

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceedings between

TENARIS S.A. AND

TALTA-TRADING E MARKETING SOCIEDADE UNIPessoal LDA

(Claimants)

- and -

BOLIVARIAN REPUBLIC OF VENEZUELA

(Respondent)

ICSID Case No. ARB/11/26

AWARD

Members of the Tribunal

Mr. John Beechey (President)

Mr. Judd L. Kessler

Mr. Toby T. Landau QC

Secretary of the Tribunal

Ms. Alicia Martín Blanco

Date of dispatch to the Parties: 29 January 2016

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID Rules, or Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
ICSID, or the Centre	International Centre for Settlement of Investment Disputes
Luxembourg Treaty	Agreement between the Government of the Republic of Venezuela and the Belgium-Luxembourg Economic Union for the Reciprocal Promotion and Protection of Investments, signed on 17 March 1988, and in force as of 28 April 2004
Portuguese Treaty	Agreement between the Government of the Republic of Venezuela and the Government of the Portuguese Republic for the Reciprocal Promotion and Protection of Investments, signed on 17 June 1994, and in force as of 11 May 1995
The Treaties	The Luxembourg and Portuguese Treaties
Request or RFA	Request for Arbitration, 24 August 2011
Claimants' Memorial	Claimants' Memorial, 24 August 2012
Respondent's Counter-Memorial	Respondent's Counter-Memorial, 10 May 2013
Claimants' Reply	Claimant's Reply Memorial, 27 August 2013
Respondent's Rejoinder	Respondent's Rejoinder Memorial, 5 December 2013
C-	Claimants' Exhibit
R-	Respondent's Exhibit
CLEX-	Claimants' Legal Authority
RLA-	Respondent's Legal Authority
Transcript	Transcript of the hearings in January/February 2014 and July 2014.

A. INTRODUCTION

1. THE PARTIES

1. The Claimants in this arbitration are as follows

(a) Tenaris S.A. (“**Tenaris**”), a company incorporated under the laws of the Grand Duchy of Luxembourg, the registered office of which is situated at:

29, avenue de la Porte-Neuve
3rd Floor
L-1855, 2227
Luxembourg

(b) Talta – Trading e Marketing Sociedad Unipessoal Lda (“**Talta**”), a company incorporated under the laws of the Portuguese Republic, the registered office of which is situated at:

Rua da Alfandega 74-76
2o andar, sala H
Funchal, 9000-059
Ilha da Madeira
Portugal

2. The Respondent is the Bolivarian Republic of Venezuela (“**Venezuela**”).

3. The Claimants and Respondent are hereinafter collectively referred to as the “**Parties**”.

2. NATURE OF THE DISPUTE AND RELEVANT TREATIES

4. According to Claimants’ Request for Arbitration, Tenaris is a global supplier of steel tubes and related services for the world’s energy industry and certain other industrial applications. Talta is Venezuela’s only producer of stainless steel pipes for the oil and gas industry.¹ Talta is wholly owned by Tenaris Investments S.a.r.l, which, in turn, is 100% owned by Tenaris.

¹ Transcript (English) Day 1, p. 38

5. Through Talta, Tenaris held a 50.1997% shareholding in Matesi Materiales Siderurgicos S.A. (“**Matesi**”), a company established under the laws of Venezuela. Matesi produces high quality hot briquetted iron (“**HBI**”), a component used in the production of steel. Further details of the corporate links between the Claimant entities, and their respective interests in entities which feature in this arbitration, are set out in **Section C**, and **Annex I** below.
6. By way of broad summary, Claimants assert that their use and enjoyment of their investment has been lost as a result of the “*indirect expropriation of their investments in, and pre-nationalisation interference with, their investments in Matesi*”.² The Claimants’ complaints break down into two broad categories: (a) pre-expropriation interference with the investment, and in particular discrimination in the supply of pellets to Matesi; and (b) the subsequent assumption of full managerial and operational control of Matesi by Venezuela in breach of Venezuelan law and due process, and without the payment of compensation.
7. It is Claimants’ case that Respondent’s actions constituted a breach of:
 - (a) the protections available to Claimant Tenaris under the Agreement between the Government of the Republic of Venezuela and the Belgium-Luxembourg Economic Union for the Reciprocal Promotion and Protection of Investments (the “**Luxembourg Treaty**”)³, and in particular Articles 3 and 4 thereof; and
 - (b) the protections available to Claimant Talta under both:
 - i. the Agreement between the Government of the Republic of Venezuela and the Government of the Portuguese Republic for the Reciprocal Promotion and Protection of Investments (the

² Claimants’ Memorial, para. 2

³ Exhibit C-1. The Luxembourg Treaty was signed on 17 March 1988 and entered into force on 28 April 2004

“Portuguese Treaty”)⁴, and in particular Articles 2, 3 and 4 thereof; and

- ii. the Luxembourg Treaty, by reason of Talta’s status as an entity effectively controlled by Tenaris.
8. Claimants further assert that Respondent has been on notice of the dispute since 20 August 2009, when formal notice was given pursuant to the Treaties.⁵ The Claimants maintain that attempts at amicable resolution within the periods stipulated by the Treaties have failed to result in a settlement. While it is accepted by Respondent that notice of dispute was given by Claimants on 20 August 2009, the extent to which the claims advanced in this arbitration were the subject of the notice is in issue (see **Section E** below).

3. THE ARBITRATION AGREEMENTS

9. Article 9 of the Luxembourg Treaty provides:

- “1. Any dispute between an investor and the other Contracting Party concerning the application of this Agreement shall be subject to written notification, accompanied by a sufficiently detailed memorandum, from the investor. As far as possible, the parties shall endeavor to settle the dispute amicably by negotiation, where necessary seeking expert advice from a third party or by conciliation.
2. In the absence of an amicable settlement within six months from the date of notification, the dispute shall be submitted, at the investor’s option, either to the competent jurisdiction of the State in which the investment was made or to international arbitration. Once made the choice shall be final.
To this end, each Contracting State shall give in advance its irrevocable consent for the dispute to be submitted to this arbitration.

⁴ Exhibit C-3. The Portuguese Treaty was signed on 17 June 1994 and entered into force on 11 May 1995

⁵ Exhibit C-14: letter from Claimants to The Hon. Dr Rodolfo Sanz, Minister of Basic Industries and Mining

3. In the event of recourse to international arbitration, the dispute shall be submitted to the International Centre for the Settlement of Investment Disputes (ICSID) established by the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States”, opened for signature in Washington on 18 March 1965.

If it is impossible to submit the dispute to ICSID, the investor shall have the option to submit the dispute to an ad hoc tribunal constituted under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

.....

5. The arbitral tribunal will decide on the basis of the domestic law of the Contracting Party who is party to the dispute and in whose territory the investment is located, including its rules on conflicts of laws, the provisions of this Agreement, the terms of any specific agreement existing concerning the treatment of the investment, as well as the principles of international law.
6. The award shall be determined solely on whether the Contracting Party concerned has breached an obligation under the present Agreement, and if there has been damage to the investor, shall fix the amount of compensation, which that Contracting Party shall pay to the investor.
7. Arbitral awards shall be final and binding on the parties to the dispute. Each Contracting Party undertakes to execute the awards in accordance with their national law.”

10. Article 8 of the Portuguese Treaty provides:

- “1. Disputes regarding the application of this Agreement that arise between one of the Contracting Parties and an investor of another Contracting Party who has made investments in the territory of the former shall, to the extent possible, be resolved by means of amicable consultations.
2. If the dispute cannot be resolved amicably within a period of six (6) months, starting from the date when consultations are commenced, the dispute may be submitted, at the choice of the investor:
 - a) to local courts of the Contracting Party in whose territory the investment was made:

- b) to arbitration at the International Centre for the Settlement of Investment Disputes (ICSID), established by the Washington Convention of 1965, in the event that both Contracting Parties are parties thereto, or, if it is the case, to the additional facility rules for the administration of conciliation proceedings, arbitration and fact-finding by the ICSID Secretariat. If for any reason neither ICSID nor the Additional Facility Rules are available, the arbitration shall be carried (sic) under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).
3. The arbitral tribunal shall decide based on provisions of this Agreement, the relevant rules and principles of international law, the law of the Contracting Party in whose territory the investment was made and any specific agreements that refer to the investment.
 4. Arbitral awards shall be final and binding on the Parties to the dispute and shall be executed in accordance with the national law of the Contracting Party in whose territory the investment was made.
 5. In any event, the arbitral award shall only address whether the Contracting Party concerned has breached an obligation in this Agreement, and if such a breach has caused damage to the investor, and, if that is the case, the arbitral tribunal shall determine the amount of compensation that the Contracting Party shall pay to the investor for both damages.
 6. The Contracting Parties undertake to refrain from submitting, through diplomatic channels, disputes that have been submitted to judicial procedures or international arbitration until these procedures are concluded, unless one of the Contracting Parties has not complied with the judgment or award of the Arbitral Tribunal, under the terms established in the respective decision or award.”
-

B. PROCEDURAL HISTORY

1. COMMENCEMENT OF ARBITRATION

11. On 24 August 2011, ICSID received a request for arbitration dated 24 August 2011 from Tenaris S.A. and Talta – Trading e Marketing Sociedad Unipessoal Lda against the Bolivarian Republic of Venezuela (the “**Request**” or “**RFA**”).
12. On 30 September 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 the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

2. THE ARBITRAL TRIBUNAL

13. On 13 December 2011, Claimants requested that the Tribunal be constituted pursuant to Article 37(2)(b) of the ICSID Convention. Pursuant to ICSID Arbitration Rule 3, Claimants informed the Centre that they had appointed Mr Judd L. Kessler, a national of the United States of America, as arbitrator and proposed the appointment of a President of the Tribunal. In accordance with ICSID Arbitration Rule 3(1)(b), Respondent was invited to appoint an arbitrator and to concur with the person proposed by Claimants or to propose another person as President of the Tribunal. On 29 November 2011, Claimants requested the appointment of the arbitrator not yet appointed and the designation of the President of the Tribunal pursuant to Article 38 of the ICSID Convention. On 18 January 2012, Respondent appointed Mr Toby T. Landau, QC, a national of the United Kingdom, as arbitrator. By letter dated 19 April 2012, the Parties agreed to the appointment of Mr John Beechey, a national of the United Kingdom, as President of the Tribunal.
14. On 26 April 2012, the Secretary-General, in accordance with ICSID Arbitration Rule 6(1), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to

have been constituted on that date. Ms Alicia Martin Blanco, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

3. THE FIRST SESSION

15. The Tribunal held a first session with the Parties on 27 June 2012, at which, the Parties confirmed that the Members of the Tribunal had been validly appointed. They further 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 proceedings would be the seat of the Centre in Washington, D.C. The agreement of the Parties was embodied in Procedural Order No. 1, dated 14 August 2012.

4. REQUEST FOR BIFURCATION

16. Following the submission of the Claimants' Memorial on the Merits on 24 August 2012 (the "**Claimants' Memorial**"), Respondent sought a bifurcation of the proceedings, and a determination by the Tribunal as a preliminary matter of Respondent's objections to jurisdiction.
17. Pursuant to a timetable set out at paragraph 13(f) of Procedural Order No. 1, as amended by Procedural Order No. 2, dated 25 October 2012, the Parties exchanged the following submissions:
 - (a) Respondent's Request for Bifurcation dated 28 September 2012;
 - (b) Claimants' Response to Respondent's Request for Bifurcation, dated 19 October 2012;
 - (c) Respondent's Reply on Bifurcation dated 2 November 2012;
 - (d) Claimants' Rejoinder to Respondent's Request for Bifurcation dated 12 November 2012;
 - (e) Respondent's Counsel's letter dated 14 November 2012;
 - (f) Claimants' Counsel's letter dated 21 November 2012.
18. By its Procedural Order No.3 dated 5 December 2012, the Tribunal denied Respondent's request for bifurcation.

5. WRITTEN SUBMISSIONS

19. Thereafter, the Parties served the following submissions:

- (a) Respondent's Counter-Memorial on Jurisdiction and Merits, dated 10 May 2013 (the "**Respondent's Counter-Memorial**");
- (b) Claimants' Reply Memorial, dated 27 August 2013 (the "**Claimants' Reply**");
- (c) Respondent's Rejoinder, dated 5 December 2013 (the "**Respondent's Rejoinder**").

6. WITNESS STATEMENTS AND EXPERT REPORTS

20. Witness statements and Expert reports have been filed by the Parties as follows:

On behalf of the Claimants:

- (a) Witness statements of Marcelo Malvassora, dated 24 August 2012 and 26 August 2013;
- (b) Witness statements of Oscar Montero, dated 24 August 2012 and 22 August 2013;
- (c) Witness statement of Angel Mario Tamez, dated 27 August 2013;
- (d) Expert Valuation report by Compass Lexecon LLC (Manuel A. Abdala and Pablo T. Spiller), dated 24 August 2012, and a Supplemental Report dated 27 August 2013;
- (e) Legal Opinion by Professor Andre Pruem (Luxembourg law), dated 23 January 2014;
- (f) Legal Opinion by Professor Dr. Dario Moura Vicente (Portuguese law), dated 23 January 2014.

On behalf of the Respondent:

- (a) Witness statement of Ramon Cadenas, dated 23 April 2013;

- (b) Witness statement of Rawan Sabbagh, dated 2 May 2013;⁶
- (c) Witness statement of Marbeni Milagros Seijas Marcano, dated 4 May 2013;
- (d) Witness statement of Felix Luis Moya Bello, dated 22 November 2013;
- (e) Witness statement of Marilyn V. Bello Rodriguez, dated 3 December 2013;
- (g) Expert Valuation Report of Timothy H Hart, dated 8 May 2013; and a Supplemental Report, dated 3 December 2013;
- (h) Expert Technical Report of Dr Joseph J. Poveromo, dated 8 May 2013, and a Second Expert Technical Report, dated 3 December 2013;
- (i) Legal Opinion of Dr Henrique Iribarren Monteverde (Venezuelan Law), dated 25 March 2013;
- (j) Legal Opinion of Professors Pedro Maia and Tiago Duarte (Portuguese law), dated 28 November 2013;⁷
- (k) Legal Opinion of Professor Alain Steichen (Luxembourg law), dated 29 November 2013.

7. PROCEDURAL ORDERS

21. The Tribunal issued the following additional Procedural Orders:

- (a) Procedural Order No. 4, dated 17 April 2013;
- (b) Procedural Order No. 5, dated 9 January 2014;
- (c) Procedural Order No. 6, dated 22 January 2014;
- (d) Procedural Order No. 7, dated 30 January 2014.

8. FIRST SUBSTANTIVE HEARING

22. A Hearing was held at the premises of ICSID in Washington DC over six working days between Friday 31 January 2014 and Friday 7 February 2014.

⁶ Mr Sabbagh's witness statement was subsequently withdrawn in circumstances described in correspondence dated 22 August 2013 and reflected in the Tribunal's Procedural Order of 16 September 2013.

⁷ By its Procedural Order No. 5, the Tribunal admitted into the record the expert opinions of Professors Maia and Duarte and Professor Steichen and it further admitted into the record the witness statement of Ms Marilyn V. Bello Rodriguez, all of which had been the subject of objections raised by Claimants.

23. In the course of the Hearing, the Tribunal heard opening statements from the Parties, and testimony from the following witnesses and experts:

On behalf of the Claimants:

Mr Oscar Montero (Day 2)

Mr Angel Mario Tamez (Day 2)

Mr Marcelo Malvassora (Days 2 & 3)

Dr Manuel A. Abdala and Professor Pablo T. Spiller (Days 5 & 6)

On behalf of the Respondent:

Mr Ramon Cadenas (Day 3)

Ms Marilyn del Valle Bello Rodriguez (Day 3)

Ms Marbeni Milagros Seijas Marcano (Day 3)

Mr Felix Moya (Day 4)

Professor Iribarren Monteverde (Days 4 & 5)

Mr Joseph J. Poveromo (Day 5)

Mr Timothy Hart (Day 6)

24. By agreement of the Parties, the factual record of the proceedings was closed on 5 February 2014, save for liberty to make a reasoned application to admit new factual material.⁸

9. SECOND SUBSTANTIVE HEARING

25. Thereafter, a further hearing was held in London on 9 and 10 July 2014 to hear evidence from the Parties' respective experts on Portuguese and Luxembourg law.

10. POST-HEARING SUBMISSIONS

26. The Parties filed Post-Hearing Briefs on 8 August 2014 and Costs Submissions on 28 November 2014.

⁸ Transcript (English), Day 4, pp. 1080-1081.

27. With leave of the Tribunal, Venezuela filed Comments on Claimants' Costs Submissions on 12 December 2014.
28. The proceeding was closed on 21 December 2015.

C. RELEVANT FACTS

29. The Tribunal sets out below the basic facts that have led to this dispute.
30. Further issues of fact are elaborated in the course of the analysis of jurisdiction in **Section E.** below, and the analysis of the substantive claims in **Section F.** below.
31. Unless otherwise indicated, all statements of fact in each of these sections reflect the Tribunal's findings.
32. Given the number of entities referred to in the course of this narrative, and for ease of reference, a list of "Relevant Entities" with brief descriptions is included at **Annex I** to this Award.

1. THE PRIVATISATION OF THE VENEZUELAN STEEL INDUSTRY

33. Between 1974 and 1993, the Venezuelan steel industry was primarily state owned. It was managed by CVG, a wholly state-owned entity, and its subsidiaries.⁹ CVG is a dependency of the MIBAM, which, since 2011, has been known as the Ministry of Industry. One of CVG's subsidiaries was CVG Sidor, incorporated in 1964 by CVG and another state entity, CVG Electrificación del Caroni C.A., for the purpose of developing the Venezuelan iron and steel industry.

⁹ Request, para.11

34. On 10 March 1992, the Venezuelan Congress enacted the Privatisation Law.¹⁰
35. On 7 December 1994, by Decree No. 448, the Government of Venezuela provided for the “*initiation of the process for the privatisation of ... Companies held by [CVG]*”, including CVG Sidor.¹¹
36. In March 1995, the Venezuelan State entity, Fondo de Inversiones de Venezuela, was charged with the task of privatising companies in the iron and steel sector, including CVG Sidor.
37. In November 1997, the Venezuelan Congress approved the execution of the sale and purchase agreement for the shares of CVG Sidor to Consorcio Siderurgica Amazonia Ltd., which, in turn, became a subsidiary of Ternium S.A., an affiliate of Tenaris. The privatised company was named Siderurgica del Orinoco C.A. (“**SIDOR**”). SIDOR became one of the largest integrated steel producers in Latin America (and the largest in the Andean region) as well as the continent’s main finished steel exporter, with an increasing need for basic inputs such as hot briquetted iron (“**HBI**”).¹²
38. In the early 2000s, Tenaris, which was already a significant investor in the privatised Venezuelan steel industry, held a controlling stake in Venezuela’s sole producer of seamless pipes, TAVSA. It also had a minority shareholding in the HBI producer, Comsigua.¹³ It was looking for extra sources of HBI. In 2003, the South Korean concern, POSCO, decided to sell its HBI producing assets in Venezuela, which included a decommissioned HBI plant within two kilometres of SIDOR’s plant and within 20 kilometres of the port of Palua. At that time, SIDOR was also looking for additional HBI in order to be able to produce at full capacity.

¹⁰ Exhibit C-18

¹¹ Exhibit C-19

¹² In the steel-making process, lump ore and iron pellets are first transformed into direct reduced iron (“**DRI**”), which is then mechanically compressed into brick-shapes known as hot briquetted iron or HBI.

¹³ Claimants’ Memorial, para. 25

39. Built in the 1990s at a cost of over \$370 million¹⁴, PosVen was held out as the newest and most modern HBI plant in the world, and the plant with the third highest production capacity (1.5 million tons of HBI per year) world-wide.¹⁵ It had been decommissioned in late 2001 following operational difficulties and a downturn in the steel market.
40. Also among the assets was PosVen's 29% shareholding in COPAL, the operator of the Port of Palua, through which HBI products, including those made by PosVen (and, in due course, by Matesi), were shipped and of the capacity of which, PosVen had an entitlement to use approximately one third.
41. In March 2004, SIDOR and Tenaris Global Services (B.V.I.) Limited ("**Tenaris Global**"), a wholly owned subsidiary of Tenaris, bid successfully for the assets of PosVen.¹⁶
42. In April 2004, Tenaris Global and SIDOR incorporated a company in Venezuela, which was called Materiales Siderurgicos Masisa S.A. ("**Masisa**") and through which they would acquire the PosVen assets. Tenaris Global's 55% shareholding in Masisa was transferred to Talta, which already held the remaining 45% of the shares.¹⁷ In August 2004, Masisa's name was changed to Matesi.¹⁸ Talta continued to hold 50.2% of the shares and SIDOR acquired 49.8%.¹⁹ Hereafter Masisa/Matesi is referred to as "**Matesi**".
43. On 27 April 2004, an Asset and Sale Purchase Agreement was concluded between PosVen as Seller, Matesi as Purchaser, Tenaris Global Services S.A. (a company incorporated in Uruguay) and SIDOR, pursuant to the terms of which, the PosVen assets would be transferred to Matesi for US\$120 million.²⁰

¹⁴ Exhibit C-68, p. 2

¹⁵ Exhibit C-68, p. 5

¹⁶ See Montero, para. 25

¹⁷ Exhibit C-21, Articles of Incorporation of Matesi

¹⁸ Exhibit C-22

¹⁹ Exhibit C-13

²⁰ Exhibit C-23

44. Among a number of conditions precedent to closing was a requirement that Matesi enter into contracts for the supply of raw materials crucial to the production of HBI with a number of state-owned entities on terms no less favourable than those enjoyed by PosVen. Among them was a long-term iron ore contract with a subsidiary of CVG, CVG Ferrominera del Orinoco, C.A. (“**CVG FMO**”), the monopoly supplier of iron ore. Matesi duly entered into a long-term (13 year) contract with CVG FMO for the supply of iron mineral and pellets on 17 June 2004.²¹
45. On 8 July 2004, Matesi and PosVen executed a Sale and Purchase Agreement.²² On the same day, SIDOR and Talta entered into an Investment Agreement. Pursuant to the terms of that agreement, SIDOR and Talta each confirmed that they would purchase the assets of PosVen, including its HBI plant, through Matesi. SIDOR and Talta also confirmed, first, the amount that each would invest in Matesi in order to permit it to commence operations and, second, that they would enter into Off-Take agreements under the terms of which, they would acquire Matesi’s HBI.²³
46. The asset purchase and start-up costs of Matesi were financed in part by loans from Talta and SIDOR, including a loan for some US\$60 million from Talta, which was the subject of a Loan Agreement between Matesi and Talta concluded that same day (the “**Talta Loan**”).²⁴
47. On 9 July 2004, the Talta Off-Take Agreement was signed. Pursuant to its terms, Matesi undertook to sell 50.2% of its total output to Talta and Talta was obliged to purchase at least 30.12% of Matesi’s production. In the case of the Off-Take agreement into which Matesi entered with SIDOR, Matesi was

²¹ Exhibit C-25

²² Exhibit C-24

²³ Exhibit C-73

²⁴ Exhibit C-74. The SIDOR Loan and Off-Take Agreements were entered into on or about the same day. Part of the Talta Loan was capitalised in 2004. The balance was reduced to some US\$48 million (See Exhibits C-79 and C-67 at p. 6) The amount of the Loan now claimed to be outstanding is US\$27.1 million

obliged to sell 49.8% of its total output to SIDOR and SIDOR was obliged to purchase at least 29.88% of Matesi's production.²⁵

48. On 21 July 2004, Matesi entered into a 15-year gas supply contract with PDVSA Gas, S.A.²⁶ Pursuant to an assignment, it had already entered into an existing 20-year agreement with EDELCA for the supply of electricity on 8 July 2004.²⁷
49. Matesi took possession of the HBI plant in August 2004. The plant was the subject of an initial US\$7 million upgrade and refurbishment programme in order to render it operational, after having been 'mothballed' for three years. The upgrade included the acquisition and installation of a new transformer and the modification of the plant's cooling conveyor. Production at the Matesi HBI plant recommenced on 17 October 2004.²⁸
50. In September 2004, Venezuela implemented Disposition No. 58 of 2 September 2004.²⁹ Pursuant to the terms of the Disposition, the approval of the Comisión de Administración de Divisas ("CADIVI") was required before foreign currency could be applied to the repayment of a foreign loan. CADIVI's own approval was conditional upon receipt of a certificate from the Ministry of Planning that the loan in question constituted a "*productive financing*" falling within the economic and social policies of Venezuela. In the event, although Matesi requested such certificate, none was ever forthcoming. Claimants contend that in the absence of the Ministry's certificate, CADIVI would not register Matesi's debt to Talta with the result that Matesi could not effect repayment.³⁰

²⁵ Exhibits C-26 and C-27

²⁶ Exhibit C-77

²⁷ Exhibit C-72

²⁸ It is asserted by Claimants that by February 2005, Matesi was producing at some 80% of production capacity; that it was running at some 75% of capacity on average between February and April 2005; that in the first full year of production, it produced approx. 1 million tons of HBI; and that it was expected to increase production over time, contingent on receiving sufficient iron pellets and lump ore from CVG FMO pursuant to the Supply Contact. (See Claimants' Memorial, paras. 51-53).

²⁹ Exhibit C-80

³⁰ Claimants' Memorial, paras. 62 and 63

2. PRESIDENTIAL DECREE NO. 3895

51. Presidential Decree No. 3895 of 12 September 2005 required the renegotiation of: “*Agreements to Ensure the Supply of Raw Materials and Inputs*” intended to “*guarantee the supply of raw materials and semi-finished products produced by basic industries*”³¹ One such agreement was Matesi’s Supply Contract with CVG FMO.
52. SIDOR was required to renegotiate its contract within a week or face nationalisation.³² The amendment to Matesi’s own Supply Contract included a 50% increase in the price of iron ore.
53. In October 2005, MIBAM, CVG FMO and others concluded an Agreement to Ensure the Supply of Raw Materials and Semi-Finished Products for the Iron and Steel Sector.³³ For its part, CVG FMO “*guarantee[d] the supply of iron mineral to producers of semi-elaborated products*”. Pursuant to Clause 7 of the Agreement, existing supply contracts were to be renegotiated within two months in conformity with the Agreement. Companies in the iron and steel sector, which did not agree to the renegotiated terms faced the threat of expropriation.³⁴
54. Matesi entered into a Declaration of Adherence dated 6 December 2005.³⁵ Its own renegotiated supply contract with CVG FMO was concluded on 18 January 2006.³⁶ CVG FMO maintained that a price increase was necessary to: “*suspend the unfairness and inequality that [CVG FMO had] sustained following the increase in international prices of iron and steel.*”³⁷ The effect of the renegotiation was that CVG FMO undertook to supply Matesi with the volume and quality of products that it required for a period of 12 years, subject to an increase of some 50% in the prices to be paid by Matesi. The renegotiated

³¹ Exhibit C-28

³² Claimants’ opening presentation, Slide 24

³³ Exhibit C-29

³⁴ Exhibit C-32 and see also President Chavez’s statement that SIDOR would be nationalised, if it did not adhere to the terms of the Steel Supply Agreement (Exhibit C-86).

³⁵ Exhibit C-30

³⁶ Exhibit C-31

³⁷ Exhibit C-24

contract also permitted CVG FMO to sell its own products to state (“Social Production”) companies at lower prices than it offered to Matesi.

3. THE NATIONALISATION OF SIDOR: PRESIDENTIAL DECREE NO. 6,058

55. On 10 April 2008, pursuant to powers conferred on the President of Venezuela by the third Enabling Act approved by the National Assembly on 31 July 2007,³⁸ President Chavez announced that SIDOR was to be nationalised to: “*recuperate our steel industry in order to put it at the service of the development of our country.*” By its Declaration of 10 April 2008, the National Assembly lent its support.³⁹ It did so in terms critical of international companies, including Ternium, a sister company of Claimants (which held a controlling stake in SIDOR), maintaining that it was necessary to:

“defend the sovereignty of our basic industries against the attacks of transnational companies to take over our natural resources and to promote the recuperation of our strategic resources as a secure source of raw material for our national industries.”⁴⁰

56. A Presidential Decree, No. 6,058, implementing the decision was issued on 30 April 2008 (the “**Nationalisation Decree**”).⁴¹ The Decree, which had the “*Rank, Value and Force of Organic Law*”, recorded that:

“Article 1. For reasons of national convenience and in light of its relation with activities that are strategic for the development of the Nation, the industry of the transformation of the iron ore in the Guayana region is hereby reserved for the State, being this region a zone in which the largest portion of the iron reserves are concentrated, whose extraction has been reserved for the State since 1975.

Article 2. The transformation of the commercial company SIDOR C.A., its subsidiary and affiliated companies, into State corporations in accordance with the provisions of Article 100 of the Organic Law on Public Administration, with a State shareholding of not less than 60% of its capital stock, is hereby ordered.”

³⁸ Respondent’s Counter-Memorial, para. 345

³⁹ Exhibit C-35

⁴⁰ Exhibit C-35

⁴¹ Exhibit C-36

57. Pursuant to Article 5 of the Nationalisation Decree, Transition Commissions were to be established within seven days for each company subject to the Decree to ensure their transfer to state-controlled corporations by 30 June 2008. Private sector company shareholders, which were shareholders in the companies affected by the Decree, were required to: “*cooperate to achieve an orderly and safe operational transition*”. The shareholders of SIDOR, its subsidiaries and affiliates (including Matesi in which SIDOR had a 49% shareholding) were afforded 60 days within which to agree terms and conditions upon “*their possible shareholding participation*” in those companies, which were to become state corporations with a State shareholding of not less than 60% (Article 6). The amount of compensation was to be fixed by a Technical Commission, composed of representatives of the State and of the shareholders, likewise within 60 days (Article 7). In fact, the Transition Commission of Matesi set up pursuant to the Nationalisation Decree was not established until 25 May 2009. (See paragraph 63 below).
58. Article 8 of the Nationalisation Decree provided that if no agreement for the transformation of the entity into a State-owned company had been reached within 60 days, then the State:
- “through [MIBAM] or any of its operationally decentralized entities, shall assume the exclusive control and operation of the same, for purposes of preserving the continuity of the activities carried out by the companies to which Article 2 refers.”
59. Article 8 further provided that to the extent no such agreement had been reached:
- “the National Executive Branch shall decree the expropriation of the aforementioned shares in compliance with the provisions of the Law on Expropriation for Public and Social Utility. In no case shall lost profits or indirect damages be taken into account for the calculation of compensation or fair value for the aforementioned assets.”
60. A Technical Commission for SIDOR was set up in May 2008. A Transition Commission (of which the Minister of MIBAM, Mr Sanz, was a member) was

established pursuant to Presidential Decree No. 6,066 dated 13 May 2008.⁴² By July 2008, SIDOR was under state control.⁴³ Negotiations concerning the compensation terms for the nationalisation of SIDOR broke down in August 2008. President Chavez was reported as saying that:

“Techint has been arrogant, so I say, we have to take all the companies that Techint has here and that Techint leave the country.”⁴⁴

61. Meantime, since November 2007, Matesi had been in negotiation with its union (SINTRAMATS) about the terms of a new collective bargaining agreement. Matesi entered into a collective bargaining agreement on 22 August 2008.⁴⁵ Claimants maintain that Matesi accepted terms demanded by Venezuela under threat of nationalisation.
62. That same month, Matesi received, for the first time, an official request from MIBAM to produce detailed figures for the previous ten years of production, together with national and international sales figures.⁴⁶

4. THE NATIONALISATION OF MATESI

63. On 21 May 2009, in the course of a speech delivered nationwide on TV and radio, President Chavez announced his intention to nationalise Matesi and other HBI producers in Venezuela:

“the [HBI] sector, nationalise it. There is nothing to be discussed. The company Matesi shall be nationalised.”⁴⁷

64. Formal confirmation of the nationalisation of Matesi, and of the transfer of its shares to the Venezuelan government pursuant to the Nationalisation Decree of 2008, was set out in a letter from MIBAM Minister Sanz, dated 25 May 2009.⁴⁸ The Minister confirmed his (unilateral) appointment of a Transition

⁴² Exhibit C-37

⁴³ Exhibit C-122

⁴⁴ Exhibit C-128

⁴⁵ Exhibit C-126

⁴⁶ Exhibit C-124

⁴⁷ Exhibits C-38 and C-143

⁴⁸ Exhibit C-39

Commission established pursuant to the Nationalisation Decree, whose task was to:

“[direct, execute and successfully carry] out the entire transition process that will conclude with the transfer of [Matesi’s] **shareholding** to the Venezuelan State.” (Emphasis added).

65. One of the members of the Transition Committee appointed by the State was Mr Daniel Rodriguez, the leader of SINTRAMATS, Matesi’s labour union (see also paragraphs 75-77, 82, 245, 433, 435, 448 and 473 below). The representatives of Matesi were required to:

“provide all the information relating to [Matesi’s] operations, as well as its economic, administrative, productive, financial and labor situation with the aim to fully carry out the granted allocation within a peremptory time.”

66. By letter dated 29 May 2009, Claimants noted the decisions to nationalise Matesi and to designate a Transition Commission, pursuant to the Nationalisation Decree. Article 7 of that Decree required the Commission to establish the compensation to be paid to Matesi’s shareholders within 60 days. Reserving their rights pursuant to Venezuelan and international law, Claimants nominated their representatives to the Technical Commission to be set up pursuant to Article 7 of Decree No. 6,058 and to be charged with the task of fixing the compensation to be paid for the taking of Matesi. However, no government representatives were ever nominated and no Technical Commission was ever constituted.⁴⁹

67. In the meantime, by letter to COPAL dated 28 May 2009, CVG FMO announced the transfer of the operations and administration of the Port of Palua to the State, also pursuant to the announcement of President Chavez made on 21 May 2009.⁵⁰

⁴⁹ Transcript (English), Day 1, p.72

⁵⁰ Exhibit C-40

5. **DECREE NO. 6,796**

68. In the event, that process (namely, the nationalisation of the shares in Matesi pursuant to the April 2008 Nationalisation Decree) was not followed. Instead, by Presidential Decree No. 6,796, enacted on 14 July 2009, an order was made, in reliance upon Article 1 of the Nationalisation Decree (which reserved the iron ore transformation industry in the Guayana Region for the State), for the:

“... acquisition of the **assets** of ... [VENPRECAR, COMSIGUA Matesi and TAVSA], their subsidiaries and affiliates ... with the aim of transforming [them] into State corporations in accordance with the provisions of Article 102 of the Decree with Rank, Value and Force of Organic Law on Public Administration”⁵¹ (Emphasis added)

69. The Decree, which has the “*Rank, Status and Force of Law in those matters that are Delegated in the Council of Ministers*”, also established separate Transition and Technical Commissions dedicated to Matesi, albeit that a Transition Commission, but not a Technical Commission, had already been constituted pursuant to the Nationalisation Decree.

70. Article 3 of Decree 6,796 contemplated that, once constituted, the Transition Commission would become part of Matesi’s current Board of Directors:

“immediately assuming operational control in order to guarantee the transfer and continuity of the activities [it carries] out. The private sector companies that are shareholders of [Matesi] shall cooperate to achieve an orderly and secure operational transition.”

71. Article 4 of the Decree provided:

“A Technical Commission, composed of representatives of the State and of the private sector involved shall be established for purposes of agreeing upon the fair value to be paid, which commission shall function for a period of sixty (60) calendar days that may be extended, by mutual agreement, for sixty (60) additional consecutive days.”

72. Article 5 of the Decree provided:

⁵¹ Exhibit C-42

“Upon the expiration of the period established in [Article 4] without an agreement for the transformation into a State company being reached, the Bolivarian Republic of Venezuela, through the agency of the Ministries or any of their operationally decentralized entities, indicated in Article 2 of this Decree, shall assume exclusive control and operation thereof in order to ensure the continuity of the activities carried out by the companies referenced in Article 1”.

73. Further, the Decree provided that:

“Should no agreement be reached in the negotiation of the **assets**, the National Executive shall decree the expropriation thereof in compliance with the provisions of the Law on Expropriation Due to public or Social Utility. The Technical Commission can not in any way take into account lost profits nor indirect damages when calculating indemnification or in the valuation of the aforementioned assets.” (Emphasis added)

74. Thus, while the Transition Commission was to become part of Matesi’s existing Board of Directors in order immediately to assume operational control and to guarantee the transfer and continuity of the company’s activities, the Technical Commission was tasked with agreeing the compensation to be paid within 60 days, subject to any mutually agreed extension of a further 60 days. Absent such agreement, the state would assume control over Matesi.

75. On 16 July 2009, the Transition Commission, headed by Mr Rodriguez and established pursuant to the Nationalisation Decree, rather than any Commission yet to be appointed pursuant to Decree No. 6,796, began to make a series of new appointments including that of a Maintenance Manager and an Industrial Plant Manager. It “*dismissed, violently expelled and replaced Matesi’s management*”.⁵²

⁵² Request, para. 49 and see Exhibits C-43 and C-44

76. Matesi subsequently gave notice to the President of the Transition Commission that it was no longer responsible for the plant, because Mr Rodriguez had seized complete control on behalf of the Transition Commission on 22 July 2009.⁵³
77. Notification of the establishment of a Transition Commission, pursuant to Decree No. 6,796 was issued to Matesi by Vice-Minister Hernandez of MIBAM on 23 July 2009. Matesi was informed that the Transition Commission, which was identical in its membership to the Transition Commission set up pursuant to the Nationalisation Decree, had joined the Management Board of Matesi with effect from 15 July 2009.⁵⁴ On 28 July 2009, the Transition Commission notified Matesi of the appointment of a new Production Manager and a new Maintenance Manager.⁵⁵ However, no Technical Commission pursuant to Decree 6,796 was ever constituted to determine compensation.
78. On 12 August 2009, Matesi wrote formally to the Minister, MIBAM, to inform him that it had sustained losses in excess of US\$600 million.⁵⁶
79. The formal transfer of the plant to the government of Venezuela took place on 17 August 2009, evidenced by the signing of Extrajudicial Inspection Minutes by an official of the Court of the Municipality of Caroni.⁵⁷ On the face of the Minutes, the government recorded that in compliance with Decree No.6,796, the Transition Commission appointed by the President was:

“assuming operational control only and exclusively **over the assets and other goods** owned by Matesi in order to repair and put into operation the briquette production plant and this declaration does not imply an acceptance by the Commission or the Republic of [Matesi’s] shares, bank accounts, commercial or financial debts, labor liabilities, contractual or other obligations ... environmental or tax contingencies as well as any other obligations [of Matesi].” (Emphasis added)

⁵³ Exhibit C-44

⁵⁴ Exhibit C-45

⁵⁵ Exhibit C-46

⁵⁶ Exhibit C-33

⁵⁷ Exhibit C-47

80. The government further:
- “recorded that [Venezuela], through the Transition Commission (representative of the Bolivarian Republic of Venezuela), does not assume the administration of [Matesi], in order to comply with [Decree No. 6,796], **it only and exclusively receives the assets of the aforementioned company**, given that its control and operation belong to its shareholders under the Commercial Code and therefore [Matesi] is responsible for its administration and control.” (Emphasis added)
81. For its part, Matesi protested that:
- “[it] did not participate in and does not ratify the report presented by [Vice-Minister Hernandez for MIBAM].”
82. Mr Rodriguez was subsequently appointed General Manager of Matesi. Although the company is now referred to as “Briqueteras de Venezuela” or “**BriqVen**”, there has been no formal change of name, nor has a state corporation in that name been constituted to hold Matesi’s assets.

6. THE EXPROPRIATION OF MATESI

83. On 15 May 2010, President Chavez announced that Matesi was to be expropriated, because it had not proved possible to reach an agreement with Matesi’s shareholders.⁵⁸
84. The formal expropriation order was made pursuant to the Law for Expropriation in the Public or Social Interest of May 2002.⁵⁹

7. DECREE NO. 8,280

85. On 7 October 2010, the Venezuelan National Assembly declared that the assets of Matesi were of “*social purpose and public interest*”.⁶⁰ That declaration was followed on 14 June 2011 by Decree No. 8,280.

⁵⁸ Exhibit C-52: “We have been unable to achieve an amicable agreement with [Matesi’s] owners. Therefore, we will expropriate Matesi. We cannot continue to play cat and mouse. I expect the Decree to expropriate and take control of Matesi.”

⁵⁹ Exhibit C-53

⁶⁰ Exhibit C-54

86. Pursuant to the terms of the Decree, an order was made for the “*forced acquisition*” of: “*all of the movable and immovable assets and improvements presumptively owned or in possession of Matesi*” which were required: “*for the execution of the “BRIQUETERA DE VENEZUELA C.A.” [“BriqVen”] project.*” (Emphasis added).
87. The expropriated assets, which were the subject of, and which were listed specifically in, the Decree, comprised itemised land and buildings of Matesi, together with:
- “structures, equipment (plant, vehicles, tools, miscellaneous equipment computers and software), inventory (consumables, spare parts, raw materials) belonging to [Matesi] and that are needed for [the BriqVen project] as well as the investment securities that [Matesi] possesses from [COPAL]”.
88. These were to:
- “pass free of encumbrances or limitations to become property of [Venezuela] in accordance with the provisions of article 11 of the Law on Expropriation Due to Public or Social Utility.”⁶¹
89. Specifically, Article 8 of the Decree required the Attorney-General to proceed to implement the expropriation and to transfer the assets.
90. On 14 July 2011, the Attorney-General announced by way of a press notice that he was establishing a Valuation Commission to determine the compensation to be paid for the expropriation of the Matesi assets pursuant to Decree No. 8,280.⁶² The Attorney-General invited Matesi’s owners to nominate their representative to the Commission within 30 days, failing which the judicial expropriation of Matesi’s assets would be undertaken pursuant to the Expropriation Law. In the event that did not happen, and the steps provided for in Decree 8,280 and the Expropriation Law were not completed.

⁶¹ Exhibit C-55

⁶² Exhibits C-57 and C-58

91. Following the State’s takeover of Matesi, operations continue under the name of Briquetera de Venezuela (“**BriqVen**”). But title to Matesi’s assets and shares has never been transferred to the State, and BriqVen has never been registered as a company.

D. SUMMARY OF THE PARTIES’ POSITIONS

92. The Tribunal has had the benefit of extensive and detailed written memorials and submissions; a full evidential record; and extensive oral submissions. It has carefully considered every argument raised, and all materials and evidence adduced, by all Parties. The Tribunal has chosen, however, not to set out a lengthy recitation of each side’s case in this Award, but instead simply to outline the broad positions of the Parties in this **Section D**, and then to summarise some of the more significant points made, in the course of its analysis of jurisdiction (**Section E**), the substantive claims (**Sections F and G**) and quantum (**Section H**).
93. In so far as any argument or evidence has not been specifically identified or recorded in the body of this Award, this does not mean that it has not been taken into full consideration.

