly calculates the value of KNI's alleged rights under the Offtake Agreement as the difference between the mid-Caribbean price for ammonia and urea on the open market, on the one hand, and the more favourable Offtake Agreement Price (namely, low Caribbean price minus 3% urea or 4% ammonia discount), on the other hand. The Respondent says that the Claimants' attempt to dispute the existence and credibility of a mid-Caribbean price is "astonishing",[639] since it was their own expert witness (Mr Giles) who first discussed this price in his first expert report.[640]

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[639] Resp. PHB, Paragraph 259.
[640] Giles ER1, Paragraphs 4.14-4.15; D.3.

9.185 As to (b), the Respondent says that developments in the USA and global fertilizer markets known before the valuation date indicate that KNI would have been, and in fact likely was, able to procure ammonia and urea replacement quantities at below NOLA/TAMPA costs. As a consequence of the substantial increase in the USA's domestic supply of inexpensive natural gas (which is the key component of both ammonia and urea) since early 2008, according to the Claimants' own sources, both domestic and foreign companies have started new fertilizer plants, or reactivated plants mothballed earlier, in the USA. This development results in an increase of both USA and global supply of fertilizer product, as well as a decrease of USA demand for imported (Caribbean) fertilizer, and elsewhere. Indeed, the Respondent contends that the Claimants have recognised the new benefits of producing fertilizer product in the USA.[641]

9.186 In this regard, the Respondent contends that USA and international sources expect that new investments into the USA fertilizer industry will result in between 3 to 7 million tons of additional nitrogen fertilizer capacity in the USA.[642] The Respondent submits that the significant increase in the USA's domestic fertilizer supply has already begun to impact USA import demand. It follows, so the Respondent says, that, since the USA was the major importer of Caribbean fertilizer product, a decrease in US importation will result in more Caribbean product being available for purchase in the Caribbean. The Respondent points, amongst other matters, to a report that Trinidad will be "worst affected among them all" by an overall decrease of US import needs.[643] Further, the Respondent contends that the data it provided regarding the impact of the US shale gas revolution on the global fertilizer markets is reliable. Finally, Mr Sorlie testified that there is an opportunity to buy ammonia and urea spot tons on the Caribbean market.[644] Even if such opportunity were limited, the Respondent contends that this would contradict the Claimants' allegations that they were not able (now and forever) to replace any of the FertiNitro offtake quantities at Caribbean

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[641] First (September) Hearing D2.125-126 (Sorlie); Koch Nitrogen Company, LLC, Koch Nitrogen to Build New Urea Plant and Increase Existing Production (15 May 2013) (EO-71), page 1.
[642] CEIFIC Position Paper, The implications of the shale gas revolution for the European chemical industry (15 March 2013) (R-88).
[643] eAmmonia, Is Ammonia Boom in North America Peril for Trinidad Ammonia Plants? (21 May 2013) (R-87).
[644] First (September) Hearing D2.119 (Sorlie).

open market prices. It follows, so the Respondent submits, that the Claimants, who carry the burden of proof, have failed to provide the required evidence to discharge that burden.

9.187 Third, the Respondent contends that the Claimants' lost profits calculations are "flawed and highly speculative".[645] In this regard, the Respondent points to the fact that the Claimants simply assume that KNI would have been able to export to the USA the same amounts of fertilizer product at the same prices as in the past. However, the Respondent submits that this entirely ignores the important changes in the USA fertilizer market, which suggest that the USA's demand for foreign fertilizer product will further decrease and NOLA/TAMPA prices will decline, resulting in reduced profit margins and reduced sales volumes for KNI over the years. It points to Mr Giles' acknowledgement of "the drastically increased gas reserves in the US and the resulting reduction in price and demand for imported LNG in the US."[646] The same as with respect to LNG holds true with respect to ammonia and urea.

9.188 Further, the Respondent contends that Mr Giles' lost profits calculations are unreliable since the shipping costs he accounts for are highly speculative. Mr Sorlie's evidence that Mr Giles' cost estimate is reasonable cannot be relied upon, as he relied only on invoices for two years (2009 and 2010), which is clearly too short a period for any proper assessment.[647] Instead, as Dr Flores explained, "in the shipping industry, as commodity prices rose, 2006, 2007 and 2008, shipping costs also increased dramatically, and then they fell a lot in 2009 and 2010. I find it a little bit suspicious that they have only given us a little bit of data for 2010, just one number that they say they have calculated internally for 2009, and no data whatsoever for 2007/2008".[648] In addition, Mr Giles' calculation of shipping costs is also said to be "sloppy", as he has incorrectly used shipment data to Taft, Louisiana, rather than Tampa, Florida, to calculate cost of transporting ammonia from José to Tampa.

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[645] Resp. PHB, Paragraph 266.
[646] Giles ER1, Paragraph 2.16.
[647] cf. Second Witness Statement of Jim Sorlie (26 July 2013) ("Sorlie WS2"), Paragraph 23 (Table 1).
[648] Second (November) Hearing D6.139 (Flores).

9.189 Finally, the Respondent contends that Mr Giles ignores any costs associated with the business, such as overhead costs. The Claimants' allegation that overhead costs were immaterial to their cost calculations remains unproven.

(5) The Tribunal's Analysis and Decisions

9.190 *Principal Issues*: Having regard to the submissions of the Parties' summarised above, there are, in relation to the question of compensation under Article 6 of the Treaty, three principal issues that arise for the Tribunal's determination, namely:

Issue (1): What is the appropriate standard of compensation for unlawful expropriation under Article 6 of the Treaty?

Issue (2): What is the compensation payable to KOMSA in respect of its expropriated interest in FertiNitro?

Issue (3): What is the compensation payable to KNI in respect of its expropriated interest in the Offtake Agreement?

9.191 Each of these issues raises many sub-issues, the nature of which is plain from the Parties' extensive written and oral submissions, summarised above. Those sub-issues will be addressed to the extent appropriate below, as part of the three principal issues.

Issue (1): What is the Appropriate Standard of Compensation?

9.192 The Tribunal begins with Article 9(3) of the Treaty. It requires the Tribunal to limit itself to awarding compensation for damages payable by the Respondent to KOMSA or KNI where the Tribunal has determined that the Respondent has failed to comply with an obligation under the Treaty. As to such compensation for a failure to comply with Article 6 of the Treaty, that provision refers, for a lawful expropriation, to "effective and adequate compensation" that "shall amount to the market value of the investment expropriated immediately before the expropriatory action was taken or became public knowledge, whichever is the earlier." Ostensibly, all Parties agree that such a market value, or fair market value (FMV), is the appropriate standard of compensation to be applied to both KOMSA's and KNI's claims for compensation against the Respondent (see the summaries of the Parties' respective submissions above).

