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**PARTIALLY DISSENTING OPINION OF  
PROF. ZACHARY DOUGLAS QC**

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**A INTRODUCTION**

1. I agree with the majority's decision on liability and the assessment of damages and interest in respect of KOMSA's expropriation claim for its interest in FertiNitro. I am also prepared to join the majority in respect of its decision in relation to costs.
2. I respectfully dissent, however, from the majority's decision on liability and the assessment of damages and interest in relation to KNI's expropriation claim for its interest in the Offtake Agreement for the reasons that follow.

**B KNI'S EXPROPRIATION CLAIM: LIABILITY**

3. KNI's only claim in respect of the Offtake Agreement is for expropriation. An expropriation requires the total and permanent deprivation of a property right. Intangible property rights, such as a chose-in-action created by a contract, can certainly be the object of an expropriation. Intangible property rights obviously do not have a physical existence; they are purely creatures of law.<sup>1</sup>

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<sup>1</sup> A valuable discussion of intangible rights as the object of an expropriation can be found in: *Emmis International Holding, B.V. et al v Hungary*, ICSID Case No. ARB/12/2, Award, 16 April 2014, §§ 159-169.

4. The Offtake Agreement is governed by the law of New York.<sup>2</sup> Any intangible property rights arising out of the Offtake Agreement are thus created and sustained by the law of New York.
5. The majority has concluded that the Expropriation Decree of 10 October 2010 expropriated KNI's rights under the Offtake Agreement. The Expropriation Decree is a legal act that only has effect within the Venezuelan legal system. It cannot operate to deprive or nullify KNI's intangible property rights that are created and sustained under the law of New York any more than it could deprive or nullify any tangible property rights belonging to KNI and physically situated in New York.<sup>3</sup> KNI's rights under the Offtake Agreement remain valid and binding as against its counterparties to that contract after the Expropriation Decree. KNI can enforce those rights by invoking the arbitration clause in the Offtake Agreement, which provides for ICC arbitration in Miami, Florida.<sup>4</sup>
6. The Offtake Agreement was evidently designed to be insulated against any sovereign interference on the part of Venezuela. By selecting the law of New York as the governing law, Venezuela cannot use its sovereign powers to modify or nullify the rights and obligations set out in the Offtake Agreement. By selecting ICC arbitration in Miami, Florida, Venezuela cannot use its sovereign powers to interfere with the resolution of any disputes arising out of the Offtake Agreement.
7. The basic legal proposition underlying this analysis is hardly controversial. In the words of the leading writer on this subject, F.A. Mann:

If one asks in what circumstances an international wrong committed by a foreign State may involve a breach of contract made by the same State with an alien, the field, properly analysed, is very limited, for the question makes sense only where three conditions coincide.

In the first place the contract must be governed by the law of the State which is a party to the contract and has committed the wrong. If the contract is governed by any other legal system, the breach is most unlikely to be in any sense legally relevant. Thus a contract of concession granted, but wrongfully repudiated or modified, by a given State in law necessarily continues to exist unaffected if it is governed by the law of another State or by international law (assuming the latter alternative to be possible). Discharge or variation of a contract is subject to its proper law. This will not recognize interference by

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<sup>2</sup> Offtake Agreement (C-19), §13.1.

<sup>3</sup> Hence the present case is distinguishable from the international precedents in which a State has been found internationally responsible for annulling a contract subject to its own law by the issuance of a decree that has effect in its own legal system: see, e.g. *Shufeldt Claim* (Award, 1930) 2 RIAA 1079.

<sup>4</sup> Offtake Agreement (C-19), §12.2.

another legal system except as a fact creating impossibility of performance. Even so, it is hard to imagine any legal system which would allow a party to a contract to rely on self-induced impossibility to get rid of its legal obligations or to bring a contract to an end against the will of the other party to it.<sup>5</sup>