1. CLAIMANTS’ CASE

94. *Jurisdiction:* It is Claimants’ position that they have fulfilled all criteria to establish jurisdiction in this case. They have a legal dispute with Venezuela within the meaning of Article 25(1) of the ICSID Convention; the dispute arises directly out of an investment within the definitions of the Luxembourg and the Portuguese Treaties; Claimants satisfy the relevant nationality criteria; and the Parties have consented to arbitrate their disputes.
95. *Substantive Claims:* Claimants maintain that they, as investors, and their qualifying investments in Venezuela, are protected by the terms of the Luxembourg and Portuguese Treaties, and that by virtue of its conduct, Venezuela is in breach of its obligations thereunder.

96. In particular, it is the Claimants' case that Venezuela has breached:
- (a) **Articles 3 and 4** of the Luxembourg Treaty.
 - (b) **Articles 2, 3, and 4** of the Portuguese Treaty.
97. In terms of remedies, Claimants seek:
- (a) Declarations by the Tribunal with respect to Venezuela's alleged breaches;
and
 - (b) Damages from Venezuela in the principal sum of US\$299.3 million, as at the Valuation Date of 30 April 2008, "*or such other sum as the Tribunal determines will ensure full reparation*".
98. Claimants' principal damages claim of US\$299.3 million comprises three elements:
- (a) US\$235.9 million in compensation for the taking of Claimants' 50.2% equity stake in Matesi based on a Discounted Cash Flow valuation;
 - (b) US\$27.1 million in compensation for the taking of Talta's loan to Matesi;
and
 - (c) US\$36.3 million in compensation for losses suffered by Matesi by reason of the alleged discriminatory supply of iron pellets by CVG FMO.
99. Claimants further seek pre-award interest on the sum of US\$299.3 million in the amount of US\$489.8 million from the Valuation Date to 31 December 2011 at a rate of 17.12% (being the WACC of Talta), and at a rate of 16.27% from 1 January 2012 to 31 July 2014 (being the adjusted WACC of Talta following changes to corporate income tax applicable to Talta in Madeira, Portugal), and thereafter until the date of the Tribunal's Award, compounded annually, or at such other rate and compounding period as the Tribunal determines will ensure full reparation.

100. An additional claim is made for post-Award interest to be paid by Venezuela on both of the claimed sums of principal and interest at a rate of 16.27%, compounded annually, until such time as payment has been made in full or at such other rate and compounding period as the Tribunal determines will ensure full reparation.
101. Claimants seek further Declarations from the Tribunal to the effect that the awards of damages and interest are made net of applicable Venezuelan taxes and that Venezuela may not deduct taxes in respect of the payment of any such awards, together with an Order that Venezuela indemnify Claimants in respect of any double taxation liability that would arise in Luxembourg, Portugal or elsewhere that would not have arisen but for Venezuela's adverse measures.
102. Finally, Claimants seek such other relief as the Tribunal considers appropriate and an Order that Venezuela pay all of the costs and expenses of the arbitration, including Claimants' legal and expert fees, the fees and expenses of the Tribunal and ICSID's other costs.⁶³

2. VENEZUELA'S CASE

103. *Jurisdiction:* Venezuela objects to the jurisdiction of the Tribunal to entertain the Claimants' claims. It maintains that:
 - (a) Claimants have failed to establish that they have standing as investors for the purposes of the Luxembourg and/or Portuguese Treaties, in that they have failed to establish that they meet the requirement of "*siège social*" and "*sede*";
 - (b) by their 20 August 2009 Notice of Dispute and accompanying memorandum, Claimants failed to give any, or any sufficient, notice of:

⁶³ Claimants also looked to Venezuela to pay for the fees and expenses of any experts appointed by the Tribunal, but no such expert has been appointed.

- i. their Protection and Security Claims under the Luxembourg and Portuguese Treaties;
 - ii. their Fair and Equitable Treatment / Discrimination Claims under the Luxembourg and Portuguese Treaties;
- (c) even if Claimants had standing and proper notice had been given, the Tribunal lacks jurisdiction under the Luxembourg and Portuguese Treaties to entertain the Claims concerning the Supply Contract, the Off-Take Agreements and the Talta Loan, because Claimants have failed to prove that they qualified as investments for the purposes of the Luxembourg and Portuguese Treaties; and
- (d) the Tribunal lacks jurisdiction to entertain claims concerning pre-expropriation damages based upon any alleged breach of the CVG FMO Supply Contract.
104. A further jurisdictional objection was raised by Venezuela in its letter to the Tribunal of 28 September 2012, to the effect that Claimants should not be permitted to proceed jointly in this arbitration. The objection was formally withdrawn in the course of Respondent's Opening submissions at the hearing.⁶⁴
105. *Substantive Claims:* Without prejudice to its jurisdictional objections, Venezuela denies any breach on its part of the Fair and Equitable Treatment / Discrimination provisions of the Luxembourg and Portuguese Treaties, asserting that the acts of CVG FMO cannot be attributed to Venezuela; that CVG FMO did not, in any event, discriminate against Matesi in the distribution of pellets pursuant to the Supply Contract, whether by favouring other HBI producers or otherwise; and that Claimants have failed to meet the high threshold for establishing a breach of the international minimum standard of treatment.
106. Venezuela likewise denies any failure on its part to accord protection and security under the Luxembourg and Portuguese Treaties. It points, first, to what

⁶⁴ Transcript (English), Day 1, pp. 211-212

it contends was a failure by Claimants to satisfy the high burden of establishing that Venezuela had colluded or conspired with SINTRAMATS to seize or harm the Matesi plant and, second, to the interventions of the State Judiciary, which carried out two Judicial Inspections and granted Matesi a Protection Order and to that of the National Guard to protect the Plant.

107. Venezuela further maintains that the expropriation of Matesi was carried out in the exercise of its sovereign authority; that it complied with the requirements of international law; and that it did not violate Treaty requirements in respect of the payment of compensation.

108. So far as the damages claimed in respect of Matesi are concerned, Venezuela contends that Claimants have failed to establish any such entitlement: the basis of the claim is flawed and the valuation defective and inflated - as is the claim for interest. Nor is there any basis for the claimed tax indemnity.

109. In sum, Venezuela contends that the Tribunal has no jurisdiction over Claimants' claims, but to the extent that it determines that it does have jurisdiction, all of the claims should be rejected in their entirety.

110. Venezuela seeks compensation for all expenses and costs associated with its defence of the claims.

3. PRINCIPAL TREATY PROVISIONS

111. For convenience, the Tribunal sets out below the principal provisions of each treaty that are relied upon by the Parties:⁶⁵

a. The Luxembourg Treaty⁶⁶

“Article 1: Definitions

⁶⁵ The Tribunal has taken the English language text comprising part of RLA-113 (the Luxembourg Treaty) and RLA-114 (the Portuguese Treaty), both of which were used by both Parties for the purposes of the examination of the Legal Experts.

⁶⁶ RLA-113

1. The term “investors” means:

.....

(b) “Companies”, that is to say, any legal person constituted in accordance with the laws of the Republic of Venezuela, the Kingdom of Belgium or the Grand Duchy of Luxembourg, and having its ‘siège social’ in the territory of the Republic of Venezuela, the Kingdom of Belgium or the Grand Duchy of Luxembourg respectively, as well as any legal person effectively controlled by an investor covered by paragraphs 1, (a) or (b);

that has made an investment in the territory of the other Contracting Party.

2. The term “investments” shall mean any kind of asset, or any direct or indirect contribution in cash, in kind or in services, invested or reinvested by an investor of one Contracting Party in the territory of the other Contracting Party in any sector of economic activity whatsoever” ...

including

(b) ... shares, equity participations and any other form of participation, including minority or indirect participation in companies constituted in the territory of one of the Contracting Parties....

(c) obligations, claims and rights to any benefit having an economic value linked to an investment.

Article 2: Promotion of Investments

1. Each Contracting Party shall promote investments in its territory by investors of the other Contracting Party and shall admit such investments in accordance with its laws.

2. In particular, each Contracting Party shall facilitate the conclusion and execution of licensing agreements and commercial, administrative or technical assistance agreements, to the extent that these activities are related to investments.

Article 3: Protection of Investments

1. All investments, whether direct or indirect, made by investors of one Contracting Party enjoy in the territory of the other Contracting Party, fair and equitable treatment according to international law.

2. Except for measures required for the maintenance of public order, such investments shall enjoy constant protection, which precludes any arbitrary or discriminatory measure that could hinder, in fact or in law, their administration, maintenance, use, enjoyment or disposal.
3. For all matters governed by this Agreement, investors of each Contracting Party shall enjoy, in the territory of the other Contracting Party, treatment no less favorable than that accorded by the former Contracting Party to its own investors or to investors of the most-favored nation.
4. However, this treatment and protection will not cover the privileges that either Contracting Party accords to investors of any third State by virtue of its participation or association in a free trade area, customs union, common market or any other regional economic organization of a similar nature.

Article 4: Measures Depriving or Restricting Property

1. Each Contracting Party undertakes not to adopt any measure of expropriation or nationalization, nor any other measure whose effect is to directly or indirectly dispossess investors of the other Contracting Party of investments belonging to them in its territory, unless the following conditions are fulfilled:
 - A) the measures are adopted for reasons of public purpose or national interest;
 - B) the measures are adopted in accordance with legal procedures;
 - C) they are neither discriminatory nor contrary to a specific commitment concerning the treatment of an investment;
 - D) they are accompanied by provisions for the payment of adequate and effective compensation.
2. The amount of the compensation shall correspond to the real value of the investments concerned on the day prior to the adoption or publication of the measure.

The compensation shall be paid in convertible currency. It shall be paid without undue delay and shall be freely transferable. Interest

shall be paid at the normal commercial rate from the date it is determined until the date of payment.

3. Investors of one Contracting Party whose investments have suffered damage due to war or other armed conflict, revolution, a state of national emergency or revolt occurring within the territory of the other Contracting Party shall enjoy, from the other Party, treatment no less favorable than that accorded to its own investors or investors of the most favored nation as regards restitution, indemnification, compensation or other indemnification.”

b. The Portuguese Treaty⁶⁷

“Article 1

1: The term “investor” means

...

- b) Legal persons, including commercial companies and other companies or associations, that have their seat in one of the Contracting Parties and are constituted and function in accordance with the Laws of that Contracting Party.

(2): The term ‘investments’ includes all types of assets and rights relating to investments made in accordance with the laws of the other Contracting Party, and specifically, but not exclusively including ...

- (b) Shares and other forms of participation in the capital or the economic results of companies;
- (c) Credit rights related to money or any other obligation having an economic value

Article 2

1 – Each Contracting Party shall promote, within its territory, investments made by the other Contracting Party and shall admit such investments in accordance with its legislation.

⁶⁷ RLA-114

- 2 – Each Contracting Party shall protect, within its territory, investments made in conformity with its laws and regulations by the investors of the other Contracting Party and shall refrain from adopting arbitrary or discriminatory measures that prevent the administration, manufacturing, use, usufruct, extension, alienation and disposal of its investments.

Article 3

- 1 – Each Contracting Party shall guarantee, within its territory, non-discriminatory, fair and equitable treatment, according to international law, to investments made by investors of the other Contracting Party.
- 2 – On matters governed by this Agreement, the treatment referred in paragraph 1 of this Article shall not be less favorable than that granted by a Contracting Party to investments made in its territory, in similar conditions by its own investors or by those of a third country.
- 3 – The provisions included in paragraphs 1 and 2 of this Article do not affect the current most favorable treatment or that granted in the future by a Contracting Party to investments by investors of third States by virtue of the following:
 - a) Participation in customs unions, free trade areas or other similar forms of economic cooperation or regional integration;
 - b) Agreements to avoid double taxation or any other tax instrument.

Article 4

Neither Contracting Party shall take measures that deprive, directly or indirectly, investors of the other Contracting Party of investments made by them, except if the following conditions are fulfilled:

- a) that the measures are adopted for reasons of public purpose or national interest, in accordance with the legislation in force;
- b) that the measures are non-discriminatory;
- c) that the measures are accompanied by provisions that guarantee the payment of immediate, adequate and effective

compensation; this compensation shall be based on the market value of the investment in question immediately prior to the moment when the measure was made public; compensation will accrue interest at the exchange rate applicable at the date on which the transaction becomes effective, in the territory where the investment is located; the lawfulness of the referenced measures and the amount of compensation may be submitted for review pursuant to the applicable legal procedure.”

E. JURISDICTION

112. Each of Venezuela’s objections to jurisdiction is addressed in turn below.

113. As noted earlier, the Tribunal has considered carefully every argument advanced on behalf of each Party in the course of these proceedings, albeit not all points are set out in terms in the body of this Award.

1. THE REQUIREMENT OF “*SIÈGE SOCIAL*” / “*SEDE*”

a. Venezuela’s Case

114. It is Venezuela’s case that neither Tenaris nor Talta qualify as “*investors*” under the Luxembourg and Portuguese Treaties respectively, because Tenaris has no “*siège social*” in Luxembourg, and Talta has no “*sede*” in Portugal.

115. The relevant provisions of the two Treaties are as follows (with emphasis added):

The Luxembourg Treaty

“Article 1: Definitions

1. The term “investors” means:

.....

(b) “Companies”, that is to say, any legal person constituted in accordance with the laws of the Kingdom of Belgium, the Grand Duchy of Luxembourg or the Republic of Venezuela, **and having**

its ‘siège social’ in the territory of the Kingdom of Belgium, the Grand Duchy of Luxembourg or the Republic of Venezuela respectively and any legal person effectively controlled by an investor covered by paragraphs 1 (a) or (b)

that has made an investment in the territory of the other Contracting Party.”

The Portuguese Treaty

“Article 1

1: The term “investor” means

... b) Legal persons, including commercial companies and other companies or associations, **that have their seat [sede] in one of the Contracting Parties** and are constituted pursuant to and function in accordance with the Laws of that Contracting Party.”

116. Venezuela maintains that in order to have standing to access arbitral jurisdiction under these Treaties, Claimants must demonstrate not only their respective incorporation, but also that each has its place of effective management in the jurisdictions of Luxembourg and Portugal respectively.
117. Since the establishment of a registered office is central to the act of incorporation, any other interpretation of the additional requirement that Claimants have their “*siège social*” or “*sede*” in Luxembourg and Portugal respectively would render that further condition redundant. This, in turn, would be contrary to the requirement that “*effet utile*” be given to all of the terms of a treaty. It is submitted by Venezuela that the addition of the “*siège social*” and “*sede*” condition, when added to that of incorporation, demonstrates an intention to limit a BIT’s coverage by the inclusion of a genuine link between the individual putative claimant corporate entity and the national State – a link which could not be effected by formal requirements alone.
118. According to Venezuela, the concept of “*siège social*”, a legal term of art, is “*fundamental*” to determining whether the Tribunal has jurisdiction over

Claimants' claims.⁶⁸ It contends, further, that on a proper interpretation in accordance with Article 31(1) of the Vienna Convention, and having regard to international law and investment treaty practice, consistent with the roots of the concept of “*siège réel*” in French civil law, the ordinary meaning of “*siège social*” connotes the place where the “*effective management*” of a company takes place. Venezuela says that neither Claimant has discharged its burden to prove that its place of effective management is in Luxembourg (in the case of Tenaris) or Portugal (in the case of Talta). Reliance on mere extracts from the Luxembourg and Portuguese Commercial Registries is insufficient. In particular, Venezuela contends that Claimants have failed the test set out in *Alps Finance v Slovak Republic*.⁶⁹

119. With respect to the record in this case, Venezuela submits that there is no evidence that the Boards of the Claimant companies actually met in Luxembourg and Portugal respectively. Rather, industry analysis and other sources indicate that whilst Tenaris was constituted in Luxembourg, it was actually directed from Buenos Aires. Venezuela questions whether Tenaris even had an office in Luxembourg at all: it contends that such evidence as there is suggests a picture of two companies, neither of which has its effective management in Luxembourg or Portugal respectively.⁷⁰

120. In its Rejoinder, in reliance on Tenaris S.A.'s Form 20-F, filed with the US Securities and Exchange Commission, Venezuela developed this submission further, asserting that Tenaris is an Argentine company, with 27,000 employees, billions of dollars of revenue and offices on the 26th and 30th floor of a 30-storey office block in Buenos Aires.

121. So far as Talta is concerned, Venezuela maintains that it, too, is an Argentine company, suggesting that Portuguese tax filings show income inconsistent with

⁶⁸ Respondent's Counter-Memorial, para. 131

⁶⁹ *Alps Finance and Trade AG v. Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 5 March 2011, (“*Alps Finance*”); Respondent's Reply on Bifurcation, para. 15.

⁷⁰ Transcript (English), Day 1, pp. 251 and 252

a small office: Talta must, therefore, be managed by Tenaris and since that is an Argentine company, so must be Talta.

122. According to Venezuela, the reality is that Tenaris' connections with Luxembourg and those of Talta with Portugal are "*minimal*".⁷¹
123. On the basis that the criterion of "*siège social reel*" is controlling, argues Venezuela, it could not be right that a company constituted in Luxembourg, but having its central administration in a different country, which would not be governed by Luxembourg law and would not have Luxembourg nationality under Luxembourg law, would nonetheless be entitled to international law protections under the Luxembourg Treaty.⁷² And similarly for Portugal.

b. Claimants' Case

124. Claimants contend that the Tribunal has jurisdiction *ratione personae* over both Tenaris and Talta.
125. Their approach to the interpretation of the terms "*siège social*" or "*sede*" is as follows:
- (a) the terms employed in the Treaties must be interpreted under international rules of treaty interpretation, and in particular Article 31(1) of the Vienna Convention;
 - (b) Articles 31(2), (3) and (4) of the Vienna Convention provide exceptions to this general rule, but they make no reference to the domestic law of a party. If the treaty provision itself does not reference the domestic law of a party, then the interpreter cannot rely upon domestic law to construe that provision under Article 31;

⁷¹ Respondent's Counter-Memorial, paras. 172 and 173

⁷² *Idem*, para. 141

(c) if the interpreter wishes to confirm a meaning produced by Article 31(1), or if the application of Article 31(1) produces an ambiguous, obscure, manifestly absurd or unreasonable result, the interpreter may have recourse to:

“supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion”;

(d) although there is no express reference to the domestic law of the parties among the supplementary means of interpretation, it is not expressly excluded either;

(e) however recourse to domestic law would be inappropriate in this case. First, it is significant in the context in which the terms “*siège social*” and “*sede*” appear in the Treaties that they are the only terms in the definition of “investor” which are not expressly related to the State parties’ domestic law. Second, there is no concept of “*siège social*” or “*sede*” in Venezuelan law and it would be wrong to interpret a Treaty provision by reference to the domestic law of only one of the parties to the Treaty.⁷³ Third, the governing law clauses at Articles 9(5) and 8(3) of the Luxembourg and Portuguese Treaties, respectively, constitute “*lex specialis*”, which supersede the Vienna convention. And these provisions only allow for the application of the domestic law of the host State of the investment in addition to the terms of the Treaties and international law.

126. Be that as it may, even if recourse to domestic law were permissible, according to Claimants, the outcome would be the same: there is no notion of “*sede*” under Venezuelan law⁷⁴ and concepts such as “*domicile*” are irrelevant for the purposes of interpreting the term “*sede*” under the Treaties. But assuming for a moment that Professor Iribarren’s suggestion that “*domicile*” should be treated as an equivalent term for the purpose of interpreting the concept of “*sede*” in the

⁷³ *Patrick H. Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Award, 9 February 2004, para. 50

⁷⁴ Professor Iribarren confirmed that such a concept does not exist under Venezuelan law. (Transcript (English), Day 4, p. 1084)

Portuguese Treaty were correct⁷⁵, then, contend Claimants, it would follow that the term means the company's domicile specified in its articles of incorporation, that is to say, its statutory domicile or registered office. And they say that confirmation for that proposition is to be found at Article 203 of the Venezuelan Commercial Code:

“The domicile of a company shall be the place specified in the company's articles of incorporation; if no place is specified, the domicile shall be the company's principal establishment.”⁷⁶

127. Under Luxembourg and Portuguese law the term “*siège social*” or “*sede*” ordinarily means statutory seat. And even if it were to mean “*siège reel*”, the presumption that the “*siège reel*” and the statutory seat of each of the Claimants coincided would apply, unless rebutted by Venezuela. This presumption was said to be express in Article 2 of the Luxembourg Law of 10 August 1915 on Commercial Companies, and implicit in Article 3(1) of the Portuguese Code on Commercial Companies of 2007. It is Claimants' case that Venezuela has failed to establish any facts, which would rebut this presumption.

128. Finally in terms of approach, Claimants contend that Article 25 of the ICSID Convention does not influence the interpretation of the terms “*siège social*” or “*sede*” in the Treaties.

129. Claimants say that upon the basis of an interpretative exercise conducted pursuant to Article 31(1) of the Vienna Convention, and to such supplementary means of interpretation to which regard might properly be had pursuant to Article 32 of the Vienna Convention, the term “*siège social*” or “*sede*” must be construed as “*registered office*” or “*statutory seat*”, and that the documents that they have provided⁷⁷ are sufficient to prove that Claimants have their seats in Luxembourg and Portugal respectively.

⁷⁵ Transcript (English), Day 4, p. 1112

⁷⁶ Exhibit C-167

⁷⁷ See *e.g.* Extract of the Luxembourg Registry of Commerce and Corporations for Tenaris, 21 June 2011 (Exhibit C-6); Permanent Certificate of Talta, 11 July 2011 (Exhibit C-9) and Extract of the Luxembourg Registry of Commerce and Corporations for Tenaris Investments, 22 July 2011 (Exhibit C-10)

130. Claimants dismiss any suggestion that this case is analogous to *Alps Finance v Slovak Republic*: that was a very different case, which related to an entity which had been set up specifically in order to attempt to bring an abusive claim under a BIT. A Slovak company had assigned receivables to a Swiss corporation, which it had set up expressly for the purpose of bringing itself within the treaty. It was held to be neither an investor, nor to hold an investment.⁷⁸ In this case, there was a physical presence: there were offices, there were ‘phone numbers, and there were people present. Tenaris and Talta had been established long before the investment in Matesi had been made, and they had had seats in Luxembourg and Portugal respectively from the dates of their respective incorporation.
131. Further, Claimants argue that their case is very similar to that considered by the ICJ in the *Barcelona Traction* case⁷⁹ and the basis upon which genuine links with a home state had been established in order to clear the way to bringing a claim. In that case, a company incorporated in Canada, carried on operations in Spain. It had Belgian shareholders. Belgium sought to initiate claims on behalf of its nationals in the ICJ. The ICJ denied the application, holding that only Canada had a right to exercise diplomatic protection on behalf of a Canadian incorporated company.
132. Claimants maintain that Venezuela’s attempt to rely upon Tenaris’ Form 20-F filing with the SEC⁸⁰ as evidence for its proposition that Tenaris is an Argentine corporation employing 27,000 people, 7,000 of them in Argentina, is misconceived. Quite apart from the fact that the Luxembourg Court of Appeal has ruled that the number and location of a company’s employees are irrelevant considerations so far as the determination of the real seat of a company is concerned,⁸¹ Form 20-F relates to Tenaris and all 25 of its “*consolidated*

⁷⁸ Claimants’ opening statement, Slide 77

⁷⁹ *The Barcelona Traction, Light & Power Company Limited* (Belgium v. Spain), Second Phase: I.C.J. Reports 1970, Judgment, 5 February 1970 (“*Barcelona Traction*”)

⁸⁰ Exhibit R-140

⁸¹ Exhibit AP-27: Decision of the Court of Appeal of Luxembourg No. 37940 of 21 December 2011. Notwithstanding that the company in question had established a branch in Switzerland; that liability for payment of salaries, social security obligations and salary taxes existed in Switzerland; and that all of the equipment and property listed in the company’s balance sheet were located at the Swiss branch, the

(Footnote continued on next page)

subsidiaries". Tenaris' sole function is to manage that portfolio of subsidiary companies. The addresses of its subsidiaries are set out in order to comply with listing requirements in the countries in which Tenaris is publicly traded, namely the United States, Italy, Mexico and Argentina. Tenaris' only office is its office in Luxembourg: it has no premises in Buenos Aires. Mr Malvassora's evidence to the Tribunal was that the Tenaris subsidiary, SIDERCA, was the only Tenaris entity to occupy space in Techint's 30-storey office block in Buenos Aires.⁸²

133. As for Talta, Claimants dismiss the allegation that this is an Argentine company as:

"Pure speculation and conjecture, not a single document has been submitted in support of such assertions."⁸³

c. Analysis

1. The Meaning of "*Siège Social*" and "*Sede*"

134. It is common ground that the starting point for any interpretative exercise on the part of the Tribunal is Article 31(1) of the Vienna Convention on the Law of Treaties:

"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."

135. Venezuela asserts that the ordinary meaning of both "*siège social*" and "*sede*" must be taken to be "effective seat", or the location where "*the effective or principal or actual management of the company takes place*".⁸⁴ In contrast, the Claimants assert that the ordinary meaning of both terms must be taken to be "*registered office*" or "*statutory seat*", without any further requirement. Both sides have cited extensive materials in support of their position.

(Footnote continued from previous page)

real seat of the company was at its registered office in Luxembourg where it held shareholders' meetings and maintained its accounting records.

⁸² Transcript (English), Day 3, p. 629

⁸³ Transcript (English), Day 1, p. 103.

⁸⁴ Respondent's Reply on Bifurcation, para. 13.

136. The principal authorities relied upon by Claimants for the proposition that “*siège social*” and “*seat*” have been taken to mean no more than registered office or statutory seat are as follows:

(a) C. Schreuer, *Nationality of Investors: Legitimate Restrictions vs. Business Interests*, 24(2) ICSID Review–Foreign Investment L.J. (2009), p. 522, opining that the requirement of a seat is a “*formal requirement*[.]” that does not require “*genuine economic activity*”;⁸⁵

(b) *Tokios Tokelès*, in which the tribunal held that relevant evidence of corporate seat included a:

“registration certificate, statute of incorporation, and notices of payment of foreign investment registered by the respondent state.”

and that:

“a nationality test of *siège social* leads to the same result as one based on state of incorporation”⁸⁶

(c) The *Barcelona Traction* case,⁸⁷ in which the ICJ held that only Canada had a right to exercise diplomatic protection on behalf of a Canadian incorporated company. The ICJ noted that the company was incorporated in Canada; that it had its registered office,⁸⁸ maintained its accounts and share registers and held its board meetings there; and that it was listed with the Canadian tax authorities. The company was held to have a close and permanent connection with Canada, irrespective of its commercial activities outside Canada (akin, according to Claimants, to the position of *Tenaris* and *Talta* in this case).

(d) *Total v. Argentina*, at para 57, where the tribunal used “registered office” as a shorthand definition of the term “*siège social*”:⁸⁹

⁸⁵ CLA-25

⁸⁶ *Tokios Tokelès v Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004, para. 43 (“*Tokios Tokeles*”)

⁸⁷ See FN 81, *supra*

⁸⁸ “*Registered office*” and “*siège*” were used co-terminously by the ICJ.

⁸⁹ *Total SA v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Objections to Jurisdiction,

(Footnote continued on next page)

“Total has submitted evidence that it was incorporated and constituted in accordance with the laws of France and maintains its registered office (*siège social*) in France.”

137. Venezuela rebuts or distinguishes each of the authorities relied upon by the Claimants on this issue. For example, it has pointed out that:

- (a) In *Barcelona Traction*, (as observed by Douglas⁹⁰), the theoretical right of Canada to exercise diplomatic protection on behalf of the Barcelona Traction company was never actually disputed.
- (b) As to *Tokios Tokelès*, in light of the wording of Article 1(2)(b) of the Ukraine-Lithuania BIT, the tribunal’s analysis was *obiter dictum*. Nor is there any indication in the body of the tribunal’s award of the arguments Ukraine raised to rebut the evidence submitted by Tokios or to establish that the *siège social* of the company was maintained in Ukraine.
- (c) As to the jurisdictional award in *Total v. Argentina*, where the tribunal deemed the claimant company’s maintenance of a registered office in France to be sufficient evidence that it had its *siège social* there, Venezuela points out that in that case, the point was actually conceded:

“... Argentina **has not disputed** that the Claimant meets the requirement of being a French body corporate having its registered office in France in accordance with French law as required by Article 1.2(b) of the BIT.²⁸³”

138. Venezuela, for its part, has cited an extensive compilation of authorities and instances in international law and practice, which demonstrate that the terms “*siège social*” and “*seat*” may import a requirement of effective or actual management, or something more than simply the address of a registered office or statutory seat. By way of example:

(Footnote continued from previous page)

25 August 2006, para. 57.

⁹⁰ Z. Douglas, *The International Law of Investment Claims* (2009) at p. 22, at para. 44. (RLA-5)

- (a) UNCTAD, *Scope and Definition*, in UNCTAD Series on Issues in International Investment Agreements (1999), p. 39:⁹¹
- “Generally speaking, ‘seat of a company’ connotes the place where effective management takes place.”
- (b) N. Rubins & S. Kinsella, *International Investment, Political Risk and Dispute Resolution* (2005), p. 409:⁹²
- “... a juridical person may be considered a national of the State where it has its **effective** headquarters (or ‘*siège social*’)” (emphasis added)
- (c) M. Sornarajah, *The International Law of Foreign Investment* (2nd ed., 2010), p. 324:⁹³
- “...the *siège social* theory ... determines nationality by looking for the place where the seat of its **effective** management is located” (emphasis added)
- (d) P. Sauvé, *Trade and Investment Rules: Latin American Perspectives*, United Nations (2006), p. 22:⁹⁴
- “Some BITs combine the place of incorporation test with criteria focusing on a company’s ‘seat.’ This test attributes the nationality of the place where the *siège social* is located. The ‘seat of the company’ often refers to the place of **effective** management decision-making, and as such, while more difficult to determine, reflects a more significant economic relationship between the corporation and the country granting nationality” (emphasis added)
- (e) A. Diehl, *The Core Standard of International Investment Protection* (2012) p. 63:⁹⁵
- “Under th[e] concept [of *siège social*], the **actual** management of a company determines its nationality” (emphasis added)

⁹¹ RLA-17

⁹² RLA-12

⁹³ RLA-14

⁹⁴ RLA-13

⁹⁵ RLA-4

- (f) E. Z. Jaramillo & A. Saldarriaga, et al., *Treaty Planning: Current Trends in international Investment Disputes that Impact Foreign Investment Decisions and Treaty Drafting* [in:] M. Á. Fernández-Ballesteros & David Arias eds., *Liber Amicorum Bernardo Cremades 1207* (2010), p. 1222:⁹⁶
- “The place of incorporation and the entity’s seat or **principal** seat of business (*siège social*) are the most commonly used requirements” (emphasis added)
- (g) R. Thorn & J. Doucleff, *Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of Investor* in: M. Waibel et al eds., *The Backlash Against Investment Arbitration* (2010), pp. 6-7:⁹⁷
- “**Siège social** ... connotes the place of **effective** management, and therefore reflects a more genuine link between the entity and the home country than the place of incorporation” (emphasis added)
- (h) Professor Brownlie, *Principles of Public International Law* (7th ed., 2008), p. 484,⁹⁸ who observes (in the context of diplomatic protection⁹⁹) that the *siège social* criterion is intended to provide a:
- “guarantee that the grant of personality is **reasonable** and not a device for limiting the **proper** sphere of protection of other governments.” (emphasis added)
- (i) Dolzer & Stevens (1995), pp. 35-38,¹⁰⁰ who opine that Belgium-Luxembourg bilateral investment treaties rely on the concept of “seat (or *siège social*),” which the authors define as the place of:
- “**actual management** of a company,” (emphasis added)
- (j) *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, at para 123:¹⁰¹

⁹⁶ RLA-9

⁹⁷ RLA-15

⁹⁸ RLA-3

⁹⁹ There is clearly a marked difference between diplomatic protection and investor-state treaty protection, and no basis to import the rules of one into the other (see, e.g., Z. Douglas, *The International Law of Investment Claims* (2009), paras. 541 and 605-9). But the references to materials here and below concerning diplomatic protection remain relevant simply in terms of the understanding of the term “*siège social*” itself.

¹⁰⁰ RLA-40

“the Tribunal’s reading of the treaty language is further strengthened if one bears in mind that in twenty-four Kazakh BITs the Respondent has agreed to the same test as in the present one, the place of incorporation, while in ten other BITs it has added a requirement that the *siège social* or place of business be placed or “real economic activities” be conducted there.”

- (k) Z. Douglas, *The International Law of Investment Claims* (2009), at p. 22 (para. 45):¹⁰²

“... the practice of states ..., in general, reveals that diplomatic protection is not exercised merely on the basis of incorporation. In deciding whether or not to take up claims based on the corporate interests of their nationals, states are naturally preoccupied with the extent to which their own economy has been affected by the alleged violation of the host state. Thus it is common for states to insist that the corporate interest comprises a dominant shareholding or beneficial ownership or a connection based on the *siège social* of the company. ...”

139. Venezuela also placed heavy reliance on the decision in *Alps Finance v Slovak Republic*,¹⁰³ which was the subject of extensive submissions by both sides. In that case, the Slovak Republic objected to the tribunal’s jurisdiction under the Switzerland-Slovak Republic BIT, on the basis (*inter alia*) that the investor did not have a business seat in Switzerland, as required by the BIT in question. Venezuela cites the Slovak Republic’s argument that “seat”:

“has a precise meaning under the BIT, namely the principal place of an actual business”¹⁰⁴

and that to prove that the Swiss corporate address was the “*nerve center*,” *Alps Finance*:

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¹⁰¹ *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013

¹⁰² RLA-5

¹⁰³ *Alps Finance*, see FN 73, *supra*

¹⁰⁴ *Alps Finance*, para. 88.

“had the burden to produce telephone records, rental agreements and rental payments, invoices, purchase orders, banking records, contracts for sale and services, utility bills or even witness statements.”

Venezuela then notes that the investor (much like Claimants here), maintained that an extract from the commercial registry attached to its statement of claim sufficed to prove that it had a “seat” in Switzerland, from where it:

“... administers its business, it holds its headquarters, keeps proper books, rents its office and opens a bank account ...”¹⁰⁵

140. Importantly for Venezuela, the tribunal in *Alps Finance v Slovak Republic* concluded that the indicia relied upon by the investor were insufficient to establish the existence of a Swiss seat. According to the tribunal:

“Proof of a ‘business seat’, in the meaning of an effective center of administration of the business operations, requires additional elements, such as the proof that: the place where the company board of directors regularly meets or the shareholders’ meetings are held is in [the home State’s] territory; there is a management at the top of the company sitting in [the home State]; the company has a certain number of employees working at the seat; an address with phone and fax numbers are offered to third parties entering in contact with the company; certain general expenses or overhead costs are incurred for the maintenance of the physical location of the seat and related services ...”¹⁰⁶

141. But on a closer analysis, the *Alps* case provides no support at all for Venezuela’s case. On the contrary, it appears to cut exactly the other way, and demonstrate that the terms in question are susceptible of different meanings in different contexts. Article 1(1)(b) of the Switzerland-Slovak Republic BIT (in issue in that case) provides as follows:

“The term “investor” refers with regard to either Contracting Party to [...]

¹⁰⁵ *Alps Finance*, para. 117(i).

¹⁰⁶ *Alps Finance*, para. 217.

(b) legal entities [...] which are constituted or otherwise duly organized under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting [P]arty.”

142. It is immediately apparent that this is a differently worded provision to that in both the Luxembourg and Portuguese Treaties, and that – unlike here – the tribunal in the *Alps* case had to apply a “*real economic activities*” test, as specifically provided for in the treaty.

143. But more than this, the juxtaposition in Article 1(1)(b) of the Switzerland-Slovak Republic BIT of the two requirements of “*seat*” and “*real economic activities*”, which are clearly expressed as separate and cumulative criteria, demonstrates that “*seat*” in this particular context must mean something other, and presumably less, than “*real economic activities*”.

144. Having carefully considered the extensive submissions and voluminous materials provided by both sides on this issue, it is clear that neither term has been used in international law and practice as a consistent “legal term of art”, with only one meaning. On the contrary, the range of references upon which each side has relied indicates that these terms are susceptible of either a formal or substantive meaning. As is well-established, a “*term may have a number of ordinary meanings*”.¹⁰⁷ In such circumstances, a tribunal must have regard to the “context” in which the terms appear, and the “object and purpose” of each Treaty, in order to determine which one of the possible ordinary meanings prevails.

145. Article 31(2) of the Vienna Convention provides that the “context” of a treaty includes its preamble, annexes and text. The latter includes:

“the remaining terms of the sentence and of the paragraph; the entire article at issue; and remainder of the treaty”.¹⁰⁸

¹⁰⁷ Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The ‘Crucible’ Intended by the International Law Commission*, in *The Law of Treaties Beyond The Vienna Convention* (Enzo Cannizzaro ed., 2011), p. 109.

¹⁰⁸ Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), p. 427.

146. The “object and purpose” of a treaty :

“include a treaty’s aims, its nature and its end.”¹⁰⁹

147. The key distinguishing feature of both Treaties in this case – unlike the treaty in cases such as (for example) *Tokios Tokeles* – is that the terms “*siège social*” and “*sede*” are used alongside other criteria that would ordinarily be encompassed by the term itself, namely:

-- “... *constituted in accordance with the laws of the Kingdom of Belgium, the Grand Duchy of Luxembourg or the Republic of Venezuela..*” in the Luxembourg Treaty, and

-- “... *constituted pursuant to and function in accordance with the Laws of that Contracting Party ...*” in the Portuguese Treaty.

148. Given this context, it is immediately apparent – as Venezuela has argued – that neither “*siège social*” nor “*sede*” can mean simply “*registered office*” or “*statutory seat*” in a purely narrow and formal sense, since neither term would then have any effective meaning. For a company to be “*constituted in accordance with the laws of ... the Grand Duchy of Luxembourg*”, it must have its registered office or statutory seat in Luxembourg. And for a company to be “*constituted pursuant to and function in accordance with the Laws of*” Portugal, it must have its registered office or statutory seat in Portugal.

149. This point was put in terms to all experts on Luxembourg, Portuguese and Venezuelan law, and no other conclusion was forthcoming. Only Claimants’ Expert on Portuguese law, Prof. Moura Vicente, initially took issue with this point, stating in his Opinion that Portuguese law allows for the possibility that the place of incorporation and place of statutory seat do not coincide.¹¹⁰ Indeed, this appeared to be the only substantive point, which Claimants advanced in

¹⁰⁹ per Villiger, *supra*.

¹¹⁰ Legal Opinion of Professor Dr. Dário Moura Vicente, 23 January 2014, at paras. 37-40.

their response on this issue.¹¹¹ However, Prof. Vicente subsequently accepted that “*a company that is incorporated in Portugal must have its seat in Portugal.*”¹¹² And on a proper analysis, as the Tribunal concludes, absent:

- re-incorporation (*i.e.* in the case of an in-coming foreign company, per Article 3(2) of the Portuguese Code on Commercial Companies, in which case Portuguese law requires that the company be re-incorporated in Portugal, and establish a statutory seat in Portugal), or
- accommodation by a foreign law (*i.e.* in the case of an out-going foreign company, per Article 3(4) of the Portuguese Code, which will depend upon the relevant foreign law allowing such a situation),

it is evident that Portuguese law does not accept that companies be incorporated in one place and have their statutory seat in another.

150. So if “*siège social*” and “*sede*” are to have any meaning, and not be entirely superfluous, each must connote something different to, or over and above, the purely formal matter of the address of a registered office or statutory seat. And this leads one to apply the other well-accepted meaning of both terms, namely “effective management”, or some sort of actual or genuine corporate activity.

151. This conclusion follows from the simple wording of each Treaty. But as articulated by Venezuela, it is also mandated by the well-established doctrine of “*effet utile*”. According to this, the terms of a treaty must if possible be interpreted so that they do not become devoid of effect,¹¹³ or as put by Venezuela:

¹¹¹ See *e.g.* Claimants’ Post-Hearing Brief, para. 174.

¹¹² Transcript (English), Day 7, p. 2101:12-14 (Moura Vicente).

¹¹³ See, *e.g.*, *Corfu Channel Case (Merits)*, Judgment, 9 April 1949, I.C.J. Reports 1949, p. 4 at p. 24 (RLA-24); *Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination* (Georgia v. Russian Federation), Preliminary Objections, Judgment, 1 April 2011, para. 133. (RLA-22).

“... tribunals and courts [must] interpret the provisions of treaties in a manner to give full weight and effect consistent with the normal sense of the words and with the other parts of the text, and in a manner such that reason and sense will be accorded as much as possible to each part of the text.”¹¹⁴

152. This canon of interpretation has frequently been applied in investor-state arbitrations. For example, in 1990, the tribunal in *AAPL*, citing the *Cayuga Indians* case, observed that:

“Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than deprive it of meaning.”¹¹⁵

153. As to “objects and purposes”, the preamble to the Luxembourg Treaty notes that the Contracting Parties desire to “*strengthen their economic cooperation by creating favorable conditions for investments to be made by investors of [either] Contracting Party*” and that they consider the Treaty to have a “*beneficial influence*” on “*reinforcing confidence in the area of investment*”. The Portuguese Treaty states that it is “[*m*]otivated by the desire to intensify economic cooperation between the two States” because “*the reciprocal promotion and protection of investments will contribute to [...] economic prosperity*”. There is clearly a policy decision to be made in the context of strengthening and promoting bilateral economic cooperation as to the class of investors that each Contracting State, acting as host, wishes to attract, and is willing to protect within the scope of each Treaty. Nothing in the evident objects and purposes of either Treaty suggests that a purely formal test of “registered office” or “statutory office” is required. And nothing suggests that a requirement of a genuine link would somehow undermine any object or purpose. On the contrary, if anything, requiring some genuine link with one Contracting

¹¹⁴ Respondent’s Counter-Memorial, para. 148.

¹¹⁵ *Asian Agricultural Products*, at para. 40. See also, *Occidental Exploration and Production Company v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, para. 68 (“*The Tribunal agrees with both parties in that the proper interpretation of Article X must not result in rendering it meaningless. This is the conclusion that arises evidently from the Vienna Convention on the Law of Treaties in respect of interpretation*”); *Salini Costruttori S.p.A. e Italstrade S.p.A. v. the Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 9 November 2004, para. 95 (“*One is therefore hard pressed to see the usefulness of Article 9(2) as interpreted by the Claimants. Such an interpretation runs counter to the general principle of effectiveness (‘effet utile’) and for that reason also ought to be set aside*”).