9.193 In the circumstances of this case, for both KOMSA and KNI, that date for such valuation is 10 October 2010 immediately prior to the Expropriation Decree and the responsible Minister's public statements (which are to be treated as one composite event) on the 11 of October 2010. The Parties have used the date of 30 September 2010. For the Tribunal, the difference is not material for the purpose of this Award. The date of 10 October 2010 or 30 September 2010 (as used by the Parties) is the relevant date for assessing compensation due to KOMSA and KNI, without the benefit of hindsight based on subsequent factors. The Tribunal has taken cognisance of the unresolved debate in other arbitrations as to whether and, if so, to what extent, factors subsequent to unlawful expropriation (in its different forms) up to the date of the award may be relevant to the assessment of compensation, particularly the decisions in *Quiborax v. Bolivia* and *Burlington v. Ecuador*.[649] It need not enter that debate here, given the express terms of the Treaty as applied by the Parties.

9.194 In this case, it is unnecessary for the Tribunal to decide upon any difference between an unlawful expropriation in breach of Article 6 of the Treaty and an expropriation under Article 6 that would not be unlawful if the Contracting Party had made provisions "for effective and adequate compensation". Whilst other tribunals have laboured in deciding this controversial question under international law and treaty wording, the Parties have here agreed that, whatever the correct answer may be, the relevant compensation to KOMSA and KNI should be based on the fair market value of the expropriated investment as at the relevant date absent, or "but for", any violations of the Treaty by the Respondent (the "FMV standard"). Thus, the answer for unlawful expropriation is the same as for lawful expropriation, under Article 6 of the Treaty. Thus, here, compensation to KOMSA and to KNI should be based on the same FMV.

9.195 For their respective methodologies, as quantum experts, both Mr Giles (for the Claimants) and Dr Flores (for the Respondent) refer to a fair market value (FMV), as being the value

[649] *Quiborax S.A. and Non Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award (16 September 2015) (RLA-157); *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID ARB/08/5, Decision on Reconsideration and Award (7 February 2017).

at which a willing buyer and a willing seller would exchange an asset in cash, acting at arms' length in an open and unrestricted market when both have reasonable knowledge of the relevant facts.

9.196 Accordingly, this FMV standard, as thus formulated, is common ground between the Parties and their quantum experts as the methodology for compensation for this case.[650] The Parties' approach is consistent with decisions on quantum methodology, such as *CMS v. Argentina* and *Occidental v. Ecuador*.[651] In the circumstances, the Tribunal is content to adopt the Parties' common approach for both KOMSA and (by a majority) KNI.

9.197 However, in calculating the FMV for KOMSA's interest in FertiNitro, the Parties' two expert witnesses, Mr Giles and Dr Flores, applied methodologies producing starkly different results, as to which the Tribunal has experienced reservations, as explained below. In calculating the FMV of KNI's interest in the Offtake Agreement, the same two expert witnesses have also employed different assumptions, with Mr Giles calculating lost profits from 2010 onwards (essentially calculating Tampa/Nola resale prices less Offtake Agreement price less transportation costs); and with Dr Flores excluding the period before 28 February 2012 (essentially calculating price differentials with the open Caribbean market).

Issue (2): What Compensation is Payable to KOMSA in Respect of Its Expropriated Interest In Fertinitro?

9.198 In their respective FMV calculations, as summarised above, the Parties' expert witnesses differ significantly, in particular, as to applicable discount rates and FertiNitro's production and costs. The Tribunal refers to these experts' points of disagreement in Table 2 above.

9.199 As to discount rates, Dr Flores and the Respondent advance a greater market risk rate, country risk rate, *lambda*, "BIT Risks" and liquidity adjustment. As to the FertiNitro Plant's production and costs, Dr Flores and the Respondent invoke existing defects in the construction of the FertiNitro Plant, poor maintenance in the Plant's early years of

[650] Second (November) Hearing D1.34; Third (June) Hearing, Slide 3.4 (Respondent).
[651] *CMS v. Argentina* (CLA-130), Paragraph 402; *Occidental v. Ecuador* (CLA-129).

operation, excessive unplanned shutdowns of the Plant, high costs of maintenance owing to the Plant's defective history and condition; problems with the supply of gas and electricity to the Plant; and Venezuela's generally adverse economic situation.

9.200 The Respondent also accuses Mr Giles of cherry-picking data, in particular as to costs of natural gas, turnarounds, maintenance, capital expenditure and, as to production data, the exclusion of the years 2009 and 2010. The Respondent rejects Mr Giles' reasonableness checks as to the MOU of October 2008, the construction costs of other plants elsewhere and the book value of FertiNitro.

9.201 As to discount rates, Mr Giles uses different inputs. As market risk, he uses an "adjusted" historical premium which, with other differences, results in a total discount rate of 10.1%, in contrast to Dr Flores' rate of 20.4%. As regards figures for production and costs, Mr Giles used actual values but, where these were thought by him to be unreliable, budgeted figures (particularly for 2008, 2009 and 2010). Mr Giles was clearly troubled by the Plant's historically high level of actual turnaround and maintenance costs.

9.202 As to sanity checks, Mr Giles used a book value for FertiNitro's assets, calculating KOMSA's 25% interest at US$ 168.1 million (but also recognising that a book value of assets alone does not value FertiNitro as a going concern). As to FertiNitro's historical construction costs, these equated to US$ 273 million for KOMSA (at 2001 prices). As to the MOU valuations in 2008 for KOMSA's 25% interest, Mr Giles adjusted these figures to exclude the impact of the Urea Decree and reversed the effect of FertiNitro's new and increased taxes, arriving at a figure of US$ 360.8 million.

9.203 In the Tribunal's view, there is no cogent evidence that any MOU price was actually "agreed" in 2007 or 2008 between Pequiven and KOMSA. The first offer came via an email message of 9 October 2007 from Mr Toro of Pequiven with a valuation of US$ 1.175 billion for 100% of the equity of FertiNitro, less the amount outstanding to its banks and bondholders (which he put at US$ 450,000, presumably US$ 450 million).[652] On 7 November 2007, KOMSA responded with its draft MOU and a valuation of US$1.210

[652] Email from F. Toro to B. Gwaltney and T. Parra re: FertiNitro Negotiations (9 October 2007) (C-90).

billion less the debts to the banks and bondholders plus the excess cash in FertiNitro.[653] Discussions were halted between these parties in early 2008. However, Pequiven came back again in October 2008 with a revised draft MOU which provided for a payment of US$ 212.5 million to KOMSA for its share of FertiNitro's equity.[654] Ultimately, no MOU or valuation was ever agreed or signed between KOMSA and Pequiven. Pequiven declared that the purchase of the private shareholders' shares in FertiNitro was no longer a priority. However, Mr Parra (of KOMSA) testified in his witness statement (paragraph 69) that KOMSA's representatives understood that there was "no real alternative but to accept Pequiven's proposal."[655] In these circumstances, the only figure equating to any "agreed' valuation was the sum of US$ 212.5 million proposed by Pequiven to KOMSA in October 2008 (which maintained the Urea Decree and the various taxes). As indicated, however, this figure was never in fact agreed between KOMSA and Pequiven or the Respondent.

9.204 In these circumstances, the Tribunal attaches no weight to these incomplete negotiations in 2007 and 2008 for the purpose of arriving at the appropriate FMV much later in September/October 2010.

