

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

In the arbitration proceeding between

**FÁBRICA DE VIDRIOS LOS ANDES, C.A. & OWENS-ILLINOIS DE VENEZUELA, C.A**

Claimants

and

**BOLIVARIAN REPUBLIC OF VENEZUELA**

Respondent

**ICSID Case No. ARB/12/21**

---

**AWARD**

---

*Members of the Tribunal*

Professor Hi-Taek Shin, President of the Tribunal  
The Honorable L. Yves Fortier, C.C., Q.C., Arbitrator  
Professor Zachary Douglas, Q.C., Arbitrator

*Secretary of the Tribunal*

Marisa Planells-Valero

*Date of dispatch to the Parties:* November 13, 2017

## REPRESENTATION OF THE PARTIES

Representing Fábrica de Vidrios Los Andes, C.A. and Owens-Illinois de Venezuela, C.A.:

Mr. Robert Volterra  
Mr. Giorgio Mandelli  
Ms. Suzanne Spears  
Mr. Álvaro Nistal  
Ms. Jessica Pineda  
Ms. Zuzana Morháčová  
Mr. Anass El Mouden  
Volterra Fietta  
8 Mortimer Street  
London W1T 5HE  
United Kingdom

and

Mr. José Antonio Muci Borjas  
Escritorio Muci-Abraham & Asociados  
Edificio Banco de Lara, Piso 7,  
Oficinas B-C Avenida Principal de  
Urbanización La Castellana  
Caracas, 1060  
Venezuela

Representing the Bolivarian Republic of Venezuela:

Dr. Reinaldo Enrique Muñoz Pedroza  
Procurador General de la República (E)  
Av. Los Ilustres, cruce con calle Francisco Lazo  
Martí  
Edificio Sede Procuraduría General de la  
República  
Urb. Santa Mónica  
Caracas, 1040  
Venezuela

and

Mr. Osvaldo César Guglielmino  
Mr. Pablo Parrilla  
Mr. Guillermo Moro  
Ms. Verónica Lavista  
Ms. Mariana Lozza  
Mr. Patricio Grané Riera  
Mr. Nicolás Bianchi  
Mr. Alejandro Vulejser  
Mr. Nicolás Caffo  
Guglielmino & Asociados  
Cerrito 1320 – Piso 9  
C1010ABB Buenos Aires  
Argentina

and

Mr. Diego Brian Gosis  
175 SW 7th Street, Suite 2110  
Miami, FL 33130  
United States of America

## TABLE OF CONTENTS

I.	INTRODUCTION AND PARTIES .....	1
II.	OVERVIEW OF THE CASE AND THE PARTIES' REQUESTS FOR RELIEF.....	2
III.	PROCEDURAL HISTORY.....	4
IV.	FACTUAL BACKGROUND.....	20
	A. Context Prior to the Expropriation .....	20
	(1) The Origins of the Investment .....	20
	(2) Governmental Reforms prior to the Expropriation.....	21
	B. The Expropriation.....	23
	(1) The Expropriation Decree.....	23
	(2) Measures taken by Venezuela following the Expropriation Decree.....	26
	a. The INDEPABIS Audits .....	26
	b. The INPSASEL Review and Fine .....	26
	c. The Provisional Remedy granted by the First Administrative Court .....	27
	d. Visits to the Plants by Third Parties .....	27
	e. The MINCIT Resolution .....	28
	f. The Creation of Venvidrio .....	28
	(3) The Expropriation Procedure and the Compensation Negotiations.....	29
	a. The Amicable Settlement Phase.....	29
	b. The Negotiations for Compensation.....	30
	C. Impact of the Parallel Arbitration in this case .....	31
	D. Venezuela's Denunciation of the BIT and the ICSID Convention .....	32
V.	JURISDICTION .....	33
	A. The Relevant Provisions of the ICSID Convention and the BIT .....	34
	B. The Parties' Positions.....	35
	(1) The Respondent's Position .....	35
	a. The Tribunal's Jurisdiction under the ICSID Convention .....	35
	b. The Tribunal's Jurisdiction under the BIT .....	41
	(2) The Claimants' Position.....	44
	a. The Tribunal's Jurisdiction under the ICSID Convention .....	44
	b. The Tribunal's Jurisdiction under the BIT .....	49
	(3) The Tribunal's Analysis.....	53
	a. Introduction .....	53

b. Article 9 of the BIT .....	54
c. Articles 71 and 72 of the ICSID Convention .....	58
d. Other Decisions .....	70
e. Conclusions .....	73
VI. COSTS .....	74
a. The Parties' Claims for Costs and Expenses.....	74
b. The Costs of the Arbitration.....	74
c. The Tribunal's Decision on Costs .....	75
VII. AWARD .....	77

## TABLE OF SELECTED ABBREVIATIONS

Agreement or BIT	The Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Venezuela and the Kingdom of the Netherlands signed on 22 October 1991 and entering into force on 1 November 1993, to remain in force for fifteen years.
C- [#]	Claimants' Exhibit
Cabrera ER	Report by Jesús Eduardo Cabrera Romero, legal expert appointed by the Respondent, dated December 19, 2013.
CADIVI	Commission for the Administration of Currency Exchange of the Bolivarian Republic of Venezuela
CLA- [#]	Claimants' Legal Authority
Claimants' Memorial	Claimant's Memorial on the Merits, dated July 15, 2016
Claimants' Post-Hearing Brief	Claimants' Post-Hearing Brief, dated June 6, 2016
Claimants' Rejoinder	Claimants' Rejoinder on Jurisdiction, dated August 21, 2014
Claimants' Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction, dated March 21, 2014
Claimants' Response	Claimants' Response to the Preliminary Objections to Jurisdiction, dated August 20, 2013
Expropriation Decree	Presidential Decree No. 7,751 issued by the President of the Republic on October 26, 2010 and published in Official Gazette No. 39,538 of October 26, 2010.
Favianca	Fábrica de Vidrios los Andes C.A.
Gomez I WS	First witness statement of Luis Gomez dated July 14, 2013