State would appear to be consistent with the bilateral / reciprocal nature of each Treaty. As the Tribunal explains at paras. 203-223 below, it has found, as a matter of fact, that incontrovertible evidence of such genuine links between Tenaris and Luxembourg and Talta and Portugal exists in this case.

154. *Conclusion:* In conclusion, in order to make sense of each provision, and ensure that each term is given meaning, the Tribunal determines that both “*siège social*” and “*sede*” in the Treaties in issue in this case mean the place of actual or effective management.

2. Other BITs

155. Claimants have submitted extensive materials charting the bilateral investment treaty practice of both Luxembourg (*i.e.* the Belgo-Luxembourg Economic Union) and Portugal, and emphasised that in the majority of cases, treaties have been concluded by Luxembourg with third states in which the term “*siège social*” has been used, and translated in an English version as “registered office”, and treaties have been concluded by Portugal with third states in which the term “*sede*” has been used, and translated in an English version as simply “seat” or “main office”.
156. Venezuela has maintained that the treaty practice adopted by the States of which Claimants assert nationality, far from being conclusive, is “*ultimately irrelevant*,”¹¹⁶ and has invoked the *Guaracachi* case¹¹⁷ as follows:

“According to the Tribunal, the fact, invoked by the Respondent, that other BITs concluded by Bolivia explicitly exclude indirect investments is insufficient to support an a *contrario sensu* interpretation that only those BITs containing such an explicit reference cover indirect investments, since it is well accepted that this kind of argument is not on its own strong enough to justify a particular interpretation of a rule of law”.

¹¹⁶ Respondent’s Post-Hearing Brief, para. 89.

¹¹⁷ *Guaracachi America Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL PCA Case No 2011-137, Award, 31 January 2014.

157. Venezuela also argued, initially, that there is nothing in the Vienna Convention regime, which authorises an interpreter to construe the meaning of a treaty by reference to the provisions of other treaties concluded with third countries. But as the proceedings developed, it then accepted that investment treaties concluded between Luxembourg and Portugal with third parties were a relevant interpretative source under Article 32 of the Vienna Convention.¹¹⁸
158. The Tribunal considers that Luxembourg’s and Portugal’s respective treaty practice has potential relevance as a supplementary source only, under Article 32 of the Vienna Convention. It is not a primary source under Article 31, and it cannot be a starting point in the analysis.
159. In the Tribunal’s view, there is nothing in the treaty practice of either Luxembourg or Portugal that is sufficiently conclusive as to undermine the analysis of “*siège social*” and “*sede*” set out above, and arrived at in the application of Article 31 of the Vienna Convention.
160. It is true that a proportion of Belgo-Luxembourg BITs translate “*siège social*” as “registered office.”¹¹⁹ But there are notable variations in this practice, such as (*e.g.*) Luxembourg’s BITs with the Philippines (which was signed a mere two months before the signing of the Luxembourg-Venezuela BIT); the Czech Republic; and Rwanda, all of which translate “*siège social*” as “head office”.¹²⁰
161. Equally, Portugal’s translation into English of “*sede*” as “main office” or “principal office” does not appear to assist the analysis (given that both “main office” and “principal office” may have a formal or substantive meaning). And

¹¹⁸ Respondent’s Rejoinder, para. 276: “The list of supplemental means in Article 32 is non-exhaustive; thus, it can include other treaties on the same subject matter (adopted before or after the treaty in question) that employ the same or similar terms”.

¹¹⁹ Claimants’ Opening Statement, Slide 73. (And see also the Azerbaijan BIT at Slide 72).

¹²⁰ Agreement between the Government of the Republic of the Philippines and the Belgo-Luxembourg Economic Union, on the Reciprocal Promotion and Protection of Investments, signed on 14 January 1998, entered into force 19 December 2003, Art. I(1)(a)(ii)[,] (b) (RLA-143); Belgo-Luxembourg Economic Union and Rwanda, Convention concerning the reciprocal encouragement and protection of investments, signed on 2 November 1983, Art. 1(2)(a) (RLA-140); Agreement Between the Belgo-Luxembourg Economic Union and the Czechoslovak Socialist Republic Concerning the Reciprocal Promotion and Protection of Investments, signed on 1 August 1975, Art. 1(a)[,] (b) (RLA-138).

in any event, Portugal's treaty practice in this regard is inconsistent. For example, the BITs with Korea and Zimbabwe translate the same term as "principal place of business",¹²¹ whereas Portugal's BIT with Bosnia Herzegovina uses the term "registered seat" ("*sede registrada*" in the Spanish version), instead of "*sede*".¹²²

162. Ultimately, of course, each treaty has to be interpreted on its own account, on the basis of its own context and objects and purposes.¹²³ Given the analysis under Article 31 of the Vienna Convention, the Tribunal has gleaned little assistance from this comparative exercise in this particular case.

3. Relevance of Municipal Law

163. In interpreting the test in each Treaty, each side also took sharply different positions (as recorded above) as to whether the Tribunal should have regard to the way in which "*siège social*" and "*sede*" are understood as a matter of Luxembourg, Portuguese and Venezuelan law.

164. According to the Claimants, by Article 31(1) of the Vienna Convention, in interpreting the terms "*siège social*" or "*sede*", the Tribunal is restricted to the confines of each Treaty itself, as Article 31(1) admits of no other sources upon which reliance may be placed. Articles 31(2), (3), and (4) provide exceptions to the general rule in Article 31(1), but these Articles make no reference to one party's domestic law. If the treaty provision itself does not reference the domestic law of a party, reliance cannot be placed upon domestic law to construe that provision under Article 31. It is only when an interpreter of a treaty wishes to confirm a meaning produced by Article 31, or if Article 31

¹²¹ Agreement Between the Government of the Republic of Korea and the Government of the Portuguese Republic on the Mutual Promotion and Protection of Investments, signed on 3 May 1995, entered into force 11 August 1996, Art. 3(b) (RLA-142); Agreement Between the Government of the Portuguese Republic and the Government of the Republic of Zimbabwe for the Promotion and Mutual protection of Investments, signed on 5 May 1994, Art. 1(3)(b) (RLA-141).

¹²² Agreement Between Bosnia and Herzegovina and the Portuguese Republic on the Mutual Promotion and Protection of Investments, signed in March 2002, entered into force 3 February 2009, Art. 2(a)(ii) (RLA-144).

¹²³ It might be noted in passing that, at the Hearing, Claimants' own Expert on Luxembourg law, Prof. Prüm, testified that he did not consider Claimants' treaty-practice argument as "*decisive as such*," but rather "*relevant*" only in terms of "*context*." Transcript (English), Day 8, pgs. 2208:20-2209:1 (Prüm).

produces an ambiguous, obscure or manifestly absurd or unreasonable result, that reference may be made to supplementary materials, as provided in Article 32 of the Vienna Convention. No supplementary material can be used as a “first step” for interpretation. And even then, according to the Claimants, no recourse whatsoever ought to be made by the Tribunal under Article 32 of the Vienna Convention to Luxembourg, Portuguese or Venezuelan domestic law.

165. The Tribunal accepts that the interpretation of the terms “*siège social*” or “*sede*” is a matter of international, not domestic, law. Whereas the concepts of “*citizen*” and corporate “*constitution*” in the Luxembourg Treaty, and “*national*” and “*constitution and functioning*” in the Portuguese Treaty, contain a specific and express *renvoi* to the domestic laws of the parties to the Treaties, the terms “*siège social*” and “*sede*” in the respective Treaties do not.

166. The Tribunal also accepts that no supplementary material is to be used as a first step for interpretation.

167. Having said this, the requirements in question here are, in substance, nationality requirements. The criteria of “*siège social*” and “*sede*” are both mechanisms to determine the nationality of a company, and as such whether or not the company qualifies for coverage by a Treaty. And nationality requirements are frequently (though not exclusively) applied in light of relevant domestic law. As noted by Professor Douglas:

“The tribunal’s jurisdiction *ratione personae* extends ... to an individual or legal entity ... which has the nationality of another of the contracting state parties in accordance with the relevant provision in the investment treaty **and the municipal law of that contracting state party** and, where applicable, Article 25 of the ICSID Convention.¹²⁴ (Emphasis added).

168. The position has been summarised by Sasson as follows:

“Once the treaty criteria have been established, they must be applied pursuant to the relevant municipal law. In certain circumstances, municipal law has to be disregarded if the investment treaty refers to

¹²⁴ Z. Douglas, *The International Law of Investment Claims* (2009), p. 284 (RLA-129).

specific criteria to determine corporate nationality (such as Article 17 of the ECT).

...

This does not mean that investment tribunals' decisions will affect the recognition of nationality at the domestic level. But it does mean that investment tribunals must determine nationality for investment treaty purposes. To make such determinations, tribunals may need to assess the evidence adduced by the parties on the application of the relevant municipal law. To the extent that municipal law (including a municipal law determination on the precise matter at issue) clashes with principles of international law, international law must prevail.”¹²⁵

169. To this end, whilst the interpretation of the terms “*siège social*” and “*sede*” remains a matter of international law alone (there being no express *renvoi* to municipal law for either term), the Tribunal considers it appropriate at least to consider the municipal law of (in particular) Luxembourg and Portugal, by way of background to its interpretation.

170. Put in terms of Article 32 of the Vienna Convention, the Tribunal considers that in order to confirm the interpretation at which it has arrived pursuant to Article 31, it may have regard to municipal law (*e.g.* in order to ensure that the interpretation under Article 31 is not impossible, or unworkable as a practical matter). Indeed, as the Claimants themselves accept:

“... it is commonly understood that the list of sources in VCLT Article 32 is not exhaustive. Therefore, domestic law is not excluded *per se* from consideration.”¹²⁶

171. The Tribunal has had the benefit of extensive evidence and submissions on Luxembourg, Portuguese and Venezuelan law, and has carefully considered all of this material. Given its supplementary nature, it is not necessary to recount here all submissions and evidence in any detail, or indeed for this Tribunal to resolve every disagreement on the detailed operation of municipal law. Overall, the Tribunal has arrived at the firm conclusion that there is nothing as a matter of Luxembourg, Portuguese or Venezuelan law that causes it to re-consider the interpretation of “*siège social*” and “*sede*” to which the application of Article 31

¹²⁵ M. Sasson, *Substantive Law in Investment Treaty Arbitration* (Kluwer, 2010), p. 64.

¹²⁶ Claimants' Post-Hearing Brief, para. 194.

of the Vienna Convention gives rise. In particular, the Tribunal notes that notions of “effective seat”, and the use of a substantive test for corporate nationality in certain circumstances, are entirely familiar to both Luxembourg and Portuguese law (being the municipal systems of most relevance to the issues of nationality in this case).

172. *Luxembourg Law:* As Prof. Steichen testified, Luxembourg law has adopted the theory of “effective seat” for purposes of the law applicable to corporations and their nationality.¹²⁷ This proposition was agreed by Prof. Prüm,¹²⁸ who stated that although the theory primarily purports to “*avoid that certain companies [would/could] be able to avoid Luxembourg law in an abusive way,*” it also covers situations where “*a company had its ... statutory seat in Luxembourg and would transfer its real seat abroad.*”

173. Article 2 of the Luxembourg Company Law of 10 August 1915 (as amended) provides:

*Art. 2: “Le domicile de toute societe commercial est situe au siège de l’administration centrale de la societe. L’administration central d’une societe est presume, jusqu’a preuve du contraire, coincider avec le lieu du siège statutaire de la societe.”*¹²⁹

In English translation:

“the domicile of a registered company is located at the seat of its central administration (head office).¹³⁰ Until evidence to the contrary shall have been finally brought, the central administration of the company is deemed to coincide with the place where its registered office is located.”

174. Both Claimants’ and Venezuela’s Luxembourg legal experts agree that the unqualified term, “*siège social*” in the Company Law refers to the statutory seat or registered office.¹³¹

¹²⁷ Transcript (English), Day 8, p. 2126:9-2127:15 (Steichen).

¹²⁸ Transcript (English), Day 8, p. 2233:9-2234:19 (Prüm).

¹²⁹ Exhibit AP-6

¹³⁰ The footnote explains that the English language text of the amending EC Regulation 2157/2001 uses the term “head office”, whereas the term “central administration” is used in a number of translations of laws of the financial sector and by the financial industry.

¹³¹ Transcript (English), Day 8, p. 2123 (Steichen) and Transcript (English), Day 8, p. 2206 (Prüm); see also Steichen Legal Opinion, para. 21, and Prüm, paras. 11-15

175. Pursuant to Article 2 of the Company Law, a presumption is established that the “*real seat*” of a corporation coincides with its statutory seat, unless the contrary is proven.

176. It is common ground between the experts¹³² that the “*real seat*” theory, as it is applied by the Luxembourg courts, is intended to preclude a company from seeking fraudulently to circumvent Luxembourg law. It is for that reason that the relevant provision of the Company Law is to be found within Section X of the Law, entitled “*Companies constituted in foreign jurisdiction*”.

177. Article 159 provides:

“Any company whose central administration (head office) is located in the Grand-Duchy shall be subject to Luxembourg law, even though the constitutive instrument may have been executed in a foreign jurisdiction. In case the domicile is located in the Grand-Duchy of Luxembourg, it is of Luxembourg nationality and Luxembourg law is fully applicable to it. In case the domicile of a company is located abroad but such company has in the Grand-Duchy of Luxembourg one or more locations where it conducts operations, the place of its most important establishment in the Grand-Duchy of Luxembourg, which it shall indicate for that purpose in the documents whose publication is required by law, shall constitute the secondary domicile of that company in the Grand-Duchy of Luxembourg.”

178. Both Prof. Steichen and Prof Prüm agreed that the test of “*effective seat*” was to be defined as:

“the place where the company, in truth, operates in terms of its brains and its heart, ...[w]here ... the key decisions are being taken on a regular basis”

and that the elements indicative of the presence of an effective seat within the above meaning included: the places where the Directors meet; the place where

¹³² Transcript (English), Day 8 p.2126 (Steichen), Legal Opinion of Prüm, para. 41

the Shareholders meet; and the place where the books and records of the company are being kept.”¹³³

179. Prof. Steichen also explained that interpreting Luxembourg law to require that a company have a “genuine link” with Luxembourg was consistent with Luxembourg’s “open economy” policy.¹³⁴

180. *Portuguese Law*: The only Portuguese legal provision defining the “*sede*” of a corporate entity is to be found at Article 159 of the Portuguese Civil Code as follows:

“The seat of a corporate entity is the one designated in its bye-laws or, in the absence of such designation, the place in which its principal administration normally operates.”¹³⁵

181. The evidence before the Tribunal on behalf of both sides was that the interpretation of the unqualified term “*sede*” in this Code must be made with reference to Article 3(1) of the Commercial Companies Code, which adopts the qualified term “*sede efectiva*”, and imports a concept of the principal and effective seat of the administration of a commercial corporation.¹³⁶

182. Article 3(1) of the Commercial Companies Code provides as follows:

“Commercial companies have as their personal law the law of the State where the main and effective seat of their administration is located. A company having its statutory seat in Portugal may, however, not oppose to third parties its submission to a law other than Portuguese law.”¹³⁷

183. In their Legal Opinion, Professors Maia and Duarte pointed to the following factual elements as being relevant to the determination of Talta’s effective seat:

- (a) the place where day-to-day management takes place or where those responsible for management act;

¹³³ Transcript (English), Day 8, p. 2129:5-8 and 2132:8-13 (Steichen). Transcript (English), Day 8, p. 2255:16-2256:8 (Prüm).

¹³⁴ Transcript (English), Day 8, p. 2136:1-2137:13 (Steichen).

¹³⁵ Exhibit DMV-26 and see Transcript (English), Day 7, p. 1977 (Maia)

¹³⁶ Maia/Duarte Opinion, paras. 7-12, 23, 25-26, 32; Transcript (English), Day 7, p. 1897:1-16 (Maia). Transcript (English), Day 7, p. 2057:17-20 (Moura Vicente).

¹³⁷ Exhibit DMV-19

- (b) the place where third parties have contact with the management of the company.¹³⁸
184. Two further elements were added in the course of their evidence at the hearing, namely:
- (c) the place where the managers meet; and
- (d) the place where documents belonging to the management of the company are kept.¹³⁹
185. For his part, Professor Vicente considered that the effective seat was determined by the place:
- “in which the main deliberations of [the company’s] managing bodies are transformed into acts of [ordinary] management”
- although that was not necessarily the place where the managing bodies met.¹⁴⁰
186. *Venezuelan Law*: The position with respect to Venezuelan law is less clear, albeit not such as to negate the interpretation to which Article 31 of the Vienna Convention gives rise.
187. Venezuela’s presentation of Venezuelan law rested upon the expert testimony of Professor Iribarren. The Tribunal has given careful consideration to this evidence, in light of Claimants’ submission that to the extent that the notion of “*domicile*” is relevant to the interpretation of the Treaties then it is clear, on the basis of Article 203 of the Venezuelan Commercial Code, that if a company has a registered office identified in its articles of incorporation (as is the case here), that place is the company’s domicile for the purposes of Venezuelan law.
188. The Tribunal notes Professor Iribarren’s concession that he had not referenced Article 203 in his First Report¹⁴¹ and his proposition that given the “*complexity*”

¹³⁸ Legal Opinion of Pedro Maia and Tiago Duarte, para. 32

¹³⁹ Transcript (English), Day 7, p. 1939

¹⁴⁰ Legal Opinion of Dario Mauro Vicente, para. 59 and see also Transcript (English), Day 7, pp. 2064-2065

¹⁴¹ Transcript (English), Day 3, p. 1113

of the nature of the problem and the aspects of public law involved, there was, as he put it:

“an interest to interpret the idea of domicile under Venezuelan law in a way that is not as straightforward or simple as stated under the Business Code.”¹⁴²

189. Professor Iribarren suggested that it was necessary to establish the “*real, actual reason underlying the activities of the company that has started [the] arbitration.*” To that end, he postulated a “*progressive interpretation of the law*” based upon the Constitution, such that the law was “*(a)dapt(ed) to the new times and to the interpretation under the Constitution*” and an application of the BITs in an “*abusive manner*” could be avoided.¹⁴³ That he achieved by an “*interpretative effort*” whereby Article 203 of the Commercial Code was interpreted jointly with Article 27 of the Civil Code.¹⁴⁴ Article 27 provides that the domicile of a natural person is their principal seat of business and interests. If the latter was not the seat designated in the act of incorporation, then applying a “*progressive interpretation of the Act*”, “*we could conclude that the Claimants did not have any real reason in actual fact to bring forward this arbitration.*”¹⁴⁵

190. For the reasons adumbrated by Claimants, the Tribunal has considerable difficulty with this proposition. First, it runs contrary to the clear terms of Article 203 in a manner contrary to Article 7 of the Venezuelan Civil Code:

“Laws cannot be derogated from except by other laws and their disuse, custom or contradictory practice cannot be invoked against their observance, regardless how old and universal they are”¹⁴⁶

Second, it contradicts Article 8 of the Venezuelan Commercial Code, which provides that the provisions of the Venezuelan Civil Code only apply to commercial companies where the Commercial Code is silent. Article 203 of the Commercial Code regulates the domicile of commercial companies and so

¹⁴² *Idem*, p. 1086

¹⁴³ *Idem*, p. 1088

¹⁴⁴ Iribarren Second Legal Opinion, paras. 25 and 35

¹⁴⁵ *Idem*

¹⁴⁶ Exhibit HIM I-9

Article 27 of the Civil Code is inapplicable. Third, Article 203 is clear on its terms and so no “*interpretative effort*” is required – or appropriate.

191. The Tribunal has real difficulty, too, with the further suggestion, which emerged in the course of Professor Iribarren’s cross-examination that the determination of the seat of a mercantile corporation could change depending upon whether the company was dealing with the State or with a private entity:

“it could change if we apply the techniques and the interpretation under the Constitution and the progressive interpretation of the law to see the true economic reality underlying the legal matter at issue.”¹⁴⁷

192. In the course of an important and revealing exchange with a member of the Tribunal, Professor Iribarren confirmed that the starting point in his inquiry had been that:

“... in arbitration ... one needs to go for the real reality, the underlying economic reality of the matter, and that is why it seems to me that perhaps some transnational companies that make investments in other countries might make abusive use of the form to the detriment of the underlying economic reality in its business existence.” He confirmed, too, that that was also the end point of his inquiry.¹⁴⁸

193. But the most telling point in terms of the weight to be attributed to his evidence, was Professor Iribarren’s response to a series of questions focused upon his failure to draw attention to Article 28 of the Civil Code which, in contrast to Article 27, deals specifically with the domicile of partnerships, associations, foundations and corporations and provides that it shall be:

“the place where its direction or management is located except otherwise provided by its Bylaws or special laws.....”¹⁴⁹

194. Professor Iribarren accepted that Article 28 referenced the specific issue of the domicile of civil companies by reference to the company’s statutory domicile or

¹⁴⁷ Transcript (English), Day 4, p. 1109

¹⁴⁸ *Idem* at pp.1127-1129

¹⁴⁹ Exhibit HIM II-2

registered office, but he declined to accept that it was controlling as opposed to a complement to Article 27.¹⁵⁰ He continued:

“I didn’t mention it, because what I tried to clarify when I analyzed the case and the matter was, what is the underlying economic reality in the matter, and the underlying economic reality could make it such that neither Talta nor Tenaris had their main economic activity in Portugal or Luxembourg. The issue was how would a literal interpretation of these provisions we’re discussing be prejudicial to the position of the Republic. That is what I tried to do in my first Report as well as in the second one on this issue.”¹⁵¹

195. Beyond the inadequacies of Professor Iribarren’s testimony, the Tribunal concludes that nothing in Venezuelan law undermines, impedes or renders unworkable the interpretation of the Treaties to which Article 31 of the Vienna Convention gives rise.

4. Article 25 of the ICSID Convention

196. Venezuela’s assertion that the definitions of “*corporate investor*” in the Treaties should be interpreted in light of Article 25 of the ICSID Convention, which definition was to be understood to reflect domestic legal requirements for corporate nationality, was raised for the first time in the course of cross-examination of Professor Pruem.¹⁵² The Tribunal does not consider that to be a point well taken. It takes the view, reflected in the decisions of other ICSID tribunals, notably in *Rompetrol v. Romania*¹⁵³ that the requirements and criteria to be fulfilled in order to qualify as a corporate investor shall be those set out in the applicable investment treaties and that there is no scope for importing additional conditions purporting to be based upon Article 25 of the ICSID Convention.

¹⁵⁰ Transcript (English), Day 4, p. 1119

¹⁵¹ *Idem*, p. 1120

¹⁵² Transcript (English), Day 8, pp. 2228-2229

¹⁵³ *Rompetrol v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent’s Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008, paras. 81-83. (RLA-137)

5. Nature and Application of the Test

197. Having arrived at a meaning for both terms in the context in which they appear here, there is then a question as to the precise test that each imports.
198. In assessing whether Tenaris' and Talta's actual or effective management was located in Luxembourg and Portugal respectively, the Tribunal considers it critical to take into account the actual nature of each company, and its actual activities.
199. In so far as either entity is no more than a holding company, or a company with little or no day-to-day operational activities, its day-to-day "management" will necessarily be very limited, and so will its physical links with its corporate seat. Put another way, it would be entirely unreasonable to expect a mere holding company, or a company with little or no operational responsibility, to maintain extensive offices or workforce, or to be able to provide evidence of extensive activities, at its corporate location. And yet holding companies, and companies with little or no operational responsibility, have "management", and are certainly not excluded from the Treaties in this case. Indeed, countries such as Luxembourg and Portugal clearly consider it to their respective benefit to attract such companies, and to maintain a corporate regulatory regime that allows for them.
200. To this end, the Tribunal considers that the test of actual or effective management must be a flexible one, which takes into account the precise nature of the company in question and its actual activities. And it is with this in mind that the Tribunal has assessed the record in this case.

6. Tenaris

201. Tenaris is no more than a holding company. And critically, by virtue of its Articles of Association, it is prohibited from engaging in industrial or commercial activities, which are undertaken by its operating subsidiaries. Its Articles of Association, dated 6 June 2007 provide as follows at page 002:

“[t]he company may not carry on directly any industrial activity or maintain a commercial establishment open to the public”.¹⁵⁴

202. Similarly, the Extract of the Luxembourg Registry of Commerce and Corporations for Tenaris, dated 21 June 2011, provides as follows, at page 0003:

“Description of Corporate Purpose: The purpose of the Company is to engage in all activities directly or indirectly associated with financial acquisitions, in any form whatsoever, in Luxembourg or foreign companies or in other commercial entities and in the administrative, management, control and development of activities thereof [...]”¹⁵⁵

203. As a holding company, Tenaris has over 25 subsidiaries. Its purpose is to engage in all activities directly or indirectly associated with financial acquisitions, in any form whatsoever, in Luxembourg or foreign companies or in other commercial entities in the administrative, management control and development of activities thereof. It has no operational activities of its own and its only function is to manage its portfolio of companies.

204. But Tenaris has a valid existence in Luxembourg in its own right as a holding company, and this is distinct from the existence and operation of its subsidiaries outside of Luxembourg. Accordingly, the Tribunal considers Venezuela’s focus upon the extent of activity of, and net sales generated by, Tenaris’ subsidiaries outside Luxembourg,¹⁵⁶ and the number of subsidiaries Tenaris has in countries other than Luxembourg,¹⁵⁷ is misconceived. It is Tenaris’ own operation within Luxembourg that must be examined for the purposes of the Luxembourg Treaty.

205. With this in mind, the activity of “managing” Tenaris and its operations would necessarily be a relatively limited one. And on the evidence in this case, the “effective” centre for such activity was Luxembourg.

¹⁵⁴ Exhibit C-202

¹⁵⁵ Exhibit C-6

¹⁵⁶ See *e.g.* Respondent’s Counter-Memorial, para. 172; Respondent’s Rejoinder, paras. 15 and 197

¹⁵⁷ See *e.g.* Respondent’s Rejoinder, para. 197

206. In terms of constitution and structure, the Tribunal notes, in particular, the following:

(a) an extract dated 21 June 2011 from the Luxembourg Registry of Commerce and Corporations confirms that Tenaris was incorporated in 2002, with its “*corporate headquarters*” (“*siège social*”) located at 29 Avenue de la Porte-Neuve, L-2227 Luxembourg,¹⁵⁸

(b) Tenaris’ Articles of Association dated 6 June 2007¹⁵⁹ record as follows:

i. Article 1: Tenaris is a:

“*societe anonyme* holding governed by these Articles of Association and by the laws and regulations of the Grand Duchy of Luxembourg governing business corporations and holding companies, and more specifically by the laws of August 10, 1915 and July 31, 1929, such as those laws were amended by subsequent laws and regulations.”

ii. Article 3:

“The registered office “*siège social*” is established in Luxembourg-City”

iii. Article 9:

“The board of directors shall meet as often as required by the interests of the Company and at least four (4) times a year, upon notice by the chairman or by two (2) directors, either at the registered office or at any other place indicated in the notice ...Board of directors meetings can be validly held by means of telephonic conference call, video conference or any other means genuinely allowing for the participation, interaction and intercommunication of the attending directors.”

iv. Article 15:

¹⁵⁸ Exhibit C-6. By 2008, the *siège social* of Tenaris had moved to 46a, avenue John F. Kennedy, but by the time of the June 2011 AGM, it had reverted to the former address at 29 ave de la Porte-Neuve. See para. 209 above.

¹⁵⁹ Exhibit C-202

“The annual general meeting shall meet each year *ipso jure* in the city of Luxembourg at the place indicated in the notices for meeting on the first Wednesday of June at 11.00 a.m. The general meetings, including the annual general meeting, may be held in a foreign country whenever there occur circumstances of force majeure as determined by the board of directors in its discretion. In such event, the terms and conditions necessary to provide proper deliberations and publications will continue to be those provided for by the laws of Luxembourg.”

v. Article 19:

“The nationality of the company may be changed and the commitments of its shareholders may be increased only with the unanimous consent of all the shareholders and bondholders, if any....”

vi. Article 20:

“Twenty (20) days before the general meeting, the shareholders may take cognizance at the registered office of the annual accounts and the report of the auditors.”

vii. Article 25:

“All points not covered by the present Articles of Association shall be governed by Luxembourg law.”;

(c) Tenaris’ amended Articles of Association dated 2 May 2012¹⁶⁰ record that:

i. Article 1: Tenaris is:

“a *societe anonyme* governed by these Articles of Association and by the applicable laws and regulations of the Grand Duchy of Luxembourg.”

ii. Its Registered Office remained unchanged (Art. 3) as did the provisions of Arts. 9, 19 and 25;

iii. Article 15:

¹⁶⁰ See Exhibit C-231. The Articles were amended pursuant to an EGM of the Company held in Luxembourg on 1 June 2011 the (incomplete) note of which is as Exhibit C-224.

“The annual general meeting shall meet each year in Luxembourg at the place indicated in the notices of meeting on the first Wednesday of May at 9.30 a.m. The general Meetings, including the annual general meeting, may be held in a foreign country whenever there occur circumstances of force majeure as determined by the board of directors in its discretion. In such event, the terms and conditions necessary to provide proper deliberations and publications will continue to be those provided for by the laws of Luxembourg.”

iv. Article 20:

“Copy of the annual accounts, the auditor’s report on such annual accounts and such other documents required by law shall be made available to shareholders in compliance with applicable law.”

207. Against this structure, and with respect to the actual management of Tenaris and its business in Luxembourg, there are a number of key points, as set out below.

208. The office in Luxembourg is the only office of Tenaris worldwide.¹⁶¹

209. Tenaris’ annual general meetings of shareholders are convened at its Luxembourg “*siège social*”.¹⁶²

210. The Minutes of the AGM in June 2009 do indeed show that it was convened at 46A ave. John F Kennedy in Luxembourg, as was the June 2010 AGM, while the June 2011 AGM was convened at the “*siège social*” at 29, ave de la Porte-Neuve.¹⁶³

¹⁶¹ Transcript (English), Day 1, pp.97-98

¹⁶² Transcript (English), Day 1, pp.97-98

¹⁶³ See Exhibit C-224. As noted by Prof. Prüm, and other Luxembourg legal commentators (*e.g.* J.P. Winandy, *Manuel de droit des sociétés*, 2011 ed., 2011, Exhibit AP-26, page EN 0003), the place where the shareholders’ meetings take place is the “*most relevant criteri[on]*” and the “*really decisive factor*” for Luxembourg courts (Cross-Examination of Prof. Prüm, Transcript (English), Day 8, 2255:16-22; 2256:1-2). This is also apparent from the *Caldwell* case - Decision of the District Court of Luxembourg, no. 107,744, 18 April 2008, Exhibit AP-21, page EN 0003; Decision of the Court of Appeal of Luxembourg, No. 33908, 21 October 2009, Exhibit AP-23, page EN 0004; Dismissal of the appeal of the *Cour de Cassation* of Luxembourg, No. 2795, 9 December 2010, Exhibit AP-25, page EN 0004.

211. Tenaris holds Board of Directors meetings at its registered office in Luxembourg. This transpired in the course of oral testimony, as for example in the testimony of Mr Oscar Montero:¹⁶⁴

“Q: [...] did you have a moment in which you had to go to Tenaris’s offices?”

A: Yes. The last joint venture that we announced between Tenaris and Ternium is an investment in Mexico for a thermoelectric plant, a \$1 billion dollar investment. In November, I had to participate – even though I am not a member of Ternium’s board, I often attend – and in that opportunity that investment was going to be discussed at the board, and I had to go to Luxembourg to discuss this investment, and also at Ternium’s board. Afterwards, the Tenaris board meeting took place, also in Luxembourg where it has its seat”.¹⁶⁵

212. In this regard, Claimants (rightly in the Tribunal’s view) dismiss the criticism raised at the hearing by Venezuela that there are no minutes of Tenaris’ Board minutes in the record. They point out that the matter had never been raised by Venezuela in its pleadings, nor had it sought their disclosure as being documents:

“intrinsically relevant to the question of the ‘siège social’ of the Claimants and the jurisdiction of the Tribunal.”¹⁶⁶

213. It is also clear from Tenaris Shareholders’ Meeting Minutes, 2009-2011,¹⁶⁷ pages 0001, 0016, 0032 and 0046 that Mr Roberto Bonatti, a member of the Tenaris’ Board of Directors, was physically present at each of Tenaris’ shareholders’ meetings held in Luxembourg between 2009-2011. The Claimants observed that that was:

“unsurprising, considering that it is typical in the corporate world for a company to hold a board meeting immediately after the Shareholders’ annual meeting.”¹⁶⁸

¹⁶⁴ Cross-Examination of Oscar Montero, Transcript (English), Day 2, p. 399:6-17

¹⁶⁵ Transcript (English), Day 2, p.399.

¹⁶⁶ See Request No. 5 of Respondent’s Request for Documents dated 25 January 2013.

¹⁶⁷ Exhibit C-224.

¹⁶⁸ Claimants’ Post-Hearing Brief, FN 542.

214. Tenaris keeps its books and records at its registered office in Luxembourg. This is prescribed in Article 20 of the company's Articles of Association of 6 June 2007,¹⁶⁹ and also confirmed in Shareholders' Meeting Minutes.¹⁷⁰
215. The Auditors of Tenaris were PricewaterhouseCoopers in Luxembourg.¹⁷¹
216. Further, the Tribunal notes that the Respondent has been singularly unable to identify and demonstrate any other corporate seat for Tenaris, outside of Luxembourg. It was not until its Rejoinder that it posited Argentina, but in the Tribunal's view this has no foundation. In particular, the Respondent has been unable to point to any consistent acts of management of Tenaris itself (as distinct from its subsidiaries) taking place elsewhere.
217. To the extent that other criteria have been raised by Venezuela by reference to Luxembourg law, Claimants maintain that they are irrelevant and/or inaccurate, and the Tribunal agrees. In particular, as set out above, the test to be applied in each Treaty here is ultimately one of international law, not Luxembourg law. The points are noted below for completeness.
218. First, as to domicile and nationality of Tenaris' directors and CEO as a matter of Luxembourg law, Claimants note that the *Caldwell* case¹⁷² made clear that nationality and residence of senior management do not constitute valid criteria of attachment – a proposition accepted by the Luxembourg legal experts of both Parties at the hearing.¹⁷³
219. Second, the (inaccurate) assertion that Tenaris S.A. had 27,000 employees of whom 7,000 were in Argentina is irrelevant: the Court of Appeal of

¹⁶⁹ Exhibit C-202.

¹⁷⁰ Meeting Minutes, 2009-2011, pp. 0002, 0017, and 0033. (Exhibit C-224)

¹⁷¹ Tenaris Shareholders' Meeting Minutes, 2009-2011, pp. 0010, 0011, 0026, and 0042 (appointing PwC S.a.r.l. as Tenaris' auditor). (Exhibit C-224)

¹⁷² *Caldwell S.a.r.l v. State of the Grand Duchy of Luxembourg*: see FN 165, *supra* and Exhibits AP-21, AP-23, and AP-25.

¹⁷³ Transcript (English), Day 8, p. 2167 (Steichen); Transcript (English), Day 8, pp. 2249-2251 and pp. 2264-2265. And see also Exhibit AP-10: Decision of the District Court of Luxembourg in *Focant v. Bacci*.

Luxembourg has held that the number and location of any employees of a company are not relevant criteria.

220. Third, the contention that Tenaris S.A. occupied two floors of a 30-storey office block in Buenos Aries has been refuted by the evidence of Mr Malvassora.

221. Fourth, contrary to the suggestion that (tested by Luxembourg law) it does not maintain an office, or any adequate office, in Luxembourg, as already noted there is irrefutable evidence in the record that Tenaris does have a physical presence in Luxembourg, albeit that under Luxembourg law, there is no need for a company to own or rent premises in Luxembourg.¹⁷⁴

222. Fifth, and again as already noted, Tenaris is a holding company prohibited by its Articles of Association from undertaking industrial or commercial activities, which are the province of its subsidiaries. Even if it were not the subject of such a prohibition, the Luxembourg Court of Appeal has determined that:

“the principal establishment is the place where the heart and brain of the company is (sic) located. It must be distinguished from the company’s seat of operations which corresponds to the place where the company pursues its industrial and commercial activities.”¹⁷⁵

223. In light of the matters set out above, the Tribunal is satisfied that Tenaris has complied in good faith with the Treaty requirement that it be both “*constituted in accordance with the laws of ... the Grand Duchy of Luxembourg*” and that it have its “*siège social*” in Luxembourg.

7. Talta

224. As for Talta, the Tribunal notes that:

¹⁷⁴ See Exhibit AP-16: Law of 31 May 1999 published in the Journal Officiel du Grand-Duché de Luxembourg dated 21 June 1999. And as to Belgian law: see Exhibit AP-7: Wauwermans: “Manuel pratique des sociétés anonymes”

¹⁷⁵ See Exhibit AP-27: Decision No. 37940, dated 21 December 2011. And see also Exhibit AP-10: Decision of the District Court of Luxembourg dated 21 April 1971.

- (a) its Articles of Incorporation dated 5 June 2003 show that its first registered office was at Rua dos Murcas 88 3rd floor District of Se, Funchal¹⁷⁶;
- (b) the Permanent Certificate issued by the Commercial Registry of the Free Zone of Madeira¹⁷⁷ records that its Head Office (“*sede*” in the Portuguese original) is at Rua Alfandega no.74-76-2o andar, sala H 9000 058 Funchal Madeira;
- (c) Talta has no offices elsewhere in Portugal, or anywhere else outside Portugal;
- (d) two of its four Managers are resident in Portugal. Importantly, the joint signatures of Group A managers (De Sousa and Gouvea) and one Group B Manager (both Argentines) or the single signature of a member of the Board of Directors, if so authorised by General Meeting, are required to bind the company. As the company was structured, the signature of a Portuguese resident manager was necessary for every management decision taken by the company;
- (e) Talta holds out to third parties its Portuguese office contact details;
- (f) Talta’s management records are kept in Portugal where its financial statements are subject to audit, and it retains auditors in Lisbon;
- (g) the Minutes of the Shareholders’ meetings of 2010 and 2011 indicate that these meetings took place at an adjacent office in Funchal.¹⁷⁸ As pointed out by Claimants, Rua das Murças runs parallel to Rua da Alfândega. The address on Rua das Murças, indicated as the location of the shareholder meetings, is in the same building and a floor above the location of Talta’s “*sede*” on Rua da Alfândega;

¹⁷⁶ See Exhibit C-170

¹⁷⁷ See Exhibit C-9

¹⁷⁸ Exhibit C-245 and see also Exhibit CLEX-66

- (h) Talta has entered into a Sub-lease dated 27 May 2009 (entered into by Mr Sousa, the manager of Talta) of space in Rua da Alfandega, and an addendum sub-lease agreement of 20 October 2009 for an additional room “I” (for meetings) and a common entrance hall;
- (i) Talta makes corporate filings at the Commercial Registry in Funchal;
- (j) Talta files its tax returns with the Portuguese tax authorities in its capacity as a Portuguese resident (see *e.g.* Talta’s tax filings for 2011 and 2012);
- (k) Talta’s managers have executed powers of attorney, including to their representatives in this arbitration, before a Portuguese Notary Public;¹⁷⁹
- (l) the SEC Filing 20-F for the year ended 2012,¹⁸⁰ which shows Talta as a “*trading and holding company*” incorporated in Funchal.

225. In light of the matters set out above, the Tribunal is satisfied that Talta has complied in good faith with the Treaty requirement that it be both “*constituted pursuant to and function in accordance with the Laws of*” Portugal, and that it have its “*sede*” in Portugal.

8. Conclusion

226. On the basis of the submissions and the evidence that it has received and reviewed above, and judged fairly against the nature of each company, the Tribunal concludes that it has jurisdiction *ratione personae* over Claimants: Tenaris has established that, in accordance with the terms of the Luxembourg Treaty, its “*siège social*” is in Luxembourg. Talta has likewise established that, in accordance with the terms of the Portugal Treaty, its “*sede*” is in Portugal.

¹⁷⁹ A number of these examples are the subject of the references collected at FN 627 of the Claimants’ Post-Hearing Brief.

¹⁸⁰ Exhibit R-141

227. Tenaris is thus entitled to the protections afforded to an investor under the Luxembourg Treaty and Talta is both entitled to the protections afforded to an investor under the Portuguese Treaty and, by virtue of its standing as a wholly owned subsidiary of Tenaris, to those available to an investor under the Luxembourg Treaty, as well.

2. NOTIFICATION OF CLAIMANTS' CLAIMS

a. Venezuela's Case

228. Venezuela objects that it did not receive proper notice of all of the substantive claims that are now pursued by the Claimants in this arbitration, and in particular the Fair and Equitable Treatment / discrimination claims, and the Protection and Security claims. Venezuela argues that this constitutes a failure on Claimants' part to fulfil the jurisdictional requirements of the Treaties.

229. Article 9(1) of the Luxembourg Treaty provides that:

“Any dispute between an investor and the other Contracting Party concerning the application of this Agreement shall be the subject of a written notification, accompanied by a sufficiently detailed memorandum, from the investor. As far as possible, the parties shall endeavor to settle the dispute amicably by negotiation.....”

Article 9(2) continues:

“In the absence of an amicable settlement within six months from the date of the notification of the dispute, the dispute shall be submitted, at the investor's option, either to the competent jurisdiction of the State in which the investment was made or to international arbitration. Once made, the choice shall be final.”

230. There is no direct equivalent provision in Article 8 of the Portuguese Treaty to the express notification provision contained in Article 9 (1) of the Luxembourg Treaty, but Article 8(1) of the Portuguese Treaty does require an attempt to be made to resolve any disputes by “*means of amicable consultations*”, and Article 8(2) provides for recourse to international arbitration (or the local courts of the Contracting Party in whose territory the investment was made):

“[s]hould the dispute not be solved by amicable means within a period of six (6) months counting from the beginnings of these consultations.....”¹⁸¹

231. While Claimants point out that the Portuguese Treaty does not require the submission of any formal notice of dispute, Venezuela suggests that there was implicit recognition on Claimants’ part of the need to give details in the terms of the memorandum submitted with the Notice of Dispute of 20 August 2009.¹⁸²

In that memorandum, Claimants stated that its purpose was to:

“provide detailed information on the dispute under the Luxembourg Treaty and the Portuguese Treaty concerning the nationalization of Matesi.”

232. As a preliminary point, it is to be noted that there is no issue between the Parties that Claimants’ Notice of Dispute of 20 August 2009 and the accompanying memorandum constituted sufficient notice of what Venezuela describes as Claimants’ “*nationalization*” claims.