9.205 More significantly, by the required valuation date of 10 October 2010 (or 30 September 2010) under Article 6 of the Treaty, the FertiNitro Plant was not what it had been in 2007 and 2008. It was in a distressed condition operated by a troubled company with a divided board of directors, within a deteriorating national economy. It was also badly run, poorly maintained, mismanaged and with costs "spiralling out of control" in the words of its board of directors on 5 August 2010. There were by now high inflation rates in Venezuela; and, with the devaluation of Venezuelan currency, its US$ denominated costs had increased significantly (albeit to an extent reducing local costs). There was also growing industrial and social unrest impacting adversely upon the operation of the FertiNitro Plant, as Mr Gwaltney testified.[656] The Tribunal does not therefore consider FetiNitro's state on 10

[653] KOMSA Draft Memorandum of Understanding (non-dated) (C-92). This draft had earlier been presented by Messrs Parra and Gwaltney (for KOMSA) to Messrs Toro and Lazo (of Pequiven) at a meeting on 7 November 2007 (*see* Gwaltney WS1, Paragraph 112).
[654] Pequiven Draft Memorandum of Understanding (non-dated) (C-93).
[655] *See* Cls. Mem., Paragraphs 144-152.
[656] Gwaltney WS1, Paragraphs 60ff.

October 2010 to be comparable to its earlier state in 2007-2008, thereby making earlier data materially irrelevant, including historical construction costs, higher production levels and (as already decided above) the 2007 or 2008 draft MOU valuations.

9.206 In the circumstances, the Tribunal does not consider that either expert witness, for all their obvious professional skill and industry, has succeeded in establishing a reliable fair market value of KOMSA's interest in FertiNitro. Overall, the experts' differences can be mostly attributed to wide-ranging disagreements as to the relevance and scope of factual inferences and factual assumptions. The Tribunal has summarised their approach at length above, from which it can be seen that each severely criticises the other's analysis and conclusions. Whilst insufficient to establish on firm ground their own approach, parts of that criticism suffice to destroy the Tribunal's confidence in the other's approach as an expert witness on quantum. It is as if two boxers in the ring knocked each other out simultaneously, with neither winning the contest.

9.207 The Tribunal therefore turns to the two Advantis reports, particularly its second report of July 2011, which contains two scenarios. The first scenario appears to be a mere revision of the first report of May 2011, as no explanation is given for the figure of US$ 113 million as the value of KOMSA's 25% interest in FertiNitro.[657] Using a DCF methodology to arrive at a FMV and taking into account several factors not considered in the first report this "second scenario" valued KOMSA's 25% interest in FertiNitro at US$ 140.25 million (being 25% of a total value of US$ 561 million) as at September 2010, based only upon data available up to 2010. Neither KOMSA nor the Respondent accept any of Advantis' valuations; but the Parties and the Parties' quantum expert witnesses (Mr Giles and Dr Flores) referred to the Advantis reports on numerous occasions for different purposes.

9.208 The Advantis reports take the form of Power Point presentations, prepared in the Spanish language. Although in part laconic, possibly incomplete and with their authors not made available to the Tribunal as witnesses in this arbitration, the Tribunal considers that these

[657] First Advantis Report (R-86).

reports suffice well for present purposes, particularly the "second scenario" in the second report.

9.209 In its first report of May 2011, Advantis valued KOMSA's interest as US$ 30-48.5 million if the Urea Decree continued (on different scenarios), and as US$ 99.5 million if it ceased at the end of 2012.[658]

9.210 In its second report of July 2011, Advantis valued KOMSA's interest on two further scenarios. Under a first scenario, calculated on a base value of US$ 452 million, Advantis valued that interest at US$ 113 million.[659] Under the second scenario, Advantis calculated a base value for FertiNitro of US$ 561 million, adjusted from the base value of US$ 452 million to take account of six factors, including higher prices for ammonia and urea (some of these other factors increasing and some decreasing the value of Fertinitro, resulting in a net increase of US$ 109 million). This second scenario in Advantis' second report valued KOMSA's interest in FertiNitro as US$ 140.25 million, being 25% of US$ 561 million.[660]

9.211 These six factors were: adjusted prices for ammonia and urea as set out in a separate appendix for 2011 to 2016 (+ US$ 125 m); 10% as discounts for new investments as set out in a separate appendix for 2011 to 2016 (+ US$ 4m); tax credits reducing the effective income tax rate for 2007-2010 as set out in a separate appendix (+ US$ 35m); increased depreciation (+ US$ 59m); adjusted exchange rates for PDVSA's and Pequiven's debts as set out in a separate appendix (- US$ 41m); and adjusted inflation rates for income tax (- US$ 68m). The Tribunal accepts these adjustments.

9.212 The first Advantis report was discussed with FertiNitro's foreign shareholders. It was received and studied by KOMSA at the time. Mr Gwaltney (for KOMSA) testified that both Advantis Reports were provided to KOMSA by Pequiven and that the second report followed his letter to Pequiven expressing criticisms of the first report.[661] It does not appear

[658] *First Advantis Report* (R-86), pages 9 and 19, calculated on a base value of FertiNitro of US$ 398 million.
[659] *Second Advantis Report* (C-157) (English version), page 2.
[660] *Second Advantis Report* (C-157) (English version), page 4.
[661] Second Witness Statement of Brent W. Gwaltney (20 August 2013), Paragraph 40.

from the evidence available to the Tribunal that KOMSA discussed the second report with Pequiven or Advantis at the time.

9.213 The Tribunal has considered the different comments on the Advantis Reports made by the Parties and their respective experts, Mr Giles and Dr Flores.

9.214 By reference to the two Advantis' reports, Dr Flores valued KOMSA's interest as US$ 34.6 million if the Urea Decree continued, and at US$ 64.3 million if it ended in 2012. As also submitted by the Respondent at the Third (June) Hearing:

> *"[…] the Advantis report is a better sanity check than the MoU prices, simply due to the fact that it contains a valuation as of September 2010, which is the same time that we are looking at for FertiNitro today and under the BIT. The Advantis valuations, both of them – the first one in May 2011 and the second one in July 2011 – both support that Dr Flores's [sic] valuation of $34.6 million is a lot more reasonable than Mr Giles's valuation of $361 million. Here we are speaking about the 25% share of KOMSA in FertiNitro."* [662]*;*
> *and later*
> *"Advantis only discussed the discount rate in the May 2011 valuation, not in the July 2011 valuation. However, since both of them refer to the value of FertiNitro as of September 2010, it is reasonable to assume that Advantis used the same discount rate in both of those reports. Advantis calculated the equity and market risk premium as the average of the return on the S&P 500 over the risk-free rate in the previous ten years. This is not a common estimation method. And when discussing, when thinking about Advantis's [sic] equity risk premium, it is important to understand that in carrying out their calculation, Advantis uses a higher beta and a higher risk-free rate, so overall that has an effect on its utility as a point of comparison. But it is more meaningful to compare overall discount rates with those of Mr Giles and Dr Flores than it is to look at any of the single components in isolation, as the Claimants have done. You need to look at it as a whole to figure out whether it is reasonable, rather than cherry-picking individual points from the Advantis report to try and make your position."* [663]

9.215 In contrast, Mr Giles (inter alia) valued KOMSA's interest at US$ 361 million, with a separate impact from the Urea Decree calculated as US$ 22.4 million. In its submissions,

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[662] Third (June) Hearing D2.8 (Ms Teveni).
[663] Third (June) Hearing D1.280ff (Mr Ryan).