Gomez II WS	Second witness statement of Luis Gomez dated March 20, 2014
Hernandez I ER	First Expert Report of Ignacio Hernandez dated July 10, 2013
Hernandez II ER	Second Expert Report of Ignacio Hernandez dated March 21, 2014
ICSID Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
INDEPABIS	Institute for Defence of People in the Access to Goods and Services of the Bolivarian Republic of Venezuela
INPSASEL	National Institute for Prevention, Health and Work Safety of the Bolivarian Republic of Venezuela
JATs	Temporary Administrative Boards created by the INDEPABIS to manage the Plants
Kaczmarek's reports	Expert report by Brent C. Kaczmarek (Navigant Consulting Inc.), the Claimant's quantum expert, issued on July 15, 2013 and March 21, 2014
LECUPS	Expropriation Law for Public or Social Interest, published in Official Gazette No. 37,475 of July 1, 2002
LOPCYMAT	Organic Law on Prevention, Working Conditions, and the Work Environment, Published in Official Gazette No. 38,236 of July 26, 2005
Machaen I WS	First witness statement of Enrique Machaen dated July 12, 2013

Machaen II WS	Second witness statement of Enrique Machaen dated March 18, 2014
MINCIT	Ministry of the People's Power for Science, Technology and Intermediate Industries of the Bolivarian Republic of Venezuela
NAV-XX	Exhibits to Kaczmarek's reports
OI	Group controlled by Owens-Illinois Group, Inc.
OIdV	Owens-Illinois de Venezuela C.A.
OIEG	OI European Group B.V.
Pimentel I WS	First Witness Statement dated December 13, 2013
Pimentel II WS	Second Witness Statement dated June 17, 2014
R- [#]	Respondent's Exhibit
Respondent's Post-Hearing Brief	Respondent's Post-Hearing Brief, dated June 6, 2016
Respondent's Preliminary Objections	Respondent's Submission on Preliminary Objections to Jurisdiction, dated August 16, 2013
Respondent's Rejoinder	Respondent's Rejoinder on the Merits, dated June 20, 2014
Respondent's Reply	Respondent's Reply on Jurisdiction, dated June 20, 2014
RFA or the Request	Request for Arbitration, dated July 20, 2012
RL- [#]	Respondent's Legal Authority
Sarmiento I WS	First Witness Statement of Alexander Sarmiento dated December 18, 2013
Sarmiento II WS	Second Witness Statement of Alexander Sarmiento dated June 18, 2014
Tr. Day [#] (ENG/SPA), [page: line]	Transcript of the hearing on jurisdiction, merits and quantum

UNCITRAL Rules	The United Nations Commission on International Trade Law's Arbitration Rules as adopted by General Assembly Resolution 31/98 on 15 December 1976
VCLT	Vienna Convention on the Law of Treaties dated May 23, 1969.
Venezuela or The Respondent or The Republic	Bolivarian Republic of Venezuela



## **I. INTRODUCTION AND PARTIES**

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Bolivarian Republic of Venezuela dated October 22, 1991, which entered into force on November 1, 1993 (the “Agreement” or the “BIT”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated March 18, 1965, which entered into force on October 14, 1966 (the “ICSID Convention”).
2. The Claimants are Fábrica de Vidrios Los Andes, C.A. (“Favianca”) and Owens-Illinois de Venezuela, C.A. (“OIdV”). Favianca and OIdV are hereinafter collectively referred to as the “Claimants.”
3. The Claimants are companies incorporated under the laws of the Bolivarian Republic of Venezuela but controlled directly or indirectly by OI European Group B.V. (“OIEG”), a legal person constituted under the laws of the Kingdom of the Netherlands. OIEG owns, through its combined direct and indirect shareholdings, 71.996% of the shares in Favianca. OIEG also directly owns 73.97% of the shares in OIdV.
4. The Respondent is the Bolivarian Republic of Venezuela and is hereinafter referred to as “Venezuela”, the “Republic” or the “Respondent.”
5. The organs of the Respondent principally involved in the circumstances of this arbitration are the President of Venezuela (at the time, President Hugo Chávez Frías), the National Guard, the Ministry of Popular Power for Science, Technology, and Intermediate Goods Industries (“MINCIT”), the National Institute for Labour Prevention, Health and Safety (“INPSASEL”), the Institute for the Defence of People in the Access to Goods and Services (“INDEPABIS”) and the judiciary of Venezuela.
6. The Claimants and the Respondent are hereinafter collectively referred to as the “Parties.” The Parties’ current respective representatives and their addresses are listed above on page (i).

## II. OVERVIEW OF THE CASE AND THE PARTIES' REQUESTS FOR RELIEF

### Overview of the Case

7. The dispute arises from the expropriation of the two largest glass container production plants in Venezuela. The Claimants allege that this expropriation was carried out illegally and with no compensation, and that the Respondent's behaviour with regard to the Claimants' investments breached numerous obligations under the Netherlands-Venezuela BIT. The Claimants request substantial compensation. The Respondent challenges the Tribunal's jurisdiction and also contends that there was no breach of the BIT.
8. The Claimants' majority shareholder, OIEG, launched a parallel arbitration, namely *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), under the same BIT ("the Parallel Arbitration"). The tribunal in the parallel arbitration rendered its award on March 10, 2015 ("the OIEG award") unanimously awarding damages to OIEG. Venezuela has launched annulment proceedings which are currently pending.
9. The Parallel Arbitration addresses mostly the same substantive matters at issue in the present proceedings.