233. However, Venezuela objects that it did not receive notice of Claimants’ Fair and Equitable Treatment / discrimination and Protection and Security claims.

234. First, and as to the former, it suggests that Claimants have resorted to an after-the-event re-characterisation of complaints raised in correspondence exchanged between Matesi and CVG FMO in 2006 in respect of alleged breaches of contractual obligations on the part of CVG FMO *vis-à-vis* Matesi, as the basis for a Treaty claim. In particular, Venezuela complains that prior to the filing of Claimants’ Request for Arbitration, the issue of pellet allocation had been referred to as: “*contract disputes or questions of contract*”.¹⁸³

235. Second, it was a prerequisite to arbitration that the Parties should attempt to reach an amicable settlement. Such a pre-arbitration negotiation phase was a condition of Venezuela’s consent to arbitral jurisdiction and Claimants failed to

¹⁸¹ RLA-114

¹⁸² Exhibit C-14

¹⁸³ Respondent’s Post-Hearing Brief, para. 156

perfect that consent, so far as the Fair and Equitable Treatment / discrimination and Protection and Security claims are concerned. In particular, it was essential to any fulfilment of the requirement that the Parties seek to find an amicable solution of their disputes that the Parties should know what the matters were, which were said to give rise to the Treaty dispute(s). Venezuela referred to the holding of the Tribunal in *Burlington* that a claimant must “*articulate [its] disagreement with a reasonable degree of specificity*” in order to “*apprise Respondent of a dispute.*”¹⁸⁴

236. Venezuela maintains, too, that were the Tribunal to deem the notice defective, as Venezuela contends is the case, it would be adhering to the “*recent trend*”,¹⁸⁵ exemplified by the decision in the *Tulip* case, to interpret notice provisions strictly.

b. Claimants’ Case

237. In answer, Claimants say that:

- (a) Venezuela had notice of all three claims (*i.e.* the Fair and Equitable Treatment / discrimination and Protection and Security claims, as well as the Expropriation claim);
- (b) even if it did not have specific and separate notice of the Fair and Equitable Treatment / discrimination and Protection and Security claims, they were sufficiently related to the Expropriation claim that no such notice was required in respect of these claims; and
- (c) notice and amicable settlement provisions have been considered by many international tribunals not to be strict jurisdictional requirements, particularly where there was active engagement by a State in a settlement

¹⁸⁴ *Burlington Resources, Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, 2 June 2010.

¹⁸⁵ Respondent’s Post-Hearing Brief, para. 163. And see *Tulip Real Estate & Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28 (“*Tulip*”), Award, 10 March 2014: “Neither the Vienna Convention nor principles of customary international law enable the terms of State consent to jurisdiction to be redefined as merely directory or subject to unexpressed qualifications.”

effort. Accordingly, a failure to comply would not divest a tribunal of jurisdiction. However, it has also been suggested that these clauses provide a procedural opportunity to settle, and if a State does not take advantage of that opportunity, there are no jurisdictional consequences arising from a defect in any notice.¹⁸⁶

238. In this case the principal documents upon which Claimants rely are:

- (a) Claimants' letter dated 20 August 2009 addressed to MIBAM Minister Sanz;¹⁸⁷ and
- (b) Claimants' subsequent letter to Minister Sanz dated 20 November 2009.¹⁸⁸

c. Analysis

239. The communications comprising notice of the two disputed claims have been described as "*woefully inadequate*".¹⁸⁹ On analysis, the Tribunal is unable to agree.

240. Taking the letters in turn, the 20 August 2009 letter refers to interference in the normal administration of Matesi to the detriment of its business operations since the implementation of Decree no. 6,058, and to the fact that:

"since 2004, **as detailed in our letter dated 12 August 2009**,¹⁹⁰ the Government has been obstructing Matesi's normal operation through various acts, including gross violations of its contractual obligations with respect to Matesi and accompanying this conduct with threats of nationalization". (Emphasis added)

241. In the 20 November 2009 letter, Claimants referred to:

¹⁸⁶ Transcript (English), Day 1, p. 134

¹⁸⁷ Exhibit C-14

¹⁸⁸ Exhibit C-51

¹⁸⁹ Respondent's Rejoinder, para. 131

¹⁹⁰ Exhibit C-33: Claimants' letter to Minister Sanz of 12 August 2009 makes specific reference to the allegedly inequitable distribution of pellets by CVG FMO and to the impact of the collective labour agreement.

“losses ... suffered before the issuance of Decree 6,058, due to the intervention measures of the Government in the transactions of Matesi that affected its economic situation. As an example, this included the suspension of the delivery of materials and the lack of action by the labor authorities of the Government regarding the abuses committed by members of the union organization, who instead were officially recognised by your Office by making them members of the Transition Committee for the taking over of control of Matesi.”

242. It is apparent from the manner in which these letters are framed that any settlement negotiations with Venezuela were intended to encompass the totality of what Claimants perceived as the effect of Venezuela’s interventions upon Matesi’s business over a period going back to 2004. They were matters of which Claimants provided adequate identification, and of which, in any event, Venezuela was well aware. In the opinion of the Tribunal, these letters do articulate the disagreement with a reasonable degree of specificity as envisaged in *Burlington* and as elaborated (*e.g.*) in *Tulip*.

243. In *Tulip*, the relevant clause provided that a dispute could be referred to ICSID arbitration twelve months after it had arisen, having been the subject of attempts at amicable settlement in the meantime. The Tribunal found that:

“the applicable legal standard is as stated by the tribunal in *Burlington Resources v. Ecuador*. In this regard, Article 8(2) does not require the investor to spell out its legal case in detail during the initial negotiation process. Nor does Article 8(2) require the investor, on the giving of notice of a dispute arising, to invoke specific BIT provisions at that stage. Rather, what Article 8(2) requires is that the investor sufficiently informs the State party of allegations of breaches of the treaty made by a national of the other Contracting State that may later be invoked to engage the host State’s international responsibility before an international tribunal.”¹⁹¹

244. In the Tribunal’s view, this standard is satisfied here.

245. If the Tribunal were wrong about that, it is in no doubt that, whether or not the claims prove ultimately to be well founded, Claimants’ Fair and Equitable

¹⁹¹ *Tulip*, Decision on Bifurcated Jurisdictional Issue, March 2013, para. 57.

Treatment / discrimination and Protection and Security claims are closely related to their Expropriation claim, and that they arise out of substantially the same subject matter. The Fair and Equitable Treatment / discrimination claims centre upon an alleged attempt by Venezuela to starve Matesi of a key input in favour of companies in which the State held an interest, prior to the expropriation. This was in order to try to decrease the value of Matesi. All of this coincided with, and was said to be closely related to, threats of expropriation directed against the Techint companies. The Protection and Security claim arises out of an alleged failure by Venezuela to stop both the violence perpetrated by the Matesi trade union, which, Claimants say, was directed against the company following the promulgation of the Nationalisation Decree, and the violent actions of the government appointed Transition Commission, exacerbated by the appointment to the Commission of the leader of Matesi's trade union.

246. Consistent with the findings of the Tribunals in *CMS Gas Transmission Co. v. Argentina* and *Teinver v. Argentina*, the Tribunal is of the opinion that no separate notice of these claims is called for, and that the initial notice satisfies the amicable settlement requirement for multiple measures.¹⁹²

3. THE TALTA LOAN AND THE TALTA OFF-TAKE AGREEMENT

a. Venezuela's Case

247. Venezuela does not dispute that Claimants' shareholding in Matesi constituted an "investment" for the purposes of the Luxembourg and Portuguese Treaties. However, it takes issue with the characterisation of both the Talta Loan and the Talta Off-Take Agreement as "investments" under each Treaty.

¹⁹² *CMS Gas Transmission Co. v. Argentina*, ICSID Case No. ARB01/8, Decision on Jurisdiction, 17 July 2003, para. 109: "As long as [the alleged measures] affect the investor in violation of its rights and cover the same subject matter, the fact that they may originate from different sources or emerge at different times does not necessarily mean that the disputes are separate and distinct." ("*CMS Gas*") *Teinver v. Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, para. 125: "Given that the formal expropriation alleged does appear to be closely related to ... [Argentina's regulatory measures], it appears reasonable to conclude that these two core issues are related to the point that they share the same subject-matter."

248. *The Talta Loan:* Pursuant to a Loan Agreement dated 8 July 2004,¹⁹³

Talta agreed to lend Matesi US\$60,346,211:

“to be applied for the payment of the purchase price for the acquisition of the assets located in Ciudad Guayana, Bolivarian Republic of Venezuela, which comprise the hot briquetting iron plant of Posven C.A. and for covering the cost necessary to cause such plant to restart operations.”

249. Provision was made for 20 equal consecutive semi-annual repayments (Article 2.02) and, at Article 2.06 (c), Matesi was required to:

“seek to obtain the registration of the Loan and this Agreement with the Venezuelan exchange control authority (CADIVI) and to obtain authorisations from such authority to purchase from the Venezuelan Central Bank the Dollars required to make the payments required under this Agreement and the Note on such dates set forth in this Agreement.”

250. The loan was duly recognised in Matesi’s books.¹⁹⁴

251. Matesi was subsequently precluded from making the requisite dollar repayments by reason of the implementation of Disposition no. 58 on 2 September 2004. Pursuant to the terms of the Disposition, Matesi was required to obtain approval from CADIVI before it could apply foreign currency to the repayment of the loan that it had received from Talta. CADIVI conditioned its own approval upon receipt of a certificate from the Ministry of Planning that the debt constituted a “productive financing” falling within the economic and social policies of Venezuela. No such certificate was ever forthcoming. Matesi was obliged to extend the calendar of payments in order to avoid a default and part of the loan was capitalised.¹⁹⁵ However, as of 30 April 2008, a sum of US\$27.1 million remained unpaid.

¹⁹³ Exhibit C-74

¹⁹⁴ Claimants’ Reply Memorial, para. 169, and Second Compass Lexecon Report, para. 58.

¹⁹⁵ Transcript (English), Day 3, p. 823 (Bello). See also Transcript (English), Day 3, pp. 826 and 827

252. Venezuela contends that the Talta Loan had no value independent of Matesi's business¹⁹⁶ - indeed it was a legal fiction, because there was no repayment and no interest was collected. In effect, argues Venezuela, Talta seeks a double recovery as both a shareholder in, and lender to, Matesi.¹⁹⁷ Moreover, if the Talta Loan was an independent asset, it carried no risk other than the normal commercial risk of default for which the agreement established its own remedies – for example at Clause 2.03:

“The Borrower shall pay interest on the unpaid principal amount of the Loan outstanding from time to time at a rate per annum equal at all times during each Interest Period to Libor plus 5.00% per annum, payable in arrears on each Payment Date and on the date the Loan is paid in full.”¹⁹⁸

253. Moreover, lender risk was measurable by reference to the interest rate attributable to the loan and in the event of non-payment, Talta's exposure was limited: Clause 6.09 provided that:

“Nothing herein [the loan] shall be deemed or construed to make the Lender a surety or a guarantor of the Borrower or of any other shareholder or Affiliate of the Borrower or liable to meet any obligation of the Borrower or of any other shareholder or Affiliate of the Borrower.”¹⁹⁹

254. In the event of a default, Talta was to rank *pari passu* with all other present and future senior and unsubordinated debt,²⁰⁰ and it was protected in the event of an expropriation by a right to immediate repayment. Clause 5.01 established as an “*event of default*”:

“Any authority asserting or exercising governmental or police powers in Venezuela or any Person acting or purporting to act under such authority shall have taken, authorized or ratified any action or series of actions for or resulting in: (1) the appropriate, requisition, condemnation, seizure, confiscation, expropriation or nationalization of all or substantially all of the shares of the Borrower or all or substantially all of the properties or assets of the Borrower.”

¹⁹⁶ Hart Report, para. 89

¹⁹⁷ Respondent's Rejoinder, paras. 220-222

¹⁹⁸ Talta-Matesi Loan Agreement, § 2.03(a). (Exhibit C-74)

¹⁹⁹ *Idem*, § 6.09.

²⁰⁰ *Idem*, § 3.01(f).

And in the case of an event of default:

“the Lender may declare the entire unpaid principal amount of the Loan, all accrued and unpaid interest and all other amounts payable under the Agreement and the Note to be forthwith due and payable.”²⁰¹

255. *The Talta Off-Take Agreement*: Pursuant to the Off-Take Agreement of 9 July 2004,²⁰² Matesi agreed, for a period of 10 years from the date of its acquisition of Posven’s assets, to sell 50.2% of its Produced Volume to Talta, and Talta agreed to take up 30.12% of the Produced Volume at cost plus 10%.

256. It is contended by Venezuela that the Off-Take Agreement is no more than a straightforward sale and purchase agreement – a commercial agreement entered into between two private entities.²⁰³ Claimants’ assertions that the Off-Take Agreement amounted to a contribution to the State, because it was one of the reasons for Talta’s investment in Venezuela in the first place²⁰⁴ and that it provided for continued supply to Matesi to enable it to operate and employ workers in Venezuela and ensure local supply of HBI were dismissed by Venezuela as being: “*so vague as to be meaningless.*”²⁰⁵ According to Venezuela, such evidence and argument were insufficient to demonstrate that the Off-Take Agreement involved a genuine contribution, namely a commitment of capital, made with the expectation of a commercial return, which was both in the future and uncertain.

257. Furthermore, according to Venezuela, the argument that it involved investment risk, because it was: “*subject to operational and competitive risk that may have decreased the value of Matesi to its shareholders*” was misconceived: that was the sort of operational and competitive risk inherent in any commercial contract

²⁰¹ Idem, §5.01(k) et seq

²⁰² Exhibit C-27

²⁰³ Respondent’s Counter-Memorial, para. 191

²⁰⁴ Claimants’ Reply Memorial, para. 268

²⁰⁵ Transcript (English), Day 1, p. 262

- and in this case, there was a guaranteed seller and a guaranteed buyer within the same corporate family.²⁰⁶

258. In short, this was not a situation in which Talta was paying money or contributing a meaningful asset while any returns were uncertain or dependent upon future profitability. On the contrary, all risks were capable of being minimized by contractual agreement.

259. Venezuela placed reliance, *inter alia*, upon the holding in *Joy Mining Machinery v Arab Republic of Egypt* that:

“If a distinction is not drawn between ordinary sales contracts even if complex, and an investment, the result would be that any sales or procurement contract involving a State agency would qualify as an investment Yet those contracts are not investment contracts except in exceptional circumstances and are to be kept separate and distinct for the sake of a stable legal order.”²⁰⁷

And the holding in *Romak S.A. v. The Republic of Uzbekistan* that:

“An investment risk entails a different kind of plea, 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. Where there is a ‘risk’ of this sort, the investor simply cannot predict the outcome of the transaction.”²⁰⁸

260. Venezuela maintained that in the case of the Off-Take Agreement, there was no involvement of the Venezuelan State, which derived no benefit from a commercial arrangement, subject to normal commercial terms, including provision for ICC arbitration in Montevideo, Uruguay and an application of UNIDROIT principles.²⁰⁹

²⁰⁶ Respondent’s Rejoinder, paras. 216 and 217

²⁰⁷ *Joy Mining v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004. (“*Joy Mining*”).

²⁰⁸ *Romak v. Uzbekistan*, PCA Case No. AA 280, Award, 26 November 2009. (RLA-107)

²⁰⁹ Exhibit C-27 at Art. 13.2.

261. Venezuela also dismissed Claimants' suggestion that the cover afforded by Article 1(2)(c) of the Luxembourg Treaty was "automatic"²¹⁰ and that, by application of Article 1 (2)(e), it extended to all "contractual obligations". In the submission of Venezuela, the protection of the Treaty extended to public law contractual concessions and this agreement was not such an instrument.

b. Claimants' Case

262. Claimants' submission is that both the Talta Loan and the Off-Take Agreement fall squarely within the definitions of "investment" contained in the Treaties (specifically within Art. 1(2)(c) of the Luxembourg Treaty) and that even if the Tribunal were to hold that one or both agreements did not constitute an investment for treaty purposes, then they were elements of a transaction, which had to be considered as a whole and which itself was an "investment".

263. For their part, Claimants maintained that the long term nature (10 years) of the commitment to a supply of HBI at cost-plus pricing manifested by the Off-Take Agreement was one of the drivers behind Talta's investment in Venezuela in the first place. The arrangements put in place for a long-term continued supply constituted a contribution to the State in that it secured the operation of the facility, the hiring of local employees and a market for locally supplied HBI. In these respects the Off-Take Agreement satisfied the Portuguese Treaty's definition of a right relating to investments or an obligation with economic value.

264. If that were wrong, Claimants urged upon the Tribunal the need to step back and consider the overall transaction, namely their qualifying investment in Matesi, of which, it was contended, both the Talta Loan and the Off-Take Agreement were integral parts. They relied upon the decisions in *Ceskoslovenska Obchodni Banka AS v Slovak Republic*²¹¹; *Mytilineos Holdings SA v. State Union of Serbia and Montenegro*²¹²; and *Inmaris Perestroika Sailing Maritime Services*

²¹⁰ Respondent's Counter-Memorial, para. 187.

²¹¹ *Ceskoslovenska Obchodni Banka AS v Slovak Republic*, ICSID Case ARB/97/4, 24 May 1999.

²¹² *Mytilineos Holdings*

GmbH et al v. Ukraine.²¹³ Venezuela’s reliance upon *Romak* was inapposite: this was not a transaction akin to a one-off commercial transaction for the sale of wheat; and its reliance upon the *Joy Mining* case was equally misplaced:

“...the *Joy Mining* tribunal counseled in favor of using a transaction-based approach to the definition of investment, holding that ‘a given element of a complex operation should not be examined in isolation because what matters is to assess the operation globally or as a whole [...].’ None of these tribunals used the formalistic test advocated by Venezuela here.”²¹⁴

c. Relevant Principles

265. Before dealing with each of these disputed elements in turn, the Tribunal sets out the basis upon which it has conducted its analysis.

266. Article 25(1) of the ICSID Convention provides that:

“The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State ... and a national of another Contracting State, which the Parties to the dispute consent in writing to submit to the Centre.”

267. As is now routinely cited, in their Report on the ICSID Convention, the Executive Directors of the International Bank for Reconstruction and Development stated:

“No attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which the Contracting States can make known in advance, if they so desire, the classes of dispute which they would or would not consider submitting to the Centre. (Article 25(4).”²¹⁵

268. The relevant “mechanisms” in this case are the particular provisions of the applicable BITs in which “investments” are defined.

²¹³ *Inmaris Perestroika Sailing Maritime Services GmbH et al v. Ukraine*, ICSID Case No. ARB/8/08, Decision on Jurisdiction, 8 March 2010, para. 92.

²¹⁴ Claimants’ Reply, paras. 174-175, citing *Joy Mining*, para 54.

²¹⁵ IBRD: Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1968), Sec V.27.

269. The Luxembourg Treaty provides, at Article 1(2), that:

“The term ‘investments’ shall mean any kind of asset, or any direct or indirect contribution in cash, in kind or services, invested or reinvested by an investor of one Contracting Party in the territory of the other Contracting Party in any sector of economic activity whatsoever...”

270. Included within the definition are:

“(b) ... shares, equity participations and any other form of participation, including minority or indirect participation in companies constituted in the territory of one of the Contracting Parties....

(c) obligations, claims and rights **to any benefit having an economic value linked to an investment.**” (Emphasis added).

271. Article 1(2) of the Portuguese Treaty provides that :

“The term ‘investments’ includes all types of assets and rights relating to investments made in accordance with the laws of the other Contracting Party, and specifically, but not exclusively including ...

(b) Shares and other forms of participation in the capital or the economic results of companies;

(c) Credit rights related to money or any other obligation having an economic value ...”

272. These provisions are to be interpreted by reference to general principles of international law and Article 31 of the Vienna Convention (see para 134 above).

273. Venezuela emphasises the importance of the preambles to the Treaties, which, it contends:

“[shed] light on the object and purpose of the contracting parties’ respective obligations.”²¹⁶

The Preambles to the Luxembourg and the Portuguese Treaties (as quoted earlier in this Award) speak respectively to “*strengthen[ing] their economic*

²¹⁶ Respondent’s Counter-Memorial, para. 181

cooperation” and “intensify[ing] economic cooperation between the two States for their mutual benefit.”

274. That does not seem to the Tribunal to be a controversial point, any more than is Venezuela’s reliance upon Zachary Douglas’ proposition that:

“The notion of a *quid pro quo* between a foreign investor and the host state is the cornerstone for the system of investment treaty arbitration. In exchange for contributing to the flow of capital into the economy of the host contracting state, the nationals of the other contracting state ... are given the right to bring international arbitration proceedings against the host contracting state and to invoke the international minimum standards of treatment contained in the applicable investment treaty.”²¹⁷

275. Venezuela takes the position that the mere fact that an asset or right, which is said to constitute an “investment”, appears to meet the formal characteristics of an “investment” prescribed in a BIT is insufficient; it must incorporate certain substantive features of an economic nature sufficient to distinguish it from a cross-border commercial transaction. As put by Douglas:

“An investment in order to qualify for investment treaty protection must incorporate certain legal and economic characteristics. The economic characteristics derive from the common economic conception of foreign direct investment. In Rule 23 [of this Treatise], they are codified as the transfer of resources into the economy of the host state and the assumption of risk in expectation of a commercial return. The legal characteristics derive from the non-exhaustive examples of an ‘asset’ that constitute ‘investment’ in investment treaties and this forms the basis of Rule 22, which generalizes the requirement as the acquisition of property rights in the host state. It is essential that an investment have both the requisite legal and economic characteristics.”²¹⁸

276. That, too, is a proposition, which has informed the Tribunal’s analysis in the context of the two disputed “investments”. However, it is suggested by Claimants that what in fact Venezuela has sought to do is to elevate these general principles to a point that they somehow evolve into an overarching

²¹⁷ RLA-5, para. 335.

²¹⁸ *Idem*

concept of “investment”, which purports to override the terms of the Treaties themselves. If that were the case, the Tribunal would have no difficulty in rejecting it. The express terms of Article 1(2) of both of the Treaties must be given due weight in accordance with Article 31 of the Vienna Convention, that is to say: “*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.*” That being the case, and while it accepts Claimants’ submission that the listed examples in Articles 1(2) of the two Treaties are examples enumerating the different legal forms in which “investments” may manifest themselves, it would be equally inappropriate if the Tribunal were to seek to construe those terms without regard to the context in which they came to be made.

d. Analysis

277. The question for the Tribunal, properly framed, is whether each of the Talta Loan and the Talta Off-Take Agreement qualifies as an “investment” under the terms of the Treaties and the Convention in its own right and/or whether they constitute:

“... interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment.”

278. In particular, Claimants maintained that the test, as enunciated by the tribunal in *CSOB v Slovak Republic*, was as follows:

“ ... 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 part of an overall operation that qualifies as an investment.”²¹⁹

279. Venezuela emphasises the application by ICSID tribunals of a two-prong test to establish the existence of an investment in investor-State disputes. While bilateral investment treaties may confirm or restrict the notion of investment in the ICSID Convention they

²¹⁹ *CSOB v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, para. 72.

“... cannot contradict the definition of the ICSID Convention ... they cannot expand it in order to have access to ICSID... As long as it fits within the ICSID notion, the BIT definition is acceptable. It is not if it falls outside of such definition.”²²⁰

280. In the opinion of the Tribunal, there is nothing in the language of the Luxembourg and Portuguese Treaties, which purports to deviate from the Convention notion of “investment”.

281. Moreover, the Tribunal must consider whether or not the Talta Loan and the Talta Off-Take Agreement constitute “investments” in the context of a dispute in which Claimants’ investment in Matesi is itself acknowledged to be an “investment” for the purposes of the Convention and the Treaties.

282. Notwithstanding that acknowledgement, Venezuela’s attack upon the Talta Loan and the Off-Take Agreement is premised not least upon the contention that the acquisition of Matesi itself did not conform to what Venezuela suggested at the hearing was a “key factor”, namely that “*the overarching plan [for the alleged investments taken as a whole] included a direct intentional benefit to the host State.*”²²¹ Rather than having any regard to the development of the economic or banking capacity of Venezuela, the objective of the purchase of the PosVen assets, including the Matesi plant, was the opportunity for Claimants to exploit in the open market a guaranteed supply of HBI produced by Matesi and purchased pursuant to the Off-Take Agreement on very favourable terms, which Claimants could then sell on at a considerable profit. In short:

“Rather than intending to invest in the host State to the direct benefit of the host State with the expectation of an investment level of return, the entire plan seems to be about engaging in commercial transactions for the purchase and sale of HBI through a corporate [family] structure.”²²²

²²⁰ *Phoenix Action Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009.

²²¹ Transcript (English), Day 1, p. 268.

²²² *Idem*, p. 271.

283. The Tribunal considers that that proposition cannot be reconciled with the proposition that the acquisition of Matesi was an “investment” and, in any event, it begs the question as to the nature of the acquisition of Matesi.

284. In considering this issue, the Tribunal respectfully adopts the “combined effect” test referenced in the decisions in:

(a) *Mytilineos Holdings SA v. State Union of Serbia & Montenegro*,²²³ in which the Tribunal had concluded that:

“the combined effect of the [a]greements [was] clearly more than an ordinary commercial transaction”;

(b) *Inmaris Perestroika Sailing Maritime Services GmbH et al v. Ukraine*²²⁴ in which the Tribunal had held that:

“It is not necessary to parse each component part of [an] overall transaction and examine whether each, standing alone, would satisfy the definitional requirements of the BIT and the ICSID Convention. For the purposes of this Tribunal’s jurisdiction, it is sufficient that the transaction as a whole meets those requirements”;

as well as the “integrality test” elaborated in the *CSOB* case.²²⁵

285. With these principles in mind, the Tribunal endorses the suggested “holistic” approach articulated by counsel for Claimants as follows:

“... what was the investment of [Claimants]? Is there any element here, if you took it away, would have resulted in the investment not occurring? ...[W]hat was the overall package that made [Claimants] invest in Venezuela? It was the ability to buy assets ... They needed to finance that acquisition, so that was part of their ability to do that ... [T]he business sense for it was to have a ready supply of what was essentially a raw material ... the pellets which it could then export through the port. The combination of all that, together obviously with the Supply Agreement ... all of these were linked together. If you took

²²³ *Mytilineos Holdings*.

²²⁴ *Inmaris Perestroika Sailing Maritime Services GmbH et al v. Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010.

²²⁵ See para. 277, *supra*.

one away, if there was no loan, then there would have been no money to bring these elements together and the Off-take agreement was essentially something that was of fundamental interest to them because that was then a market for what was occurring.”

...

“... [W]e think the problem is if you start to looking in isolation of what specific links are you have to think what was the intention of the investor at the moment of the investment? And if they are all linked together in that way, is it an integrated investment undertaking? ... It is not necessary to parse each component; it’s [the] integrated investment, ... [the] transaction as a whole.”²²⁶

286. As to those submissions, the Tribunal notes Venezuela’s contention that reliance on the cases cited by Claimants is misplaced, because they related to disputes in which a clear interest on the part of the respondent State could be identified. However, in this case, the investment in Matesi is a qualifying investment for the purposes of the Convention and the Treaties, and so that is not an objection that need detain the Tribunal.

287. *The Talta Loan*: As far as the Talta Loan is concerned, it is clear on the evidence before the Tribunal that, in the context of the Investment Agreement, the commitment by Talta to advance some US\$60 million to finance the purchase of the PosVen assets and to contribute to the costs of their refurbishment was critical to the making of the investment in Matesi.

288. Mr Montero testified to the Tribunal that the Talta Loan was used to fund the start-up costs of the venture.²²⁷ Mr Malvassora’s evidence was that the Loan was a:

“productive financing which was necessary to reactivate the plant which for three years had been paralysed, would generate 300 jobs, pay taxes ... an investment to reactivate an industry, which had been paralysed, which, ... was within the strategic and social and economic plan of Venezuela.”²²⁸

²²⁶ Transcript (English), Day 1, pp.142-143.

²²⁷ Transcript (English), Day 2, pp. 470-471.

²²⁸ Transcript (English), Day 3, p.656.

289. The Tribunal accepts that evidence. It is satisfied that the Talta Loan was more than a mere facilitation of Claimants' purchase of HBI from Matesi, as Venezuela contended.²²⁹ Its purpose was to provide for the acquisition of the PosVen assets and to be applied to start-up costs. In the opinion of the Tribunal, the Talta Loan qualifies as an "investment" in its own right under the terms of Articles 1(2) of the Luxembourg and Portuguese Treaties. But even if that were wrong, the Tribunal is satisfied that it was an essential element of Claimants' "investment" in Matesi.

290. *The Off-Take Agreement:* So far as the Off-Take Agreement is concerned, Mr Montero emphasised the importance of the Off-Take Agreement to the Matesi "investment". In answer to a question from a member of the Tribunal, he stated that it had been very important to the decision to acquire the plant. By avoiding a tie to a volatile market: "*one can remove a lot of problems and guarantee the financial continuity of the company.*"²³⁰

291. The Tribunal accepts Venezuela's submission²³¹ that the Off-Take Agreement is not an "investment" in its own right. Nor does it consider that the Off-Take Agreement would constitute an investment, if an holistic approach were adopted: despite the context in which it was concluded, it remains, in essence, a commercial agreement in respect of the purchase and delivery of product at a known price, and in such a manner that Talta took off-shore Venezuela the benefit of the profit of the on-sale in the open market. To this end, the Tribunal considers that the Off-Take Agreement must be treated differently to the Talta Loan.

e. Conclusion

292. Accordingly, the Tribunal concludes that the Talta Loan constitutes an "investment" within the scope of the Luxembourg and Portuguese Treaties, and that accordingly it has jurisdiction to consider claims in respect of it.

²²⁹ Respondent's Post-Hearing Brief, para. 121.

²³⁰ Transcript (English), Day 2, p. 490.

²³¹ See Respondent's Post-Hearing Brief, paras. 192 – 199.

293. As for the Talta Off-Take Agreement, the Tribunal concludes that this was not an “investment” in its own right.

4. ALLEGED “CONTRACTUAL CLAIMS”

a. Venezuela’s Case

294. In this case the sole source of supply of raw material (iron ore in the form of pellets and lump ore) was CVG FMO, a Venezuelan State entity, which enjoyed a monopoly. The Supply Contract was signed between Matesi and CVG FMO on 17 June 2004.²³²

295. It is Venezuela’s case that Claimants’ claims in respect of allegedly insufficient or discriminatory pellet supply by CVG FMO to Matesi constitute a contractual, rather than a treaty, dispute, which can only be resolved pursuant to the dispute resolution and forum selection clauses of the Supply Contract. To this end, this Tribunal has no jurisdiction over the Claimants’ claims in this regard.

296. Further, Venezuela contends that since CVG FMO acted in a commercial and private capacity as a seller of raw materials, the basis upon which it fulfilled its supply obligations was a matter of its exercise of the terms of the contract: it had not invoked sovereign prerogatives and hence, even if there had been a breach of CVG FMO’s contractual obligations, Venezuela’s liability under the Treaties could not have been implicated.

297. Venezuela emphasises in this regard that throughout the considerable correspondence in the record between Matesi and CVG FMO, the discussion was only ever of contractual obligations. Indeed, even in its letter of 12 August 2009 to MIBAM, Tenaris alleged “*contractual violations*” on the part of CVG FMO. Furthermore, the valuation of loss and damage said to be attributable to

²³² Exhibit C-25

failures of adequate supply of pellets was based upon a contractual expectation.²³³

b. Claimants' Case

298. For their part, Claimants say that their claims – for discrimination arising out of breaches of the fair and equitable treatment and non-impairment clauses of the Treaties – are not claims for breach of the pro-rating provisions of the Supply Contract (a contract to which they are not party).

299. Rather, the underlying premise in the Claimants' case is that CVG FMO is a State entity with a sovereign monopoly over the supply of raw material; that Venezuela's responsibility is engaged in respect of the discriminatory treatment accorded by CVG FMO to Matesi, by operation of customary international law rules of attribution; that the conduct in question constituted a breach of Venezuela's obligations under the Treaties; and that Claimants' claim for damages for the diminution of the value of their shareholding is calculated based upon the customary international law rule of "full reparation", rather than any contractual measure.

c. Analysis

300. In assessing this objection, a clear distinction must be drawn between two enquiries:

(a) Whether this Tribunal is entitled to hear and determine the Claimants' claims in respect of raw material supply.

(b) Whether the Claimants' claims in respect of raw material supply actually constitute a breach of either Treaty, for which Venezuela is responsible.

301. As to (a), it is common ground that the Tribunal only has jurisdiction to hear and determine breach of treaty claims, not breach of contract claims.²³⁴ And so the

²³³ See Respondent's Post-Hearing Brief, paras. 213-230

sole determinative question at the jurisdictional stage is: on the assumption that the Claimants' allegations are true, could such allegations amount to a breach of treaty, as opposed to a breach of contract?

302. This is an enquiry on a *prima facie* basis, which does not require the Tribunal actually to assess the allegations themselves, or address (b) above - as this would obviously be a merits issue, to which the Tribunal would only turn if it had jurisdiction.²³⁵

303. Much of Venezuela's argument here was actually concerned with (b), not (a). Hence, whether or not CVG FMO was in fact acting in a commercial and private capacity as a seller of raw materials; and whether or not its conduct actually engages Venezuela's responsibility, are key issues in determining whether or not there has been a breach of treaty. But they are not questions that will delimit the Tribunal's ability to hear such claims in the first place – *i.e.* the only enquiry at this stage.

304. In this case, Claimants have been very careful and very clear in identifying all claims in respect of the supply of raw material as breaches of treaty – not breaches of the Supply Contract. As summarised (*e.g.*) in their Reply:

“In their Memorial, the Claimants described how Venezuela discriminated against Matesi in the supply of iron pellets necessary for HBI production in favor of state-owned enterprises and how this contradicted the Treaties' fair and equitable treatment and 'non-impairment' provisions. In particular, the Claimants stated that CVG FMO, an organ of the Venezuelan State, had a sovereign monopoly over supply and it abused its authority to discriminate against Matesi, thus reducing the value of the Claimants' shareholding. The Claimants also cited the late President Hugo Chávez making threats of discriminatory conduct regarding supply against the Claimants' holdings at around the same period as the defects in supply occurred.

(Footnote continued from previous page)

²³⁴ There are no “Umbrella Clause” claims in this case (albeit such claims might be properly characterised as breaches of treaty in any event).

²³⁵ *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)* (ICJ Reports 803) Judgment, 12 December 1996, Separate Opinion of Judge Rosalyn Higgins, para. 32.

The Claimants also noted that Matesi entered into the CVG Supply Contract, which guaranteed a *pro rata* share of iron pellets based on its share of the total domestic annual pellet requirements. The Claimants, however, raised no claims of contractual breach at any point in their Memorial.”²³⁶

...

“As stated in the Claimants’ Memorial, the Venezuelan government had a *de jure* monopoly on Matesi’s inputs of lump iron ore and iron pellets. CVG FMO, an organ of the Venezuelan state, controlled that monopoly. The Claimants noted that there was a state policy whose purpose was to effect the nationalization of the steel industry and reduce the value of Matesi at the time of the taking. Part of this policy, was the State’s use of its monopoly over supply of iron pellets in a discriminatory fashion to favor state-owned companies, in contravention of the Treaties’ provisions on fair and equitable treatment and non- discrimination.”²³⁷

305. Indeed, Claimants could not have raised any claims for breach of contract in any event for the simple reason that they are not party to the Supply Contract.²³⁸

306. It follows that, since the only claims that are advanced are said to be breaches of the Treaties, such claims are properly brought before this Tribunal.

307. As to Venezuela’s reliance on the existence of a contract dispute resolution provision in the Supply Contract, this takes matters no further. As confirmed by the *Vivendi I* Annulment Committee (and by numerous other tribunals):

“where the ‘fundamental basis of the claim’ is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state or one of its subdivisions cannot operate as a bar to the application of the treaty standard.”

...

²³⁶ Claimants’ Reply, para. 176.

²³⁷ Claimants’ Reply, para. 178.

²³⁸ CVG Supply Contract, 17 June 2004, p. 1. (Exhibit C-25)

“[a] state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty.”²³⁹

308. Among the cases to reaffirm this approach, and by way of further example, in *Abaclat* the tribunal concluded that while there was a contractual obligation to bondholders to make payments on certain bonds, what had elevated the matter into a treaty claim was that Argentina’s breach of that obligation had been brought about by the sovereign act of passing legislation, which “*had the effect of unilaterally modifying Argentina’s payment obligations.*”²⁴⁰
309. But even aside from this basic proposition, there remains the simple point that, not being a party thereto, the Claimants could not have taken advantage of the dispute resolution provision in the Supply Contract in any event. In the course of their submissions, the Claimants observed that there was no basis to suggest that they might be able to avail themselves of any “group of companies” doctrine to trigger the dispute resolution provisions of the Supply Contract, and the application of such a doctrine to an arbitration clause governed by Venezuelan law was not developed at the Hearing.²⁴¹
310. It follows that this Tribunal has jurisdiction to hear and determine Claimants’ claims regarding supply of raw material, and that Venezuela’s objections in this regard must be dismissed.

²³⁹ *Compania de Aguas del Aconquija SA and Vivendi Univeral SA v Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, paras. 101 and 103. See similarly: *SGS Société Générale de Surveillance SA v Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, paras. 125, 128, and 137–138; *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd v Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006, paras. 41–45; *Jan de Nul NV, Dredging International NV v Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 16 June 2006, paras. 132–133; *Eureko BV v Republic of Poland*, Partial Award, 19 August 2005, paras. 92–114; *Impregilo SpA v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3 Decision on Jurisdiction, 22 April 2005, paras 286–290; *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, paras. 75–79; *SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, paras. 146–155; *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction, 17 July 2003, paras. 70–76.

²⁴⁰ *Abaclat et al v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility 4 August 2011, para. 319

²⁴¹ Claimants’ Post-Hearing Brief, para. 305, and Transcript (English), Day 1, p.276.

311. Having so concluded, in light of various arguments that were advanced on behalf of Venezuela in the course of the proceedings, the Tribunal also clarifies, in the words of the *Bayinder* tribunal, that while its jurisdiction is engaged here in respect of treaty claims only:

“[The Tribunal] can and must [consider contract matters] to the extent necessary to rule on the treaty claims. It takes contract matters, including the contract’s governing municipal law into account as facts as far as they are relevant to the outcome of the treaty claims. Doing so, it exercises treaty not contract jurisdiction. This approach is in conformity with international law and arbitral practice.”²⁴²

312. Whether or not the Claimants are actually able to sustain their allegations with respect to the supply of raw materials is considered in **Section F.1** below.

5. CONCLUSION ON JURISDICTION OBJECTIONS

313. In light of the matters set out above, and save in respect of the Off-Take Agreement (see paragraph 291 above), the Tribunal finds that it has jurisdiction to hear and determine all of the Claimants’ claims in this arbitration, and that each of Venezuela’s objections in respect of the latter claims must be dismissed.

F. PRE-EXPROPRIATION CLAIMS

314. The Claimants’ substantive claims divide into two broad categories: claims arising out of conduct in the period up to the nationalisation of Matesi, and claims arising out of the nationalisation itself.

315. In this section, the Tribunal considers the former category, which comprises allegations of breach of the fair and equitable treatment / non-discrimination / non-impairment standard, and the protection and security standard.

²⁴² *Bayindir Insaat Turizm Ticaret ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, paras. 135-136.

316. Each set of claims is addressed in turn below.

1. FAIR AND EQUITABLE TREATMENT / DISCRIMINATION CLAIM

317. It is the Claimants' case that Venezuela is in breach of the fair and equitable treatment / non-discrimination / non-impairment standard in both Treaties, by virtue of the fact that Matesi was the subject of discrimination in the supply of raw material by CVG FMO.

a. The Matesi Plant

318. The Matesi HBI plant comprised two reactors, which were designed to operate on a mix of lump ore and iron pellets. Each reactor was capable of producing 100 tons of HBI per hour, or 750,000 tons per year, giving a nominal capacity of 1.5 million tons a year.²⁴³ The reactors used a mix of pellets (80%) and lump ore (20%), supplied through CVG FMO (TOPPCA).

319. Since the production of a ton of HBI requires approximately 1.6 million tons of pellets, lump ore and "fines", it would require some 2.4 million tons of iron ore, some 1.92 million tons (80%) of which comprised pellets, in order to achieve Matesi's nominal capacity of 1.5 million tons.

320. Were a reactor unable to operate at 50% capacity or more, Matesi would have to shut it down. It was essential therefore, that Matesi secure a reliable supply of feed materials for its reactors from one or both of the producers of pellets in Venezuela, CVG FMO and Sidor (its 49% shareholder). Sidor used much of its own production in its own steel production processes. To the extent that it had any excess pellets, it could release them to the market, but Matesi could not buy directly from Sidor: Sidor was obliged to sell to CVG FMO, which held a monopoly over sales of pellets to the four domestic HBI producers, Comsigua (in which Claimants held a minority shareholding)²⁴⁴, Venprecar,

²⁴³ Tamez Witness Statement, para. 12.

²⁴⁴ Transcript (English), Day1, p. 39.

Minorca/OPCO (which was wholly owned by CVG and, since 2007, operated by CVG FMO), and Matesi.

321. CVG FMO was thus the sole source of supply to Matesi.

322. Claimants maintain that an agreement with CVG FMO was:

“pivotal to [their] decision to invest in Matesi and was a condition precedent to [their] purchase of PosVen’s assets.”²⁴⁵

b. The Complaint

323. The basis of Claimants’ complaint is that CVG FMO discriminated against Matesi and in favour of other HBI producers in the supply of raw material. Claimants allege that State-owned Minorca/OPCO was the “*primary beneficiary*”²⁴⁶ of CGV FMO’s discriminatory conduct.

324. Venezuela maintains, first, that there was no discrimination against Matesi in the context of pellet distribution; and, second, that disputes over pellet distribution were commercial matters, which could, and should, have been handled through dispute resolution mechanisms in the contracts.

325. Further, according to Venezuela, Claimants have failed to show that CVG FMO was an organ or entity of the State exercising specific government authority when distributing pellets, or that it had had discriminatory intent.

326. Venezuela points out that it had an interest of its own in Matesi, which pre-dated nationalisation, as well as its interests in Comsigua, Venprecar and Minorca/OPCO, and that Claimants, through Tenaris, had a “*significant*” interest²⁴⁷ in Comsigua.