KOMSA compared Dr Flores' calculations unfavourably with those made by Advantis, as to market risk premium (3.5% v. 6.7%), generic country risk premium (7.6% v. 11.26%), and the FertiNitro Plant's daily production of ammonia (96% vs 91.3% of nameplate); and production of urea (98% v. 90.8% of nameplate). KOMSA finds support in the Advantis reports for Mr Giles' approach; but it rejects the Advantis reports as a 'sanity check'. However, as eventually submitted by KOMSA at the Third (June) Hearing:[664]

> *"The Advantis report [of July 2011] is not really usable as a sanity check. Advantis was retained by Venezuela -- it wasn't retained jointly, it wasn't retained as an independent consultant -- and therefore its work is not indicative of fair market value. […] There are some interesting features in Advantis that I think bear looking at. The market risk premium that Advantis uses is significantly lower than Dr Flores, and closer to Mr Giles. The generic risk premium, while being higher than Mr Giles's [sic] premium at 6%, is still materially lower and further away from Dr Flores. The production levels here are quite high, much higher than Dr Flores: 96% nameplate for Advantis, and 91.3% for Dr Flores, that's for ammonia; and 98% on urea, 91% for Dr Flores. This is quite telling because Advantis was retained by Venezuela to do a valuation, and on many of these important criteria they have chosen values that are much closer to Mr Giles's [sic] independent valuation than they are to Dr Flores's [sic]. So I think that does bear looking at […]".*

9.216 The Tribunal considers that it is inappropriate to cherry-pick different parts of the Advantis Reports and thereby seek to adjust, one way or another, the several factors invoked by Mr Giles and Dr Flores. This exercise would be difficult, if not impossible for the Tribunal, as indeed each expert was criticised for doing so by the opposing Party. Moreover, it would constitute, inevitably, a subjective and self-serving exercise. In the Tribunal's view, the Advantis reports must be accepted as they stand, with the Tribunal preferring to accept, as a whole, the second scenario in the second Advantis report read with the remainder of the Advantis reports. At the very least, it is fair to conclude that Pequiven would not have submitted to the other shareholders the second Advantis report if it did not consider that it was proposing a fair market value for FertiNitro.[665] Moreover, it is worth noting, as stated

[664] Third (June) Hearing, D1.236-237 (Mr Beckett),
[665] First (September) Hearing D3.86-87 (Barrientos).

by Mr Barrientos in his oral testimony, that "two of the shareholders accepted that valuation and these were the shareholders with which we were able to reach a friendly settlement."[666]

9.217 The Tribunal can state shortly the result of its analysis of the Parties' respective submissions, together with the expert testimony of their respective witnesses, Mr Giles and Dr Flores. Both generally (as already indicated above) and ostensibly based on the Advantis Reports, the Tribunal can place no reliance in such divergent testimony and submissions, each producing such extreme and incompatible results based on materially different data, inferences and assumptions. In brief, the Tribunal regards Dr Flores' valuation as far too low; but it also regards Mr Giles' valuation as too high. It has also experienced difficulties in adopting at face value either expert's methodologies when, with only slight factual variations between them, the end-result can be skewed so radically one way or the other.

9.218 The Tribunal therefore returns to the second scenario in Advantis' second report of July 2011, as a contemporary, independent professional valuation (albeit by valuation experts retained by Pequiven, in the absence of an agreement with the other shareholders on a joint appointment of a valuator) calculated as at the relevant date without material hindsight. In the Tribunal's view, this second report's second scenario provides the best available answer to the issue under consideration under Article 6 of the Treaty, namely the (fair) market value of KOMSA's interest in FertiNitro immediately before its unlawful expropriation by the Respondent on 11 October 2010.

9.219 At the Third (June) Hearing, the Tribunal did request the Parties for the software versions of their experts' calculations, in the form of an agreed interactive matrix, so as to attempt to make its own inputs and test differing results.[667] To the Tribunal's regret, by joint email messages dated 12 July 2016 the Parties declined this request as impracticable.[668] In

[666] First (September) Hearing D3.87 (Barrientos).
[667] Third (June) Hearing D2.110-111.
[668] See the Parties' respective email messages dated 12 July 2016 ("The parties are in agreement that preparing the requested table at a level of detail useful to the Tribunal would be a highly complicated, time consuming, and costly endeavor.").

particular, it has made it impossible for the Tribunal to test the experts' respective conclusions based on different factual assumptions.

9.220 As to sanity checks, the Tribunal acknowledges that its FMV approach based on this second scenario leads to a significant reduction in KOMSA's claim and Mr Giles' valuation. Conversely, it represents a very significant increase from Dr Flores' valuation (US$ 34.6m). The Tribunal has considered other reality checks invoked by the Parties; but it considers none materially helpful. In particular, whilst Mr Giles' book value of US$ 168.1 million might broadly support the Tribunal's approach, the Tribunal recognises that such a book value cannot correspond to the FMV of a going concern. Similarly, the Tribunal accepts the Respondent's criticisms of Mr Giles' other reality checks, including construction costs elsewhere.

9.221 Accordingly, in accordance with Article 6 of the Treaty the Tribunal assesses, as best it can on the available materials, that the fair market value of KOMSA's 25% expropriated interest in FertiNitro as at 10 October 2010 (or 30 September 2010) was US$ 140.25 million.

Issue (3): What, If Any, Compensation is Payable to KNI In Respect of Its Expropriated Interest in The Offtake Agreement?

9.222 It is necessary to recall the basis on which this question arises. First, the Tribunal (by a majority) has found the Respondent liable under Article 6 of the Treaty for the unlawful indirect expropriation of KNI's interest in the Offtake Agreement, as claimed by KNI. KNI's claim is a claim advanced exclusively under the Treaty, under the Treaty's provision for ICSID arbitration. It is not advanced as a contractual claim under KNI's Offtake Agreement with FertiNitro. The Respondent is not a party to the Offtake Agreement. The Tribunal has no jurisdiction in regard to any contractual claim by KNI against FertiNitro under the Offtake Agreement by itself. Indeed the Offtake Agreement contains its own provisions for commercial arbitration and municipal (not international) law. Second, the issue of liability under Article 6 is legally distinct from the issue of compensation for such liability. Whilst the former derives from the latter, the issue of compensation is, of course, materially different under the Treaty. Third, the Parties and their respective experts were agreed that KNI's loss was to be assessed by reference to the FMV of its interest in the

Offtake Agreement as at the relevant date required under the Treaty, namely 30 September 2010 (or 10 October 2010). None advocated for a contractual measure of damages; and, significantly, Dr Flores' did not arrive at a figure of zero compensation. Last but not least, as a matter of procedural fairness to all Parties, it is necessary to limit the issues decided in this Award to those raised by the Parties based on the legal submissions and evidential materials made and adduced by them in this arbitration.