### The Parties' Requests for Relief

10. In their Reply on the Merits and Counter-Memorial on Jurisdiction, and as confirmed in their Post-Hearing Brief, the Claimants ask the Tribunal to render an award:
  - (i) declaring that the Respondent has breached the BIT, including Articles 3(1), 3(2), 3(4) and 6;
  - (ii) ordering the Respondent to pay damages to the Claimants in the amount of not less than US\$ 1,033,052,912.00;
  - (iii) ordering the Respondent to pay compound interest on such amount that the Tribunal awards to the Claimants as damages (less any amount awarded by the Tribunal by way of moral damages) at the interest rate of LIBOR + 4 percent, such compound interest to run from the date of expropriation until the date upon which payment is made;

- (iv) ordering the Respondent to pay all of the Claimants' costs, including costs in the arbitration (extending but not limited to all the fees and expenses of ICSID and the Tribunal and all the legal costs and expenses incurred by the Claimants, including but not limited to the fees and expenses of counsel), and including the Claimants' legal costs and expenses incurred consequent upon the expropriation, all with interest calculated in accordance with paragraph (iii) above;
- (v) in the event that the Tribunal does not order the Respondent to pay all of the Claimants' costs in the arbitration, ordering the Respondent to pay all of the Claimants' costs in connection with the Respondent's preliminary objections and request for bifurcation, including but not limited to all the fees and expenses of ICSID and the Tribunal and all the legal costs and expenses incurred by the Claimants (including but not limited to the fees and expenses of counsel), with interest calculated in accordance with paragraph (iii) above; and
- (vi) ordering such other and further relief as the Tribunal deems appropriate.<sup>1</sup>

11. In its Post-Hearing Brief, the Respondent invites the Tribunal to:

- (i) exclude from the case record any expert report, witness statement produced at the hearing and any other material relating to the submissions made by Mr. José Ignacio Hernández, in compliance with rule 9.2. (b) of the IBA rules;
- (ii) declare that the present dispute is not within the jurisdiction of the Centre or the competence of the arbitral tribunal;
- (iii) declare that the Respondent has not violated the BIT, including Articles 3(1), 3(2), 3(4) and 6 thereof;
- (iv) declare that the Claimants are not entitled to any compensation;
- (v) order the Claimants to pay all costs relating to this arbitration, including the Arbitral Tribunal's and ICSID's fees and expenses, and all legal fees and expenses incurred by the Respondent in connection with its defence;

---

<sup>1</sup> Claimants' Reply, ¶ 681; Claimants' Post-Hearing Brief, ¶ 104.

(vi) order any such further relief in favour of Venezuela as it may deem appropriate.<sup>2</sup>

### **III. PROCEDURAL HISTORY**

12. On July 23, 2012, ICSID received a request for arbitration dated July 20, 2012, with supporting documentation, from the Claimants against Venezuela (the “Request” or “RFA”). The Request was supplemented by letter dated August 3, 2012.
13. On August 10, 2012, 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 constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(c) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.
14. On October 24, 2012, in the absence of an agreement between the Parties, the Claimants requested that the Tribunal be constituted pursuant to Article 37(2)(b) of the ICSID Convention. Pursuant to Rule 3 of the ICSID Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”), the Claimants appointed The Honorable L. Yves Fortier Q.C., a national of Canada, as arbitrator.
15. On October 31, 2012, the Respondent proposed to the Claimants the appointment of the same tribunal in this case as appointed in the Parallel Arbitration on the basis of the similarities between the two cases. On November 9, 2012, the Claimants rejected the Respondent’s proposal.
16. On November 21, 2012, the Respondent appointed Mr. Alexis Mourre, a national of France, as arbitrator.
17. On December 3, 2012, the Claimants expressed reservations to the appointment of Mr. Mourre and requested the Chairman of the Administrative Council to appoint the presiding arbitrator pursuant to Article 38 of the ICSID Convention.

---

<sup>2</sup> Respondent’s Post-Hearing Brief, ¶ 192.

18. On December 27, 2012, the Respondent notified the Centre the appointment of the law firm of Shearman & Sterling LLP as its counsel of record in the case.
19. On December 28, 2012, the Centre, having consulted with the Parties, confirmed that the appointment of the presiding arbitrator would be made in accordance with Articles 38 and 40(1) of the ICSID Convention.
20. On January 16, 2013, in accordance with Articles 38 and 40(1) of the ICSID Convention, the Centre notified the Parties that it intended to propose to the Chairman of the Administrative Council the appointment of Professor Hi-Taek Shin, a national of the Republic of Korea, as the presiding arbitrator in this case, and invited the Parties to submit observations to this proposal. On January 23 and 24, 2013, the Respondent and the Claimants, respectively, submitted their observations on the proposal. On January 28, 2013, Professor Shin submitted comments. On January 30 and February 1, 2013, the Claimants and the Respondent, respectively, submitted further observations.
21. On February 6, 2013, the Centre informed the Parties that, after considering the Parties' observations, the Chairman of the ICSID Administrative Council had decided to proceed with the appointment of Professor Shin as the President of the Tribunal in this case.
22. On February 14, 2013, Professor Shin accepted his appointment. On that same date, the Secretary-General of ICSID, in accordance with Rule 6(1) of the ICSID Arbitration Rules, 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. Ann Catherine Kettlewell, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
23. The Tribunal held the first session with the Parties in Paris (France) on April 11, 2013. Present at the session were:

Members of the Tribunal

Professor Hi-Taek Shin, President of the Tribunal  
The Honorable L. Yves Fortier, C.C., Q.C. Arbitrator  
Mr. Alexis Mourre, Arbitrator

ICSID Secretariat

Ms. Ann Catherine Kettlewell, Secretary of the Tribunal

Attending on behalf of the Claimants

Mr. Robert Volterra	Volterra Fietta
Mr. Stephen Fietta	Volterra Fietta
Mr. Jiries Saadeh	Volterra Fietta
Mr. Álvaro Nistal	Volterra Fietta
Ms. Mary Beth Wilkinson	OI European Group B.V.