327. Moreover, Venezuela contends that Matesi was reliant principally upon its own shareholders to take its supply. That dependency left it exposed, first because

²⁴⁵ Claimants’ Post-Hearing Brief, para. 18

²⁴⁶ Claimants’ Post-Hearing Brief, para. 69

²⁴⁷ Respondent’s Post-Hearing Brief, para. 219

SIDOR used its own direct reduced iron before turning to any other source, and financial difficulties had caused it to reduce its demand for Matesi-sourced HBI over the period 2005-2008. Second, because Matesi had been set up as a cost centre primarily to service the requirements of its corporate affiliates, such that it was not established in its own right in the export market, unlike Venprecar, Comsigua and Minorca/OPCO - all of which had had a long-term presence in the export market.

328. In any event, far from under-supplying Matesi, Venezuela maintains that the record at the Hearing demonstrated that Matesi had received an over-allocation of pellets between 2005 and 2008.²⁴⁸

c. Terms of the Supply Contract

329. The Supply Contract provided, *inter alia*, as follows:²⁴⁹

“1.3: Annual Basis for Nominal Capacity

This is defined as the IRON ORE needs that the BUYER requires for Nominal Capacity of its REDUCTION PLANT, which amounts to 2,400,000 TONS of IRON ORE per year.

...

2.1... The volume to be supplied annually to the BUYER, except in the INITIAL YEAR and the following CALENDAR YEAR (corresponding to 2005), shall be fixed in accordance to the BUYER’s requirements, the amount of the SELLER’s annual availability of IRON ORE, and the annual availability of pellets for sale derived from the plant owned by Siderurgica del Orinoco (SIDOR) C.A. This total annual availability shall be distributed equitably and on a pro rata basis, when applicable, among the various HBI producers on the domestic market.

The aforementioned pro rata distribution applies only when the sum of the total annual pellet requirements from all HBI producers on the

²⁴⁸ *Idem*, paras. 221-225

²⁴⁹ Exhibit C-25

domestic market exceeds the total annual availability of pellets for sale with such total annual availability of pellets being understood as the sum of the annual production of PELLETS by the SELLER plus the annual availability of pellets for sale from the plant owned by SIDOR and only in this case shall the proportional distribution take place **based on the estimated annual requirements for pellets of each of the HBI producers on the domestic market.**

A pro rata distribution in accordance with the above shall apply in the event of a shortage of LUMP IRON ORE.

[CVG FMO] shall guarantee to [Matesi] the accuracy of the information provided by [CVG FMO] as well as compliance with equitable distribution among all of the HBI producers on the domestic market. (Emphasis added)

2.2: The guaranteed distribution of PELLETS and LUMP IRON ORE to be supplied under the CONTRACT shall be (a) during the first seven (7) calendar years (including the INITIAL DELIVERY YEAR) eighty percent (80%) PELLETS and twenty percent (20%) LUMP ORE and (b) for the remaining term of the CONTRACT (after the first seven (7) CALENDAR YEARS), ninety percent (90%) PELLETS and ten percent (10%) LUMP IRON ORE....

2.3: Before 1 October of each CALENDAR YEAR following the INITIAL DELIVERY YEAR, the BUYER shall notify the SELLER if it wishes to increase or decrease the volume of actual delivery for the following CALENDAR YEAR, by an amount that cannot exceed twenty percent (20%) of the volume for the year in progress such that the volume for the following CALENDAR YEAR shall not exceed 10% of the ANNUAL BASIS FOR NOMINAL CAPACITY (2,400,000 TONS).

2.4: The monthly volume of IRON ORE for the INITIAL DELIVERY YEAR that the SELLER commits to supply and the Buyer commits to accept and pay for the volumes supplied shall be that indicated below (figures shown in tons)

IRON ORE	SEPT 04	OCT 04	NOV 04	DEC 04	TOTAL
PELLETS	48,000	70,000	80,000	90,000	288,000
LUMP	12,000	18,000	20,000	22,000	72,000

IRON
ORE

TOTAL	60,000	88,000	100,000	112,000	360,000
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For the following CALENDAR YEAR (2005), the requirement in IRON ORE agreed between the BUYER and the SELLER is for 1,750,000 TONS, distributed as 1,400,000 TONS of PELLETS and 350,000 TONS of LUMP IRON ORE with the understanding between the PARTIES that in the event of a shortage in the specified quantities of IRON ORE to be supplied in the year 2005, the pro rata clause indicated in item 2.1 of this Clause shall apply.

2.5: In the event that the BUYER is able to increase the nominal capacity of the REDUCTION PLANT, it may request an increase in the ANNUAL BASIS FOR THE NOMINAL CAPACITY, notifying the SELLER in writing at least one (1) year in advance of the month in which the increase will occur. Within three (3) months, the SELLER shall inform the BUYER of its capacity to support the requested increase. In any event, the SELLER shall supply the requested increase only up to ten percent (10%) of the ANNUAL BASIS FOR THE NOMINAL CAPACITY.”

330. Clause 3 set out the physical and chemical specifications for the Pellets.

d. Undisputed Facts

331. It is not in dispute that:

- (a) in order to produce at its full nominal capacity of 1,500,000 tons of HBI per year, Matesi required an annual supply of 2,400,000 tons of iron ore, 80% of which was to be in pellet form and the rest as lump iron ore.
- (b) The initial annual quantities to be required and supplied would be limited to some 70% of Matesi’s base capacity, increasing over four years until Matesi could call for 100% of the pellets it required to produce at full capacity in 2008. That entitlement, in terms of tons of pellets, was as follows, the second line showing the percentage of pellets required to produce at 100% capacity:

Sept 04	Oct 04	Nov 04	Dec 04	2005	2006	2007	2008
48,000	70,000	80,000	90,000	1.4 mill.	1.592 mill.	1.784 mill.	1.920 mill.
30%	40%	50%	56%	73%	83%	93%	100%

- (c) As it was required to do from the second full year of the contract onwards, Matesi notified CVG FMO of its estimated pellet requirements for each calendar year three months before the start of the year in question. The annual requirements letters for 2006, 2007 and 2008 requested the full amounts to which Matesi was entitled as set out in the table above for those years.²⁵⁰
- (d) All of the pellet-using HBI producers had similar supply contracts with CVG FMO. And they included *pro-rata* provisions similar to Article 2.1 of the Matesi contract in their own agreements with CVG FMO.²⁵¹
- (e) From May 2005 onwards, there was a shortage of pellets, which triggered the *pro-rata* provisions in the Supply Contract (and those of the supply contracts of the other producers).

e. Impact of the Pro-Rating

332. According to Matesi's Production Data, it had achieved approximately 80% of the plant's production capacity by February 2005 (some 100,000 tons). Between February and April 2005, monthly HBI production averaged approximately 75% of production capacity. In 2005, the plant's first full year of operation, it achieved just under 70% capacity, producing approximately one million tons of HBI,²⁵² notwithstanding a shortfall in the supply of iron pellets from CVG FMO in the second half of 2005. Claimants maintain that the shortfall, which began in

²⁵⁰ The letters are in the record at C-179, C-196, and C-203 respectively

²⁵¹ See PVOI-1 (OPCO); PVOI-2 (Comsigua) and Amendment at PVOI-4; PVOI-3 (Venprecar) and Amendment at PVOI-5

²⁵² Claimants' Memorial, paras. 51 and 52

May 2005, was attributable to technical problems experienced at CVG FMO's plant.

333. In the course of 2007, the rate of supply from CVO FMG to Matesi was reduced to the point that it received 50% less iron pellets in 2007 than it had in 2006. It appears that Matesi was not receiving its *pro rata* share of available iron pellets either. On the basis of its own production data, Matesi's plant operated at less than 30% capacity in 2007.²⁵³

334. The situation deteriorated in 2008. Matesi maintains that in July 2008, it received no products at all from CVG FMO,²⁵⁴ whereas it continued to supply HBI to SIDOR for which SIDOR failed to pay, incurring a debt of some US\$ 5.9 million to Matesi.

f. Operation of the *Pro Rata* Mechanism

335. Article 2.1 of the Supply Contract provides that with effect from 1 January 2006, the volume of iron ore to be supplied to Matesi:

“... shall be fixed in accordance to [Matesi's] requirements, the amount of [CVG FMO's] annual availability of IRON ORE, and the annual availability of pellets for sale derived from the plant owned by [SIDOR]. This total annual availability shall be distributed equitably and on a *pro rata* basis, when applicable, among the various HBI producers on the domestic market.

The aforementioned *pro rata* distribution applies only when the sum of the total annual pellet requirements from all HBI producers on the domestic market exceeds the total annual availability of pellets for sale with such total annual availability of pellets being understood as the sum of the annual production of PELLETS by [CVG FMO] plus the annual availability of pellets for sale from the plant owned by SIDOR and only in this case shall the proportional distribution take place **based on the estimated annual requirements for pellets of each of the HBI producers on the domestic market.**” (Emphasis added)

²⁵³ Claimants' Memorial, paras. 67-69 and Exhibit C-157

²⁵⁴ Witness statement of Mr Malvassora, para. 65. And see Claimants' Memorial, para. 89

336. The clause continues:

“[CVG FMO] shall guarantee to [Matesi] the accuracy of the information provided by [CVG FMO] as well as compliance with equitable distribution among all of the HBI producers on the domestic market.” (Emphasis added)

337. The Parties differ in their interpretation of this provision, and specifically the operation of the *pro rata* mechanism. Claimants maintain that the entitlement should be calculated as follows:²⁵⁵

Matesi’s *pro rata* % share of pellets = Matesi’s annual pellet requirement
+ total annual HBI Producers’ pellet requirements

Total national pellet availability = pellets produced by CVG FMO +
excess produced by SIDOR

Matesi’s *pro rata* pellet allotment = Matesi’s *pro rata* % share of pellets
x total national pellet availability

338. A number of competing interpretations were advanced by Venezuela’s witnesses and experts, although, following the withdrawal of the evidence of Mr Sabbagh, the disgraced former President of CVG FMO, no one else from CVG FMO appeared to give evidence before the Tribunal.²⁵⁶ None of the alternatives advanced by Venezuela withstood scrutiny.

339. Dr Poveromo initially suggested that the *pro rata* allocation was based upon proven or historical production capacity, on the basis that CVG FMO would use that as:

“sort of a test of the annual requirements” ... “they wouldn’t allocate pellets to someone who was asking for more pellets than FMO knew they could actually use.”

²⁵⁵ See Montero 1, para. 35; Montero 2, paras. 14-16 and Transcript (English), Day 2, pp. 464-466

²⁵⁶ The Tribunal was informed that Mr Amais, CVG FMO’s Sales Manager, with whom Matesi had frequent dealings, remains at the company. See Transcript (English), Day 4, p. 997 (cross-examination of Moya)

But he backed away from that position when he was shown the actual terms of Article 2.1, and it was pointed out to him that in none of the other supply contracts that he himself had produced was there reference to “*proven or historical production capacity*”.

340. Nor, as a matter of fact, could Matesi point to any production history at the time that it had entered into the Supply Contract, as the plant had only been re-commissioned a matter of months before. Indeed, nor could it point to an unimpaired production history, since it had never enjoyed a full year of production unaffected by shortages or supply limitations.

341. Finally, Dr Poveromo proffered the remarkable observation that:

“In the world of iron ore, a contract is not a contract”: [while it] “defines the price, sets the terms, lists the specifications, in terms of volumes, it expresses an intention of the iron ore company to supply ‘X’ tons of iron ore per year and it expresses the intention of the steel company to consume or receive the same ‘X’ tons of iron ore every year.”²⁵⁷

The Tribunal is not persuaded by the proposition that the terms of a commercial contract, negotiated at arms’ length, should not be given proper deference and effect.

342. Mr Hart’s evidence was inconsistent in two principal respects. First, he had not compared “like with like” when calculating Matesi’s *pro rata* share of pellets. He (and Dr Poveromo) had used best ever historical production figures by reference to years in which there had been no shortage of pellets in the case of Comsigua, Minorca/OPCO and Venprecar, whilst reflecting in the calculations Matesi’s actual production capacity in years affected by shortages.²⁵⁸ Second, he applied this methodology only to the pre-expropriation discrimination claim period. When it came to the valuation of Claimants’ equity stake in Matesi at the date of expropriation, he adopted much lower production capacities for

²⁵⁷ Transcript (English), Day 4, pp. 1436 and 1437

²⁵⁸ Hart 2nd Report, paras. 20 & 21 (and see also, Poveromo 2nd Report at para. 12, Table 2)

Matesi's competitors, thereby increasing Matesi's *pro rata* share up from 23% (2007) to 31% (2008).²⁵⁹

343. Of the factual witnesses proffered by Venezuela, it was Mr Moya whom Venezuela called upon primarily to address the pro-rating issue. The Tribunal recalls that Mr Moya was a former PosVen and Matesi employee. He had been Head of Logistics for Matesi, reporting to Mr Tamez (the Industrial Manager). Post nationalisation, he assumed the role of Manager of Processes at BriqVen. He testified to the effect that, first, he had notified CVG FMO of Matesi's requirements by reference to the operational state of its plant in the course of meetings held with CVG FMO when the weight of deliveries of pellets to Matesi was reconciled; and second, he had attended weekly and monthly meetings with CVG FMO at which all of the HBI companies were present and at which the *pro rata* distribution of pellets was agreed. Much of his written testimony was hearsay and unsupported by the documentary record.²⁶⁰ And at the oral hearing, neither of his key propositions survived cross-examination.

344. Faced with the monthly pellet delivery logs signed by CVG FMO representatives and Mr Moya himself, Mr Moya conceded that they did not reflect the operational status of the Matesi plant: rather, the comments reflected the operational status of the CVG FMO plant:

“Q. My question was different. My question was whether any of the logs we just looked at mentioned in the observations box the operating conditions of Matesi's plant?”

A. The operating conditions at the Matesi plant – I'm sorry, is the question whether I would write anything about the operating conditions at the Matesi plant? No. I wrote here in the comments what was happening at the Ferrominera plant.”²⁶¹

²⁵⁹ *Ibid* at Tables 4 and 7

²⁶⁰ Witness Statement of Moya, para. 6: “It is my understanding that [CVG FMO] allocated the amount of product by taking into account not only the order placed by each briquette company, but also the production conditions at the plant, and especially considering the production capacity of each briquette company.”

²⁶¹ Transcript (English), Day 4, pp. 974 and 975. And see also Exhibit Hart I-A E, at pp. EN0001-0002, 0004, 0006-0012. And see also Exhibit C-308 (Mr Moya's October 2009 press statement): “In 2006 Matesi produced over 750,000 tons and in 2007 over 400,000 tons not because its capacity would not allow it but because it was restricted by the supply problems at the [CVG FMO] pellet plant.”

345. It became apparent that none of the emails exchanged with CVG FMO's Sales Department referred to the operational status of the Matesi plant either: Matesi was told what quantities of pellets it would receive by reference to "*current pellet availability*" and the operational conditions at the relevant pellet production plants.²⁶²

"Q. Do any (sic) of these two emails mention the operating conditions at Matesi's plant or Matesi's pellet requirements according to its production plan?

A. No, no reference is made to the conditions in these emails of the Matesi plant, of course."²⁶³

346. It was apparent, too, from his answers to questions from the Tribunal,²⁶⁴ that Mr Moya was unaware of the basis upon which CVG FMO distributed pellets to Matesi and the other HBI producers, but on any view, CVG FMO could not have allocated pellets by reference to the operational status of the Matesi plant, if that information had never been communicated to, or recorded by, CVG FMO.

347. To the extent that meetings were held between CVG FMO and the HBI producers, Mr Moya's evidence changed in the course of his cross-examination. He initially adopted the line, which had been taken by Mr Sabbagh (albeit a line unsupported by any documentary record) that the HBI producers had met CVG FMO in general meetings to agree upon the *pro rata* distribution of pellets between them.²⁶⁵ Subsequently, he conceded that each of the HBI producers had met separately with CVG FMO while representatives of their competitors waited their turn in the hallway outside²⁶⁶ and that, in fact, as he told a member of the Tribunal, he had no information in respect of the quantities requested by other plants and the quantities with which they were supplied:

²⁶² See Witness Statement Moya, paras. 5 & 6 and Exhibits C-192, C-193, and C-194

²⁶³ Transcript (English), Day 4, pp. 996-999

²⁶⁴ Transcript (English), Day 4, pp. 981 & 982 and pp. 1069-1071

²⁶⁵ *Idem*, p. 962

²⁶⁶ *Idem*, p. 968

“Q. What types of information were you being provided with at the time about the quantities that were being requested by the other plants and amounts that were being sent to other plants?”

A: I didn’t have information about how much was sent to OPCO or to Comsigua because I didn’t have access to their records. I said that it was being sent to them, it wasn’t being sent to us, but I cannot say how much. I don’t have any information or any place to get such information from.”²⁶⁷

348. Whether or not any such general meetings took place – and on the basis of the evidence that it has heard, the Tribunal concludes that they did not – it seems counter-intuitive that competing HBI producers, faced with a supply shortage, would entertain any such voluntary waiver of their *pro rata* contractual entitlements to pellets in order to accommodate their competitors rather than pressing for those entitlements in full. The Tribunal notes, and accepts as the more likely scenario, Mr Malvassora’s explanation that, in circumstances in which pellets were in short supply, each producer would require the full amount of materials to which it was entitled, because any allocation would be determined by each producer’s *pro rata* share of the total requirements of all of the producers.²⁶⁸

349. In order to calculate Matesi’s *pro rata* pellet allotment, the two variables are:

- (a) Matesi’s *pro rata* % share of pellets (ascertained by dividing Matesi’s annual pellet requirement by the total quantity of available domestically produced pellets); and
- (b) the total domestic pellet availability (*i.e.*, pellets produced by CVG FMO and excess pellets produced by SIDOR).

The *pro rata* allocation to Matesi is the result of multiplying Matesi’s *pro rata* % share and the total domestic pellet availability.

²⁶⁷ *Idem*, pp. 981 and 982

²⁶⁸ Malvassora First Witness Statement, para. 25 and Malvassora 2nd Statement, paras. 14 and 15

350. Article 2.1 requires that the volume of supply be fixed by reference to Matesi's requirements and:

“... the amount of [CVG FMO's] annual availability of IRON ORE, and the annual availability of pellets for sale derived from the plant owned by [SIDOR].”

The Tribunal notes that Claimants' experts' assessment of the quantity of available pellets was derived from contemporaneous information published by IVES, the Venezuelan Steel Institute, obtained from CVG FMO and SIDOR, and from SIDOR's records establishing its own consumption of pellets (only excess SIDOR pellets being made available for sale to domestic HBI producers). Those calculations were adopted by Mr Hart for the purposes of his own calculations.²⁶⁹

351. On the basis of the evidence before the Tribunal, however, Matesi was never informed of the annual requirements/entitlements of its competitors,²⁷⁰ albeit that pursuant to Article 2.1 of the Supply Contract, it was incumbent upon CVG FMO to:

“ ... guarantee to [Matesi] the accuracy of the information provided by [CVG FMO] as well as compliance with equitable distribution among all of the HBI producers on the domestic market.”

352. In this regard, it is pertinent to note that, save for certain very late disclosure, the accuracy of which is contested, Venezuela has declined to produce records of the other HBI producers' historic requirements, albeit that it conceded that there were records in CVG FMO's possession.²⁷¹

353. Be that as it may, there is other evidence available to the Tribunal, which in Claimants' submission, is indicative of “*obvious*”²⁷² discrimination against Matesi. It includes statistics from IVES, the Venezuelan Steel Institute, from

²⁶⁹ First Expert Report, Compass Lexecon, para.74 and Tables XII and XIV and Exhibit CLEX-85 and Exhibit Hart I-3

²⁷⁰ Transcript (English), Day 2, p. 631 (Malvassora); Malvassora 1st Witness Statement, para. 25 and Malvassora 2nd Witness Statement, para. 13

²⁷¹ Claimants' Post-Hearing Brief, paras. 49 and 50

²⁷² Transcript (English), Day 1, p. 51

which it would appear that on the basis of figures for 2005 and 2006 in respect of the total local supply of pellets and the total demand, there were shortages of supply against demand of 10% and 25% respectively.²⁷³ However, Matesi sustained a shortfall of 15% in 2005 and 46% in 2006.²⁷⁴ In 2007, Matesi received half of its 2006 supply and it was reduced to a production level of a quarter of its capacity. No statistics from the Venezuelan Steel Institute are available in respect of pellet demand for 2007, but it is known that the reduction of supply in the market that year was of the order of 35%. In 2008, there was a 3% increase in the availability of pellets over 2007, but Matesi's allocation was 59% down on that of the previous year.²⁷⁵

354. Claimants further point to the fact that the cutback in supply in 2007 coincided with the resumption by CVG FMO of its role as operator of OPCO/Minorca, the plant which was located within CVG FMO's own facilities.

355. The contemporaneous documentary record, including correspondence between Mr Moya and CVG FMO in 2006 and monthly log reports for June 2007 and March 2008, supports the proposition that other HBI producers were receiving supplies at the expense of Matesi.²⁷⁶ Mr Moya further confirmed in the course of his evidence that CVG FMO would deliver pellets to Comsigua via the conveyor belt, which passed Matesi's plant on days when it was said that there were no available supplies for Matesi,²⁷⁷ a point corroborated by Mr Tamez and by Mr Malvassora.²⁷⁸ Mr Moya confirmed that he had been critical of CVG FMO's unequal distribution of pellets as between Matesi and Comsigua²⁷⁹ and that he had recorded his complaints in respect of a disproportionate supply in

²⁷³ Compass Lexecon First Report, Table XII

²⁷⁴ Claimants' Opening Presentation, Slide 25; Exhibit R-156, pp. 0056-0098; Exhibit CLEX-85

²⁷⁵ See FN 165 and 166, Claimants' Post-Hearing Brief

²⁷⁶ See Exhibits C-305, C-306, C-307 and see also Exhibit Hart I-A E pages EN 0002 and EN 0012

²⁷⁷ Transcript (English), Day 4, pp. 983 and 984

²⁷⁸ Tamez Witness Statement, para. 36 (b) and Second Witness Statement Malvassora, para. 24(b). See also the redirect examination of Mr Malvassora at Transcript (English), Day 3, pp.711 and 712, in which he confirmed that other plants continued to receive supplies of pellets when they were stopped for maintenance, but Matesi: "... experienced difficulties in getting [CVG FMO] to continue to deliver pellets during the stoppages."

²⁷⁹ Transcript (English), Day 4, pp. 1054 and 1055

favour of Minorca/OPCO, which was based in the facilities of, and since May 2007 operated by, CVG FMO.²⁸⁰

356. Claimants contend, too, that between 2006 and 2007, Matesi's production was reduced by 44%, whereas Minorca/OPCO's declined by 20% and in 2007-2008, Minorca/OPCO was the only HBI producer to see an increase in output, rising by 15% against Matesi's decline of 35%.²⁸¹ Claimants maintain that the only plausible explanation for Minorca OPCO's relative success is that it was the beneficiary of preferential supply by CVG FMO.²⁸²
357. Venezuela did not produce any documentary evidence to rebut the claim with its Counter-Memorial or its Rejoinder, nor did it produce documents pursuant to the Tribunal's Disclosure Order of 21 August 2013. On 22 January 2014, nine days before the hearing however, it produced certain documents purporting to show the annual requirements of the various HBI producers, which it appeared had been in its possession since at least November 2013.²⁸³
358. This document production was the subject of substantial criticism on the part of Claimants,²⁸⁴ not least because it proved to be deficient in a number of material respects.
359. Claimants have demonstrated that Venezuela's Information Charts purporting to show actual pellet allocation to the HBI producers²⁸⁵ cannot be reconciled with the invoices produced in January 2014 in that the amounts shown as having been allocated by CVG FMO to the HBI producers do not tally with the total tonnage invoiced. Although the Information Charts are blank as to iron ore deliveries to Minorca/OPCO for the years 2007-2009, invoices subsequently produced indicate that 326,000 tons of material was invoiced to Minorca/OPCO in the period January-May 2007. That, Claimants point out, would account for

²⁸⁰ *Idem* at pp. 981 and 982, and see also Exhibit C-103

²⁸¹ Claimants' Post-Hearing Brief, para. 72

²⁸² Exhibit C-249: email Mr Amaiz (CVG FMO) to Mr Soler (SIDOR), 7 August 2007

²⁸³ Exhibit R-156, p. 0012

²⁸⁴ See, e.g. Transcript (English), Day 1, p. 55

²⁸⁵ Exhibit C-243

much of the difference between the total amount of pellets allocated by CVG FMO in the Information Charts and the total amount of pellets invoiced by CVG FMO.

360. Moreover there is no correlation between the total amount of domestic pellets invoiced by CVG FMO and the amount of domestically available pellets calculated by Professor Spiller and Dr Abdala by reference to the contemporaneous documents, and whose figures were adopted by Mr Hart. It would seem that significant quantities were simply not invoiced by CVG FMO: 24.75% of available pellets in 2007 and 63.81% of available pellets in 2008 are unaccounted for – rather more than the total pellets supplied to Matesi in the two years in question. The inference that Claimants invite the Tribunal to draw in the absence of records of pellet deliveries to Minorca/OPCO for the years in question and the unexplained increase in Minorca/OPCO production is that Minorca/OPCO received these supplies directly from CVG FMO, such that it received 1.47 times more pellets than Matesi in 2007 and 6.36 times as many in 2008, for all that it had some 66% of Matesi’s nominal production capacity.

361. Letters, which Venezuela represented to the Tribunal²⁸⁶ evidenced annual pellet requirements notified by Matesi, Minorca/OPCO, Comsigua and Venprecar between 2005 and 2008 in fact contain nothing in respect of Minorca/OPCO’s requirement for 2008. Nor do the quantities referenced in the letters in respect of the HBI producers other than Matesi match the contractual pellet entitlements pursuant to their supply contracts. To the contrary, Claimants maintain that they have established that all of the producers were requesting supplies significantly in excess of the iron ore that they required to produce at 100% capacity. To the extent that CVG FMO was predicated *pro rata* shares based upon annual requirements that exceeded the HBI producers’ respective contractual requirements, it was not operating pursuant to the terms of the supply contracts and Matesi suffered a reduction in its *pro rata* share as a result. It is Claimants’ contention that based upon the annual requirement letters, it should have

²⁸⁶ Letter to the Tribunal dated 22 January 2014 at p.2, para.(c)

received a *pro rata* share of 33.4% in 2007 and 34.4% in 2008, whereas, in fact, it received far less.²⁸⁷

362. A further issue identified by Claimants is that the disclosed invoices do not relate to iron pellet imports by Comsigua and Venprecar, but only to those of Minorca/OPCO between 2005 and 2008. And there are significant discrepancies between the invoiced amounts and those stated on the certificates.²⁸⁸
363. Venezuela's answer to these complaints is that, first, Matesi's problems were attributable to technical shortcomings, rather than to any discrimination against it in terms of supply allocation and, second, and in any event, Matesi sought to over order. Thirdly, it was the beneficiary of an illicit supply of pellets from SIDOR. It was suggested that in 2006, SIDOR was receiving oversized pellets for further refining, but rather than returning them to CVG FMO as it was obliged to do, SIDOR was delivering them to Matesi.²⁸⁹
364. However, the only fact witness proffered to address the variety of technical issues said to have impacted on Matesi's performance was Mr Cadenas, who purported to identify some dozen technical and operational problems at the Matesi plant. Mr Cadenas had led Matesi's electromechanical technical group between 2004 and 2009. He had a reporting line to the Maintenance Manager, Mr Alberti, who, in turn, was one of four employees who reported to Matesi's Industrial Manager, Mr Tamez.²⁹⁰ It became apparent that none of the issues to which he had drawn attention related to equipment or processes for which he was responsible.²⁹¹ Mr Cadenas' evidence was supplemented by that of Dr Poveromo, but he conducted no independent investigation of his own into the technical status of the Matesi plant – and he purported to rely on the evidence of Mr Tamez as opposed to that of Mr Cadenas.

²⁸⁷ Damages Revision Based on Newly Disclosed Documents by Venezuela (Spiller and Abdala) 6 February 2014 at Table II

²⁸⁸ Claimants' Post-Hearing Brief, para. 84

²⁸⁹ Transcript (English), Day 1, pp. 303-304

²⁹⁰ Transcript (English), Day 3, pp. 730-732

²⁹¹ *Idem*, pp. 743, 752-757, 759 & 760 and 772

365. The allegations of technical deficiencies at Matesi were addressed in comprehensive and compelling fashion by Claimants' witnesses.
366. *PosVen Construction Issues:* It was pointed out that the issues which had led to the disputes between PosVen and its contractor, Raytheon, in 2001- 2002 had long been resolved by the time of the acquisition of the plant by Claimants,²⁹² and that, in any event, they were belied by the actual performance of the plant, which achieved 80% of capacity by February 2005 following an October 2004 start-up.
367. *Pellet Quality Issues:* Out of spec. pellets, which gave rise to channelling in the reactor had had to be pre-sieved in the yard as well as being subject to screening, but the principal issue remained one of supply rather than quality.²⁹³
368. *Cooling Conveyors:* Venezuela's witnesses (Messrs. Poveromo, Cadenas and Moya) maintained that the reason that Matesi had produced off-spec. briquettes (as Mr Malvassora conceded had been the case²⁹⁴) was because its cooling conveyors were defective. Prior to their replacement in July/August 2007, it was suggested that those quality problems would have limited Matesi's ability to market its products internationally. In fact, Mr Malvassora testified that the principal cause of Matesi's inability to produce briquettes to specification was the quality of the pellets that it received from CVG FMO.
369. *Heat Exchangers:* The leakage problem affecting the heat exchangers was detected in 2006. It reduced Matesi's production levels to some 70% in 2007 and 2008, but it only received sufficient pellets to produce at 22% in 2007 and at less than 10% of capacity in 2008.²⁹⁵ Mr Tamez told the Tribunal that Matesi had made some temporary repairs, whilst it took steps to replace the heat exchangers. That involved the ordering of bespoke equipment with a substantial

²⁹² Transcript (English), Day 2, pp. 425, 435 & 436

²⁹³ See Tamez Witness Statement, para. 26(i), and paras. 49-54; and Transcript (English), Day 2, pp. 511-513

²⁹⁴ Transcript (English), Day 3, p.722

²⁹⁵ Exhibit C-246 and Transcript (English), Day 2, p.594 and Transcript (English), Day 3, p. 693 and 694 (Malvassora)

delivery lead-time. Had the plant not been expropriated, the necessary remedial work would have been completed.

370. *VS2 loading and discharge valves and seals*: Claimants confirmed that there had been an issue with the valves, exacerbated by the fact that Matesi could not import from Tenova because of CADIVI problems. It had had to use locally made seals, which had a service life of some 1-2 months as against 18 months for the products, which Claimants would have wished to use. While the shortcomings in the valves gave rise to a constant replacement problem, the Tribunal was told that that had not affected productivity.²⁹⁶

371. Mr Tamez testified that the only limit on production had been the supply constraint: none of the technical problems raised by Venezuela had impacted production.²⁹⁷ The Tribunal notes that, in fact, Matesi's production had closely tracked the supply of pellets that it received²⁹⁸ and it accepts that had there been operational problems, then there would be a lag between supply and production. Both Mr Tamez and Mr Malvassora confirmed that Matesi had been obliged consistently to operate at the limits of its inventory.²⁹⁹

372. In contrast, Mr Moya sought to persuade the Tribunal that CVG FMO had:

“always sent material based on [Matesi's] request and also based on a monthly schedule and based on the operational condition of [Matesi]”.³⁰⁰

373. However, the Tribunal is unable to reconcile that assertion with:

(a) Mr Moya's own statement to the press in October 2009 that:

“in 2006, Matesi produced over 750,000 tonnes and in 2007, over 400,000, not because its capacity would not allow it, **but because it**

²⁹⁶ Transcript (English), Day 2, p. 595

²⁹⁷ Transcript (English), Day 2, pp. 542-543

²⁹⁸ Claimants' Opening Presentation, Slide 33

²⁹⁹ Transcript (English), Day 2, p. 497 (Tamez) and Transcript (English), Day 2, p. 594 (Malvassora)

³⁰⁰ Transcript (English), Day 4, p. 953

was restricted by the pellet supply problems at the [CVG FMO] plant³⁰¹ (emphasis added);

- (b) documentary evidence in the record that Matesi had been obliged to reduce production levels or to stop one or both reactors for want of pellets;³⁰²
- (c) his own internal and external correspondence;³⁰³ and
- (d) the Diagnostic Report submitted to the Matesi Transition Commission in July 2009, which he signed and which confirmed that:

“the operations of the Matesi plant have been halted since November 2008. The unavailability of raw material has forced the plant to operate at less than half its capacity since 2007.”³⁰⁴

g. Conclusions on Supply by CVG FMO

374. On the basis of the record available to it, and having considered the failure by Venezuela to produce materially relevant documentation as outlined above, the Tribunal concludes that:

- (a) Matesi suffered a shortage of pellet supply in the course of its operations between 2005 and 2008;
- (b) technical issues at CVG FMO were a significant contributing factor to the disruption of supply;
- (c) such technical issues as Matesi might have faced were not material to its inability to produce to planned capacity; and

³⁰¹ Exhibit C-308 and see also Monthly Log for December 2007 at Exhibit Hart I-A E, p. E0005 and Exhibit C-211

³⁰² Exhibit C-211

³⁰³ Exhibits C-304 and C-307

³⁰⁴ Exhibit CLEX-78

- (d) there was a preferential supply by CVG FMO to other producers, notably Minorca/OPCO, at the expense of Matesi.

375. Further, the Tribunal considers that the assessment of the reductions in Matesi's *pro rata* share in 2006 put forward by Professor Spiller and Mr Abdala (27.8% to 25.8% in 2006; 33.4% to 25.6% in 2007 and 34.4% to 25.7% in 2008) is to be preferred.

376. On the basis of its findings set out above, the Tribunal concludes that Venezuela's submission that the evidence supports the contention that Matesi had received an over-allocation of pellets between 2005 and 2008 cannot be sustained.

377. Finally, while the Tribunal notes the exchanges of correspondence cited in Venezuela's Counter-Memorial in respect of an asserted additional supply of pellets to Matesi from SIDOR in 2004, 2005 and 2006, it notes, too, Claimants' explanation that, in fact, what SIDOR was doing was returning to Matesi substandard pellets that it had received from CVG FMO under its *pro rata* share and which Matesi had sent to SIDOR for processing – a process known as “*maquila de finos*” – while still retaining title.³⁰⁵

378. In the opinion of the Tribunal, the evidence points to a failure on the part of CVG FMO both properly to operate the pro-rating provisions of Article 2.1 of the Supply Agreement, and to meet its obligations to provide Matesi with information in respect of the status of supplies to other producers.

h. Venezuela's Responsibility

379. The question for the Tribunal, however, is whether these are breaches of a commercial contract in respect of which, as Venezuela contends, Matesi/Claimants should have looked to CVG FMO for redress or whether, as

³⁰⁵ Respondent's Counter-Memorial, paras. 280-283 and Respondent's Reply, paras. 85-86

Claimants contend, the international responsibility of the Venezuelan State is engaged.

380. Claimants maintain that Venezuela has breached its international treaty obligations of fair and equitable treatment, non-discrimination and non-impairment. In particular, through the vehicle of CVG FMO,³⁰⁶ it discriminated against Matesi in terms of pellet supply with the intent to diminish the value of Claimants' interest ahead of a nationalisation of Matesi and the steel industry generally, which was already on the Venezuelan Government's agenda.³⁰⁷
381. Claimants assert that only the Venezuelan State could use governmental authority to modify contracts with a private party and that even if CVG FMO was not an organ of the State, it was exercising elements of governmental authority in regulating the supply of iron ore to Matesi. Its actions are therefore attributed to Venezuela under Articles 4 or 5 of the ILC Articles on State Responsibility (the "ILC Articles").³⁰⁸
382. For its part, Venezuela insists that it is not in breach of its treaty obligations and that CVG FMO is neither an organ of the State, nor an entity whose acts might be attributed to Venezuela. The Supply Contract was simply a commercial purchase and sale agreement. In any event, Venezuela maintains that there was no logic in a suggestion that it would have sought to discriminate among the various HBI producers when it held ownership stakes in all of them, including Matesi - even before the nationalisation of SIDOR, which took Venezuela's stake in Matesi to 49.8% in April 2008.³⁰⁹

383. *Treaty Provisions:* Article 3 of the Luxembourg Treaty provides that:

³⁰⁶ In their notice letter of 20 August 2009, Claimants referenced alleged gross violations of contractual obligations on the part of Venezuela, which would suggest that Venezuela was regarded as one and the same as CVG FMO for these purposes.

³⁰⁷ Claimants' Post-Hearing Brief, para. 332 (and see also Claimants' Reply, para. 217)

³⁰⁸ *Idem*, para. 344. Exhibit CLEX-13: Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission on the work of its fifty-third session, 2001

³⁰⁹ Respondent's Counter-Memorial, para. 261 and Respondent's Post-Hearing Brief, paras. 167 and 179

“1. All investments, whether direct or indirect, made by investors of one Contracting Party enjoy in the territory of the other Contracting Party, fair and equitable treatment according to international law.

2. Except for measures required for the maintenance of public order, such investments shall enjoy constant protection, which precludes any arbitrary or discriminatory measure that could hinder, in fact or law, their administration, maintenance, use, enjoyment or disposal.

3. For all matters governed by this Agreement, investors of each Contracting Party shall enjoy, in the territory of the other Contracting Party, treatment no less favourable than that accorded by the former Contracting Party to its own investors or to investors of the most favoured nation.”

384. So far as the Portuguese Treaty is concerned, Article 3 provides:

“1. Each Contracting Party shall guarantee, within its territory, non-discriminatory, fair and equitable treatment, according to international law, to investments made by investors of the other Contracting Party.

2. On matters governed by this Agreement, the treatment referred [to] in paragraph 1 of this Article shall not be less favourable than that granted by a Contracting Party to investments made in its territory, in similar conditions by its own investors or by those of a third country.”

385. *Discrimination Standard:* Venezuela maintains that the Luxembourg Treaty makes express reference to discriminatory measures only in the context of the constant protection provision. While it acknowledges that the Portuguese Treaty does include a specific guarantee of non-discriminatory, as well as fair and equitable, treatment of foreign investments, the fact that both Treaties reference such treatment as being “*in accordance with international law*” results in the applicable standard being that which derives from international law – namely the minimum standard of treatment of aliens and their property under customary international law. Venezuela suggests in its Rejoinder that it is “*well established that the ordinary meaning of the fair and equitable treatment standard clause worded this way*”, *i.e.* by reference to the minimum standard, is a prohibition of intentional discrimination.³¹⁰

³¹⁰ Respondent’s Rejoinder, paras. 273 and 283

386. However, of the awards referenced by Venezuela and said to be “*worded this way*”, (i.e.: “*fair and equitable treatment according to international law*”), Claimants pointed out that none, in fact, related to treaties with such a formulation.³¹¹ The only relevant award referred to the Tribunal was in the *Tecmed* case, in which the tribunal held that the scope of the undertaking of fair and equitable treatment in the Spain – Mexico BIT resulted “*from an autonomous interpretation*” and not from the minimum standard of treatment.³¹²
387. Claimants assert that language such as “‘*under*’ or ‘*according to*’ international law” does not, of itself, convert a fair and equitable provision into one requiring only the international minimum standard, noting that in *Vivendi*, the tribunal found “*no basis for equating principles of international law with the minimum standard of treatment*”.³¹³ Further, in the case of the Portuguese Treaty, non-discrimination is part and parcel of a fair and equitable treatment provision to be applied “*according to international law*”.³¹⁴
388. Notwithstanding the issue between the Parties as to whether or not the Treaty standard should be interpreted as an autonomous standard, both referenced the decision in the *Saluka* case as setting out the applicable test - namely:
- “any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.”³¹⁵

³¹¹ *Idem*, para. 273

³¹² *Tecnicas Medioambientales Tecmed S.A. v Mexico*, ICSID Case No. ARB(AF)/00/2, para. 155

³¹³ *Compania de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.4.7 and citing, too: *Azurix Corp. v Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006, para. 361 and *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para. 185

³¹⁴ Claimants’ Reply, paras. 210 and 211

³¹⁵ *Saluka Investments B.V. v The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 307

In *Saluka*, it was held that the claimant bank had received markedly less fair treatment than other banks of similar size and market position without explanation or justification.

389. Both Claimants and Venezuela have also cited to the decision in *Unglaube* to support the proposition (Claimants) that:

“in order to prevail regarding an allegation of discriminatory treatment a claimant must demonstrate that it has been subjected to unequal treatment in circumstances where there appears to be no reasonable basis for such differentiation”³¹⁶

and (Venezuela) for the proposition that within that framework, decisions of a State will be afforded a “*considerable degree of deference*” and that it is necessary to establish behaviour:

“sufficient to shock the conscience [or which is] improper or discreditable or which otherwise blatantly def[ies] logic or elemental fairness.”³¹⁷

390. In the opinion of the Tribunal, on the basis of the findings of fact that it has made in respect of the supply of pellets issue, there would be grounds for holding Venezuela in breach of its obligations to afford Claimants fair and equitable treatment **if** the actions of CVG FMO were properly to be imputed to Venezuela. Matesi was the subject of discriminatory treatment at the hands of CVG FMO and no reasonable justification has been advanced for the treatment that it received.

391. It would follow, too, that Venezuela would be in breach of its obligation not to impair Claimants’ use and enjoyment of the investment pursuant to Article 3(2) of the Luxembourg Treaty (see above) and Article 2(2) of the Portuguese Treaty:

“Each Party shall ... refrain from adopting arbitrary or discriminatory measures that prevent the administration manufacturing use usufruct extension alienation and disposal of its investments.”

³¹⁶ *Marion and Reinhard Unglaube v. Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award 16 May 2012, para. 262

³¹⁷ *Idem*, para. 258

392. But the critical question is one of attribution – *i.e.* whether the acts of CVG FMO in respect of the distribution of raw material can properly be attributed to the Venezuelan State, such as to engage the latter’s international responsibility.

393. *Attribution:* Claimants argue that the liability of Venezuela is engaged because of the actions of CVG FMO, which they maintain is:

“owned, directed and controlled by [Venezuela] and is not a State organ only by operation of law or formality alone”.³¹⁸

394. Claimants submit, first, that CVG FMO is an organ of the State for the purposes of Article 4 of the ILC Articles, and second, in the alternative, that its acts are attributable to Venezuela by reason of Article 5 of the ILC Articles.

395. Article 4 of the ILC Articles provides:

“1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

396. Professor James Crawford’s commentary contains the following observations:

“[A]rticle 4 covers organs, whether they exercise ‘legislative, executive, judicial or any other functions’. This language allows for the fact that the principle of the separation of powers is not followed in any uniform way, and that many organs exercise some combination of public powers of a legislative, executive or judicial character. Moreover, the term is one of extension, not limitation, as is made clear by the words ‘or any other functions’. It is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or as *acta iure gestionis*.”³¹⁹

397. Article 5 of the ILC Articles provides as follows:

“Conduct of persons or entities exercising elements of governmental authority

³¹⁸ Claimants’ Post-Hearing Brief, para. 339

³¹⁹ CLA-13, p. 41.