9.223 One major issue between the Parties relates to the exclusion or inclusion of KNI's purchases from the FertiNitro Plant during the period from 11 October 2010 to 28 February 2012. The other major differences are the Parties' different assumptions regarding markets prices, sales volumes from production from the FertiNitro Plant, discount rates and the relevant cut-off date for ex-post factors. The Tribunal refers to the Parties' expert witnesses' points of disagreement in Table 3 above. Their resulting differences are stark: Mr Giles estimating KNI's compensation as US$ 206.5 million; and Dr Flores as US$ 56.2 million.

9.224 At the outset, the Tribunal notes that Mr Giles' expert testimony, as regards factual and market assumptions, was significantly supported by the testimony of Mr Sorlie. Mr Sorlie was an impressive witness; and the Tribunal found him reliable, both in his written statement and as an oral witness. There was no equivalent rebuttal factual witness called by the Respondent. Accordingly, whilst Mr Giles' expert testimony was here supported by the factual evidence, the same cannot be said as regards the expert testimony of Dr Flores.

9.225 As to the issue of the period from October 2010 to February 2012, the Tribunal has found in favour of KNI's case, as decided in Part VII above, in regard to liability. As to the cut-off date for factual assumptions, the Tribunal likewise decides against the Respondent's use of factors occurring after 10 October (or 30 September) 2010 derived only with the benefit of hindsight, particularly in regard to recent developments of shale gas production in the USA, the increased supply of ammonia and urea in the world market and differential shipping costs. These are ex-post factors irrelevant to assessing compensation at the relevant date required under the Treaty (30 September or 10 October 2010).

9.226 In the Tribunal's view, KNI's purchases during the period from 11 October 2010 to 28 February 2012 operated to reduce KNI's loss assessed at the relevant date. It was highly improbable, if not actually impossible, for the FertiNitro Plant to deliver to KNI during this period both those purchases and the offtake to which KNI was entitled under the Offtake Agreement, in addition to its other local commitments. The FertiNitro Plant did not have that spare reliable capacity for ammonia and urea. In these circumstances, whilst those purchases did not take the place of such offtakes, they nonetheless operated as a reasonable form of mitigation so as to reduce KNI's loss resulting from its expropriated interest in the Offtake Agreement. The Tribunal estimates the value of this factor at US$ 21.7 million, based on Mr Giles' testimony at the Second (November) Hearing.[669] Accordingly, in the Tribunal's view, KNI's claim must be reduced by US$ 21.7 million.

9.227 As to other major issues, the majority of the Tribunal considers that KNI and Mr Giles are correct in identifying the principal replacement supply as US Gulf at US Gulf prices (NOLA for urea and Tampa for ammonia) in a liquid market, rather than a mid-Caribbean market at mid-Caribbean prices in a very limited market. Hence, the majority of the Tribunal finds, there was no replacement supply available to KNI at prices comparable to the Offtake Agreement for KNI.

9.228 In particular, the majority of the Tribunal accepts the factual testimony of Mr Sorlie, upon which Mr Giles based his expert evidence. It merits citing at some length. In his second witness statement, Mr Sorlie testified:

> *"12. […] KNI is a committed offtaker from three ammonia production plants in Trinidad and Tobago. Even when KNI was purchasing FertiNitro tons its North American demand for products exceeded its Caribbean supply volumes. As such, KNI always sought and continues to seek to purchase any profitable nitrogen fertilizer that becomes available on a FOB basis in the Caribbean. However, because of the long-term offtake arrangements described above and the fact that Trinidad and Tobago exporters already have established customer networks, very few Caribbean tons have been available over the years for purchase by KNI.*

669 Second (November) Hearing, Tim Giles' presentation, Slide 24.

13. Since 2006, KNI has been able to purchase only a small amount of Caribbean sourced tons outside of its long term offtake arrangements. The primary example was KNI's ability, between 2006 and 2010, to purchase a total of 211,000 metric tons of ammonia from one Trinidad and Tobago plant partially owned by Terra Industries. This volume equates to approximately 1% of the total Trinidad and Tobago ammonia production during this period. In 2010 CF Industries acquired Terra Industries. This resulted in almost all of the excess ammonia volumes from that plant being transported to the US by CF Industries for use as raw materials in its North American business or for sale to CF customers. As a result, since 2011 KNI has only been able to purchase 3,500 metric tons of ammonia which equates to approximately 0.1% of the total Trinidad and Tobago ammonia production.

14. For the aforementioned reasons, it is incorrect for Dr. Flores to assume that KNI can replace lost FertiNitro offtake volumes by purchasing other products on an FOB basis in the Caribbean. Instead KNI's alternative is to purchase ammonia and urea at prices equivalent to NOLA and Tampa prices."[670]

9.229 At the First (September) Hearing, Mr Sorlie was cross-examined by the Respondent, inter alia, as follows:

"Q. […] Am I correct [in] assuming that KNI has continued supplying the US customers that it originally supplied with under the Offtake Agreement?

A. Like I have said previous(ly), we continued to make sales in the United States because we have a very competitive break bulk distribution business that is a profitable business, and so we're going to continue to make those sales with or without the FertiNitro offtake, and without the FertiNitro offtake we have to source those tonnes from other origins to supply that market, to supply that short we have.

Q. So you are saying that you have been able to replace the amounts that you were, in the past, obtaining under the Offtake Agreement, by product from other sources?

A. Yes, at a NOLA and Tampa price structure.

Q. So you're saying you're now purchasing those same products on the NOLA and Tampa prices?

A. Since we do not have the FertiNitro offtake, we have had to go into the market and we have to buy those tonnes in, and we are doing that at a NOLA and a Tampa price equivalent."[671]

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[670] Sorlie WS2, Paragraphs 12-14.

[671] First (September) Hearing D2.168ff (Sorlie).

9.230 The Respondent did not accept Mr Sorlie's evidence; but it adduced no cogent factual evidence of its own. As already indicated, the Tribunal accepts Mr Sorlie's testimony, to the effect that whatever alternative supplies were available to KNI to replace offtake under the Offtake Agreement, these were at NOLA and Tampa prices or equivalent.

9.231 Mr Giles and Dr Flores appear to have valued this particular factor as US$ 92.2 million.[672] In the Tribunal's view, given its findings above, KNI's claim does not require any reduction for this factor.