Attending on behalf of the Respondent

Mr. Christopher Ryan	Shearman & Sterling LLP
Mr. John Adam	Shearman & Sterling LLP
Dra. Anna Maria De Stéfano	Procuraduría General de la República
Dra. Magaly Gutiérrez	Procuraduría General de la República
Dr. Ronald Meignen	Procuraduría General de la República
Dra. Vanessa Bustamante	Procuraduría General de la República
Dra. Yarubith Escobar	Procuraduría General de la República
Dr. Víctor Álvarez	Procuraduría General de la República
Dr. Gilberto Hernández	Procuraduría General de la República
Dr. Inés Adarme	Procuraduría General de la República

24. The Parties confirmed that the Tribunal was properly constituted and that the Parties had no objection to the appointment of any Member of the Tribunal. It was agreed, *inter alia*, that the applicable ICSID Arbitration Rules would be those in effect from April 10, 2006, that the procedural languages of the proceedings would be English and Spanish, and that the place of proceeding would be the seat of the Centre in Washington, D.C. The agreements of the Parties were embodied in Procedural Order No. 1, dated May 15, 2013.
25. On July 15, 2013, the Claimants filed a Memorial on the Merits (the “Claimants’ Memorial”) accompanied by witness statements, expert reports, and factual exhibits.
26. On August 16, 2013, the Respondent filed its Preliminary Objections to Jurisdiction, requesting the bifurcation of the proceeding into jurisdiction and merits phases (the “Respondent’s Preliminary Objections”). Alternatively, the Respondent requested the

suspension of the proceeding pending an award in the Parallel Arbitration or during such other time as the Tribunal saw fit.

27. On August 30, 2013, the Claimants submitted their Response to the Respondent's Request for Bifurcation ("Claimants' Response"), requesting the dismissal of the request and an order from the Tribunal that all confidential information from the Parallel Arbitration disclosed by the Respondent in its Preliminary Objections to Jurisdiction be struck from the record.
28. By Procedural Order No. 2 of September 23, 2013, the Tribunal rejected the Respondent's Request for bifurcation or for a suspension of the proceeding and the Claimants' request to strike out from the record the confidential information from the Parallel Arbitration. On October 18, 2013, the Respondent renewed its request for the suspension of the proceeding. On November 25, 2013, the Tribunal rejected Venezuela's request.
29. On December 20, 2013, Venezuela filed its Counter-Memorial on the Merits ("Venezuela's Counter-Memorial") along with the accompanying exhibits, witness statements, expert reports, and legal authorities.
30. On March 21, 2014, the Claimants submitted their Reply on the Merits and Counter-Memorial on Jurisdiction together with the accompanying exhibits, expert reports, witness statements, and legal authorities (the "Claimants' Reply").
31. On June 20, 2014, the Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction, together with the accompanying exhibits, expert reports, witness statements, and legal authorities (the "Respondent's Rejoinder").
32. On June 21, 2014, the law firm of Shearman & Sterling LLP informed the Centre of its withdrawal as counsel of record for the Respondent in this case.
33. On August 20, 2014, the Respondent notified the Centre the appointment of the law firm of Guglielmino & Asociados S.A. as its new counsel of record in the case.
34. On August 21, 2014, the Claimants filed their Rejoinder on Jurisdiction (the "Claimants' Rejoinder on Jurisdiction"), together with the accompanying exhibits and legal authorities.

35. On August 26, 2014, the Claimants informed the Tribunal that Mr. Matthew DeDad, one of their witnesses in this arbitration, had been terminated from his employment by Owens Illinois Inc., and indicated that his dismissal was unrelated to this arbitration.
36. On September 4, 2014, Venezuela, on the basis of the change in its legal representation in this case, requested a 45-day postponement of the hearing in this case, which was originally scheduled to take place from October 13 to 18, 2014. On September 9, 2014, the Claimants opposed the Republic's request.
37. On September 12, 2014, Venezuela reiterated its request for a 45-day postponement of the hearing dates. On September 15, 2014, the Tribunal granted Venezuela's request and proposed new dates for the hearing.
38. On September 22 and 25, 2014, the Claimants and the Respondent respectively commented on the Tribunal's decision of September 15, 2014. On September 27, 2014, the Tribunal reaffirmed its decision of September 15, 2014 and invited the Parties to confer and find new dates for the hearing in this case.
39. On October 7, 2014, the Parties informed of their availability to hold a hearing during the week of March 30, 2015 in Paris, France.
40. On December 14, 2014, the Respondent informed that Mr. Patricio Grané Labat, one of the members of the Claimants' legal team in this case, had taken part in Venezuela's defense as a member of his previous law firm and had had access to confidential information relating to Venezuela's interests and its defense strategy in other ICSID cases. On this basis, the Respondent requested the Tribunal to exclude him as a member of the Claimants' legal team.
41. On December 19, 2014, the Claimants rejected Venezuela's allegations regarding Mr. Grané Labat's acquisition of confidential information regarding Venezuela's strategy.
42. On December 29, 2014, Venezuela requested the Tribunal (i) to exclude from this case Mr. Grané Labat, and the lawyers with access to the information he acquired, from any subsequent procedural instance in representation of interests adverse to Venezuela, (ii) to



annul each procedural act that had taken place after Mr. Grané Labat's incorporation to the Claimants' legal team, and (iii) to make itself available for a hearing on the matter.