The conduct of a person or entity which is not an organ of the State ... but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, **provided the person or entity is acting in that capacity in the particular instance.**” (Emphasis added).

398. The Notes to Article 5 include, at 3, the following statement:

“The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control—these are not decisive criteria for the purpose of attribution of the entity’s conduct to the State. Instead, article 5 refers to the true common feature, namely that these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority.”

399. Claimants maintain that the fact that CVG FMO is a “*decentralized state entity*” is sufficient of itself to meet the test of ILC Article 4.³²⁰ The fact that CVG FMO was created as a commercial entity, that it is subject to private law and that it engages in commercial activity are not matters which go to its legal nature as an organ of the Venezuelan State under Venezuelan law – a proposition, which they say Professor Iribarren recognizes and which the Constitutional Chamber of the Venezuelan Supreme Court has confirmed.³²¹

400. Claimants maintain that CVG FMO holds a governmental monopoly over a critical natural resource and thereby exercises governmental authority. It “*likewise*” forms part of the “*functionally decentralized public administration*” of the Government of Venezuela and it is subject to the control of the Ministry of Industry by reason of CVG’s shareholding. Claimants draw attention to the fact that CVG FMO’s activities have been declared of public utility and public interest pursuant to Article 3 of Decree Law no. 1531.³²² They suggest, too, that Article 6 of its By-Laws requires it to implement its control of iron ore and

³²⁰ Claimants’ Rejoinder para. 259 and Iribarren Second Legal Opinion, para. 104

³²¹ Claimants’ Post-Hearing Brief, para. 338

³²² Exhibit C-16

related products under the guidelines of the Ministry of Industry and pursuant to the directives of the President of Venezuela.³²³

401. For its part, Venezuela rejects any suggestion that CVG FMO is an organ of the State; that it exercises Governmental responsibility or authority; or that its actions are the result of State instructions or control.³²⁴ It insists upon the fact that CVG FMO was established as a corporation. The (undisputed) fact that it is wholly owned by CVG does not make it an organ of the State any more, says Venezuela, than CVG itself. The powers of CVG over CVG FMO are no more than those of a shareholder.

402. Venezuela emphasises the fact that CVG FMO's relationship with Matesi was one born of contract - and the provision for *pro rata* distribution of pellets was intended to address the possibility of a pellet shortage which might otherwise interrupt the contractually agreed delivery arrangements.

403. Venezuela asserts that Claimants have produced no evidence to show how it is said that CVG influenced CVG FMO's performance of the Supply Contract, or to what extent, if at all, CVG supervised the performance of the Contract or acted on the instructions of the State.

404. In the submission of Venezuela, ILC Articles 4 and 5 are simply inapposite, because:

“[t]he relationship between [CVG FMO] and the different briquette companies of the region was strictly contractual and commercial, consistent with the delivery of merchandise in return for payment.”³²⁵

405. Claimants dismiss the suggestion that CVG was a mere shareholder, pointing out that under Decree No. 1531 it was responsible for formulating policies and guidelines for the commercialisation of CVG FMO's products and for setting prices. The Government was therefore “*intimately engaged in how the supply of*

³²³ Claimants' Memorial, para. 192

³²⁴ Respondent's Counter-Memorial, para. 233

³²⁵ *Idem*, paras. 237-239

pellets was priced on the market.”³²⁶ Moreover, there was evidence of direct involvement of the State in the activities and operations of CVG FMO, notably in the form of a direct grant of some US\$2 billion and the direct payment by the Ministry of Industry of CVG FMO workers’ salaries.

406. The Tribunal has carefully considered all arguments put forward by each side, and the totality of the evidence on this issue. There is no doubt that CVG FMO is an entity wholly owned by Venezuela. Its By-Laws (Clause 5)³²⁷ confirm that its shares:

“belong to [Venezuela] which exercises its ownership through [CVG] and may not be alienated except by another legal entity wholly owned by the State of Venezuela, if this is decided by the President of the Republic at a Council of Ministers.”

407. Responsibility for iron ore exploitation in Venezuela was vested in CVG pursuant to Decree No. 580 of 26 November 1974.³²⁸

408. CVG FMO was incorporated in December 1975 with its domicile in Guayana City, Bolivar State.

409. At the Ordinary General Meeting of CVG FMO’s Shareholders, meeting no 14 held on 1 November 2006, a modification to Article 6 of the CVG FMO By-Laws was approved:

“to expand the commercial purpose, which is centred on a purely commercial activity, taking into consideration the guidelines issued by the National Executive Branch, in line with the commitments taken by the Ministry of Industry and of the CVG for the purposes of developing the projects which will promote the centres of endogenous industrializing development and the creation of companies for social production, through the reorientation of raw materials....” (Emphasis added)

410. CVG FMO’s By-Laws record, at Article 6 that:

“the Purpose of the Company is to engage in the iron ore industry within the National Territory, as well as, the administration, direction,

³²⁶ Claimants’ Reply, para. 226

³²⁷ By-laws of CVG FMO: 1 November 2006 (Exhibit C-99)

³²⁸ Exhibit C-15

industrialization and, in general, the exploitation of the assets which became the property of CVG due to the provisions of Decree No. 580 And in accordance with the guidelines from the Ministry of Industry, in the exercise of powers it has by the Partial Reform of the Decree on the Organisation and Operation of the Central Public Administration, published ... [on] 22 June 2006, received through the CVG, and in furtherance of the directives of the national government and the President of the Republic, oriented towards the development of the chains of production and towards social responsibility **as a State company.**” (Emphasis added)

411. Article 6 continues:

“To fulfil its corporate purpose, the Company may engage in all types of activities, and especially on the following: mining, industrialization, marketing, transportation, research, chartering, shipping agency, customs agency, temporary storage or In Bond, and in general the storage and warehouse of all types of goods to be imported. Additionally, the Company may perform all legal acts and business related to the purpose described in this clause without limitation.”

412. The Tribunal has considered the standing of CVG FMO in the context of Article 4 of the ILC Articles with these matters in mind. In this regard, the Tribunal has also taken account of the fact that:

- (a) the iron ore monopoly was enjoyed by CVG rather than CVG FMO;
- (b) while Claimants complain that CVG FMO had “*authority to alter administrative contracts unilaterally...*”,³²⁹ what happened in this case was that a price increase, which resulted in Amendment No.1 to the Supply Contract, was imposed by Presidential Decree No. 3895, and not at the initiative of CVG FMO;³³⁰ and
- (c) the activities of CVG FMO, specifically those in respect of the Supply Contract, are of a commercial nature. They have no bearing upon the legislative, executive, judicial or other functions of the Venezuelan State:

³²⁹ Claimants’ Post-Hearing Brief, para. 344.

³³⁰ Exhibit C-28

there is no evidence before the Tribunal of any vesting of a combination of public powers in, much less, any exercise of such powers by, CVG FMO.

413. On the basis of all the materials available to it, the Tribunal concludes that CVG FMO is not an organ of the State for the purposes of ILC Article 4 of the ILC Articles.

414. The question then is whether CVG FMO was empowered by Venezuela to exercise elements of governmental authority, and was so acting in the case of the Supply Contract, and, specifically, the discriminatory supply of pellets, such that its actions might be attributed to Venezuela pursuant to Article 5 of the ILC Articles.

415. The Tribunal is mindful of Note 3 of the commentary to Article 5, as quoted at para 397 above.

416. In the opinion of the Tribunal, the point here is susceptible of a short answer: there is no evidence that CVG FMO was exercising any element of government authority in respect of the allocation of pellets under the Supply Contract.³³¹ And Claimants' submission that CVG FMO exercises government authority in carrying out its monopoly over a natural resource is misconceived in that the monopoly is not that of CVG FMO but of CVG. The submission, in any event, is far too widely drawn for the purposes of Article 5 of the ILC Articles.

417. The Tribunal accepts Venezuela's case that CVG FMO had not been specifically empowered by the law of the State of Venezuela to distribute pellets, and that its corporate purpose was the marketing of iron ore, pellets and fines, which are activities of a private and commercial nature. Moreover, its obligations in the context of Matesi were obligations entered into pursuant to the Supply Contract, which was a commercial contract. To the extent that the

³³¹ See in this regard, para. 201 of Respondent's Post-Hearing Brief and the citation from the *Tulip* case to which attention is drawn.

actions of its principal shareholder CVG might be said to be relevant, there is nothing in the evidence to suggest that its oversight of CVG FMO went beyond the exercise of general supervision of a kind which international tribunals have determined would be insufficient for the purposes of attribution. The Tribunal notes and adopts the conclusion of the tribunal in *Hamester* that:

“It is not enough for an act of a public entity to have been performed in the general fulfillment of some general interest, mission or purpose to qualify as an attributable act. In this regard the Tribunal shares the view expressed by the tribunal in *Jan de Nul*, when it stated that: “[w]hat matters is not the ‘*service public*’ element, but the use of ‘*prerogatives de puissance publique*’ or governmental authority.”³³²

418. Issues in respect of CVG FMO’s pellet supply, therefore, were matters for CVG FMO’s account, and not such as to engage Venezuela’s responsibility, and any recourse in this regard ought to have been pursued against CVG FMO under the Supply Contract.

419. In fact, it is evident that Matesi made no attempt to seek redress under the terms of the Supply Agreement, which provided for arbitration.³³³ It was put to Mr Malvassora that over a period of months in 2006, Matesi complained to CVG FMO that the contract was not being performed and that Matesi was being harmed, and yet no further recourse was ever actually taken:

“Why, then, not take the step of initiating a dispute-resolution process under the Contract? If you’re in effect threatening CVG FMO throughout by saying that you are acting in breach of contract, and we are suffering a loss as a result, I’m a little bit unclear as to why, then, you wouldn’t just go that one small step further from a threat, which is to say, actually, let’s now resolve this under the contract.

A: Toward the end of 2004, October, we started the operation; and by the beginning of 2005, we were obliged to signing (sic) a modification, an amendment to the contract for the supply of mineral ore, and have an agreement for assuring the supply of raw material,

³³² See *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 202; *Jan de Nul v. Egypt* Decision on Jurisdiction 16 June 2006; and *Bayindir v Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 122.

³³³ See Exhibit C-25, Article 12: somewhat confusingly, at para. 209 of its Post-Hearing Brief, Venezuela suggests that the operative arbitration clause is that of the Talta-Matesi Off-Take Agreement (Exhibit C-27)

which implied an increase in the price, there was a raise in the price.³³⁴ Our provider was not a regular provider. It was a provider that depended or hinged on the Venezuelan State, applied the Venezuelan jurisdiction as well as it depended from laws and courts of Venezuela, and we received this expression of, let's call it, 'power', power on behalf of the Venezuelan State. At the beginning of 2005, when we had very little time of operation, even with certain threats of nationalisation, we did not deem that that was the correct pathway to follow. We believed that it was preferable to establish this exchange of letters in order to try to comply with the terms of the Contract, but we were not very successful.”

420. When pressed on the point that these exchanges had continued over a period of months without effect and that: “... *the next step would be to indicate a process under the Contract, even negotiations under the Contract*”, Mr Malvassora replied:

“In keeping with the opinion of our legal counselors it seemed that it was not efficient to try to judicialize this claim, and this is why we followed the suggestions made by our legal counselors. The opportunities, the cases, where we were convened by the Executive Branch as a result of the decree which I mentioned, and which is part of the record, it was judged to be something worsening the conditions instead of improving them.”³³⁵

421. But that evidence was given in the context of the price increase, which had been imposed in 2005. In contrast, on the issue of any failure properly to operate the *pro rata* supply provisions of the contract or to provide information as to the requirements of other producers, no persuasive evidence has been put before the Tribunal which might demonstrate an intervention into the management of CVG FMO by Venezuela. It was only the price increase that was imposed by Venezuela pursuant to Decree no. 3895, and it was then a matter for CVG FMO and the suppliers to amend their contracts to implement the legislative measure. Equally, there is no suggestion by Claimants that the price increase was unique to Matesi.

³³⁴ See Exhibit C-28, Decree No. 3895 of 12 September 2005, and Amendment No.1 to the Supply Contract at Exhibit C-31

³³⁵ Transcript (English), Day 3, pp. 717 & 718

422. In answer to further questions from the Tribunal, Mr Malvassora stated that Matesi had also raised complaints as to the chemical quality of the pellets supplied by CVG FMO, quite apart from issues about the level of supply itself. Matesi had also notified CVG FMO that it, Matesi, had received complaints from its own customers that briquettes that it had subsequently produced were off spec. Matesi had been obliged to settle a number of claims as a result. However neither the quality shortcomings in the pellets (in respect of which, Matesi had submitted a claim for compensation of some US\$ 2.87 million),³³⁶ nor reimbursement of any settlements made with its own customers, had ever been pursued with CVG FMO.

i. Conclusion

423. Having considered all of the evidence before it, and all of the submissions of the Parties, the Tribunal concludes that the shortcomings in the pellet supply from CVG FMO to Matesi (as outlined earlier) were matters for which CVG FMO was contractually responsible, and which ought properly to have been resolved pursuant to the dispute resolution provisions of the Supply Contract. There is no persuasive evidence, as a matter of fact, that these were acts and omissions in supply that were instigated or in any way directed by or motivated on behalf of the government, and there is no basis to attribute any of these acts or omissions to the Venezuelan State as a matter of law.

424. For all of the above reasons, it follows that the Claimants' case as to the alleged breaches by Venezuela of its obligations pursuant to Article 3(1) of the Luxembourg Treaty and Article 3(1) of the Portuguese Treaty must be dismissed.

2. PROTECTION AND SECURITY CLAIM

a. Claimants' Case

425. In their Memorial and Reply Memorial, Claimants rely on events, notably serious labour unrest in the form of industrial action in November 2008 (after

³³⁶ Exhibit C-181

the Nationalisation Decree), which prevented access to the plant and the holding against their will of some 20 members of its administrative staff in December 2008.

426. While what is described as the “*dispossession*” of Matesi was underway in July 2009, Claimants say that there were numerous cases of assault against its staff including assaults perpetrated by Mr Rodriguez.³³⁷ In that context, Claimants assert that an expropriation that occurs in the face of pleas for protection amounts to a breach of this standard. They sought to contrast the situation addressed by the Tribunal in *Tecmed* (in which it was held that a government had “*reacted reasonably, in accordance with the parameters inherent in a democratic state*”³³⁸) with one in which, as they alleged, “... *there [was] no doubt that the Government of Venezuela was in collusion with the union to seize Matesi*” such that the Government’s conduct amounted to “*fomenting violence against the Claimants’ investment.*”³³⁹

b. Venezuela’s Case

427. In its Counter-Memorial, Venezuela contended that these allegations amounted to a claim that Venezuela had actively colluded with Matesi’s labour union, SINTRAMATS, to harm and dispossess Matesi. It rejected the claim on the basis that:

- (a) freedom of association was a fundamental democratic right enshrined in Venezuelan and international law;
- (b) the labour unions and the State were wholly separate;
- (c) Claimants had failed to demonstrate that the Government of Venezuela had not exercised due diligence in protecting their investment;

³³⁷ Claimants’ Reply Memorial, para. 243

³³⁸ *Tecnicas Medioambientales Tecmed S.A. v Mexico*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 177

³³⁹ Claimants’ Memorial, para. 214

- (d) conspiracy and collusion were criminal acts under Venezuelan law; and
- (e) no evidence whatever had been adduced by Claimants to support their allegations of collusion.³⁴⁰

428. Venezuela pointed out that there had been widespread labour unrest throughout the Guyana Region, and pay rates offered by Claimants and the Techint Group were a particular source of grievance. In fact, Matesi's existing Collective Labour Agreement had come to an end in late 2007, when negotiations for a new agreement began. The meetings between Matesi and SINTRAMATS were chaired by the Labour Inspectorate. Following an hiatus in the negotiations of some six months, the new Collective Labour Agreement was signed in July 2008.

429. Venezuela notes that there were tensions, before and after the signing of the July 2008 Agreement, not least:

- (a) in November 2008, Matesi had imposed a production stoppage, citing the impact of the financial crisis on demand for HBI, coupled with the fact that SIDOR no longer required HBI – a stoppage which SINTRAMATS considered a breach of the new Collective Labor Agreement;
- (b) of the three categories of workers at Matesi, the least well paid, the Collective Labor Agreement workers, went seven months without salary between October 2008 and April 2009;
- (c) workers' shifts were reduced from three to one in November 2008; and
- (d) all "outsourced workers" had been made redundant when the work stoppage was introduced.

³⁴⁰ Respondent's Counter-Memorial, para. 288

430. Following a decision of SINTRAMATS to declare its formal opposition to the shift reduction and redundancies³⁴¹ and a notification by Matesi to the Labor Inspectorate in November 2008, the Inspectorate intervened in order to attempt to conciliate. Venezuela points out that neither Matesi's management nor SINTRAMATS could be sure of the outcome of the Labor Inspectorate's intervention.³⁴²
431. After further interventions by the Ministry of Labour, the Ministry of Industry, the CVG and the National Guard, an amendment to the 2008 Collective Labor Agreement was signed in May 2009.³⁴³
432. Venezuela points, too, to the judicial intervention in February 2009 following SINTRAMATS escalation of industrial action, which had led to workers being prevented from entering the plant. A judicial inspection in February 2009 was followed by another in March 2009. In addition, and over the objections of SINTRAMATS, a Protection Order was issued by the Fifth Court of First Instance of the Bolivar State Criminal Judicial Circuit in Puerto Ordaz ordering the National Guard to:
- “... Assign officers to protect the facilities of said company, stationing themselves at said place until the investigation stage is completed.....”³⁴⁴
433. So far as events in July 2009 were concerned, Venezuela acknowledges that in May 2009 the Government had decided to nationalise Matesi: “*a company clearly paralysed by worker conflict*”. The inclusion in the Transition Commission of Mr Rodriguez of SINTRAMATS was not a “*reward*” and even if Mr Rodriguez had been involved in any of the claimed acts of assault, they were not attributable to Venezuela any more than the appointment of Mr Rodriguez to the Transition Commission was proof of a desire on the part of the Government to support labour unrest or to collude with SINTRAMATS.

³⁴¹ Exhibit C-129

³⁴² Exhibit R-074

³⁴³ Exhibit C-141

³⁴⁴ Exhibit C-139

434. In short, Venezuela maintains that it had taken multiple steps to protect Matesi; that it had not acted to protect the interests of SINTRAMAT; and that there was no evidence to demonstrate any collusion on the part of Venezuela with SINTRAMATS, much less that any such collusion reduced the value of Matesi.³⁴⁵

435. As to Venezuela's case, Claimants dismiss these measures as "*deliberately ineffectual*"³⁴⁶ on the grounds that:

- (a) the Labor Inspector was a former legal advisor to SINTRAMATS and therefore his impartiality was in doubt;
- (b) only two National Guardsmen had been dispatched to try to restore order;
- (c) one of the judges who had sought to enter the plant for the purpose of a judicial inspection had been unable to enter the premises and the other had been detained by the protestors whereupon he had refused to return to the site; and
- (d) Mr Rodriguez's "*violent propensities*" were well known to Venezuela, but nonetheless he had subsequently been appointed General Manager of BriqVen.³⁴⁷

c. Treaty Provisions

436. Article 3(2) of the Luxembourg Treaty provides that:

"Except for measures required for the maintenance of public order, such investments shall enjoy constant protection, which precludes any arbitrary or discriminatory measure that could hinder, in fact or law, their administration, maintenance, use, enjoyment or disposal."

437. Article 2(2) of the Portuguese Treaty provides that:

³⁴⁵ Respondent's Counter-Memorial, paras. 323-324

³⁴⁶ Claimants' Post-Hearing Brief, para. 350

³⁴⁷ Claimants' Reply, para. 244

“Each Party shall protect, within its territory, investments made in conformity with its laws and regulations by the investors of the other Contracting Party and shall refrain from adopting arbitrary or discriminatory measures that prevent the administration, manufacturing, use, usufruct, extension, alienation and disposal of its investments.”

d. Application of the Treaty Standard

438. It is common ground that the standard of constant protection relates principally to the physical protection of the investor and its assets. In a case in which a tribunal determined that a state could have taken precautionary measures, which fell within the normal exercise of the government’s inherent powers and which could reasonably be expected to prevent the investor’s loss, it was held that constant protection requires an “*objective standard of vigilance*” of which “*mere lack or want of diligence, without any need to establish malice or negligence*” can constitute a breach.³⁴⁸

439. The Tribunal accepts Claimants’ submission that the obligation is not exclusively limited to physical protection from third parties. It has noted the decision of the Tribunal in *Biwater* that the obligation is not “*limited to a State’s failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself.*”³⁴⁹ It has also noted the decision in *Frontier Petroleum* that: “*the host state is under an obligation to take active measures to protect the investment from adverse effects that stem from private parties or from the host state and its organs.*”³⁵⁰

440. While the underlying facts are also largely not in issue, there is a clear divergence of opinion between the Parties as to the efficacy of such measures as Venezuela took pursuant to its obligations of constant protection – a divergence manifest, too, in the accounts of Mr Malvassora and Ms Bello Rodriguez.

³⁴⁸ *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, para. 77

³⁴⁹ *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award 24 July 2008, paras. 718 and 730

³⁵⁰ *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final Award, 12 November 2010

441. However a question arises as to the extent to which it is necessary for the Tribunal to consider these matters in detail and to seek to reach a conclusion as to the true facts. In their Reply Memorial, the four matters, which form the central planks of Claimants' claim are advanced as examples of a failure on the part of Venezuela to protect their interests "*during the nationalisation process.*"³⁵¹ And at the hearing, it emerged that Claimants were seeking declaratory relief only - and that for events before the date of the expropriation:

"[T]here is no separate damage claim associated with this claim, and Claimants seek a declaration in light of the failure to protect Matesi's assets against attack **before the expropriation took place** in light of the seriousness of the conduct and as part of the overall context of this dispute."³⁵² (Emphasis added)

442. Both Parties have agreed that the date of the expropriation or taking in this case is 30 April 2008, whereas all of the incidents, which are prayed in aid of this claim fall much later in time and specifically in November–December 2008 and July 2009. On that basis, Venezuela's submission that Claimants' request for relief in respect of the alleged late 2008 and July 2009 violations has become moot seems to the Tribunal to be self-evident.

443. In any event, on the evidence that is before it, the Tribunal rejects Claimants' contention that Venezuela failed to fulfil its Treaty obligations in the respects set out above, or that it colluded with SINTRAMATS to seize Matesi, or that it fomented violence against Claimants' investment.

444. First, Mr Montero pointed to a history of difficult labour relations even in the days of PosVen,³⁵³ and Mr Malvassora accepted that the trigger for the conflict in 2008 had been the decision of the company to reduce shifts with the loss of night time working. It had had nothing to do with the decision to nationalise.³⁵⁴

³⁵¹ Claimants' Reply, para. 97

³⁵² Transcript (English), Day 1, p.165-166

³⁵³ Transcript (English), Day 2, p. 385

³⁵⁴ Transcript (English), Day 3, p. 659

445. Second, the Labor Inspector against whom Claimants alleged bias, Mr Peña Guerra, had been appointed before the labour disputes at Matesi had arisen;³⁵⁵ he had been the subject of a Motion for Recusal in November 2008, which had been accepted and the file had been transferred from Puerto Ordaz to Bolivar City;³⁵⁶ and Mr Peña Guerra had, in fact, recused himself, as Mr Malvassora confirmed.³⁵⁷
446. Third, Ms Bello testified that because Matesi was a basic industry company, the National Guard was always at hand.³⁵⁸ That evidence was not challenged in cross-examination. Further, Claimants did not challenge Venezuela’s contention that none of the alleged attacks on personnel in 2009 was reported to the National Guard.³⁵⁹
447. Fourth, whether or not it is the case that SINTRAMATS “*spearheaded a radical and violent movement against Matesi’s management*”,³⁶⁰ the evidentiary record supports the proposition that the Venezuelan authorities responded by organising two judicial inspections, by the intervention of the Ombudsman and subsequently by the making of a Protection Order which mandated the intervention of the National Guard. There is no persuasive evidence of any collusion between Venezuela and SINTRAMATS.
448. Finally, it is suggested that the appointment of Mr Rodriguez to the Matesi Transition Commission by Minister Sanz on 25 May 2009³⁶¹ was a “*provocative act*” and a “*reward*”. There is no conclusive evidence before the Tribunal that confirms either allegation. As Ms Bello and Mr Malvassora confirmed,³⁶² Matesi was not unique in having trade union representation on its Transition Commission. Further, and so far as the subsequent appointment of Mr

³⁵⁵ Transcript (English), Day 3, p. 660

³⁵⁶ Transcript (English), Day 3, pp. 661 & 662 (and see Exhibit R-155)

³⁵⁷ Transcript (English), Day 3, p. 663

³⁵⁸ Bello Witness Statement, paras. 22-23

³⁵⁹ Respondent’s Counter-Memorial, para. 321

³⁶⁰ Claimants’ Reply, para. 90(b)

³⁶¹ Exhibit C-39

³⁶² Bello Witness Statement, paras 24-26; Transcript (English), Day 3, p. 678 (Malvassora) – and see Exhibit R-81

Rodriguez as a “stop-gap” President of BriqVen is concerned, it appears that that appointment was not made by Venezuela: Mr Rodriguez was appointed by the employees of the company³⁶³ and subsequently replaced in September 2013 by Mr Pablo Mora Zoppi.

e. Conclusion

449. For these reasons, the Tribunal declines to make the declaration requested by Claimants, and its claims pursuant to Article 3(2) of the Luxembourg Treaty and Article 2(2) of the Portuguese Treaty must be dismissed.

G. NATIONALIZATION AND EXPROPRIATION OF MATESI

450. The second category of claims advanced by Claimants arise out of the actual nationalisation of Matesi.

451. There is in this case no question but that Matesi was the subject of an expropriation:

“No doubt about it, Venezuela nationalized Matesi.”³⁶⁴

452. The process was initiated by President Chavez on 10 April 2008, when he announced that Venezuela’s steel industry was to be taken back and put at the service of the country. That announcement, and the subsequent ratification of the decision by the National Assembly, was followed on 30 April 2008 by the publication of Decree No. 6,058, the “*Nationalisation Decree*.” Pursuant to its terms, SIDOR and its subsidiary and affiliated companies, of which Matesi was one, were to be transformed into State corporations. There followed Decrees 6,796 (July 2009) and 8,280 (June 2011), which addressed the nationalisation and expropriation of Matesi itself. The relevant facts are set out at paras 67 to 90 above.

³⁶³ Transcript (English), Day 1, p. 315 and see Bello Witness Statement, para. 24

³⁶⁴ Transcript (English), Day 1, p. 230

1. CLAIMANTS' CASE

453. Claimants contend that Venezuela's nationalisation of Sidor and its subsidiaries in April 2008, and subsequently Matesi in May-August 2009 (followed in June 2011 by Decree 8,280 pursuant to the Expropriation Law)³⁶⁵, amounted to an indirect expropriation of Claimants' investments, the prejudicial effects of which were compounded by Venezuela's attempt to reduce the compensation which otherwise ought to have been payable.
454. One such effect of Venezuela's approach to the expropriation was that, having sought to take only the assets of Matesi, Venezuela avoided the debts of Matesi, and Claimants were left to deal with Matesi's creditors, among which was Talta.³⁶⁶
455. Further, Claimants contend that the effects of these measures rendered the shares in Matesi, which Claimants still held, valueless: the productive assets of Matesi had been expropriated and the Claimants were left with an empty shell with liabilities, and no ability to generate income to meet those liabilities.
456. Claimants contend, too, that Matesi's consequent inability to manufacture HBI and to generate income amounted to a further indirect expropriation of the Off-Take Agreement and the Talta Loan.
457. Claimants rely upon Articles 4(1) and (2) of the Luxembourg Treaty, and on Article 4 of the Portuguese Treaty.

2. VENEZUELA'S CASE

458. Venezuela maintains that its expropriation of Claimants' investment was lawful and consistent with the framework that it had put in place - specifically, the special procedure established by the Nationalisation Decree (No. 6,058). That procedure posited either a negotiated transformation of SIDOR and its

³⁶⁵ These events are described in more detail at paras. 54-81, *supra*.

³⁶⁶ Exhibit C-47, p.5

subsidiaries into State enterprises within 60 days, or, failing that, the initiation of the expropriation procedure pursuant to the Expropriation Act.

459. In the opinion of its expert witness, Professor Iribarren, Venezuela had:

“followed a strict procedure that was strictly in keeping with the law in this case.”³⁶⁷

460. The process in his view was consistent with Article 115 of the Constitution, which provides that:

“The right of ownership is guaranteed. All persons are entitled to the use, enjoyment, and disposition of their assets. Property shall be subject to any taxes, restrictions and obligations imposed by law for public benefit or in the public interest. Expropriation of any kind of property may only be declared for reasons of public benefit or public interest, through a final and conclusive judgment and timely payment of just compensation.”³⁶⁸

461. According to Professor Iribarren, Decree No. 6,058 was in conformity with the limitations upon property rights set out in Article 115. It was also in conformity with Article 7 of the Law for Expropriation in the Public or Social Interest of 21 May 2002³⁶⁹, which required that there be:

- (a) a declaration of public utility;
- (b) a declaration that the transfer of all or part of the property in question was essential to the public interest;
- (c) a determination of compensation; and
- (d) timely payment of compensation.³⁷⁰

³⁶⁷ Transcript (English), Day 3, p. 1099

³⁶⁸ Exhibit C-136

³⁶⁹ Exhibit C-53

³⁷⁰ Transcript (English), Day 3, p. 1095

462. Professor Iribarren suggested that there had been two statements of public utility (Decree No. 6,058, and the second in the form of the Declaration of the National Assembly in October 2010, which preceded Decree No. 8,280); the Attorney General had published notice of his intention to establish a Valuation Commission in July 2011; and but for the decision of Claimants not to participate in that procedure, an amicable settlement might have been reached.³⁷¹

463. Venezuela dismisses Claimants' objections that, first, no Technical Commission was ever established within the prescribed 60 day deadline to agree upon the fair value to be paid for the shares in Matesi and, second, that the subsequent Decrees No. 6,796 and No. 8,280 anticipated the expropriation of the assets of Matesi, but not its shares.

464. As to the first point, Venezuela argues that Claimants never sought to remedy any alleged defect in the process by applying the terms of the Decrees themselves, or by means of such recourse as was available to them under Venezuelan law. Venezuela maintains that it has never denied Claimants' right to fair compensation: on the contrary, Claimants elected not to participate in the amicable settlement phase post-nationalisation, and instead made "*premature*" recourse to ICSID arbitration.³⁷²

465. As to the second point, Venezuela relies on Professor Iribarren's opinion that the distinction drawn between the shares of Matesi and its assets was, in reality, more apparent than real in the context of any eventual valuation of the investment:

"But in any event, let me underscore that because of the general knowledge that I have regarding the expropriation practice within the Office of the Attorney General, even when a company is subject to the expropriation of the assets, when determining the fair value through the amicable settlement process at the Attorney General's Office, the liabilities of the company are taken into account for fair value."³⁷³

³⁷¹ Transcript (English), Day 3, p. 1096

³⁷² Respondent's Post-Hearing Brief, para. 354

³⁷³ Transcript (English), Day 4, p. 1202

466. Further, the taking of control of the assets of Matesi prior to resolution of the fair price to be paid was to be regarded as an interim measure, intended to guarantee the continuation of the activity in the meantime.³⁷⁴ According to Professor Iribarren, Article 8 of Decree No. 6,058, which was a “*special law*”, which governed expropriation in Venezuela pursuant to Article 4 of the Expropriation Law (“*special loss*”), made it possible to take control of Matesi’s assets in such a way prior to payment of a fair price, if:

“administrative preventative measures in the context of an expropriation administrative process [were necessary] ... to guarantee [the] continuation of the activity or the work which is being submitted to expropriation.”³⁷⁵

3. TREATY PROVISIONS

467. Articles 4(1) and (2) of the Luxembourg Treaty provide as follows:

“1. Each Contracting Party undertakes not to take any measure of expropriation or nationalization, nor any other measure whose effect is to directly or indirectly dispossess investors of the other Contracting Party of investments belonging to them in its territory, unless the following conditions are fulfilled:

(a) the measures are adopted for reasons of public purpose or national interest;

(b) the measures are adopted in accordance with legal procedures;

(c) they are neither discriminatory nor contrary to a specific commitment concerning the treatment of an investment;

(d) they are accompanied by provisions for the payment of adequate and effective compensation.

2. The amount of the compensation shall correspond to the real value of the investments concerned on the day prior to the adoption or publication of the measure.

³⁷⁴ See Iribarren at Transcript (English), Day 3 p. 1099 and Respondent’s Post-Hearing Brief, paras. 348-349. And see also Exhibit C-47

³⁷⁵ Transcript (English), Day 3, pp.1098 and 1099

The compensation shall be paid in convertible currency. It shall be paid without undue delay and shall be freely transferable. Interest shall be paid at the normal commercial rate from the date it is determined until the date of payment.”

468. Article 4 of the Portuguese Treaty provides as follows:

“Neither Contracting Party shall take measures that deprive, directly or indirectly, investors of the other Contracting Party of investments made by them, except if the following conditions are fulfilled:

(a) that the measures are adopted for reasons of public purpose or national interest, in accordance with the legislation in force;

(b) that the measures are non-discriminatory;

(c) that the measures are accompanied by provisions that guarantee the payment of immediate, adequate and effective compensation ... based on the market value of the investment in question immediately prior to the moment when the measure was made public; compensation will accrue interest at the exchange rate applicable at the date on which the transaction becomes effective in the territory where the investment is located; the lawfulness of the referenced measures and the amount of compensation may be submitted for review pursuant to the applicable legal procedure.”

4. THE PROCEDURE LEADING TO THE NATIONALISATION OF MATESI

469. Under the terms of Decree No. 6,058, it was envisaged that:

(a) the activities of SIDOR and its subsidiaries, including Matesi, would be transferred to the State by 30 June 2008;

(b) Transition Commissions responsible for the transfer of each of the companies subject to Decree No. 6,058 would be constituted by the State within seven days of official publication of the Nationalisation Decree;

(c) Technical Commissions comprising representatives of both the State and the affected companies were to be set up and to seek to agree on the compensation to be paid within 60 days;

- (d) if no agreement was reached so far as the transformation of the companies into State-owned enterprises was concerned within the 60 day period then control and operation of the companies would pass to the State and the expropriation of their shares would be effected in accordance with the Expropriation Law.

470. However, the Tribunal finds that it was not until 25 May 2009 that Matesi was notified of the appointment of a Transition Commission pursuant to the Nationalisation Decree of 30 April 2008. The function of the Transition Commission was to direct, execute and successfully carry out “*the entire transition process that will conclude with the transfer of [Matesi’s] shareholding to the Venezuelan State.*”³⁷⁶

471. As noted at paragraph 66 above, although Matesi nominated its representatives to serve on the Technical Commission on 2 May 2009, no such Commission was ever set up and Venezuela never nominated its representatives.

472. Two months later came the promulgation of Decree No. 6,796 by which President Chavez ordered the forced acquisition of Matesi’s assets. The Decree set out a new procedure, which, while virtually identical to that of the Nationalisation Decree, involved:

- (a) the constitution by the State of a Transition Commission to take immediate operational control of Matesi the day following publication of the Decree;
- (b) the establishment of a new Technical Commission comprised of representatives of the State and of Matesi to agree on the compensation to be paid within 60 days for the expropriation of the assets; and in the event that no such agreement was reached within 60 days;

³⁷⁶ Exhibit C-39

- (c) the assumption of exclusive control and operation of Matesi and the expropriation of the company (not the assets) pursuant to the Expropriation Law.

473. But before any Transition Commission pursuant to Decree No. 6,796 had been put in place, the Decree No. 6,058 Transition Commission, which included among its members Mr Daniel Rodriguez, seized control of Matesi with what Matesi protested at the time was a demonstration of unnecessary violence and intimidation.³⁷⁷ Notwithstanding those protests, the Ministry of Industry re-appointed the same individuals, including Mr Rodriguez, to a second Transition Commission established pursuant to Decree No. 6,796.³⁷⁸

474. Although the takeover of Matesi's operations and offices was completed by 22 July 2009, the formal handover of the plant did not occur until 17 August 2009 in the course of an extrajudicial inspection. It is noteworthy that the Minutes of Extrajudicial Inspection were made only a month and three days after the date of Decree No. 6,796, which had provided for a 60-day period within which to reach an agreement for the transformation of Matesi into a State company.

475. Although the takeover amounted to a complete takeover of Matesi's business, the Minutes of the inspection recorded that:

“In compliance with Decree No. 6,796 the Transition Commission assumes the operative control only and exclusively over the assets and other goods owned by [Matesi]....”

476. The Minutes expressly excluded any acceptance by the Commission or Venezuela of, *inter alia*, any commercial or financial debts, contractual or other obligations of Matesi. The Minutes also confirmed that the Transition Commission had “*only and exclusively*” received the assets of Matesi, as its control and operation belonged to its Shareholders and Matesi remained responsible for its operation and control.³⁷⁹

³⁷⁷ Exhibits C-43 and C-44

³⁷⁸ Exhibit C-45

³⁷⁹ Exhibit C-47

477. Matesi's plant has been under State control since 17 August 2009, operating as Briqueteras de Venezuela ("BriqVen") and initially under Mr Rodriguez as its General Manager, but there has been no attempt formally to change the name of the company and no State corporation has been constituted to hold Matesi's assets as Decree 6,796 envisaged.³⁸⁰ That situation led to "*absurd results*".³⁸¹

478. Nearly two years later, on 14 June 2011, President Chavez promulgated Decree No 8,280, ordering:

(a) the forced acquisition of Matesi's assets;

(b) the Attorney General to carry out the expropriation process prescribed by the Expropriation Law such that title to Matesi's assets was finally transferred to the State.

479. An appraisal commission was established by the Attorney General to determine the compensation to be paid for the expropriation of the assets of Matesi targeted by Decree No. 8,280. The notice published by the Attorney called upon the owners of those assets to appear within 30 days and to provide evidence of their entitlement as well as to nominate an expert to serve as a member of the appraisal commission in the context of the non-compulsory amicable agreement phase. The notice made clear that should interested parties fail to observe the 30-day deadline, then the amicable agreement phase would be deemed to be at an end and compulsory expropriation of Matesi's assets would follow pursuant to the Expropriation Law.³⁸² That 30-day deadline expired on 13 August 2011. To date, the State maintains exclusive control and operation of Matesi's plant; there has been no request for judicial expropriation of Matesi; and no compensation has been paid.

³⁸⁰ Claimants' Memorial, para. 123

³⁸¹ Transcript (English), Day 1, p.76

³⁸² Exhibits C-57 & C-58

480. As put by the Claimants, it is clear to the Tribunal that Matesi has been: “*left an empty shell, in a perpetual state of legal limbo.*”³⁸³ Its productive assets have been taken and Claimants have been left with valueless shares.

5. FAILURE TO COMPLY WITH THE TREATIES

481. Having carefully considered all of the materials before it, the Tribunal is persuaded that the simple failure on the part of Venezuela to pay compensation is sufficient to render the expropriation unlawful as a matter of Venezuelan law.³⁸⁴ It is noted that Article 115 of the Venezuelan Constitution requires expropriation to be carried out pursuant to a final and conclusive judgment and timely payment of just compensation, the latter being integral to and prior to the expropriation - according to Professor Araujo-Juarez upon whose opinion, Professor Iribarren himself relied.³⁸⁵ Further, Article 2 of the Expropriation Law likewise contemplates expropriation by way of final judgment and timely payment of fair compensation. Further still, Article 11 of the Investment Law requires that the expropriation of investments, or measures having a similar effect may only be carried out after the applicable legal procedures have been followed and upon payment of prompt, just and adequate compensation.

482. The Tribunal notes Professor Iribarren’s concessions that:

- (a) if the State occupies an asset such as permanently to deprive the owner of the right to use, enjoy and dispose of it without title to the asset being transferred to the State, that amounts to a “*measure equivalent to an expropriation*” for the purposes of Article 11 of the Investment Law; and
- (b) such occupation for three/four years without payment of compensation would constitute a breach of Article 11, since compensation had not been paid “*without delay*”.³⁸⁶

³⁸³ Claimants’ Post-Hearing Brief, para.135

³⁸⁴ *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case ARB/08/5, Decision on Liability, 14 December 2012

³⁸⁵ See Claimants’ Post-Hearing Brief, FN. 349

³⁸⁶ Transcript (English), Day 4, pp. 1140 and 1141

483. Professor Iribarren further confirmed that it was an imperative and non-discretionary requirement of Article 22 of the Expropriation Law that Matesi's assets should have been the subject of an expert appraisal even if the subject of the expropriation failed to participate in the amicable agreement process.³⁸⁷
484. The Tribunal also concludes that the taking over of Matesi's assets without the prior appraisal of the assets by the appraisal commission and the prior deposit with a court of the amount determined by the appraisal commission or a judicial order authorising the takeover, constituted a breach of Article 56 of the Expropriation Law. Although Professor Iribarren sought to suggest that those requirements could be ignored by reason of the terms of Article 8 of the Nationalisation Decree³⁸⁸, he himself confirmed that the Expropriation Law was not supplanted by the Nationalisation Decree – to the contrary, the Nationalisation Decree specifically referenced the Expropriation Law, requiring the operation, use and utilisation of Matesi assets to be in conformity with Article 56.³⁸⁹
485. Importantly, the legal framework for the nationalisation of the steel industry was established by the Nationalisation Decree, which has the rank and force of law. It was superior to, and could not be contradicted by, Decrees No. 6,796 and No. 8,280, described by Professor Iribarren as decrees of sub-statute level.³⁹⁰ Despite the fact that the Nationalisation Decree is controlling, it is clear on the facts set out above that critical aspects of the procedure set out in the Nationalisation Decree were not followed in the course of the nationalisation of Matesi, notably:
- (a) a Transition Commission was not set up within seven days of the publication of the Nationalisation Decree on 19 May 2008 in conformity

³⁸⁷ Transcript (English), Day 4, pp. 1209 & 1210. And see also pp. 1212 & 1213, at which Professor Iribarren confirmed that pursuant to Article 19 of the Expropriation Law, provision is made for a default appointment procedure in the event that a party fails to appear or make an appointment

³⁸⁸ Transcript (English), Day 4, p. 1147

³⁸⁹ Transcript (English), Day 4, p. 1147

³⁹⁰ Transcript (English), Day 4, p. 1185

with Article 5 of the Nationalisation Decree. It was not until 25 May 2009 that Venezuela appointed its members;

- (b) the Transition Commission did not transfer Matesi's activities to the State within the deadline of 30 June 2008 pursuant to Article 5 of the Nationalisation Decree – at that point, the Transition Commission had not even been constituted;
- (c) contrary to Article 7 of the Nationalisation Decree, Venezuela failed to establish a Technical Commission. It never appointed representatives, whereas Claimants did so on 29 May 2009;
- (d) contrary to Article 8 of the Nationalisation Decree, Venezuela did not order the expropriation of Matesi's shares, but pursuant to Decrees No. 6,796 and No. 8,280, it ordered the expropriation of Matesi's assets.