9.232 As to assumed freight costs, the Tribunal accepts KNI's case based on Mr Giles' sample of actual freight costs from José, Venezuela to the US Gulf. Albeit limited to shipping invoices in 2009/2010, it remains the best evidence of such estimated freight costs as confirmed by Mr Sorlie's testimony.[673]

9.233 As to *lambda* and discount rates, the Tribunal accepts Mr Giles' expert evidence that *lamda* should be reduced because FertiNitro's exposure to country risk was lessened by the access to its own dock facilities for offtakes to be exported to KNI under the Offtake Agreement. In these circumstances, the Tribunal adopts Mr Giles' *lambda* as 0.40 (towards its upper limit) for FertiNitro and not Dr Flores' factor of 1.0. As to the discount rate, namely the amount by which KNI's lost future cash flows must be discounted to arrive at their value at the relevant date, the Tribunal adopts the approach taken by Mr Giles. For these issues, it appears that the total difference between Mr Giles and Dr Flores amounts to US$ 36.4 million.[674] In addition, Dr Flores reduces Mr Giles' valuation by US$ 2 million owing to differences between the two experts regarding production volumes. In the Tribunal's view, KNI's claim does not require any reductions for these factors invoked by Dr Flores.

9.234 As to the Urea Decree and Urea Resolution, the Tribunal adopts the approach of Advantis in assuming, as at September 2010, that these urea regulations would not have continued. Mr Giles' approach did not take into account for the calculation of KNI's compensation

[672] Second (November) Hearing; Tim Giles' presentation, Slide 24.
[673] Sorlie WS2, Paragraph 23.
[674] Second (November) Hearing D6. Tim Giles' presentation, Slide 24.

the effect of the urea regulations after 28 February 2012 (in contrast to his separate assessment of compensation for "Historical Losses"). Dr Flores assumed that the urea regulations would continue beyond 28 February 2012. In the Tribunal's view, with the assumption reasonably made by Advantis for September 2010, KNI's claim (as calculated by Mr Giles) does not require any reduction for the effect of the Urea Decree and Urea Resolution.

9.235 The resulting arithmetic is relatively straightforward by reference to the figures listed above. Allocating the difference of US$ 150.3 million between the competing valuations of Mr Giles and Dr Flores, the Tribunal decides as follows: it rejects Dr Flores' reductions of US$ 92.2 million (regarding mid-Carribean pricing) and US$ 36.4 million (regarding lambda and discount rate assumptions); and it rejects Dr Flores' further reduction of US$ 2 million (regarding production assumptions), the whole totalling US$ 128.6 million. Conversely, the Tribunal reduces the claim by US$ 21.7 million (regarding product delivered to KNI during the period from 10 October 2010 and 28 February 2012), as explained in paragraph 9.226 above.

9.236 Accordingly, doing the best it can on the available materials, the Tribunal (by a majority) assesses under Article 6 of the Treaty, the fair market value of KNI's expropriated interest in the Offtake Agreement as at 10 October 2010 (or 30 September 2010) was US$ 184.8 million (i.e. US$ 206.5 million less US$ 21.7 million).

9.237 ***Decisions:*** For these reasons, the Tribunal decides under Article 6 of the Treaty: (i) KOMSA's compensation in the total principal sum of US$ 140.25 million; and (ii), by a majority, KNI's compensation in the total principal sum of US$ 184.8 million, both assessed as at 10 October 2010 (or, being materially the same, 30 September 2010).

PART X: SUMMARY AND CONCLUSIONS

10.1 The Tribunal summarises below its several conclusions reached in the earlier parts of this Award.

10.2 *Jurisdiction:* The Tribunal rejects the Respondent's jurisdictional objection to KNI's claim in respect of its interest in the Offtake Agreement, as concluded in Part VI above. The Tribunal confirms its jurisdiction to decide all claims advanced by the Claimants against the Respondent in this arbitration, under the Treaty and the ICSID Convention.

10.3 *Liability:* The Tribunal finds the Respondent liable to KOMSA for the unlawful expropriation of its indirect interest in FertiNitro under Article 6 of the Treaty, as concluded in Part VII above. The Tribunal (by a majority) finds the Respondent liable to KNI for the unlawful expropriation of its interest in the Offtake Agreement, as also concluded in Part VII above.

10.4 The Tribunal dismisses KOMSA's non-expropriation claims advanced as "Historical Losses" under Articles 4 and 11 of the Treaty, as concluded in Part VIII above.

10.5 *Compensation:* The Tribunal decides KOMSA's compensation in the total principal sum of US$ 140.25 million under the Treaty, as concluded in Part IX above. The Tribunal (by a majority) decides KNI's compensation in the total principal sum of US$ 184.8 million, as also concluded in Part IX above.

10.6 *Principal Issues:* The Tribunal has used the lists of principal issues set out in Part III above as a checklist, where applicable, for its several conclusions and decisions. Save as summarised above, the Tribunal does not think it necessary to set out here its approach to each of these principal issues *seriatim*.

PART XI: INTEREST AND COSTS

(1) Introduction

11.1 As to interest, the Parties completed their respective submissions on interest issues by joint email messages dated 26 July 2016. The principal issue relates to whether simple or compound interest should be ordered by the Tribunal on the principal sums for which the Respondent is liable to pay to the Claimants. The lesser issue relates to the use of 3-month Libor (as the Claimants contend) or the use of three-month Libor or 6-month US Treasury bills (as the Respondent contends).

11.2 For the purpose of deciding costs in this Award, in addition to the Parties' written submissions of 13 February 2015, the Tribunal has also taken into account the Parties' subsequent submissions dated 8 and 12 July 2016 as regards the allocation and assessment of costs updated to 12 July 2016.

(2) Interest

11.3 *The Claimants' Case:* In summary,[675] the Claimants contend that they are entitled to pre-award and post-award compound interest on compensation ordered by the Tribunal. They make three principal submissions in support of their case.

11.4 First, the Claimants contend that the Treaty confirms that compound interest is payable by the Respondent. Article 6 of the BIT requires that compensation be paid in the case of expropriation including interest at a normal commercial rate. That normal commercial rate, so the Claimants contend, must include an element of compounding. That approach is consistent with the tribunal's decision in the *Venezuela Holdings v. Venezuela*[676] case: "[A] normal commercial rate generally includes compounding of interest […] [T]here is a

[675] Cls. PHB, Paragraphs 296-310.

[676] *Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (9 October 2014) (RLA-153), Paragraph 399.

growing tendency of international tribunals to award such interest in order to ensure full compensation of the damage."[677]

11.5 Second, the Claimants submit that ICSID's '*jurisprudence constante*' confirms that compound interest is payable by the Respondent. In that regard, the Claimants point to the decision in *Gemplus SA v. United Mexican States*:[678]

> *"[I]t is clear from the legal materials cited by the Claimants […] that the current practice of international tribunals (including ICSID) is to award compound and not simple interest. In the Tribunal's opinion, there is now a form of 'jurisprudence constante' where the presumption has shifted from the position a decade or so ago with the result [that] it would now be more appropriate to order compound interest, unless shown to be inappropriate in favour of simple interest, rather than vice-versa."*[679]

11.6 Third, the Claimants point to scholarly commentaries confirming that compound interest is payable in current circumstances.[680]

11.7 As to rate, the Claimants propose a Libor 3-month US Dollar rate plus 2% compounded on a quarterly basis.

11.8 *The Respondent's Case:* In summary,[681] the Respondent contends that simple interest and not compound interest is appropriate. It submits that Article 6 of the Treaty does not permit the award of compound interest, unless (which is not the present case) a claimant can prove

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677 *See also Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012) (CLA-129) ("*Occidental v. Ecuador*"), Paragraph 844.