8. These observations apply with greater force in relation to a contract to which the State itself is not even a party, as is the case in respect of the Offtake Agreement (KNI's counterparty is FertiNitro).
9. The factual record in this case attests to the fact that the State of Venezuela has not attempted to do what is legally impossible (i.e. purporting to expropriate a contract governed by New York law):
  - 9.1. There is no express mention of the Offtake Agreement in the Expropriation Decree.
  - 9.2. There is no implicit mention either. The opening sentence of Article 1 refers to the '*mandatory acquisition of movable and real estate assets*', which is a clear reference to tangible property. The link between that property and FertiNitro is described as ownership or possession, which is also consistent with the object of Article 1 being tangible property rather than intangible rights under contracts. Next, Article 3 refers to the '*expropriated goods*' being '*transferred free of encumbrances or limitations*', which again is language apt to describe tangible property but not intangible rights. Finally, Article 6 refers to the '*occupancy of the assets indicated in article 1... with the objective of placing these into operation, administration and capitalization*'. This phrase does not make sense in relation to intangible rights under a contract.
  - 9.3. The parties to the Offtake Agreement continued to buy and sell the offtake products (ammonia and urea) at the prices fixed by the Offtake Agreement for some sixteen months after the Expropriation Decree.
  - 9.4. FertiNitro sent two separate communications following the Expropriation Decree, on 26 November 2010<sup>6</sup> and 1 December 2010,<sup>7</sup> confirming that it would continue to perform its obligations under the Offtake Agreement.

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<sup>5</sup> F.A. Mann, 'The Consequences of an International Wrong in International and National Law', *Further Studies in International Law* (OUP, 1990), pp. 188-189. The learned author made the same point many years earlier in 'State Contracts and State Responsibility', *Studies in International Law* (OUP, 1973), p. 303: 'In the first place the particular problem demanding a solution cannot arise unless the contract in issue, either as a whole or in part, is governed by the law of the State whose responsibility is involved, for, according to established principles of private international law, it is only in such event that the contracting State's act can possibly be relevant at all. If the contract is subject to the law of a country other than that of the contracting State, a defence derived from the proper law cannot be tortious [under international law] (and a defence derived from the law of the defendant State must be immaterial).'

<sup>6</sup> FertiNitro's Communication of 26 November 2010 (C-111).

<sup>7</sup> FertiNitro's Communication of 1 December 2010 (C-112).

- 9.5. FertiNitro eventually repudiated the Offtake Agreement by letter of 28 February 2012,<sup>8</sup> which would have been superfluous if the Offtake Agreement had somehow been expropriated on 10 October 2010 and if the parties had not been performing their obligations under the Offtake Agreement in the interim.
10. The majority relies on two documents for their contrary view. The first is a record of a speech to workers at FertiNitro's plant given by Venezuela's Minister of Energy and Oil (Mr Rafael Ramirez) the day after the Expropriation Decree.<sup>9</sup> The majority considers that that speech makes implicit references to the Offtake Agreement and, on that basis, the majority concludes that the Expropriation Decree must be interpreted as extending in scope to intangible rights under the Offtake Agreement. In relation to this evidence:
- 10.1. Whether or not the Minister's speech makes implicit references to the Offtake Agreement, the scope of the Expropriation Decree cannot extend to rights that are created and sustained by another State's legal system. If the Minister were to have proclaimed that the Expropriation Decree also expropriated ammonia and urea physically located outside of Venezuela, for instance, this would not have made it so: both public and private international law confine the scope of the Expropriation Decree to the national territory of Venezuela.
- 10.2. The text of the Expropriation Decree itself does not expressly or implicitly address intangible rights. No submissions have been made to the Tribunal, by experts or otherwise, on whether the Expropriation Decree extended to intangible rights as a matter of Venezuelan law. What a Minister says in a political speech to workers at a plant cannot fill this void.
11. The other document is relied upon by the majority to refute the point made earlier that the parties continued to perform the Offtake Agreement after the Expropriation Decree. It is an email from KNI to FertiNitro dated 3 December 2010 which states that KNI '*agrees to purchase product under terms consistent with the Offtake Agreement*' and for payment for product to be made '*to the same historical bank accounts*'.<sup>10</sup> The same email refers to KNI's expropriation claim and rights under international law. On the basis of this email, KNI and the majority assert that the purchases of urea and ammonia for a period of sixteen months after the Expropriation Decree were made pursuant to '*ad-hoc agreements*' with exactly the same terms as the Offtake Agreement and to the same bank accounts but not in accordance with the Offtake Agreement because, on their view, it had already been expropriated. In relation to this document:
- 11.1. KNI's email, which was clearly drafted with the assistance of international legal counsel, cannot unilaterally change the legal reality which was that the Offtake

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<sup>8</sup> FertiNitro's Communication of 28 February 2012 (C-114).