486. Nor did Venezuela follow the provisions of Decrees No. 6,796 and No. 8,280. The requirement for a second Technical Commission required by Article 4 of Decree No. 6,796 was never complied with. Venezuela assumed control and operation of Matesi in July 2009 in contravention of the 60-day period within which the Parties were to seek to agree terms prescribed by Article 5 of Decree No. 6,796; expropriation of the company envisaged by Article 5 of Decree No. 6,796 was never ordered: instead, Venezuela issued Decree No. 8,280 ordering the expropriation of Matesi's assets; and the judicial expropriation process provided for in Article 8 of Decree No. 8,280 was not completed.

487. It was suggested by Ms Seijas³⁹¹ and by Ms Marbeni, one of the highest ranking lawyers in MIBAM as of 2005 and Legal Consultant of MIBAM between May 2010 to December 2011, who had been one of those responsible for the legal aspects regarding the execution of Decrees No. 6,796 and No. 8,280, that the

³⁹¹ Seijas Witness Statement, para. 11 and see also Transcript (English), Day 3, p. 919

Matesi expropriation process was not yet over, but the initiation of the ICSID proceedings had “*paralysed*” it.³⁹²

488. Yet in April 2012, it appears from an internal document of the Attorney General’s Office that the Ministry of Industry had instructed the Attorney General’s Office to request the judicial expropriation of Matesi’s assets, notwithstanding the fact of Claimants’ notice of dispute and their intention to commence these arbitration proceedings.³⁹³ Indeed, the Tribunal notes that in the *CEMEX* case, the fact that ICSID arbitration proceedings were on foot did not prevent Venezuela from pursuing the judicial expropriation process.³⁹⁴ Professor Iribarren sought to suggest that the decision not to pursue the judicial process in Venezuela in this case was an exercise of discretion rather than a political decision:

“the authorities in charge of conducting the expropriation deemed that they should not continue with the trial until this arbitration would be resolved. There was a discretionary decision of [Venezuela] to avoid contradictory sentencing or decisions that might have a two-fold or double effect on the same issue.”³⁹⁵

489. But having started from the position that Venezuela had “*followed a strict procedure that was strictly in keeping with the law in this case*”, Professor Iribarren conceded in the course of his cross-examination that:

- (a) he had little or no knowledge of the actual facts, and had made no enquiry to corroborate such facts as he relied upon,³⁹⁶
- (b) the fact that Decree No. 6,796 had been promulgated in order to implement an expropriation of the assets rather than continuing to rely upon the Nationalisation Decree was the result of:

³⁹² Transcript (English), Day 2, p.85

³⁹³ Exhibit R-147

³⁹⁴ *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15. And see also Exhibit C-292: Decision of the Second Court of Administrative Litigation (“*CEMEX Case*”) 30 November 2009

³⁹⁵ Transcript (English), Day 4, p. 1230

³⁹⁶ Transcript (English), Day 4, p. 1151 and pp. 1154-1157

“a certain conceptual lack of order by different types of authorities, but in any event it all refers to the same procedure...

I think the administration could have based itself on Decree 6,058, but it did not. It based itself on the other decree. That other decree applied in isolation and with the specific result that it had .. does not give it ... strong enough coverage to the action taken by the administration. ... It grounded its action on the Executive Decree and not the Decree Law, and so it did not apply things as I think it should have as per Decree 6,058. It did things otherwise, [which] in one way or another weakens or compromises the way in which the assets of this company were taken.”;³⁹⁷

- (c) the Decrees upon which Venezuela relied had been drawn up in a “*somewhat disorderly way*”;³⁹⁸
- (d) notwithstanding his suggestion that in the course of the negotiation process initiated by the Attorney General, the practice would be to consider the liabilities of Matesi and the value of the shares, that the Notice (a “*highly significant*” document³⁹⁹) was very narrowly drawn by reference to a valuation of the assets of Matesi set out in Decree No. 8,280, and that “*The Commission that was created based on that Notice can only refer to these assets, the assets referred to here.*”;⁴⁰⁰ and crucially,
- (e) that if the Technical Commission stage of Decree No. 6,058 were not implemented then, aside from the question of any remedies in Venezuela, had an administrative court been informed that Article 7 of the Decree had not been complied with then:

“the Act would have to be annulled because of the procedural violation and according to ... Article 259 of the Constitution, [the judge] could order restoration of the legal situation that had been harmed through an order issued to the Competent Authorities to carry out the Decree as formally established.”⁴⁰¹

³⁹⁷ Transcript (English), Day 5, pp. 1280 and 1281

³⁹⁸ Transcript (English), Day 4, p. 1272

³⁹⁹ Transcript (English), Day 4, p. 1285

⁴⁰⁰ Transcript (English), Day 4, p. 1290

⁴⁰¹ Transcript (English), Day 4, p.1172 and 1173

490. Venezuela urges the Tribunal to have in mind that it is not axiomatic that a violation of a provision of domestic law constitutes an international wrong, and that an investor cannot assume that a lack of diligence in pursuing local remedies will have no bearing upon the success of any eventual treaty claim that it might seek to bring.

491. But in the Tribunal's considered view, this is not a mere administrative fault of the kind which caused the tribunal in *Generation Ukraine* to determine that it should decline jurisdiction on the basis of a failure on the part of an investor to undertake a "*reasonable - not necessarily exhaustive - effort ... to obtain correction.*"⁴⁰² Nor is it a dispute of which it might fairly be said that the investor: "*[has] intentionally ignore[d] the remedies available under local law to resolve and correct the violations alleged by the ... investor.*"⁴⁰³

492. In this case, Venezuela had put in place a "tailor made" process, which Venezuela itself then chose not to follow. It is one thing for Venezuela to argue that:

"When international law requires that the procedures of local law be respected, it is referring to local law in its entirety, *i.e.*, the requirement also includes procedural remedies that the legal system provides to remedy violations of substantive rules"⁴⁰⁴,

but quite another for it to suggest that the obligation to observe those requirements lies solely on the investor's shoulders.

6. CONCLUSION

493. In light of the evidence before it, the Tribunal is in no doubt that Venezuela failed to implement the procedures that it had put in place to effect the nationalisation of SIDOR and its subsidiaries and, specifically, Matesi. In so doing, Venezuela manifestly failed to conform with the requirements of the

⁴⁰² *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003

⁴⁰³ Respondent's Post-Hearing Brief, para. 365

⁴⁰⁴ Respondent's Post-Hearing Brief, para. 365

Venezuelan Constitution, the Expropriation Law and the Investment Law, to the extent that they address the issue of expropriation, and it failed, too, to ensure that the provisions of the Nationalisation Decree and those of Decrees No. 6,796 and No. 8,280 were consistent with one another and susceptible to be given full and consistent effect.

494. The Tribunal further concludes that the failure of Venezuela to observe the requirements of its own nationalisation legislation is sufficient to constitute a breach of Article 4(a) of the Portuguese Treaty, which has an explicit *renvoi* to Venezuelan domestic law through the language: “*in accordance with the legislation in force.*”

495. It is satisfied, too, that Venezuela has breached the requirement of Article 4(1)(b) of the Luxembourg Treaty to the extent that its conduct was not: “*in accordance with legal procedures*”.

496. In the opinion of the Tribunal, this is a case akin to the *ADC/Hungary* case, in that the affected investor has not had:

“a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard.”⁴⁰⁵

497. Further, Venezuela has acted in breach of both Treaties in effecting an expropriation without “*provisions for the payment of adequate and effective compensation*” (per Article 4(1)(d) of the Luxembourg Treaty) or “*provisions that guarantee the payment of immediate, adequate and effective compensation*” (per Article 4(c) of the Portuguese Treaty).

⁴⁰⁵ *ADC Affiliate Limited and ADC & ADMC Management Limited v Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 435

H. QUANTUM

498. Having concluded that Venezuela has expropriated Tenaris' and Talta Trading's investments in violation of Venezuelan law as well as the Luxembourg and Portuguese Treaties, the Tribunal is required to determine what compensation is due. In so doing the Tribunal must consider the Parties' very different positions as to which assets or rights should be valued; the appropriate method for valuing them; the applicable rate of interest; and a number of other related issues.

499. The following analysis does not discuss claims related to the Talta Off-Take Agreement in its own right (as addressed in **Section E.3**), over which the Tribunal has declared it has no jurisdiction, or claims for pre-expropriation damages (as addressed in **Section F**), which the Tribunal has rejected.

1. CLAIMANTS' CASE

500. Claimants argue that the proper standard of compensation in a case of unlawful expropriation is full compensation of all losses resulting from Venezuela's conduct. Claimants refer first to the *Chorzów Factory* case and the principles set forth in the ILC Articles on State Responsibility.⁴⁰⁶ Claimants emphasise that the appropriate standard for valuing such assets is Fair Market Value - meaning the price that a willing buyer would pay and a willing seller would accept.

501. According to Claimants' experts, Messrs. Abdala and Spiller of Compass Lexecon, those values (with respect to only those claims recognised by the Tribunal) are:

- (a) US\$ 235.9 million as compensation for the taking of Claimants' 50.2% equity stake in Matesi based, principally, on their Discounted Cash Flow ("DCF") analysis; and

⁴⁰⁶ See Claimants' Post-Hearing Brief, para 353.

(b) US\$ 27.1 million for the taking of Talta's loan to Matesi.

502. In their detailed report, Claimants' experts rely principally on the DCF method. In making their calculations, they analyse both the actual performance of the Matesi plant as well as projections of likely future performance and revenues. These projected cash flows are then discounted back to the date of expropriation to arrive at a valuation of US\$ 235.9 million for Talta's 50.2% interest in Matesi.

503. In addition to using the DCF approach to valuation of the Matesi Plant, Claimants' experts present an alternate approach making use of "market multiples" from comparable publicly-traded companies. In search of companies with substantial similarity to Matesi, they identified 29 companies, worldwide, whose main activity was HBI/DRI production. Of these, eight were publicly traded as of 30 April 2008.⁴⁰⁷ This group was further winnowed down by Messrs Abdala and Spiller to five companies, and it is data relating to these entities, which are used for their market multiples analysis. Their study compared median market multiples on two separate bases: (1) market value to book value of equity and (2) market value to book value of assets. Finally, they adjusted the market value of shares in these companies upward by applying a "control premium." According to their report, experienced observers are in agreement that the *per unit* value of a single share or small group of shares is substantially less than the *per unit* value of an interest sufficiently large to control the company. Regarding the question of how much this "control premium" is worth, Abdala and Spiller argue, and provide support for the use of, a 27% control premium with respect to the valuation of Talta's interest in Matesi.

504. The result of the "market multiples" approach, as adjusted by this control premium, is a valuation ranging between US\$ 196.4 to US\$ 259.7 million – figures which, the report finds, *grosso modo*, support the earlier described DCF value of US\$ 235.9 million.

⁴⁰⁷ Compass Lexecon First Expert Report, p. 87, dated 24 August 2012.

505. Messrs Abdala and Spiller also find that the proper pre-award interest rate is 17.12% from April 2008 to December 2011 and 16.27% from January 2012 to July 2014, representing Talta's weighted average cost of capital (WACC).⁴⁰⁸

2. RESPONDENT'S CASE

506. Respondent's expert, Timothy Hart of Credibility International, reaches results, which are markedly different. Regarding the DCF approach, Mr Hart finds that with the assumed termination of the Off-Take Agreements, 100% of Matesi's historic sales are eliminated and that, as of 1 May 2008, Matesi starts with no customers, marketing and sales functions, or shipping contracts. Moreover, Matesi is 100% dependent upon CVG FMO/Sidor's pellet production, which has been in a multi-year decline. He further argues that Matesi has also had some of its own production problems – and that it is tied to the Off-Take Agreements with Talta and Sidor and is therefore limited to a sales margin of cost plus 7.5%.⁴⁰⁹

507. Mr Hart concludes that, taking a sober view of these realities, and building in an appropriate level of risk, the proper value of Claimants' shareholding interest in Matesi is US\$ 0. Mr Hart finds that Matesi, in its brief period of operation, never established the positive free cash flow on which DCF valuation heavily depends. He also observes that Claimants also failed to demonstrate that Talta made a profit on the HBI.

508. Mr Hart then proceeds to perform two alternative DCF valuations. In so doing, he suggests, *inter alia*, that the forecasts used by Claimants' experts are largely speculative and unstable especially when they involve projections involving a period of more than five years. He further criticises the HBI prices used by Claimants, as well as Operating Expense assumptions and projected Capital Expenses. According to his two alternate DCF calculations, he finds support for his calculation of Matesi share value at US\$ 0.

⁴⁰⁸ Claimants' Post-Hearing Brief, para. 450.

⁴⁰⁹ First Expert Report of Timothy H. Hart, February 2014.

509. With regard to the “market multiples” approach presented by Claimants’ Experts, Mr Hart maintains that they did not use comparable companies – in part because the companies in question operate elsewhere in the world. Similarly, according to Mr Hart, the control premium adopted by Abdala and Spiller to create a putative value for Matesi may have theoretical validity, but is appropriate only in a very different country *e.g.*, India.
510. Finally, Respondent’s expert is highly critical of the pre-award interest rate suggested by Abdala and Spiller. Mr Hart notes that the interest element, which Claimants seek actually exceeds their claimed damages for the value of the company. He points to what he believes to be a flawed weighted average cost of capital (“WACC”) rate for both the pre- and post-award interest. The proper rate, according to Mr Hart is that of the 10-year U.S. Treasury bond, essentially a “no-risk” rate.
511. Mr Hart’s bottom line is that Claimants’ valuation of Matesi must assume the Off-Take Agreement’s “in place” – as they were one day before the expropriation took effect. Therefore, he concludes that Claimants’ shareholding in Matesi, with Off-Take Agreement prices in force, and accounting for an appropriate level of risk, is US\$ 0.⁴¹⁰

3. TREATY PROVISIONS

512. There can be no question concerning the right of Venezuela, pursuant to Article 4(1) of the Luxembourg Treaty and Article 4 of the Portuguese Treaty to expropriate the property of an Investor for a public or national purpose, in compliance with applicable legislative measures, in a non-discriminatory fashion, and accompanied by prompt and adequate compensation.
513. But where, as here, an expropriation is not carried out in accordance with these standards and others established in the Treaties and by customary international law, the responsible party shall be required to pay compensation.

⁴¹⁰ Second Expert Report of Timothy H. Hart, paras. 197-203 and Table 10.

514. Regarding the measurement and calculation of compensation, the language of the Treaties is as follows:

(a) Article 4.c of the Portuguese Treaty:

“. . . this compensation shall be based on the market value of the investment in question immediately prior to the moment when the measure was made public; compensation will accrue interest at the exchange rate applicable at the date on which the transaction becomes effective, in the territory where the investment is located;”

(b) Article 4.2 of the Luxembourg Treaty:

“2. The amount of the compensation shall correspond to the real value of the investments concerned on the day prior to the adoption or publication of the measure.

The compensation shall be paid in convertible currency. It shall be paid without undue delay and shall be freely transferable. Interest shall be paid at the normal commercial rate from the date it is determined until the date of payment.”

515. The above language from the treaties is very similar to that contained in the ILC Articles,⁴¹¹ which are currently considered to be the most accurate reflection of customary international law.

516. Article 36 of the ILC Articles provides as follows:

“1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.”

⁴¹¹ The Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (CLA-13).

517. This Article relies, in turn, on the oft-quoted ruling of the PCIJ regarding reparation in the *Factory at Chorzów* case which reads, in relevant part, as follows:

“The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁴¹²

4. METHOD OF VALUATION

518. There is no dispute that the correct date of expropriation is 30 April 2008.⁴¹³

519. The Parties’ experts are also in agreement that Fair Market Value means the price that a willing buyer would buy and a willing seller would sell.⁴¹⁴

520. Regarding the most desirable methodology for valuing the plant, there is – at least superficially – also some measure of agreement:

“The parties and their experts agree that where arm’s length transactions are unavailable, the value of an asset generally is determined best by its ability to generate future cash flows. Thus the appropriate (and agreed) methodology for measuring future income is the DCF method.”⁴¹⁵

521. The devil, alas, is in the detail. As indicated above, the Fair Market Value of Talta’s interest in Matesi as determined by the DCF method ranges from US\$ 239.0 million (Abdala / Spiller) to US\$ 0 (Hart).

522. The Tribunal appreciates the efforts of the experts and believes that this adversary crossfire on the valuation of Matesi – while perhaps not entirely

⁴¹² *Factory at Chorzów*, Merits, PCIJ, Series A, No. 17, 1928, p. 47. (CLA-1)

⁴¹³ See Claimants’ Memorial, para. 258; First Expert Report of Timothy H. Hart, Sec. 8.4 at p. 38.

⁴¹⁴ Claimants’ Post-Hearing Brief, para. 358; Cross-examination of T. Hart, Transcript (English), Day 6, p. 1660: 6-22; see also *Starrett Housing Corp. v. Iran* (Iran U.S. Claims Tribunal) Award No. ITL 32-24-1, 19 December 1983 4 Iran Claims Tribunal Reporter 122, para 18. (CLA-05)

⁴¹⁵ Claimants’ Post-Hearing Brief para. 359; Compass Lexecon First Expert Report, paras. 31-35; First Expert Report of Timothy H. Hart, paras. 66-69.

efficient – does assist the Tribunal in understanding some of the key issues in determining damages.

523. The valuation of the 50.2% equity interest of Talta in Matesi, located, as it was, in Venezuela, in the particular market circumstances there prevailing, presents a number of serious challenges. In that context, the Tribunal has carefully considered both the DCF and “market multiples” approaches, as put forth and then critiqued by the Parties’ respective experts and counsel. The Tribunal recognises that parties in investment cases may be prone to adopt dramatically contrasting approaches to the presentation of quantum issues in order to maximise a position – or to minimise that of the opposing party. Such a conflict can result in little or no engagement between the methodological arguments and valuation theories advanced by the opposing parties. In consequence, tribunals have based their findings upon other evidence and argument in the record introduced by each party in an attempt to arrive at a quantum determination in which they consider that they can have the requisite degree of confidence.⁴¹⁶ In so doing tribunals have, per force, sometimes made use of valuation procedures, which are generally acknowledged to be sound, but which differ from the principal valuation theories advanced by the parties. That is the position in this case in that, for the reasons set out below, the Tribunal has concluded that in the circumstances of this case, there are major flaws in the principal approaches adopted by both Claimants and by Venezuela.

a. Discounted Cash Flow (“DCF”)

524. The DCF approach is widely accepted and, where the circumstances for its use are appropriate, it has certain inherent advantages over other methods such as net book value or liquidation value. Rather than looking to more historical asset or accounting-based valuation methods, the DCF approach combines an established historical record of financial performance with the use of reasonable

⁴¹⁶ See, for example, *Tecnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, dated 29 May 2003 at paras. 186 and 195; *Khan Resources Inc., et al. v. Government of Mongolia*, UNCITRAL, Award on the Merits dated 2 March 2015 at para. 390; *Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award dated 16 June 2010 at paras. 13-73 and paras. 13-75; and *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award dated 3 November 2008 at paras. 284-290

and reliable projections of future free cash flows. One situation in which DCF would clearly be preferred might be where, after a number of years of successful performance, a long-term concession contract (*e.g.*, for operation of an airport), or where a long-term supply contract, has been terminated. In such cases, the variables are limited and the likely free cash flows are not difficult to estimate with reasonable certainty.⁴¹⁷

525. In the present case, for a number of reasons, including some mentioned in Mr Hart's report, the Tribunal does not consider the use of the DCF approach to be appropriate. While the existence of the Off-Take Agreements adds a layer of complexity, Matesi's history of operations runs only from start-up on 6 October 2004 to the initial decree providing for expropriation of Matesi's shares on 30 April 2008, a total of approximately 42 months.
526. Given the normal need for adjustments during the start-up period, the ups and downs of pellet production and delivery, and the brevity of operation of the plant under its owners, serious questions are presented in using the available data from this short, initial period to construct a DCF model. Similarly, the prospects for future supplies of pellets and iron seem even more problematic. In addition, the sharp decline in CVG FMO pellet production adds another obstacle to the reliable projection of Matesi's future free cash flow – and therefore also for the application of the DCF approach.
527. Finally, these uncertainties are compounded by other government interventions in the market place, as well as unstable inventories and shortages of a wide range of products in the Venezuelan market. It is not appropriate for this Tribunal to express itself, either positively or negatively, on the policies of the government of Venezuela. It observes, simply that general economic conditions in Venezuela as well as the business situation at Matesi did not, at the time of expropriation – or later – give rise to the likelihood that Matesi's free cash flows could be projected with reasonable certainty.

⁴¹⁷ See, for example, *ADC v. Hungary*, First Award, 2 October 2006, paras. 506-07; *CMS v. Argentina*, Final Award of 12 May 2005; see generally Ripinsky, *op. cit.*, Ch. 6, Sec. 6.2.2.

b. The “Market Multiples” Approach

528. Turning to the “market multiples” approach, the Tribunal has studied carefully the alternate approach of Claimants’ experts, in which they attempt to identify other companies dedicated principally to HBI/DRI production and which might readily be compared to Matesi, in terms of market value of publicly traded shares either to book value of equity or book value of assets. The Tribunal has also considered carefully the treatment of this approach by Respondent’s expert – who, again, making use of the same approach, reaches strikingly different conclusions.

529. The methodology and logic of this “market multiples” analysis is certainly sound in principle, but the Tribunal considers that this approach, as applied to Matesi, does not adequately take account of the unique market circumstances of Matesi, or of Venezuela during the period in question. In broad terms, commentators have often commented on the difficulty of identifying genuinely similar companies for comparison.⁴¹⁸

530. Thus while some arbitral tribunals have accepted the “market multiples” approach,⁴¹⁹ its acceptance by arbitral tribunals has been quite limited. For example, the tribunal in *CMS v. Republic of Argentina* rejected the proffered comparison between the value of TGN, a private company in which CMS owned shares, and several similar companies, which were publicly traded. In rejecting this comparison the tribunal endorsed an expert’s opinion that:

“Market capitalization in illiquid markets such as Argentina is not the most adequate method to value companies”

and it noted that there were

“significant differences between TGN and those companies regarding asset levels, business segments, financing policy and other issues.”⁴²⁰

⁴¹⁸ See S. Ripinsky and K. Williams, *Damages in International Investment Law*, (BIICL, 2008) at p. 215-6; see also, M. KANTOR, *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence* (Kluwer Law International, Aalphen aan den Rijn, 2008 pp. 119-30).

⁴¹⁹ E.g., *CME v. Czech Republic*, Final Award of 14 March 2003 (“*CME*”).

⁴²⁰ *CMS v. Argentina*, Final Award of 12 May 2005, para. 412.

531. This same line of argument has been developed in this case by Respondent's expert, Mr Hart.⁴²¹

532. As the Tribunal has indicated above, in the context of the DCF method, the uncertainties presented in the Venezuelan market at the time of the expropriation presented complex circumstances which render comparisons of the value of Matesi with even ostensibly similar companies in other countries very difficult indeed. The Tribunal is not persuaded that the five companies selected by Claimants' experts as most comparable to Matesi (all of which operate in India and which make somewhat different products with different technologies) provide reliable guidance to the Tribunal on the basis of which it might proceed to achieve a satisfactory finding of value in this case.⁴²²

c. The Talta and Sidor Off-Take Agreements

533. Before leaving the subject of the DCF and "market multiples" approaches to valuation, the Tribunal does not wish to pass over without comment the arguments of the Parties with respect to the Talta and SIDOR Off-Take Agreements and how, if at all, the Off-Take Agreements impact the fair market value of Matesi. The Tribunal has determined that the Talta Off-Take Agreement *per se*, does not constitute an "investment" for purposes of supporting an independent line item requiring compensation for expropriation, but the Talta Off-Take Agreement was obviously designed by Claimants with some care in relation to the corporate structure to which Matesi was affiliated. As indicated above, the Talta Off-Take Agreement appears to have been a crucial element in the decision to invest in Matesi, because without it (and the foreign currency revenues it assured), the financial viability of Matesi would have been called into question. Similarly, the Sidor Off-Take Agreement created a significant measure of stability in terms of sales within the Venezuelan market. The question then arises whether the Off-Take Agreements are a significant element in terms of valuation of Matesi – and, if so, how?

⁴²¹ First Expert Report of Timothy H. Hart, pp. 67-70

⁴²² *Op. cit.* paras. 162-164

534. Claimants have argued that the Off-Take Agreements made a significant contribution to lowering the level of risk associated with a volatile market. The Talta Off-Take Agreement assured the sale of much of the production for hard currency in markets considered less volatile.⁴²³ According to Claimants, both Off-Take Agreements provided a readily identifiable cash flow which potential lenders – probably including Talta itself – found comforting.

535. Respondent, however, maintains that the Talta Off-Take Agreement is simply one of several features which demonstrate that Matesi was established as little more than a “cost centre” which, by virtue of transfer pricing, allowed its owners to shift much of the profit on its products to lower tax jurisdictions. The maximum revenue obtainable under these agreements was cost plus 10%, with each party responsible for paying whatever taxes accrued to it.⁴²⁴ In addition, Respondent has argued, with strong support from its expert on valuation, Mr Hart, that when attempting to value Matesi’s value to a willing buyer, language from both the Luxembourg and Portuguese Treaties requires that the amount of compensation shall correspond: “*to the real value of the investments concerned on the day prior to the adoption or publication of the measure,*”⁴²⁵ or: “*the market value of the investment in question immediately prior to the moment when the measure was made public.*”⁴²⁶

536. Because the Off-Take Agreements were in place immediately prior to the expropriatory act, Venezuela insists that Matesi must be valued with the Off-Take Agreements in place, which would result in a significant negative drag on Matesi’s potential market value. Respondent’s expert points out that, due in part to the Off-Take Agreement pricing arrangements, Matesi actually incurred losses in its first three years of operation; that only the buyers (*i.e.* Talta and Sidor) had the right to terminate the Off-Take Agreements (except for very

⁴²³ See paras. 246-263, *supra*, for more detail on the background and purpose of the Off-Take Agreements.

⁴²⁴ For an earlier brief description of these arguments, see paras. 254-263, *supra*.

⁴²⁵ Luxembourg Treaty, Article 4.2 (Exhibit C-01)

⁴²⁶ Portuguese Treaty, Article 4 c) (Exhibit C-03)

limited exceptional situations which, it is argued, do not pertain here); and that Matesi had no record of sales outside the Off-Take Agreements – presumably a negative element which could not fail to be noticed and evaluated by a hypothetical buyer.⁴²⁷

537. On the basis of the approach to valuation adopted by the Tribunal in the following section, the Tribunal considers that this aspect of the dispute between the Parties has become essentially moot. Nevertheless, because the views of the Parties on this issue are widely disparate and have been argued with considerable intensity, the Tribunal considers that some further comment is appropriate.

538. The question presented is how the treaty language “*the day before*” or “*the date immediately prior*” is to be construed in the circumstances of this case. The starting point, once again, must be the (previously cited) rules set forth in Article 31(1) of the Vienna Convention, which reads, in relevant part as follows:

“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.”

539. Again as noted earlier, the preambles of the Treaties in this case state that their purpose is (respectively) to: “...*strengthen ... economic cooperation by creating favorable conditions for investments ...*”⁴²⁸ and: “... *to intensify economic cooperation ... and to maintain fair and equitable conditions for making investments by investors of each contracting party ...*”⁴²⁹ The Treaties also make reference to the reciprocal promotion of investments helping to contribute to the economic prosperity of the two states⁴³⁰ and: “... *the beneficial influence that an agreement of this nature can have on improving business contacts and reinforcing confidence in the area of investment.*”⁴³¹ The Tribunal finds that

⁴²⁷ Respondent’s Post-Hearing Brief, paras 400-440.

⁴²⁸ Luxembourg Treaty, preamble. (Exhibit C-01)

⁴²⁹ Portuguese Treaty, preamble. (Exhibit C-03)

⁴³⁰ Portuguese Treaty, preamble. (Exhibit C-03)

⁴³¹ Luxembourg Treaty, preamble. (Exhibit C-01)

these statements of purpose, while clear, are too broad and general to provide the needed guidance on the specific issue before it.

540. The Parties themselves seem to be in agreement concerning the purpose of the language concerning “*the day before*” or “*the date immediately prior to the expropriation measure.*” In its Counter-Memorial, the Respondent states the following:

“... the Treaties establish that the investment value will be determined beginning from the date immediately prior to the expropriation measure. This is logical from the perspective of compensation, as the objective is to compensate the investor for the net revenue it would have received in the absence of State measures. Claimants themselves emphasize this basic theory,”⁴³²

541. The Tribunal agrees fully with this general statement of the purpose of the treaty language. Further, it is clear that the agreed date of expropriation in this case is 30 April 2008, and that “*the day before*” is 29 April 2008.

542. But the specific question presented here is: what scope is to be given to the words “*the day before*” or “*the date immediately prior*” in the context of the situation here? Do these words speak only to “*when*” the investment’s value is to be determined *i.e.* as of what date? Or must these words be construed, as Respondent suggests, also to import specific directions to the Tribunal as to “*how*” the expropriated entity should be valued *i.e.* in the present case, to require that Matesi be valued with the Off-Take Agreements in place?

543. As is well known, fair market value may be determined in a number of different ways depending on the circumstances of each enterprise. As a result, there can be no single standard for the fairness by which compensation is to be determined.⁴³³ To determine the market value of property in any particular case, an endless variety of different factual issues may be presented. Each tribunal must, thus, attempt to give meaning both to the words of the treaty regarding the

⁴³² Claimants’ Memorial, para. 228.

⁴³³ The Guidelines On The Treatment of Foreign Direct Investment (Guidelines) including the report to the development committee on legal framework for the treatment of foreign investment, published in 7 ICSID Rev.-FILJ 295 (1992).

putative valuation date, as well as to the standard set forth in Article 36 of the ILC Articles,⁴³⁴ and the ruling of the PCIJ in the *Chorzów* case, *i.e.*:

“that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁴³⁵

544. Article 32 of the Vienna Convention provides that where the analysis of the treaty language pursuant to Article 31:

“(a) leaves the meaning ambiguous or obscure, or (b) leads to a result which is manifestly absurd or unreasonable,”

recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty (*travaux préparatoires*) and the circumstances of its conclusion. To this end, under Article 32, the Tribunal is free to examine further evidence from the Parties to clarify the intended scope of these phrases. However, neither Party has presented evidence indicating that this or a similar issue was raised during the preparatory work for the Treaties, or the circumstances under which they were concluded.

545. In the absence of such additional evidence, the Tribunal considers that the purposes of the Treaties are best served by construing the treaty language in question to allow the market value of the expropriated property to be determined, as far as possible, “*to compensate the investor for the net revenue it would have received in the absence of State measures.*”⁴³⁶ This purpose, the Tribunal finds, is best served by construing the “*day before*” or the “*real value on the date immediately prior ...*” to prescribe “*when*”, but not “*how*”, to determine the fair value of Talta’s ownership interest in Matesi. Indeed, other than making its argument on the “*plain language*” of the Treaties, Respondent does not put forth any rationale in terms of policy or purpose to support its interpretation.

546. In addition, the Tribunal has examined the facts of the case before it in practical business terms. It notes that, prior to the expropriation, both Sidor and Matesi

⁴³⁴ See FN 413, *supra* (CLA-13)

⁴³⁵ *Factory at Chorzów*; see FN 414, *supra*.

⁴³⁶ See para. 539, *supra*

had been controlled by Ternium S.A. and Talta, both affiliates of their parent and beneficial owner, the Techint Group.⁴³⁷ The Parties are in agreement that prior to the expropriation, the Off-Take Agreements with Sidor and Talta had two purposes: (1) to guarantee that at least 60% of Matesi's production each year would be sold under the Off-Take Agreements and (2) that the Off-Take Agreement arrangement would allow the bulk of the economic profits from Matesi's HBI output to flow directly to Matesi's affiliates. These profits were to be obtained, of course, by means of a further mark-up of Matesi's products when they were sold to unaffiliated purchasers in the international market place.⁴³⁸ Clearly, these Off-Take Agreement arrangements were made for the benefit of the owners of both Talta and Sidor, who would thereby ultimately reap additional profits.

547. Venezuela has now nationalised both Matesi and Sidor. It is, therefore, presumably, free to sell Matesi's products to whomever it wishes, at whatever price prevails in the world market, retaining all of the resulting profits for itself - as would be its right.⁴³⁹

548. If this were to occur, while, at the same time, the Tribunal had substantially restricted the Market Value of Matesi by insisting that, for purposes of valuation, the Off-Take Agreements remain in force, the business reality would be to award a gratuitous and unwarranted bonus to Respondent for its unlawful act. The Tribunal, thus, cannot accept Respondent's argument that it is required to value Matesi as if the Off-Take Agreements remained in place.

549. The Tribunal finds that there is, in any event, a more appropriate approach to the valuation of Talta's ownership interest in Matesi, which does not require that it consider further the alleged impact of the Off-Take Agreements.

⁴³⁷ Claimants' Memorial, para. 22

⁴³⁸ Normally allowing the final sale to be made from a lower-tax jurisdiction.

⁴³⁹ Claimants' Post-Hearing Brief, para. 364.

d. Best Evidence of the Value of Talta's Interest in Matesi

550. Having carefully examined the submissions and evidence presented in support of the proposed use of the DCF and the “market multiples” approaches to the valuation of Talta’s interest in Matesi, and having concluded that both approaches are inappropriate in this case, the Tribunal notes that both Parties have made reference to another valuation method - albeit both have also expressed reservations about it.

551. Claimants, in their Post-Hearing Brief, indicate that there is agreement between the Parties that the Claimants are entitled to the Fair Market Value of the assets Venezuela has taken. Claimants state:

“The test is market-based: The only question before this Tribunal is how much a willing buyer would pay for the asset if it was being sold on the open market in an unfettered sale ...”⁴⁴⁰

552. A few paragraphs later, Claimants state:

“As for the best method to determine Fair Market Value of the Claimants’ equity interest in Matesi, the parties and their experts agree: where arm’s-length transactions are unavailable, the value of an asset generally is determined best by its ability to generate future cash flows. Thus, the appropriate (and agreed) methodology for measuring future income is the DCF method. **But where the results of arms-length transactions between a willing buyer and a willing seller are available, leading commentators are in agreement that the agreed price deserves particular respect as evidence of the value of the asset in question.**” (Emphasis added).

553. Similarly, Respondent’s Expert, Mr Hart, fully concurs in the definition of Fair Market Value and the significance of the completion of an arm’s length sale transaction.⁴⁴¹

554. Ripinsky indicates in this regard:

⁴⁴⁰ Claimants’ Post-Hearing Brief, para 353; Claimants’ Opening Presentation, Transcript (English), Day 1, pp. 182:14-22 and 183:1-14.

⁴⁴¹ First Expert Report of Timothy H. Hart, para. 62-63.

“Where there is an active market for a particular asset, tribunals will generally have little difficulty in establishing its value. Here no formal theory of value is needed. We can take the market’s word for it.”⁴⁴²

555. To the same effect Kantor’s treatise on valuation for arbitration states:

“The best evidence of a company’s value, or course, may be the actual price received in an arm’s-length transaction for the sale of an interest in that very business. As the U.S. Tax Court has stated, while listed market prices are the benchmark in the case of publically traded stock, recent arm’s-length transactions generally are the best evidence of fair market value in the case of an unlisted stock.”⁴⁴³

556. Numerous arbitration tribunals have endorsed this approach.⁴⁴⁴

557. In examining the suitability of the agreed price as an adequate expression of Fair Market Value, the transaction must satisfy at least the following conditions:

- (a) Both buyer and seller must be willing and able, neither acting under compulsion.
- (b) The transaction must be at arm’s length.
- (c) The transaction must take place in an open and unrestricted market.
- (d) Both buyer and seller must have reasonable knowledge of the relevant facts.⁴⁴⁵

⁴⁴² Ripinsky and Williams, *Damages in International Investment Law* (British Institute for International and Corporate Law, 2008) Sec. 6.2.1 at p. 189.

⁴⁴³ M. Kantor, *Valuation for Arbitration*, (Wolters Kluwer: The Netherlands, 2008) at 17, 18 (citing *Estate of James Waldo Hendrickson v. Comm’r, T.C. Memo 1999-278*, 1999 Tax. G. Memo, LEXIS 318 at 42).

⁴⁴⁴ See, e.g., *Enron Corporation and Ponderosa Assets, L.P. v. Republic of Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 387-388.

⁴⁴⁵ Ripinsky and Williams, *op. cit.*, p. 184 (referring to the definition of Market Value in the Glossaries of the American Society of Appraisers and the Guidelines of the International Valuation Standards Committee.); Kantor *op. cit.*, at p. 18.

558. Sales of expropriated property, which satisfy these conditions have been accepted as adequate evidence of market value by numerous arbitral tribunals.⁴⁴⁶
559. In the present case, the Tribunal has examined the sale of the Matesi plant from the viewpoint of both the seller and the buyer.
560. The seller, Posven, with involvement of its parent and principal shareholder POSCO, appears to have made a painful business decision to dispose of an almost-new plant, built at considerable expense and employing the latest in HBI manufacturing technology. The plant had operated only from March to August of 2001, when Posven discontinued operations. The testimony and documentary evidence contain only a brief and superficial explanation of the reasoning of the owners in making this decision to sell. The reasons given were (1) that POSCO had made a change in strategy; (2) that Posven was experiencing “*certain operating difficulties*”; and (3) that the steel markets were going through a depression.⁴⁴⁷
561. At a meeting of Posven’s shareholders on 23 December 2002, it was decided to liquidate Posven. Pursuant to that decision, Merrill Lynch was engaged as Financial Advisor. Consequently the Matesi plant was offered for sale in January 2004.⁴⁴⁸
562. The involvement of Merrill Lynch in the sale process provides significant assurance that sales information on the plant was made available, broadly, to potentially interested parties in the HBI and steel business worldwide. The record does not indicate how many offers were presented, but it appears clear that the offer from Tenaris and Sidor was the offer most favorable to Posven.
563. The buyers, Tenaris Global (later Talta) and Sidor, must certainly have been aware of the status of the Matesi plant prior to the official offer to sell in January

⁴⁴⁶ Ripinsky citations from p. 184, FN 9.

⁴⁴⁷ Posven Executive Summary, p. 1. (Exhibit C-68)

⁴⁴⁸ *Ibid.*

of 2004. Given the involvement of Merrill Lynch in the process, they were surely aware of the likelihood of competing offers for the plant. In March 2004, they were, in fact, declared the successful bidders. Both Sidor and Tenaris Global were affiliates of the Techint Group, a large, successful and sophisticated investment group, heavily involved in the Latin America steel industry, and certainly capable of looking out for its own business interests.

564. A final consideration, which deserves comment is that both parties have mentioned, in passing, that the plant was sold as part of a liquidation, leaving open the possibility that this was a distress or “*fire*” sale. If so, under the criteria cited at para. 557(a) above, the transaction might be considered a sale “*under compulsion*,” rather than a sale reflecting Fair Market Value.

565. But a careful look at the evolution of the Matesi sale – and the time line involved – leads the Tribunal to conclude otherwise. Posven stopped its operations in Venezuela in August 2001. The decision to liquidate Posven was made in December 2002 – some 16 months later. This decision led to the engagement of Merrill Lynch as Financial Advisor for the sale, which, in turn, resulted in the solicitation of offers in January 2004, and the sale itself in March 2004. The Tribunal considers that the elapsed time from the cessation of Posven’s operations in August 2001, to the eventual sale of the plant in March 2004, and each of the steps leading up to the sale, indicates a carefully considered business decision by Posven and its shareholders.

566. Having considered all of the evidence before it, the Tribunal is satisfied that the resulting transaction was freely entered into by the buyers and seller, at arm’s length, in a reasonably open market, with both the seller and the buyers having reasonable knowledge of the relevant facts and other market circumstances. The Tribunal is, thus, satisfied that the agreed price of US\$ 60.2 million for Talta’s 50.2% interest in Matesi is an appropriate reflection of the Fair Market Value of Talta’s interest in the Matesi plant.⁴⁴⁹

⁴⁴⁹ The Tribunal is aware that, in appropriate circumstances, market transactions such as this one can be combined with DCF or other income-based approaches. It has considered making use of such a
(Footnote continued on next page)

567. The Tribunal recognises that the sale price reflects a transaction, which took place in 2004, and that a sale closer to the date of expropriation would likely be more fair and more reliable. Matesi, of course, operated the plant in rather complex business circumstances, from 17 October 2004⁴⁵⁰ until 30 April 2008, receiving the financial benefit of those operations such as they were. The Tribunal has considered whether the agreed price should be adjusted, either upward for inflation or downward for depreciation. The evidence before it does not, however, provide a viable basis for making such an adjustment. The Tribunal, therefore, with some reluctance accepts the agreed price of US\$ 60.2 million, without adjustment. The Tribunal does acknowledge, however, that the nationalization of the entire steel industry — as well as general market conditions affecting both the investment climate, and the availability of supplies and other aspects of HBI production — have contributed to an environment in which the traditional approaches to establishing fair market value confront serious difficulties. We have concluded, nevertheless, that Claimants have established with reasonable certainty, the value of their interest in the expropriated company. In these circumstances, the Tribunal does recognize, however, that, if we were to compare the determined value of \$60.2 million (for Talta's interest) with the Fair Market Value of an interest in a genuinely similar facility elsewhere, the value we have determined in this case is probably quite depressed.

568. Turning briefly to the issue of the Talta Loan, the Tribunal has given careful consideration to the arguments of Respondent to the effect that this loan was non-performing, or was never intended to be repaid, or that the US\$ 27.1 million remaining as unpaid on Matesi's books should not be considered an investment — or, if it is, it should be excluded from the calculation of compensation, because it amounts to double counting.

(Footnote continued from previous page)

hybrid approach, but in light of the data available in the record, has concluded that this method could not readily be adapted to the situation presented here.