678 *Gemplus S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States*, ICSID Cases Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award (16 June 2010) (CLA-54), Paragraphs 16-26.

679 *See also Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award (28 March 2011) at Paragraphs 360-361; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011) (CLA-52), Paragraphs 743-745; *Occidental v. Ecuador* (CLA129), Paragraph 848; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014) (CLA-156), Paragraph 854.

680 Particularly, S Ripinsky and K Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law, 2008) ("Ripinsky – Damages") (CLA-134), page 387.

681 Resp. PHB, Paragraphs 271-273; Resp. Rej., Paragraphs 518-524 (citing *i.e. Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award (20 May 1992) (CLA-12), Paragraph 222; *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award (23 September 2003) (RLA-60), Paragraphs 366-397; *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award (6 February 2008) (RLA-79), Paragraphs 292-298.

that it has actually suffered compound interest as damages. In the event that the Tribunal decided to award compound interest, the Respondent submits that the compounding should be annual and not quarterly (as the Claimants request) or monthly (as Mr Giles proposes).

11.9 As to rate, the Respondent submits that a risk-free rate is appropriate, such as six-month US Treasury bills. The Claimants' proposal to calculate interest based on the LIBOR three-month U.S. dollar rate plus 2% is inappropriate for calculating interest in an investor-State dispute. The function of pre-award interest is to compensate a claimant for the time value of money and the lost opportunity to invest money. However, in contrast to contractual business obligations, there is no commercial risk involved in a monetary award in investor-State arbitration under the ICSID Convention.[682]

11.10 *The Tribunal's Decision:* The Tribunal decides to award compound and not simple interest. In its view, the reference in Article 6 of the Treaty to "interest" includes compound interest. The wording clearly does not exclude it. Indeed, in modern times, it would be 'abnormal' for interest to be limited to simple interest. In the absence of contrary wording in a BIT, the general approach to interest was confirmed long ago by the decision in *Santa Elena v. Costa Rica:*[683]

> *"In particular, where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest. It is not the purpose of compound interest to attribute blame to, or to punish, anybody for the delay in the payment made to the expropriated owned; it is a mechanism to ensure that the compensation awarded the claimant is appropriate in the circumstances…".*

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[682] Resp. Rej., Paragraphs 525-529 (citing *BG Group Plc. v. Republic of Argentina* UNCITRAL, Final Award (24 December 2007) (CLA-37), Paragraph 455; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (6 February 2007) (CLA-15), Paragraph 396; *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) (RLA-123), Paragraph 102.

[683] *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica,* ICSID Case No. ARB/96/1, Award (17 February 2000) (CLA-136), Paragraphs 103ff.

11.11 It would be possible to add references to many other decisions to such effect, in addition to doctrinal writings over many years. It is unnecessary to do so here.[684]

11.12 As to rate, the Tribunal considers US$ Libor as a more international commercial rate than the rate for US Treasury bills. It is also more often used in both investor-State and commercial arbitrations. The Tribunal selects as the appropriate rate in this case US$ 6-month Libor plus 2%, compounded with 6-month rests, for both pre-award and post-award interest. As to the uplift, this does not reflect the presence or absence of commercial risk, but rather the fact that Libor is calculated for use between financial institutions for relatively short terms – neither of which is applicable here.

11.13 As to the former's starting date, the Tribunal fixes upon 11 October 2010, being the date of expropriation, under Article 6.

11.14 In conclusion, the Tribunal decides to order pre-award interest from 11 October 2010 to the date of this Award on the principal sums payable to the Claimants respectively, calculated at US$ 6-month Libor plus 2%, compounded with 6-month rests. As to post-award interest from the date of this Award until payment to the Claimants respectively, the Tribunal decides to order on the said principal sums (together with pre-award interest) interest calculated at US$ 6-month Libor plus 2%, compounded with 6-month rests.

(3) Costs

11.15 Both the Claimants and the Respondent request an order of costs in respect of both the fees and expenses they incurred ("Legal Costs") and the costs, fees and expenses of the Tribunal and ICSID in connection with this arbitration for which the Parties are jointly and severally liable ("Arbitration Costs").

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[684] For example, as to doctrinal writings, *see* F. A. Mann, Further Studies in International Law - Compound Interest as an Item of Damage (1990) (CLA-60), page 385;21:3 *U.C. Davis Law Review* 577 at 586; N. Affolder, "Awarding Compound Interest in International Arbitration"(2001), 12 *Am Rev Int'l Arb* 45 at 92; JY Gotanda, Compound Interest In International Disputes (2003) *Law and Policy in International Business* (CLA-61), page 393; J.M. Colón & M.S. Knoll, "Prejudgment Interest in International Arbitration", (2007) 4:6 *TDM* 1 at 7; Ripinsky - Damages (CLA-134), page 387; I. Marboe, Calculation of Compensation and Damages in International Investment *La*w, Oxford University Press, (2009) (CLA-137), Paragraphs 6.102, 6.103 & 6.300; and Dolzer & Schreuer, Principles of International Investment Law (2nd ed; 2012), p. 298.

11.16 *Legal Costs:* As to their own Legal Costs, the Claimant's fees and expenses amount to US$ 23,248,113.56. As to Arbitration Costs, the Claimant has advanced US$ 650,000.00 to ICSID (as well as a lodging fee of US$ 25,000) of which US$ 628,836.435 has been spent towards ICSID's administrative fees and expenses, and the fees and expenses of the Tribunal.[685]

11.17 As to its own Legal Costs, the Respondent's fees and expenses amount to US$ 11,039,280.39. As to Arbitration Costs, it has advanced US$ 650,000.00 to ICSID of which US$ 628,836.435 has been spent towards ICSID's administrative fees and expenses, and the fees and expenses of the Tribunal.[686]

11.18 *Schedules:* The Claimants and the Respondent divided their respective Legal Costs into the following categories:

(i) The Claimants' updated statement of costs:

a. Fees and expenses of their lawyers

Item	Amounts (US$)
Fees and expenses of their lawyers (paid)	17, 455,259.46
Fees and expenses of their lawyers (invoiced but unpaid)	1,063,346.50
Subtotal	18,518,605.96

b. Fees and expenses of their expert witnesses

Item	Amounts (US$)
Fees and expenses of their experts (paid)	2,432,898.36
Fees and expenses of their experts (invoiced but unpaid)	173,095.73
Subtotal	2,605,994.08

c. Expenses of their witnesses

Item	Amounts (US$)
Expenses of their witnesses (paid)	425,117.84

[685] Claimants' Corrected Updated Statement of Costs (12 July 2016).
[686] Respondent's Submission on Costs (8 July 2016).