<sup>9</sup> Online article entitled: "*Rafael Ramírez presidió la toma de instalaciones de Fertinitro en el estado Anzoátegui*," Noticias 24, 11 October 2010 (C-107).

<sup>10</sup> KNI's Communication to FertiNitro of 3 December 2010 (C-113) (emphasis added).

Agreement—governed by New York law—remained in full force and effect after the Expropriation Decree.

- 11.2. If the parties were not in reality buying and selling urea and ammonia pursuant to the Offtake Agreement over the sixteen months following the Expropriation Decree (there is no dispute that the purchases were made at exactly the same prices fixed by the Offtake Agreement), then FertiNitro's subsequent repudiation of the Offtake Agreement on 28 February 2012 would have made no sense.
  - 11.3. The majority has accepted that KNI should not be entitled to damages during this sixteen month period, which is consistent with the reality that KNI did not suffer any loss because FertiNitro continued to perform its obligations under the Offtake Agreement until the repudiation.
  - 11.4. FertiNitro affirmed on two separate occasions following the Expropriation Decree that it would continue to perform the Offtake Agreement.
12. I conclude that KNI has not established that Venezuela expropriated its rights under the Offtake Agreement. There is no evidence on the record of this arbitration that KNI's rights under a contract governed by New York law have been nullified or abrogated. KNI has offered no reason as to why its rights under the Offtake Agreement cannot be enforced against its counterparties, including FertiNitro, by pursuing ICC arbitration under the *lex arbitri* of Miami, Florida. So long as KNI's rights under the Offtake Agreement remain fully vested and enforceable it is legally impossible to speak of their expropriation. Although loss of value cannot be the exclusive touchstone of an expropriation, the fact that KNI remains entitled to an award of damages for any breach of its rights under the Offtake Agreement demonstrates conclusively that KNI's rights have not been deprived of their entire value.

## **C KNI'S EXPROPRIATION CLAIM: ASSESSMENT OF DAMAGES**

13. International law does not give a *carte blanche* to valuation experts to determine the amount of compensation that flows from a breach of an international obligation. The law defines the contours of a recoverable loss and how it is to be assessed. Where a intangible property right under a contract has been expropriated, the object of compensation in international law is to put the innocent party in the position that it would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion.<sup>11</sup> International law requires that the recoverable loss could have been anticipated or foreseen by the parties at the time of the conclusion of the contract.<sup>12</sup> The loss that could have been foreseen by the parties to the Offtake

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<sup>11</sup> *Sapphire International Petroleum v NIOC* (1963) 35 ILR 136, 185-6 ('According to the generally held view the object is to place the party to whom they are awarded in the same pecuniary position they would have been in if the contract had been performed in the manner provided for by the parties at the time of its conclusion.');

*Amco Asia Corp., et al. v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 31 May 1990, §§183-6 (*Amco v Indonesia II*).

Agreement in the event that KNI's right to purchase urea and ammonia at the prices and quantities fixed by the contract were to be nullified or abrogated is KNI's loss of profits caused by FertiNitro's failure to supply KNI with the goods in question. The loss of profits of the buyer in the context of a contract for the sale of goods is calculated as the difference between the contract price and the price paid by the buyer for replacement goods<sup>13</sup> or the difference between the contract price and the market price at the time deliveries should have been made if replacement goods are not purchased.<sup>14</sup>

14. In the present case, Mr Sorlie was the principal witness for KNI in relation to the Offtake Agreement and indeed he was the person responsible for managing the purchases of urea and ammonia under that contract from KNI's side. Mr Sorlie did not, in either of his two witness statements, give any evidence as to whether or not KNI purchased replacement goods following the alleged expropriation of the Offtake Agreement on 10 October 2010. This is a surprising omission given it is critical evidence, required by law, to establish KNI's actual loss.
15. It was only under cross-examination that Mr Sorlie gave evidence on this issue. He testified that after the expropriation of the Offtake Agreement, KNI bought replacement goods at the equivalent quantities from the former Soviet Union and Egypt as well as 'other origins'.<sup>15</sup> No evidence of the prices paid for those replacement goods was introduced onto the record. KNI's valuation expert testified that he had sight of that evidence but elected to 'disregard it' for the purpose of his calculation of KNI's loss.<sup>16</sup>
16. In summary, KNI has tendered no evidence of the prices that it actually paid for replacement quantities of urea and ammonia following the purported expropriation of the Offtake Agreement and KNI's valuation expert has disregarded this evidence for the purposes of his calculations.
17. This is not a case where the evidence of the investor's actual losses is no longer available due to an act attributable to the host State (such as where the host State's authorities have destroyed or confiscated documentation belonging to the investor). This is a case where the evidence was clearly available but deliberately disregarded by the investor and