⁴⁵⁰ See para. 48, *supra*

569. As set out earlier, the Tribunal has concluded that, pursuant to the Investment Agreement, Talta had committed to advance an additional US\$ 60 million partially to finance the purchase of the Posven assets and to contribute to the costs of refurbishment.⁴⁵¹ It is thus satisfied that the outstanding balance of the Talta Loan – whether it is considered still to be a loan or, instead, a contribution to the equity of Matesi – represents a legitimate investment by Talta for which Talta must be compensated.

570. To calculate the total amount due as compensation for Claimants' loss, we must begin with the determined value of Talta's interest in Matesi (US\$ 60.2 million) and add the value of the Talta loan (US\$ 27.1 million) — which results in a total value of Claimants' loss of US\$ 87.3 million.⁴⁵²

5. ACTUALISATION OF THE LOSS

571. Because the expropriation took place on 30 April 2008, more than seven years ago, the next issue to be resolved is the method for actualising the loss, *i.e.*, adding interest at an appropriate rate *per annum* to reflect the time value of money, from the date of expropriation to the date of the award. The positions of the Parties on this issue again differ greatly.

572. Claimants maintain that the appropriate rate of capitalisation for both pre- and post-award interest is the Claimants' opportunity cost. This rate, according to Claimants, should be equal to Talta's weighted-average cost of capital ("WACC"). As calculated by Messrs Abdala and Spiller, that rate would be 17.12% from April 2008 to December 2011; and 16.27% thereafter.⁴⁵³ Claimants also maintain that their opportunity cost is most appropriately reflected in an award of compound interest. Alternatively, Claimants point to the Portuguese Treaty language which prescribes:

⁴⁵¹ See para. 247, *supra*.

⁴⁵² Coincidentally, Respondent's Expert, Mr Hart (though applying his own approach to valuation on the DCF method) arrives at a very similar figure of US\$ 87,054,550 for Talta's share in Matesi. See Second Hart Report (Exhibit 4); Hart Cross-Examination Transcript (English), Day 6, p. 1681.

⁴⁵³ Claimants' Post-Hearing Brief, para. 435.

“interest at the exchange rate applicable at the date on which the transaction becomes effective in the territory where the investment is located”.⁴⁵⁴

573. For its part, Venezuela maintains that the use of a WACC is not appropriate because it reflects an *ex ante* risk factor for an operating company, not a commercial measure of the time value of money. Respondent maintains that no investment tribunal has adopted a WACC for this purpose. Respondent, instead, favours a no-risk rate. Respondent also argues strongly against the application of compound interest.⁴⁵⁵

574. Consistent with the objective that:

“reparation must, so far as possible, wipe out all the consequences of an illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed,”⁴⁵⁶

arbitral tribunals have increasingly sought to adjust the calculation of pre-award interest to better reflect business reality.

575. As stated in the ILC Articles:

“1. Interest on any sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date on which the principal sum should have been paid until the date that the obligation is fulfilled.”⁴⁵⁷

576. The commentary to the ILC Articles explains:

“There is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable. In practice, the circumstances of each case and the conduct of the parties strongly affect the outcome. . .”⁴⁵⁸

⁴⁵⁴ Portuguese Treaty Article 4, RLA-114; Claimants’ Post-Hearing Brief, para 435.

⁴⁵⁵ Respondent’s Counter Memorial, para. 484-487; Respondent’s Rejoinder, paras. 471-472.

⁴⁵⁶ *Factory at Chorzów*, see, FN 414 *supra*; ILC Articles, Article 38(1) (CLA-13).

⁴⁵⁷ ILC Articles, Article 38.

⁴⁵⁸ Commentary to Article 38, para. 10, footnotes omitted; see also Ripinsky, *op. cit.* at p. 365.

577. While the rationale and rate of interest applied by investment tribunals has varied widely, a consensus appears to have evolved around the principle of the claimant's opportunity cost. In the words of the UNCC General Council, the rate of interest should be:

“sufficient to compensate successful claimants for the loss of use of the principal amount of the award.”⁴⁵⁹

This language, however, leaves much to be desired in terms of specific guidance.

578. One well-recognised approach in determining the applicable interest rate was established by the Iran-US Claims Tribunal in *Sylvania Technical Systems v. Iran*⁴⁶⁰ where it focused on developing a rate:

“based approximately on the amount that the successful claimant would have been in the position to have earned if it had been paid in time and thus had the funds available to invest in a form of commercial investment in common use in its own country.”

579. Such an approach was also adopted in *Santa Elena*, though without specifying the rate used or the investment instrument from which the rate was to be derived.⁴⁶¹

580. Other distinguished tribunals and authorities have favoured use of a “*borrowing rate*,”⁴⁶² or:

“not the rate associated with corporate borrowing but the interest rate the amount of compensation would have earned had it been paid after the expropriation.”⁴⁶³

581. As stated in other words by one distinguished investment arbitration tribunal:

“The case law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred, the interest becomes an integral part of the compensation itself.”⁴⁶⁴

⁴⁵⁹ Decision of the UNCC Governing Council, “Awards of Interest,” 4 January 1993, S/AC.26/992/1b/para. 1.

⁴⁶⁰ *Sylvania Technical Systems v. Iran*, Award, 27 June 1985, 8 Iran-US CTR 298.

⁴⁶¹ *Compañía del Desarrollo de Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 104.

⁴⁶² J. Gotanda, “Awarding Interest in International Arbitration” (1996) 90 AJIL 40 at 59-61.

⁴⁶³ *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 396.

582. If the rationale for the choice of interest rate were Claimants’ opportunity cost, it would seem, logically, that Claimants should present – and the Tribunal consider – evidence on the rate of return on investment, which has been achieved by the Claimants over an extended period.⁴⁶⁵ While the rationale for this approach may be appealing, the Tribunal will adopt a more conservative approach to this question, which relies on finding an interest rate which would reflect the cost to the Claimants to borrow (*i.e.*, replace) the amounts expropriated.

583. The Tribunal agrees with reasons indicated by Respondent that the use of the WACC, developed by Claimants’ experts as part of its DCF analysis, is not appropriate. The Tribunal has also rejected the no-risk rate suggested by Respondent.

584. As indicated earlier, the Portuguese Treaty, in Article 4C, calls for:

“interest at the exchange rate applicable at the date on which the transaction becomes effective, in the territory where the investment is located.”⁴⁶⁶

The Luxembourg Treaty language simply refers to:

“a reasonable commercial rate.”⁴⁶⁷

585. The Tribunal takes note of this Treaty language, but considers that, in both Treaties, such language is directed to lawful expropriations rather than an unlawful expropriation with which the Tribunal is concerned in this case.

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⁴⁶⁴ *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990.

⁴⁶⁵ Though such evidence was not presented in this case, publicly available Annual Report data for Tenaris indicated that shareholders’ equity increased from US\$ 1.7 billion in 2002 to US\$ 12.8 billion in 2012 – an impressive growth record; *see also National Grid v. Republic of Argentina*, UNCITRAL, Award of 3 November 2008, paras. 264-265.

⁴⁶⁶ *See* para. 110, *supra*.

⁴⁶⁷ *Ibid.*

586. In examining the use of an appropriate “*borrowing rate*,” the Tribunal notes that Claimants (making reference to the language of the Portuguese Treaty) have argued that the interest rate should be equivalent:

“to the rate Venezuela would have had to pay to borrow money in April 2008 (9.75%).”⁴⁶⁸

587. Taking a different approach, Respondent’s expert, Mr Hart, compares the 6-month LIBOR and 10-year Treasury rates (in the neighbourhood of 4% in 2008). He discusses the use of such rates in other awards which are then supplemented by a factor covering political risk and other macroeconomic factors (Country Risk Premium).⁴⁶⁹ Following the reasoning of Respondent’s expert, the combination of a 4% “*no risk rate*” with a Country Risk Premium of 4.6% would yield an 8.6% “*borrowing rate*.” Comparing this rate with the 9.75% borrowing rate for the government of Venezuela propounded by Claimants, the Tribunal concludes that 9% is a reasonable and fair rate for pre-award interest.

588. With regard to the simple interest *versus* compound interest issue (also disputed between the Parties in this case), arbitral tribunals have increasingly accepted the commercial realism of compound interest in approximating the value lost by an investor, and in ensuring “*full reparation for the injury suffered as a result of an internationally wrongful act*.”⁴⁷⁰

589. Practice on this issue is still somewhat diverse. While many authorities rejecting the grant of compound interest are now somewhat dated (*e.g.* the *Norwegian Shipowners’ Claims*,⁴⁷¹ and the *British Claims in the Spanish Zone of Morocco*⁴⁷²), or specific to the practice of the US-Iran Claims Tribunal⁴⁷³,

⁴⁶⁸ Claimants’ Post-Hearing Brief, para. 435.

⁴⁶⁹ Hart Supplementary Report, paras. 186-7.

⁴⁷⁰ J. Crawford, *The International Law Commission’s Articles on State Responsibility. Introduction, Text and Commentaries* (2002), p. 239; *National Grid v. Republic of Argentina*, UNCITRAL, Award, 3 November 2008, para. 294, including FN 121; *see also PSEG Global v. Republic of Turkey*, ICSID Case No. ARB/02/5; *Siemens v. Republic of Argentina*, ICSID Case No. ARB/02/8; For a very thorough, though not exhaustive, review of ICSID precedents on this subject, *see, Compania de Aguas de Aconguija et al. v. Republic of Argentina*, ICSID Case No. ARB/97/3, para. 9.2.4 and especially FN 432.

⁴⁷¹ *Norwegian Shipowners’ Claims (Norway v. United States of America)*, R.I.A.A. Volume I (13 October 1922), p. 341 (RLA-076).

⁴⁷² *British Claims in the Spanish Zone of Morocco* (1925) 2 R.I.A.A. 616, 650 (RLA-077).

more recent authorities still reflect a degree of caution on this issue. For example, in his Third Report on State Responsibility, Professor Crawford summarised the practice of international courts and tribunals, and cautioned against the indiscriminate application of compound interest:

“... although compound interest is not generally awarded under international law or by international tribunals, special circumstances may arise which justify some element of compounding as an aspect of full reparation. Care is however needed since allowing compound interest could result in an inflated and disproportionate award, with the amount of interest greatly exceeding the principal amount owed.”⁴⁷⁴

590. Accordingly, a number of tribunals in recent years have determined that simple interest should be applied.⁴⁷⁵

(Footnote continued from previous page)

⁴⁷³ E.g. *Starrett Housing Corp., Starrett System Inc., Starrett Housing Int’l Inc. v. The Government of the Islamic Republic of Iran Banck Markazi Iran, Bank Omran, Bank Mellat*, Award No. 314-24-1, (14 August 1987), para. 370 (RLA-095); *McCullough & Co. Inc. v. The Ministry of Post, Telegraph and Telephone, the National Iranian Oil Co., and Bank Markazi*, Case No. 89 (Award No. 225-89-3, 22 April 1986), para. 114 (RLA-092); *Sylvania Technical Systems Inc. v. The Government of the Islamic Republic of Iran*, Award No. 180-64-1 (27 June 1985), p. 15 (RLA-091) (“the Tribunal has never awarded compounded interest”); *R.J. Reynolds Tobacco Co. v. The Government of the Islamic Republic of Iran and the Iranian Tobacco Co. (ITC)*, Partial Award, Award No. 145-35-3 (6 August 1984), p. 8 (RLA-090); *Anaconda-Iran Inc. v. The Government of the Islamic Republic of Iran and the National Iranian Copper Industries Co.*, Interlocutory Award, Award No. ITL 65-167-3 (10 December 1986), para. 142 (RLA-094); *Int’l Systems & Controls Corp. v. National Iranian Gas Co., National Iranian Oil Co. and the Islamic Republic of Iran*, Award No. 464-494-3, 23 January 1990, para. 123 (RLA-097).

⁴⁷⁴ ILC, Third Report on State Responsibility, p. 50 (RLA-046).

⁴⁷⁵ E.g. *RosInvestCo.UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Final Award, 12 September 2010, para. 692 (RLA-108) (simple interest on the overnight interbank offered rates of London (LIBOR)); *Saipem Sp.A. v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, para. 212 (simple interest at a rate of 3.375% per annum); *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 491 (the tribunal applied interest at the mere lending rate of the *Banco Central de Ecuador*); *Desert Line LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 298 (simple interest of 5%); *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, para. 300 (simple interest for U.S. Treasury bills); *CMS Gas*, para. 471 (simple interest on U.S. Treasury bills to those dated prior to the award date, and the arithmetic mean of the rate of the treasury bills of the U.S. for the last six months taken semi-annually); *Occidental v. Republic of Ecuador*, LCIA Case No. UN3467, para. 217 (pre-judgment simple interest at 2.75% and post-judgment simple interest at 4% beginning 30 days after the award until payment). *CME*, paras 641, 647 (simple interest at 10%); *Marvin Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 211 (simple interest on the Mexican Treasury Certificates); *Autopista Concesionada de Venezuela CA (Aucoven) v. Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003, paras. 387, 397 (simple interest on the average lending rate of five principal banks in the country).

591. But, as recognized by Prof. Dolzer and Schreuer, the practice of recent tribunals shows a trend toward compounding interest as more in accord with commercial reality. In their words:

“The practice of tribunals shows a trend toward compounding interest... While some tribunals have rejected compound interest, it has been accepted in the majority of recent decisions.”⁴⁷⁶

592. In addition, depending on the circumstances of the case and the conduct of the parties, tribunals have also, in many recent investment cases, determined that interest should be compounded annually, semi-annually, quarterly or monthly.⁴⁷⁷

⁴⁷⁶ Dolzer and Schreuer, *Principles of International Law (2d Ed.)*, Oxford University Press: New York 2008) citing: *Atlantic Triton v. Guinea*, Award, 21 April 1986, 3 ICSID Reports 13, at 33, 43; *Compania del Desarrollo de Santa Elena SA v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, paras. 104, 105; *Metalclad v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 128; *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, para. 96; *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000 (“*Wena Hotels v. Egypt*”), para. 129; *Middle East Cement v. Egypt*, ICSID Case No. ARB/98/4, Award, 12 April 2002, para. 174; *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award in Respect to Damages, 31 May 2002, para. 90 (“*Pope & Talbot*”); *Tecmed v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 196; *MTD v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, para 253(4); *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006, paras. 439-40 (“*Azurix v. Argentina*”); *ADC v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, para. 522; *PSEG v. Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 348; *Enron v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May, 2007, paras. 451-2; *Compañía de Aguas del Aconquija, SA & Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, paras. 9.1.1-9.2.8; *BG Group v. Argentina*, Final Award, 24 December 2007, paras. 456-7; *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007, paras. 483-6; *OKO Pankki v. Estonia*, ICSID Case No. ARB/04/6, Award, 19 November 2007, paras. 343-56; *Continental Casualty v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, paras. 306-16; *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, paras. 141-6; *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, paras. 594-8; *Impregilo v. Argentina*, ICSID Case No. ARB/07/17, Award, 21 June 2011, paras. 382-4.

⁴⁷⁷ *Azurix v. Argentina*, Award, 14 July 2006, 43 ILM 262 (compounded semi-annually), *Pope & Talbot*, 7 ICSID Rep 143 (compounded quarterly), *PSEG Global Inc., The North American Coal Corporation and Konya Ilgin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007 (compounded semi-annually); *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (“*Sempra Energy v. Argentina*”) (compounded semi-annually); *Wena Hotels v. Egypt*, 6 ICSID Rep 67 (compounded quarterly); *Wena Hotels v. Egypt*, ICSID Case No. ARB/98/4, Decision on the Application for Annulment, 28 January 2002; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/1, Award, 16 May 2012 (compounded semi-annually); *Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe*, ICSID Case No. ARB/06/6 (compounded semi-annually); *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15 (compounded semi-annually); *National Grid*

(Footnote continued on next page)

593. The circumstances of the present case indicate that, beginning in 2008, Venezuela put in place not one, but a series of inconsistent laws and decrees directed to the expropriation of Matesi, but, as indicated at paras. 481-496 *supra*, failed to follow or implement them. From 30 April 2008 until 13 August 2011, no judicial or administrative process to establish a value for Talta's interest in Matesi was implemented.⁴⁷⁸ Claimants have, therefore, as of the present date, been unlawfully deprived of their investment without compensation (or a viable process for determining compensation) for more than seven years.

594. Accordingly, the operative rate for actualising the damages to the date of the Award shall be 9% compounded semi-annually. On this basis the interest component, calculated on the loss of US\$ 87.3 million, from 30 April 2008 to 29 January 2016, will be US\$ 85,501,213.70, for a total compensation amount of US\$ 172,801,213.70.

595. Similarly, Claimant has specifically requested⁴⁷⁹ and is entitled to, post-award interest which the Tribunal recognizes as another important element of quantum in order to attempt to eliminate, as far as possible, the effects of the unlawful taking. While there are sometimes reason to calculate pre- and post-award interest differently, tribunals have also, in a number of cases chosen not to consider pre- and post-award interest separately but have instead awarded interest, for example, from the date of an expropriation or other key event, running until the payment in full of the award.⁴⁸⁰ In the present case, based on the same reasoning indicated in paras. 571-594 *supra* regarding pre-award

(Footnote continued from previous page)

P.L.C., v. Argentine Republic, UNCITRAL, Award, 3 November 2008 (compounded semi-annually); *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, 29 June 2012 (compounded semi-annually); *Rumeli Telekom A.S. and Telsim Mobil Telekomikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 (compounded semi-annually); See also *Phillips Petroleum Co. Venezuela Ltd (Bermuda) and ConocoPhillips Petrozuata B.V.(The Netherlands) v. Petroleos de Venezuela S.A. (Venezuela)*, ICC Case No. 16848/JRF/CA (C-16849/JRF), Award, 17 September 2012 (compounded monthly)(**CLA-58**)

⁴⁷⁸ para. 478, *supra*

⁴⁷⁹ See para. 100 *supra*

⁴⁸⁰ Ripinsky and Williams, *op.cit.* at 387; Tribunals adopting this approach include those in *Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, Section 9.2 *et. seq.*; *Tecmed v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, paras. 196-7; *PSEG v. Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, para.351

interest, the Tribunal concludes that post-award interest should continue to be paid at the same 9% rate compounded semi-annually, from the date of the award until payment in full of all sums due. The Tribunal has considered whether, in the circumstances of this case, it would be appropriate to afford Venezuela a short grace period within which payment of all sums found to be due to Claimants, including pre-Award interest, may be made without the addition of post-Award interest. The Tribunal decides that such a short grace period would be appropriate. Accordingly, provided payment of all sums due is made by Venezuela within six (6) months of the date of this Award, no post-Award interest shall be paid. For the avoidance of any doubt, the Tribunal emphasizes that the grace period is to be applied strictly and it is not subject to any extension. If no, or no full, payment is made within it, then post-Award interest on all sums remaining due to Claimants at the end of the grace period shall run from the date of this Award.

I. COSTS

1. CLAIMANTS' APPLICATION FOR COSTS

596. By their Costs Submissions dated 28 November 2014, Claimants sought the recovery of their costs "*in their entirety*"⁴⁸¹ from Venezuela, together with interest from the date on which such costs had been incurred until the date of their payment by Venezuela.

597. Those costs amount to some US\$ 7,971,727.39 and €194,673.37, comprising:

- (a) advances on the fees and expenses of the Tribunal and the administrative fees of ICSID made by Claimants amounting to US\$ 925,000;

⁴⁸¹ Claimants' Costs Submissions, 28 November 2014, para. 2

- (b) the reasonable travel and other expenses incurred by Claimants' witnesses and representatives (US\$ 43,080.21);
- (c) the fees and disbursements of Freshfields Bruckhaus Deringer US LLP in the sum of US\$ 5,219,291.57;
- (d) US\$ 137,254.14 for the fees and disbursements of Claimants' Venezuelan Counsel, D'Empaire Reyna Abogados and € 52,187.23 for the fees and disbursements of their Portuguese Counsel, Morais Leitao, Galvao Teles, Soares de Silva;
- (e) the fees and expenses of Compass Lexecon, Claimants' valuation experts of US\$ 1,381,526.36;
- (f) the fees and expenses of Claimants' legal experts, Professors Prüm and Vicente of €142,486.14; and
- (g) the fees and disbursements of FTI, Claimants' graphics and technology consultant, of US\$ 40,575.11.

598. Article 61(2) of the ICSID Convention provides that:

“In the case of arbitration proceedings, the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expense, 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.”

599. Claimants maintain that in exercising its discretion in the discharge of its obligation to assess costs and in order to ensure that any award of costs reflects the circumstances of the case, the Tribunal should have regard, *inter alia*, to the merits of the claims, the length and complexity of the proceedings and the conduct of the parties – not least, whether a party has obstructed the proceedings or needlessly prolonged them. Claimants maintain that there is ample precedent

in investment arbitration cases, were the Tribunal to consider that a costs order should be made to sanction unlawful, dilatory or other improper conduct.⁴⁸²

600. In this case, Claimants submit that in circumstances in which:

- (a) they have been obliged to engage in lengthy and expensive proceedings by reason of an unlawful expropriation of their investments without any compensation; and
- (b) Venezuela has failed to comply with its international obligations,

an award of costs in their favour is not only appropriate but it would:

“serve the purpose of disincentivising the illegal conduct that gave rise to these proceedings.”⁴⁸³

601. In addition, Claimants point to the following particular examples of conduct by Venezuela in the course of the arbitration, which they judge to be worthy of sanction in costs, namely:

- (a) bad faith production and withholding of documents, citing in particular: (i) the history of the disclosure of documentation in respect of the annual iron pellet requirements of the HBI producers, culminating in (ii) its production of 300 new documents on the eve of the January-February 2014 hearing;
- (b) the submission at the stage of the filing of Venezuela’s Rejoinder Memorial of the witness statement of Ms Marilyn Bello Rodriguez and of the expert reports of Professors Steichen, Maia and Duarte. Claimants maintain that the filing of the experts’ reports in particular at so late a stage in the proceedings required them to obtain further expert evidence

⁴⁸² Claimants have drawn attention to the decisions on costs by the Tribunals in *Liberian Eastern Timber Corporation v. Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, p. 378 and *Olguin v. Republic of Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, para. 85

⁴⁸³ Claimants’ Costs Submissions, para. 7

and led directly to the need for a further unscheduled hearing to hear the Parties' legal experts. It was held in July 2014, six months after the conclusion of the final hearing and added to the cost of, and delay in, the proceedings;

- (c) the circumstances of the withdrawal of the evidence of Mr Sabbagh and its purported replacement by the evidence of Mr Moya; and
- (d) the “*untimely*” introduction of evidence, some of it after the closure of the record in the arbitration and without prior leave of the Tribunal in January and July 2014; the application made late on 8 August 2014, the date for the filing of Post-Hearing Briefs, to introduce into the record the Award in ICSID Case No. ARB(AF)11/1, *Nova Scotia Power Inc. v. Venezuela* and the subsequent supplemental briefing; and the submission with Venezuela's Post-Hearing Brief of further evidence in the form of additional Luxembourg and Portuguese investment treaties, which had not previously been on the record. The submission was said to have been made without prior leave of the Tribunal and notwithstanding that the issue of Luxembourg's and Portugal's investment treaty practice had been raised by Claimants in submissions in response to Venezuela's bifurcation request of September 2012. Claimants had been obliged to respond to each such intervention and, and in the case of the additional investment treaty material, to file additional documents in order to address what they regarded as an incomplete or misleading submission.

602. Claimants conclude that:

“Venezuela's unlawful conduct has given rise to the significant costs of these proceedings and its tactics have needlessly added to the efforts and costs of the Tribunal and the Claimants. The Claimants should not be made to bear the cost of such conduct.”⁴⁸⁴

⁴⁸⁴ *Idem*, para. 9

2. VENEZUELA'S APPLICATION FOR COSTS

603. For its part, Venezuela maintains that if its objections to jurisdiction, which it believes to be “*dispositive of all claims asserted by Claimants*”⁴⁸⁵, were upheld, it should be reimbursed for all costs related to the arbitration. But for Claimants’ insistence that the proceedings not be bifurcated, such that the jurisdictional disputes and the merits were heard together in January 2014 with a subsequent hearing of the jurisdictional experts in July 2014, the costs and expenses attendant upon the preparation and defence of a joint proceeding on jurisdiction and merits would have been avoided.

604. Venezuela further maintains that if its jurisdictional objections were unsuccessful, it would still prevail on the merits. It would therefore be entitled to the recovery of “*all reasonable costs*”⁴⁸⁶, amounting to US\$ 6,870,028.82 and made up as follows:

- (a) US\$ 5,154,811.60 in respect of the fees of Venezuela’s Counsel, Foley Hoag LLP;
- (b) US\$ 1,174,370.96 in respect of the fees of legal and other experts engaged by Venezuela in the arbitration; and
- (c) “*administrative costs*”, including:
 - “all costs and expenses related to document production, legal research, travel, translations and other miscellaneous administrative matters”.⁴⁸⁷

605. The above costs of which Venezuela seeks recovery exclude administrative costs paid separately by Venezuela to the Centre.⁴⁸⁸

⁴⁸⁵ Respondent’s Costs Submission, 28 November 2014, para. 1

⁴⁸⁶ *Idem*, para. 2

⁴⁸⁷ *Idem*, para. 3(3)

⁴⁸⁸ Certification of Marybeth Celorier dated 28 November 2014.

3. VENEZUELA'S COMMENTS ON CLAIMANTS' SUBMISSION ON COSTS

606. Following the exchange of costs submissions, and pursuant to leave granted by the Tribunal on 2 December 2014, Venezuela submitted comments upon the Claimants' Submission by letter dated 12 December 2014.

607. Venezuela protested that Claimants had used their costs submissions as a vehicle to reargue both procedural points and matters going to the merits, "*many of which have already been rejected by the Tribunal*". Venezuela contended that any such attempt by Claimants to reargue their position "*should be rejected out of hand*".⁴⁸⁹

608. Venezuela rejected all of the complaints identified in the Claimants' submission (see para 595 above). It maintained that far from constituting conduct worthy of sanction in an award on costs, Venezuela had:

"acted in good faith and to the best of its ability to respond to Claimants' requests and the Tribunal's orders, while exercising its right to a full defense and preserving its fundamental right to be heard".

609. In Venezuela's submission, there was no basis for a departure from "*ICSID tradition*",⁴⁹⁰ which, as explained by Venezuela, meant that ICSID tribunals customarily applied the "*international law tradition*" that costs lie where they fall:

"absent egregious, unlawful or frivolous conduct by one of the parties".⁴⁹¹

610. Venezuela submitted that no such conduct was evident in this case. The Tribunal had not found at any point in the proceedings that Venezuela had acted in bad faith or that its requests or submissions were frivolous. To the contrary, every action, which Claimants sought to criticise had been an action "*taken in good faith in exercise of [Venezuela's] fundamental right to defense.*" Were Venezuela to be punished for undertaking a thorough and proper defence to the

⁴⁸⁹ Foley Hoag LLP letter 12 December 2014, para. 1

⁴⁹⁰ *Idem*, para. 4

⁴⁹¹ *Idem*, para. 6

allegations made against it, the exercise of its fundamental right to a defence and its right to be heard would be put a risk.⁴⁹²

611. As to the specific complaints raised:

- (a) Claimants had had ample opportunity to respond to documentation going to pellet production in their Reply Memorial and at the hearing: neither at the hearing itself, nor in their Post-Hearing Brief had Claimants demonstrated that the documents had been produced other than in good faith or that they were other than an “*accurate reflection*”⁴⁹³ of pellet allocation and distribution. Venezuela rejected as “*specious*”⁴⁹⁴ the suggestion that it had failed to produce evidence of the annual pellet requirements that all the HBI producers made to CVG FMO or evidence of CVG FMO’s actual iron pellet deliveries to each of the HBI producers. Rather, Venezuela suggested that Claimants were seeking to have it both ways in that they complained, first, that Venezuela had failed to comply with their document requests and, second, when it did produce documents, after a great deal of time and effort had been devoted to obtaining them from CVG, it was criticised for making a “*clear effort ... to prejudice the Claimants shortly before the hearing*”;⁴⁹⁵
- (b) there was no scope for further complaint, so far as the witness statement of Ms Bello and the expert reports of Professors Steichen, Maia and Duarte were concerned: they had been admitted by the Tribunal after it had afforded the Parties a full opportunity to explain their positions and it did so on the basis that it recognised the materials as being responsive “*to matters raised in Claimants’ Reply Memorial*”.⁴⁹⁶ Claimants had been afforded ample opportunity through allowances for expanded cross-examination (Ms Bello), the filing of rebuttal expert reports after the

⁴⁹² *Idem*, para. 11

⁴⁹³ *Idem*, para. 14

⁴⁹⁴ *Idem*, para. 15

⁴⁹⁵ *Idem*, para. 16

⁴⁹⁶ *Idem*, para. 20

submission of Venezuela's Rejoinder and a separate hearing of the legal experts;

- (c) the substitution of Mr Moya's evidence for that of Mr Sabbagh had caused the Claimants no prejudice. It was admittedly more limited in its scope, but it went to the substance of the pellet scarcity issue and the attempt to effect an equitable distribution of the locally produced pellets at the relevant time. That said;

“the substitution ... in accordance with the Tribunal's express authorisation and in keeping with [Venezuela's] right to be heard, in no way implied any delay in the arbitral proceeding nor did it prejudice Claimants”.⁴⁹⁷

- (d) Venezuela maintained that there were complete answers to all three discrete complaints. As to the first, the submission of documents made by Venezuela on 31 January 2014 was the subject of an agreement reached between the Parties and notified to the Tribunal on 2 February 2014 and the submission of 7 July 2014 had been the subject of a ruling by the Tribunal on 9 July when all but one of the documents proffered by Venezuela had been admitted onto the record. As to the second, the *Nova Scotia* decision had been admitted by the Tribunal pursuant to an application by Venezuela and its request that the Parties have an opportunity to comment upon it. And as to the third, the investment treaty materials were legal authorities submitted in direct response to an enquiry raised by a member of the Tribunal.⁴⁹⁸

4. ANALYSIS

612. The Tribunal accepts the proposition advanced by Claimants that generally in international arbitration, the term “*expenses*” is deemed to include the fees, disbursements (including travel expenses) of legal counsel and experts, together with the travel costs and disbursements of witnesses and representatives of the parties to the dispute. In light of the basis upon which the Parties to this

⁴⁹⁷ *Idem*, para. 25

⁴⁹⁸ *Idem*, paras. 27, 28 & 29

arbitration have framed their respective costs submissions, it is clear that that much is uncontroversial.

613. Venezuela’s application for its costs is premised primarily upon the success of its jurisdictional objections. Alternatively, it says that even if, contrary to its expectations, those jurisdictional objections were not to be upheld by the Tribunal, it would succeed on the merits. In the event, the Tribunal has determined that it does have jurisdiction to hear most of the claims referred to arbitration by Claimants and, to a considerable extent, Claimants have prevailed on the merits, too. They have made good their principal claim – to which much of the arbitration was devoted – that Venezuela’s expropriation of their investment was unlawful and that Venezuela has failed to make any, or any meaningful, attempt to compensate Claimants for that expropriation.

614. Accordingly the question of any entitlement on the part of Venezuela to look to Claimants for recovery of any of its costs is moot.

615. The question then arises whether the Tribunal should adopt what Venezuela has described as the “*international law tradition*”⁴⁹⁹ (see para 607 above) and allow the costs to lie where they fall, or whether it should conclude that there has been conduct which might properly be described as “*egregious, unlawful or frivolous*” on the part of Venezuela sufficient to cause the Tribunal to depart from the usual rule.

616. The Tribunal has considered with care the complaints raised by Claimants as to the conduct of these proceedings by Venezuela and to the detailed responses set out in Venezuela’s Comments on Claimants’ Submission on Costs dated 12 December 2014.

⁴⁹⁹ See *EDF Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 322: “... *the traditional position in investment arbitration, in contrast to commercial arbitration, has been to follow the public international rule which does not apply the principle that the loser pays the costs of the arbitration and the costs of the prevailing party. Rather, the practice has been to split the costs evenly, whether the claimant or the respondent has prevailed.*”

617. It has done so, in particular, having regard to the approach of the tribunals in:

(a) *Oemer Debe and Serdar Elhueseyni v. Romania*:

“[n]one of the factors that would clearly justify cost allocation (such as unreasonable argument, exaggerated claim, or obstructionist tactics) was present in this arbitration”⁵⁰⁰;

(b) *AES Summit Generation Ltd and AES-Tisza Eroemu Kft v. Republic of Hungary*:

“It is the view of the Tribunal that no frivolous claim was filed in the proceeding and that no bad faith was observed from the parties. ... Consequently, the Tribunal concludes that each party should bear its own costs and expenses and share equally in the costs and charges of the Tribunal and the ICSID Secretariat.”⁵⁰¹

618. The Tribunal concludes that even if Claimants’ objections were sustained, the conduct about which complaint is made would not reach the high bar set by previous ICSID tribunals and subject to which, a party might be sanctioned in costs.

619. Certainly this is not a case in respect of which any comparison with the *Liberian Eastern Timber* case is apposite. In that case, the tribunal concluded that a departure from the usual rule was justified, because:

“This decision is based largely on Liberia’s procedural bad faith. Not only did Liberia fail to partake in these arbitral proceedings, but it has also undertaken judicial proceedings in Liberia in order to nullify the results of this arbitration.”⁵⁰²

620. Aside from the conduct of Venezuela in the course of the proceedings, the Tribunal has also considered whether there are other circumstances to which it should have regard in the exercise of its discretion, and which might warrant an allocation of costs as between the Parties.

⁵⁰⁰ *Oemer Debe and Serdar Elhueseyni v. Romania*, ICSID Case No. ARB/10/22, Award, 5 September 2013, paras. 270-271

⁵⁰¹ *AES Summit Generation Ltd and AES-Tisza Eroemu Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award 23 September 2010 at para.15.3.3

⁵⁰² See FN 2 check *supra* and FN 11, Respondent’s Comments on Claimants’ Costs Submissions

621. There is ample authority for directing that a prevailing party should have been paid by the opposing party its costs and expenses (including legal and expert fees) as well as its share of the cost of the proceeding, on those issues on which it has prevailed.⁵⁰³ And there is also ample authority for directing that each party should pay its own expenses and that the fees and expenses of the members of the tribunal, as well as the costs of the Centre should be divided evenly.⁵⁰⁴
622. The Tribunal recalls that whilst the Claimants have succeeded in this case in establishing an illegal expropriation, and have secured a substantial award in their favour, they have not been entirely successful. The Tribunal has found against them in respect of all pre-expropriation claims. These claims, including alleged breaches of the Fair and Equitable Treatment standard and discrimination, and alleged breaches of the Protection and Security standard, were the subject of extensive written and oral submissions, as well as factual and expert evidence and much time was spent on them at the main hearing.
623. Taking this into account, and in the circumstances of this case, the Tribunal concludes that the fairest disposition on costs is that they should lie where they fall.
624. Accordingly, the Tribunal determines that Claimants and Venezuela shall each bear 50% of the fees and expenses of the Tribunal and the Centre. However, the Tribunal notes that in the absence of any payment by Venezuela, Claimants have paid in full the third advance on costs requested by the Centre on 20

⁵⁰³ E.g. *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009; *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 183 (“There is no rule in international arbitration that costs follow the event. Equally, however, the Tribunal does not accept that there is any practice in investment arbitration (as there may be, at least de facto, in the International Court and in interstate arbitration) that each party should pay its own costs. In the end the question of costs is a matter within the discretion of the Tribunal, having regard both to the outcome of the proceedings and to other relevant factors.”).

⁵⁰⁴ See e.g. *Methanex Corp. v. United States of America*, Ad hoc – UNCITRAL Arbitration Rules, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005; *International Thunderbird Gaming Corp. v. United Mexican States*, Ad hoc – UNCITRAL Arbitration Rules, Award, 26 January 2006.

October 2015 in the amount of US\$450,000. The Tribunal further notes that any balance in the account will be reimbursed by ICSID to the Parties in proportion to the payments advanced to ICSID. Consistent with its determination that Claimants and Venezuela shall bear the fees and expenses of the Tribunal and the Centre on an equal footing, the Tribunal orders Venezuela to pay Claimants such sum as shall represent half of the fees and expenses of the Tribunal and the Centre paid out of the third advance payment, which should have been paid by Venezuela, but was, in fact met in its entirety by Claimants. The amount of that payment shall be determined as soon as all invoices have been received and ICSID is in a position to issue a final financial statement. The Tribunal further considers that the Claimants are entitled to interest at the same 9% rate compounded semi-annually, from the date of the Award until payment in full of this sum, subject only to a grace period of six (6) months from the date of this Award, within which Venezuela may make payment in full of this sum without incurring post-Award interest. If no, or no full, payment is made within it, then post-Award interest on any portion of this sum that remains unpaid at the end of the grace period shall run from the date of this Award. There shall be no other order with respect to the Parties' legal fees, expenses and other claimed costs.

J. DECISION

625. Accordingly, having carefully considered all of the documentary evidence, testimony and submissions presented to the Tribunal, and having heard Counsel, the Tribunal **DECIDES, ORDERS, DIRECTS AND DECLARES** that:

1. The Tribunal has jurisdiction to hear and determine all of the Claimants' claims in this arbitration, save in respect of the Off-Take Agreement.
2. With the exception of claims submitted pursuant to the Off-Take Agreement, all of Venezuela's objections to jurisdiction are dismissed.
3. Claimants' claims pursuant to Article 3(1) of the Luxembourg Treaty and Article 3(1) of the Portuguese Treaty are dismissed.

4. Claimants' claims pursuant to Article 3(2) of the Luxembourg Treaty and Article 2(2) of the Portuguese Treaty are dismissed.
5. Venezuela has breached its obligations pursuant to Articles 4(1)(b) and 4(1)(d) of the Luxembourg Treaty and Articles 4(a) and 4(c) of the Portuguese Treaty.
6. Venezuela shall pay Claimants the sum of US\$87,300,000 (eighty-seven million, three hundred thousand US Dollars) for its breaches of the Treaties.
7. Venezuela shall pay pre-award interest on the sum of US\$87,300,000 from the Valuation Date (30 April 2008) to the date of this Award at a rate of 9% per annum, compounded at six-monthly rests, in the sum of US\$ 85,501,213.70 (eighty-five million, five hundred one thousand, two-hundred and thirteen US Dollars and seventy cents).
8. Subject only to a grace period of six (6) months from the date of this Award, within which Venezuela may make payment in full of all sums due to Claimants pursuant to this Award without incurring post-Award interest, Venezuela shall pay interest at the rate of 9% per annum, compounded at six-monthly rests from the date of this Award until payment in full, on all sums, including any sum payable by Venezuela under article 10 of this *Dispositif*, due to Claimants pursuant to this Award and remaining unpaid at the end of the said grace period.
9. Damages awarded pursuant to this Award and all accrued interest shall be paid to Claimants in full and net of any applicable Venezuelan tax, duty or other charge.
10. Save that the fees and expenses of the Tribunal and the costs attributable to the use of the services of the Centre shall be borne as to 50% by Claimants and as to 50% by Venezuela, and that pursuant to that determination, Venezuela shall pay Claimants half of the fees and expenses of the Tribunal and the Centre financed through the third advance payment, no Order for costs is made.

[Signed]

Mr. Judd L. Kessler
Arbitrator
Date: 12 January 2016

[Signed]

Mr. Toby T. Landau QC
Arbitrator
Date: 15 January 2016

[Signed]

Mr. John Beechey
President of the Tribunal
Date: 19 January 2016

ANNEX I

GUIDE TO RELEVANT ENTITIES

<p>Compañía Operadora del Puerto de Palua C.A. (“COPAL”)</p>	<p>The operator of the Port of Palua, through which, HBI products, including those made by PosVen (see below) and Matesi (see below) were shipped.</p>
<p>Consortio Siderúrgica Amazonia Ltd (“CSA”)</p>	<p>A subsidiary of Ternium S.A., an affiliate of Tenaris and Talta, to which shares in CVG Sidor (see below) were sold upon privatisation in November 1997.</p>
<p>Corporación Venezolana de Guayana (“CVG”)</p>	<p>A dependency of MIBAM (see below).</p>
<p>CVG Ferrominera Orinoco CA (“CVG FMO”)</p>	<p>A subsidiary of CVG, holding a monopoly in Venezuela over the production and sale of lump ore and iron pellets (the first stage in steel production).</p>
<p>CVG Siderúrgica del Orinoco C.A. (“CVG Sidor”)</p>	<p>A subsidiary of CVG. Re-named Siderurgica del Orinoco C.A (“SIDOR”) upon privatisation (see CSA above), SIDOR is the largest producer of semi-finished and finished steel products in Venezuela. Venezuela continued to maintain a significant shareholding in SIDOR post-privatisation.</p>
<p>Electrificación del Caroni C.A. (“EDELCA”)</p>	<p>The state supplier of electricity.</p>

<p>Materiales Siderúrgicos Masisi S.A. (“Matesi”)</p>	<p>Incorporated on 23 April 2004.⁵⁰⁵ SIDOR held 45% of Matesi’s shares and Tenaris Global (BVI) Ltd, a wholly owned subsidiary of Tenaris, the remaining 55%, which shareholding was transferred to Talta on 2 July 2004. As a result of share capital increases, the eventual shareholding participations in Matesi were 49.8003% (SIDOR) and 50.1997% (Talta).</p>
<p>MIBAM</p>	<p>The Venezuelan Ministry of People’s Power for Basic Industries and Mining – since 2011, the Ministry of Industry.</p>
<p>Petróleos de Venezuela S.A. (“PDVSA”)</p>	<p>The state-owned oil and gas company, which was responsible for the transformation of lump ore and iron pellets into direct reduced iron (“DRI”) – the second stage in steel making. The DRI was then mechanically compressed into brick-shapes known as hot briquetted iron (“HBI”) of which Venezuela was the leading producer world-wide.</p>
<p>PDVSA Gas S.A.</p>	<p>A wholly-owned subsidiary of PDVSA, which supplies gas to the steel industry</p>
<p>PosVen C.A. (“PosVen”)</p>	<p>The Venezuelan subsidiary of the South Korean concern, POSCO, which was acquired by SIDOR, Talta and Matesi. PosVen owned a decommissioned HBI plant within two kilometers of SIDOR and was also a shareholder in COPAL (see above).</p>
<p>Techint Group</p>	<p>A major international conglomerate and one of the world’s leading suppliers of steel pipe, used in the oil and gas industry. Claimants are members of the Techint Group. Tenaris S.A. is a holding company with subsidiaries and manufacturing centres worldwide. Talta, likewise a holding company, is wholly owned by Tenaris.</p>

⁵⁰⁵ Exhibit C-21