43. On January 14, 2015, the Claimants requested the Tribunal to reject the Respondent's request of December 29, 2014.
44. On January 30, 2014, the Parties were informed that Ms. Marisa Planells-Valero, ICSID Legal Counsel, would replace Ms. Kettlewell as Secretary of the Tribunal.
45. The Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference on February 9, 2015. On February 13, 2015, the Tribunal issued Procedural Order No. 7 concerning the organization of the hearing.
46. On March 4, 2015, the Secretary of the Tribunal conveyed a message from Mr. Mourre to the Parties informing that, as from May 2015, he would be leaving his law firm of Castaldi Mourre & Partners to establish his own individual arbitrator practice and that he would also have a consultancy agreement with the law firm of Dechert LLP with the title of Special Counsel. He also informed the Parties that Dechert LLP had within the past year been adverse to Venezuela and/or Petróleos de Venezuela in six unrelated litigation matters, and confirmed that he would not participate in any work of Dechert LLP with respect to Venezuela, Petroleos de Venezuela or any other entity related to Venezuela.
47. On March 9, 2015, Venezuela indicated that Mr. Mourre's communication of March 4, 2015 cast serious doubts about his suitability as an arbitrator in any of the cases to which Venezuela was a party, and requested additional information concerning Mr. Mourre's relationship with Dechert LLP. On March 11, 2015, the Secretary of the Tribunal conveyed a further message from Mr. Mourre to the Parties on the scope of his arrangement with Dechert LLP, and invited the Parties' comments by March 16, 2015.
48. On March 13, 2015, Venezuela proposed the disqualification of Mr. Mourre and Mr. Fortier on the basis that each of them lacked the requisite impartiality and independence under Articles 14 and 57 of the ICSID Convention (the "Proposal").

49. On March 16, 2015, the Centre transmitted the Proposal to the Parties and the Tribunal informing them that the proceeding had been suspended until the Proposal for Disqualification was decided, pursuant to ICSID Arbitration Rule 9(6). The Centre also established a procedural schedule for written submissions on the Proposal for Disqualification.
50. On March 19, 2015, Professor Shin informed that, in view of the pending challenge, the dates for the upcoming hearing were vacated, and that new hearing dates would be fixed as soon as possible after the resumption of the proceeding.
51. In accordance with the schedule, the Claimants submitted a Reply to the Proposal on March 24, 2015 and Mr. Fortier's furnished explanations pursuant to ICSID Arbitration Rule 9(3) on March 30, 2015.
52. Both Parties filed simultaneously additional comments on April 14, 2015.
53. On April 22, 2015, Mr. Fortier provided further explanations, and both Parties were invited to submit their final comments on the Proposal on April 27, 2015.
54. On June 11, 2015, Venezuela submitted a further letter in connection to the Proposal for Disqualification. On June 15, 2015, the Claimants provided comments on this letter.
55. On June 16, 2015, the Chairman of the ICSID Administrative Council (i) rejected as untimely the Proposal for the Disqualification of Mr. Fortier, and (ii) dismissed, in view of his resignation, the Proposal for the Disqualification of Mr. Mourre.
56. On June 17, 2015, Prof. Shin and Mr. Fortier informed the Parties that they had decided to consent to the resignation of Mr. Mourre pursuant to ICSID Arbitration Rule 8(2).
57. On June 18, 2015, Venezuela requested the Chairman to reconsider its Decision on the Proposal for Disqualification. On June 19, 2015, the Claimants provided comments.
58. On June 25, 2015, the Secretary-General of ICSID informed the Parties that the Chairman of the ICSID Administrative Council, after having reviewed the concerns expressed in the Respondent's request, had found no basis to reopen the matter.

59. On July 31, 2015, Venezuela appointed Prof. Zachary Douglas Q.C., a national of Australia, as arbitrator, in accordance with ICSID Arbitration Rule 11(1).
60. On August 5, 2015, the Centre notified of Prof. Zachary Douglas' acceptance of his appointment as arbitrator and informed the Parties that, pursuant to ICSID Arbitration Rule 12, the Tribunal had been reconstituted and the proceeding resumed on that date.
61. On August 17, 2015, the Respondent requested that the Claimants readjust their claims in this arbitration in light of the award rendered in the Parallel Arbitration, and a commitment from the Claimants not to seek double recovery in this arbitration.
62. On August 24, 2015, the Claimants requested the Tribunal to reject the Respondent's requests of August 17, 2015.
63. On that same date, the Respondent provided comments on the Claimants' letter of August 24, 2015 and requested the Tribunal to incorporate, as new jurisdictional objections, its allegations on the significance of the award rendered in the Parallel Arbitration and to set up a calendar for written pleadings on this issue.
64. On September 15, 2015, the Tribunal informed that the hearing on jurisdiction and merits was set to be held in Paris, from April 4 through April 8, 2016.
65. On September 21, 2015, the Tribunal informed the Parties that it had decided to: (i) reject Respondent's request for an order to readjust claims; and, (ii) dismiss, as untimely, the jurisdictional objections raised by the Respondent on August 31, 2015, pursuant to ICSID Arbitration Rule 41(1). Nevertheless, the Tribunal invited the Respondent to address the significance of the findings of the award in the Parallel Arbitration on any potential liability of the Respondent in this case.
66. On October 5, 2015, Venezuela responded to the Tribunal's invitation of September 21, 2015, submitting a new Expert Report by Mr. Fabian Bello.
67. On October 14, 2015, the Claimants (i) argued that the Respondent had exceeded the invitation of the Tribunal to refer to the impact of the award issued in the Parallel Arbitration, and (ii) requested the Tribunal to set a deadline for the Claimants' comments on the

Respondent's October 5, 2015 submission. On October 19, 2015, the Respondent submitted further comments on this issue.