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<sup>12</sup> *Amco Asia Corp. and others v Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, 20 November 1984, § 268 ('[A]ccording to the principles and rules common to the main national legal systems and to international law, the damages to be awarded must cover only the direct and foreseeable prejudice') (emphasis omitted); *Amco v Indonesia II*, §§172, 178. The foreseeability principle is also applied to non-contractual scenarios: *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, §§169-172; *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia*, ICSID Case Nos. ARB/05/18 & ARB/07/17, Award, 3 March 2010, §§469. See also the UNIDROIT Principles of International Commercial Contracts (2004) ('UNIDROIT Principles') Art. 7.4.4; United Nations Convention on Contracts for the International Sale of Goods (1980) ('CISG'), Art. 74.

<sup>13</sup> See, e.g. CISG, Art. 75; UNIDROIT Principles, Art. 7.4.5.

<sup>14</sup> See, e.g. CISG, Art. 76; UNIDROIT Principles, Art. 7.4.6. There is always a duty to mitigate loss: CISG, Art. 77; UNIDROIT Principles, Art. 7.4.8.

<sup>15</sup> First (September) Hearing D2/P167-68/L2-9 (*Sorlie*).

<sup>16</sup> Second (November) Hearing D6/P87/L11-18 (*Giles*).

its valuation expert. In these circumstances, the only permissible conclusion is that KNI has failed to establish its loss on the balance of probabilities—*i.e.* in satisfaction of the usual standard of proof.

18. What KNI and its valuation expert have done instead is advance a theory of damages that violates the foreseeability of loss principle recognized by international law and that is unsustainable on the facts. KNI claims that its damages should be assessed on the basis of the following counterfactual in order to arrive at the '*fair market value*' of the Offtake Agreement:
  - 18.1. Before the expropriation: KNI could buy at the offtake price, ship to NOLA/Tampa (United States Gulf Coast) and sell at NOLA/Tampa prices. The profit was therefore NOLA/Tampa price minus shipping costs minus the offtake price.
  - 18.2. After the expropriation: KNI could only buy at NOLA/Tampa prices and sell at NOLA/Tampa prices. The profit was therefore zero.
19. To be clear: both sides of the counterfactual are not what actually happened but rather are hypotheses based on what plausibly could have happened according to KNI's valuation expert.<sup>17</sup>
20. There are numerous flaws with this approach:
  - 20.1. It violates the foreseeability principle because no party to the Offtake Agreement could have contemplated such a loss, which is based on a series of hypotheses and follows an approach that is without precedent in the assessment of damages in this scenario.
  - 20.2. It is impermissible to substitute evidence of actual loss with a theory of hypothetical loss in the assessment of damages.<sup>18</sup> As KNI's actual loss could have been calculated on the basis of simple arithmetic by reference to the evidence available to it, the inescapable inference is that KNI preferred a theory of hypothetical loss because it generated a substantially higher figure. The result is that KNI's pleaded loss is likely to be vastly overstated.
  - 20.3. The counterfactual makes no sense. An approach that purports to calculate the '*fair market value*' of the Offtake Agreement must be founded on the principle that a third party purchaser would have been prepared to pay a price equivalent to that value at the expropriation date. On KNI's case, this means that a third party would have been prepared to pay USD 206.5 million for its rights under the Offtake Agreement in October 2010 (*i.e.* significantly more than the value of KOMSA's equity stake in FertiNitro at the same time). But a third party

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<sup>17</sup> *Second (November) Hearing D6/P85/ L7-14 (Giles)*.