Expenses of their witnesses (invoiced but unpaid)	Nil
Subtotal	425,117.84

d. Other costs

Item	Amounts (US$)
Client costs apart from the above (paid)	1,048,395.68
Client costs apart from the above (invoiced but unpaid)	Nil
Tribunal and ICSID fees (paid)	650,000.00
Subtotal	1,698,395.68

e. Total

Total costs and expenses of the Claimants in relation to the arbitration	Amount (US$)
	23,248,113.56

(ii) The Respondent's submission on costs:

a. Fees and expenses of its lawyers

Item	Amounts (US$)
Amounts paid	Legal fees: 6,786,084.21 Expenses: 1,511,651.42
Amounts invoiced but not paid	Legal fees: 778,491.64 Expenses: 102,838.73
Subtotal	9,179,066

b. Fees and expenses of its expert witness

Item	Amounts (US$)
Amounts paid	Professional fees: 1,012,264.97 Expenses: 16,742.73
Amounts invoiced but not paid	Professional fees: 89,901.03 Expenses: 2,450.85
Subtotal	1,121,359.58

c. Expenses of witnesses and other internal costs

Item		Amounts (US$)
Amounts paid		Witnesses' expenses: 85,344.91 Other internal costs: 3,509.90
	Subtotal	US$ 88,854.81

d. Total

The Respondent's total costs and expenses	Amount (US$)
	11,039,280.39

11.19 *Arbitration Costs*: The total fees and expenses of the Tribunal and ICSID's administrative fees and direct expenses are the following (in US$):[687]

Arbitrators' fees and expenses:	
V.V. Veeder	199,186.29
Marc Lalonde	268,828.92
Zachary Douglas	72,610.72
Judge Feliciano	145,920.97
ICSID's administrative fees:	180,000.00
Direct expenses:[688]	391,125.97
Total	**1,257,672.87**

11.20 The above arbitration costs have been paid out of the advances made to ICSID in equal parts by the Claimants and Respondent.[689] As a result, their respective share of the costs of arbitration amounts to US$ 628,836.435.

11.21 *The Tribunal's Decision*: Article 61(2) of the ICSID Convention provides that: "[t]he Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the

[687] The ICSID Secretariat will provide the parties with a detailed Financial Statement of the case.
[688] This amount includes charges relating to the dispatch of this Award (courier, printing and copying).
[689] Any remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

parties in connection with the proceedings and shall decide how and by whom these expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award." ICSID Arbitration Rule 47(1) provides that the Tribunal's Award "shall contain […] (j) any decision […] regarding the cost of the proceeding."

11.22 In the Tribunal's view, the ICSID Convention grants to the Tribunal a broad discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate in the circumstances. The Tribunal does not understand such a discretion to be contested between the Parties.

11.23 In the Tribunal's view, these circumstances are clear in the present case. The Claimants' cases have substantially but not completely prevailed over the cases advanced by the Respondent, as regards jurisdiction, liability (save as regard KOMSA's "Historical Losses"), compensation (in part) and interest. As a general principle, therefore, the Claimants should recover from the Respondent a proportion of their legal costs and such of the arbitration costs as have been borne by the Claimants. Conversely, the Respondent should bear its own legal costs and the Parties' arbitration costs in full, without any recourse to the Claimants.

11.24 The Tribunal has considered whether the legal costs incurred by the Claimants have been reasonably incurred in reasonable amounts. There is a marked disparity between the total amounts of the Parties' respective legal costs, even allowing for the legal burden resting on the Claimants to prove their respective cases. In other circumstances, it would be necessary to undertake further inquiries as to why the Claimants expended almost twice as much on legal costs than the Respondent. However, this case had from the outset certain unusual, aggravating and special features. It began, as already indicated, with the principal dispute limited to the amount of compensation due to KOMSA; but it soon became much more complicated and wide-ranging. These proceedings were also protracted, particularly with the Respondent's two unsuccessful challenges to members of the Tribunal, the consequential suspensions of the arbitration pursuant to ICSID Arbitration Rule 9(6), the untimely death of one of its members and the procedure for replacing that arbitrator. Moreover, it is a difficult task for any tribunal to second-guess, at a much later date, what a party felt necessary to spend at the time in pursuit of its claims, with its own money. For these several reasons, the Tribunal accepts the figures advanced by the Claimants for their legal costs, subject to the following.

11.25 KOMSA did not succeed in regard to its “Historical Claims”; and the claims by KOMSA and KNI for compensation only succeeded in part. The Tribunal decides that the Claimants incomplete success should be reflected in a reduction in the Claimants’ recovery of their legal costs by 25%. The Tribunal does not consider it possible to separate out legal costs as between KOMSA or KNI. As regards the Claimants’ arbitration costs, the Tribunal decides that these should be borne in full by the Respondent, without any reduction.

11.26 In conclusion, the effect of the Tribunal’s decisions can be stated as follows: the Claimants shall recover from the Respondent the total sum of US$ 17,436,085.10 as Legal Costs and the total sum of US$ 628,836.435 as Arbitration Costs. The Tribunal orders such total sums to bear post-award interest from the date of this Award until payment, at the same rate applicable to the amounts of compensation due to the Claimants; but it decides not to award any pre-award interest on these sums.

PART XII: THE OPERATIVE PART

12.1 For the reasons set out above, the Tribunal decides and awards as follows:

12.2 The Respondent's objection to the jurisdiction of ICSID and the competence of the Tribunal in regard to the claim made by the Second Claimant (KNI) is dismissed;

12.3 The Respondent violated Article 6 of the Treaty in expropriating on 11 October 2010 the interest in FertiNitro of the First Claimant (KOMSA), thereby causing loss to KOMSA in the total principal sum of US$ 140.25 million;

12.4 The Respondent violated Article 6 of the Treaty in expropriating on 11 October 2010 the interest in the Offtake Agreement of the Second Claimant (KNI), thereby causing loss to KNI in the total principal sum of US$ 184.8 million (this decision is by majority of the Tribunal);

12.5 The Respondent shall pay as compensation to the First and Second Claimants respectively the said principal sums together with pre-award compound interest thereon, from 11 October 2010 to the date of this Award calculated at the US$ Libor 6-month rate plus 2%, with six monthly rests (or *pro rata*);

12.6 The Respondent shall pay to the First and Second Claimants jointly the total principal sum of US$ 17,436,085.10 towards their Legal Costs;

12.7 The Respondent shall pay to the First and Second Claimants jointly the total principal sum of US$ US$ 628,836.435 towards their Arbitration Costs;

12.8 The Respondent shall pay to the First and Second Claimants respectively post-award compound interest on: (i) the said four principal sums; and also (ii) the total pre-award interest due on the principal sums of US$ 140.25 million and US$ 184.8 million, from the date of this Award until payment calculated at the US$ 6-month Libor rate plus 2%, with six monthly rests (or *pro rata*); and

12.9 Save as expressly ordered above, all other claims, demands and requests by the Parties are hereby dismissed.

Hon. Marc Lalonde PC, OC, QC
Arbitrator

Date: 11 October 2017

Zachary Douglas QC*
Arbitrator
(Subject to the attached Dissenting Opinion)

Date: 16 October 2017

V.V. Veeder QC
President of the Tribunal

Date: 19 October 2017

*As regards Paragraphs 12.4 above, a dissenting opinion by Arbitrator Douglas is attached hereto, as required by ICSID Arbitration Rules 47(3) and 49(4).