68. On November 16, 2015, the Claimants filed their Reply to the Respondent's comments on the relevance of the award rendered in the Parallel Arbitration, along with the accompanying legal authorities.
69. On January 27, 2016, the Claimants: (i) requested the Tribunal to confirm that the directions and timeframes contained in Procedural Order No. 7 of February 13, 2015 on the organization of the hearing were to apply *mutatis mutandis* to the upcoming hearing; and, (ii) proposed a series of amendments to the deadlines established in Procedural Order No. 7.
70. On February 5, 2016, the Respondent confirmed its agreement with the Claimants' proposal of January 27, 2016.
71. On February 11, 2016, the Tribunal issued Procedural Order No. 8, informing that the Tribunal had decided, on the basis of the agreement reached by the Parties, to modify Sections 1.3, 2.4, 3.1, 5.1, and 7.1 of Procedural Order No. 7, and that the other directions and timeframes contained in Procedural Order No. 7 would continue to apply unmodified to the upcoming hearing in this case.
72. On March 2, 2016, the Tribunal notified the Parties that it had decided to admit the Respondent's submission of October 5, 2015, including Mr. Bello's Expert Report. The Tribunal also invited the Claimants to submit evidence in rebuttal of the accompanying documents to the Respondent's submission of October 5, 2015.
73. On March 4, 2016, the Respondent proposed the disqualification of Mr. Fortier (the "Second Proposal for Disqualification").
74. On March 7, 2016, the Secretary of the Tribunal transmitted the Second Proposal for Disqualification to the other Party and the Tribunal and confirmed that, in accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision was taken with respect to the Second Proposal. On that same date, Professors Shin and Douglas set a timetable for the submissions on the Second Proposal for Disqualification.

75. The Claimants filed a submission on March 9, 2016. On March 11, 2016, Mr. Fortier furnished his explanations. On March 15, 2016, the Parties submitted their additional observations on the Second Proposal for Disqualification.
76. On March 21, 2016, Professors Shin and Douglas notified the Parties of their decision to reject the Respondent's Second Proposal for Disqualification and informed the Parties that the reasons for their Decision would be issued subsequently. In accordance with ICSID Arbitration Rule 9(6), the proceeding was resumed on that same date.
77. On March 23, 2016, the Respondent submitted the list of witness and experts that it intended to cross-examine during the hearing, and requested permission to conduct a direct examination of Mr. Bello.
78. On March 24, 2016, the Claimants (i) reminded the Tribunal that, as explained in their letter of August 26, 2014, Mr. DeDad was no longer an employee of Owens-Illinois Inc. and informed that the Claimants had contacted him to inform him of the Respondent's intention to cross-examine him and were waiting to hear from him, (ii) requested confirmation from the Respondent as to the availability of its fact witnesses and experts called for cross-examination, and (iii) sought leave from the Tribunal to submit observations of the Respondent's intention to call Mr. Bello for examination at the hearing.
79. Also on March 24, 2016, Mr. Fortier requested permission from the Parties to be accompanied during the hearing by his colleague, Ms. Annie Lespérance.
80. On March 25 and 28, 2016, the Claimants and the Respondent, respectively, confirmed that they had no objection to Mr. Fortier's request of March 24, 2016.
81. On that same date, the Tribunal invited (i) the Claimants to comment on the Respondent's communication of March 23, 2016, and (ii) the Respondent to confirm the availability for cross-examination of the fact witnesses and experts called by the Claimants.
82. On March 28, 2016, Professors Shin and Douglas issued their Reasoned Decision on the Second Proposal for the Disqualification of Mr. Fortier.

83. On that same date, the Respondent confirmed that all of its fact witnesses and experts were available for cross-examination at the hearing, and the Claimants argued that, pursuant to Procedural Order No. 7, the Respondent did not have a right to call for direct examination its own witnesses and experts.
84. On March 29, 2016, the Respondent asked the Tribunal to call Mr. Bello for examination.
85. On March 30, 2016, the Tribunal invited the Claimants to confirm whether Mr. DeDad would be available to attend the hearing. On that same date, the Claimants informed the Tribunal that they had yet to receive confirmation from Mr. DeDad.
86. On March 31, 2016, the Tribunal informed the Parties of its decision not to call Mr. Bello for examination at the hearing.
87. On April 1, 2016, the Respondent requested confirmation from the Claimants as to the availability of Mr. DeDad to be cross-examined at the hearing. The Respondent also asked for Mr. Bello to be incorporated to the list of participants in the hearing.
88. On April 2, 2016, the Tribunal confirmed that Mr. Bello had been added to the list of participants. On that same date, the Tribunal invited the Claimants to confirm, by the end of the day, whether Mr. DeDad would be available to testify at the hearing. The Claimants informed the Tribunal that they had not been able to contact Mr. DeDad.
89. On April 3, 2016, the Tribunal invited the Parties to, *inter alia*, make observations, after their opening statements on April 4, 2016, as to what weight, if any, the Tribunal should give to Mr. DeDad's witness statement.
90. A hearing on jurisdiction, merits and quantum took place in Paris, France from April 4 to April 8, 2016.
91. Present at the hearing were:

Members of the Tribunal

Professor Hi-Taek Shin, President of the Tribunal  
The Honorable L. Yves Fortier, C.C., Q.C. Arbitrator  
Professor Zachary Douglas, Q.C., Arbitrator

Ms. Annie Lesperance, colleague of Mr. Yves Fortier

ICSID Secretariat

Ms. Marisa Planells-Valero, Secretary of the Tribunal

For the Claimants:

Mr. Robert Volterra	Volterra Fietta
Mr. Patricio Grané Labat	Volterra Fietta
Mr. Giorgio Mandelli	Volterra Fietta
Ms. Suzanne Spears	Volterra Fietta
Mr. Álvaro Nistal	Volterra Fietta
Ms. Zuzana Morháčová	Volterra Fietta
Ms. Jessica Pineda	Volterra Fietta
Mr. Anass El Mouden	Volterra Fietta
Mr. Nathan Eastwood	Volterra Fietta
Mr. Michele Migliaccio	Volterra Fietta
Mr. Lucas Bastin	Quadrant Chambers
Ms. MaryBeth Wilkinson	Owens-Illinois, Inc.
Mr. Matthew Shopp	Navigant Consulting, Inc.

For the Respondent:

Mr. Osvaldo C. Guglielmino	Guglielmino & Asociados
Mr. Diego B. Gosis	Guglielmino & Asociados, Of Counsel
Ms. Verónica Lavista	Guglielmino & Asociados, Of Counsel
Mr. Guillermo Moro	Guglielmino & Asociados
Mr. Pablo Parrilla	Guglielmino & Asociados
Mr. Nicolás Caffo	Guglielmino & Asociados
Mr. Alejandro Vulejser	Guglielmino & Asociados
Mr. Nicolás Bianchi	Guglielmino & Asociados
Mr. Patricio Grané Riera	Guglielmino & Asociados
Ms. Yolanda Consuegra	Guglielmino & Asociados
Ms. Camila Guglielmino	Guglielmino & Asociados
Mr. Joaquin Coronel	Guglielmino & Asociados
Mr. Francisco Calvo	Guglielmino & Asociados
Mr. Quinn Smith	Special Counsel
Mr. Alfredo de Jesús	Special Counsel
Ms. Katherine Sanoja	Special Counsel

Ms. Erika Fernández

Procuraduría General de la República  
Bolivariana de Venezuela

Mr. Thibaud Boucharlat

KPMG

Mr. Eric Bourdonnais

KPMG

Mr. Fabian Bello

92. The following persons were examined:

On behalf of the Claimants:

Mr. Oscar Enríquez

Mr. Enrique Machaen

Mr. Luis Gómez

Mr. Manuel Capdevielle

Mr. Noé Pazos

Dr. José Ignacio Hernández

Grau, García, Hernández & Mónaco

Mr. Brent Kaczmarek

Navigant Consulting, Inc.

On behalf of the Respondent:

Mr. Rafael Romero

Mr. Pablo Morales

Mr. Alexander Sarmiento

Ms. Yuri Pimentel

Mr. Jean-Luc Guitera

KPMG

Mr. Jesús Eduardo Cabrera

(by videoconference)

93. On April 18, 2016, the Tribunal invited the Parties to submit their Post-Hearing Briefs by June 3, 2016. On May 6, 2016, the Parties submitted a common set of corrections to the transcripts.

94. The Parties filed simultaneous post-hearing briefs on June 6, 2016.

95. On June 16, 2016, the Tribunal established a calendar for the Parties' submissions on costs. The Parties filed their submissions on costs on July 8, 2016.

96. Also on July 8, 2016, the Respondent noted that Ms. Myriam Ntashamaje, Mr. Fortier's assistant, had accessed the Box folder of the present case. The Respondent further noted



that, according to her LinkedIn account, Ms. Ntashamaje had been working since August 2013 as an attorney in the international arbitration practice of the law firm Norton Rose Fulbright LLP. The Respondent requested to be informed of the reasons why Ms. Ntashamaje had access to the case documents.

97. On July 22, 2016, Mr. Fortier asked the Centre to transmit a letter to the Parties providing explanations to the questions posed by Respondent in its July 8, 2016 letter.
98. On July 25, 2016, the Respondent proposed the disqualification of Mr. Fortier (the “Third Proposal for Disqualification”).
99. On July 26, 2016, the Secretary of the Tribunal transmitted the Third Proposal for Disqualification to the Claimants and the Tribunal and confirmed that, in accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision was taken with respect to the Third Proposal for Disqualification.
100. On August 2, 2016, Professors Shin and Douglas set a timetable for the Parties’ submissions and Mr. Fortier’s explanations. In accordance with such timetable, the Claimants filed a submission on August 5, 2016, Mr. Fortier furnished his explanations on August 8, 2016, and both Parties submitted additional observations on August 12, 2016.
101. On September 12, 2016, Professors Shin and Douglas rejected the Respondent’s Third Proposal for Disqualification. In doing so, Professors Shin and Douglas decided that the Respondent shall be responsible for the costs associated with the Third Proposal for Disqualification and that an order to that effect would be made in the award to be issued by the Tribunal. The proceeding was resumed on that same date.
102. On September 16, 2016, the Tribunal fixed a procedural calendar for the Parties’ remaining submissions on costs.
103. On September 28, 2016, the Respondent requested that the Tribunal order the Claimants to report on the enforcement procedures attempted in relation to the award rendered in the Parallel Arbitration.