<sup>18</sup> *Amoco International Financial Corp v Iran* (Partial Award, 14 July 1987) Iran-US Claims Tribunal Case No. 56, §238 '[N]o reparation for speculative or uncertain damage can be awarded'.

purchaser, like KNI, would have been able to purchase the commodities in question—urea and ammonia—in markets throughout the world. Why would a third party purchaser assess the value of the Offtake Agreement in October 2010 on the basis that the commodities could only have been purchased at NOLA/Tampa, where demand is consistently very high and prices are also very high accordingly? A third party purchaser would assess the value of the Offtake Agreement on the basis of the evidence of long term trends in prices for urea and ammonia on the world markets and assess the difference between those market prices and the prices fixed by the Offtake Agreement. A third party purchaser would not assess the value of the Offtake Agreement based upon a non-existent obligation to purchase these commodities exclusively at the very place at which it was most lucrative to sell those commodities.

- 20.4. The counterfactual's hypothesis contradicts KNI's own evidence of how the international markets for ammonia and urea function. Mr Sorlie testified that: *'Ammonia and urea imported into the US typically come from one of the four main areas of nitrogen fertilizer export production in the world: the Caribbean, North Africa, the Black Sea region and the Arab Gulf.'*<sup>19</sup> Why would a third party purchaser also not look to buying the commodities in those regions for sale to NOLA/Tampa and profit from the price-differential? And as already noted, the counterfactual's hypothesis also contradicts what KNI actually did following the expropriation the Offtake Agreement: according to Mr Sorlie, KNI purchased replacement goods from the former Soviet Union, Egypt and elsewhere. Why would KNI have bothered doing that if it could only have obtained the same prices as at NOLA/Tampa?
21. In relation to this last point, the majority appears to place decisive weight upon Mr Sorlie's evidence in cross-examination that KNI was able to purchase replacement ammonia and urea *'at a NOLA and Tampa price structure.'*<sup>20</sup> The majority states that it *'accepts Mr Sorlie's testimony, to the effect that whatever alternative supplies were available to KNI to replace offtake under the Offtake Agreement, there were at NOLA and Tampa prices or equivalent'* because the Respondent *'adduced no cogent factual evidence of its own.'*<sup>21</sup> I have several difficulties with this conclusion:
- 21.1. The question, adopting KNI's damages methodology, is not what alternative supplies were available to KNI but what supplies were available to a hypothetical third party purchaser of the Offtake Agreement at the date of expropriation and into the future.
- 21.2. The **only** evidence on the record in support of the majority's conclusion is Mr Sorlie's statement in cross-examination. That statement is contradicted by Mr Sorlie's testimony to the effect that KNI purchased replacement goods from the former Soviet Union, Egypt and elsewhere (and there would have been no

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<sup>19</sup> First Witness Statement of Jim Sorlie (29 May 2012), §17.

<sup>20</sup> Award, §9.229.

<sup>21</sup> Award, §9.230.



commercial reason to do so if they could only be obtained at NOLA/Tampa prices). Mr Sorlie's assertion that KNI purchased replacement goods at the same prices as at NOLA/Tampa is not addressed in either of his witness statements and KNI does not provide any evidence in relation to the prices that it did in fact pay for the replacement goods or any evidence in relation to the prices in the different markets throughout the world. KNI has the burden to establish this critical factual premise for its damages calculation and it has failed to discharge that burden.

- 21.3. The Respondent has produced factual evidence of its own and it is more robust than an unsupported statement by a single witness in cross examination. Fertecon is the world's leading provider of market information and analysis on fertilizers and fertilizer raw materials. The Respondent's expert exhibited Fertecon's reports in 2010 for urea and ammonia (together constituting more than 350 pages of analysis).<sup>22</sup> What these reports show, which is hardly surprising, is that the prices for urea and ammonia at the various markets around the world differed significantly both historically and in 2010 and the prices at Nola/Tampa in the United States were almost invariably the highest.
22. In conclusion, even if Venezuela did expropriate the Offtake Agreement by the issuance of the Expropriation Decree, which I do not accept, I would have concluded that KNI has failed to prove its loss to the requisite standard. As a result I would also have found that KNI is not entitled to interest.

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<sup>22</sup> Expert Reports of Daniel Flores (EO-7 and EO-8).



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Zachary Douglas QC  
Arbitrator

Date: 8 october 2017