104. Also on September 28, 2016, the Parties submitted their statements of costs incurred in connection with the Third Proposal for Disqualification and their observations to the other Party's statement of costs of July 8, 2016.
105. On October 3, 2016, the Tribunal invited the Claimants to submit observations on the Respondent's request of September 28, 2016. The Claimants did so on October 7, 2016.
106. On October 20, 2016, the Tribunal informed the Parties that it had decided to remain seized of the Respondent's request of September 28, 2016 while it continued its deliberations, and that it would adjudicate the Respondent's request in due course.
107. On November 2, 2016, each Party filed observations on the other Party's statement of costs incurred in connection with the Third Proposal for Disqualification.
108. On December 23, 2016, the Respondent proposed the disqualification of Mr. Fortier (the "Fourth Proposal for Disqualification").
109. On that same date, the Secretary of the Tribunal transmitted the Fourth Proposal for Disqualification to the Claimants and the Tribunal and confirmed that, in accordance with ICSID Arbitration Rule 9(6), the proceeding was suspended until a decision was taken with respect to the Fourth Proposal for Disqualification.
110. On December 30, 2016, Professors Shin and Douglas set a timetable for the Parties' submissions and Mr. Fortier's explanations.
111. On January 5, 2017, Mr. Fortier requested an extension until January 20, 2017 for the submission of his explanations. On January 9, 2017, Professors Shin and Douglas granted the requested extension.
112. On January 10, 2017, the Claimants requested an extension for the submission of their Reply to the Fourth Proposal for Disqualification. On January 11, 2017, Professors Shin and Douglas granted the requested extension. The Claimants filed their Reply to the Fourth Proposal for Disqualification on January 16, 2017, and Mr. Fortier furnished his explanations on January 20, 2017.

113. On January 26, 2017, the Respondent requested an extension for the filing of the Parties' additional observations on the Fourth Proposal for Disqualification until February 10, 2017. On that same date, the Claimants opposed this request.
114. On January 27, 2017, the Claimants submitted to the Secretariat their Additional Observations on the Fourth Proposal for Disqualification. On that same date, Professors Shin and Douglas granted the Respondent's request for an extension.
115. On February 3, 2017, the Respondent requested that Professors Shin and Douglas schedule (i) a document production phase and (ii) a hearing to examine certain witnesses in connection with the Fourth Proposal for Disqualification. By communications of February 3, 4 and 6, the Claimants opposed this request. On February 6, 2017, the Respondent submitted a further communication on this matter.
116. On February 7, 2017, Professors Shin and Douglas informed the Parties that they would be taking a decision on the document production and hearing requests following their review of the Parties' additional comments on the Fourth Proposal for Disqualification.
117. On February 10, 2017, the Respondent submitted its additional observations on the Fourth Proposal for Disqualification. On February 13, 2017, the Secretary of the Tribunal circulated to the other Party, to Professors Shin and Douglas and to Mr. Fortier each Party's additional comments.
118. On May 5, 2017, Professors Shin and Douglas rejected the Respondent's Fourth Proposal for Disqualification. In doing so, Professors Shin and Douglas decided that the Respondent shall be responsible for the costs associated with the Fourth Proposal for Disqualification and that an order to that effect would be made in the award to be issued by the Tribunal.
119. On May 15, 2017, the Parties submitted their respective statements of costs incurred in connection with the Fourth Proposal for Disqualification.
120. On May 18, 2017, the Parties filed their observations to the other Party's statement of costs incurred in connection with the Fourth Proposal for Disqualification.

121. The Tribunal declared the proceeding closed on August 1, 2017. In doing so, the Tribunal informed the Parties of its decision rejecting the Respondent's requests of September 28, October 12, and November 2, 2016, and indicating that it would provide the reasons for this decision in the Award.
122. On August 14, 2017, the Respondent requested the Tribunal to reopen the proceedings to introduce new documents into the record under ICSID Arbitration Rule 38. The Claimants filed observations on August 14, 2017. On August 22, 2017, the Tribunal decided to reject the Respondent's request and also indicated that it would provide the reasons for this decision in the Award.

#### **IV. FACTUAL BACKGROUND**

123. The Tribunal summarizes below, insofar as relevant to make its determinations, the factual background of these proceedings.

##### **A. Context Prior to the Expropriation**

###### **(1) The Origins of the Investment**

124. The origins of OIdV's and Favianca's investments in Venezuela date back half a century<sup>3</sup> to when they were incorporated (OIdV<sup>4</sup> on April 13, 1956, and Favianca<sup>5</sup> on August 8, 1968). On December 31, 2005, OIEG acquired the majority shareholdings in OIdV and Favianca.<sup>6</sup> However, subsidiaries of Owens Illinois Inc. have held, directly or indirectly, a majority shareholding in OIdV and Favianca for more than forty years. According to the Claimants, Owens Illinois Inc. and its global subsidiaries are together global leaders in the development of the machinery, technical processes and know-how used in the industrial production of glass, and held a strong market position in Venezuela.<sup>7</sup>

---

<sup>3</sup> Claimants' Memorial, ¶ 17.

<sup>4</sup> Charter & ByLaws of OIdV, incorporation dated April 13, 1956, C-1, p. 4.

<sup>5</sup> Charter & ByLaws of Favianca, incorporation dated August 8, 1968, C-2, p. 1.

<sup>6</sup> Share registry of OIdV, C-119, pp. 7-11; Share registry of Favianca, C-120, pp. 6-7.

<sup>7</sup> Claimants' Reply, ¶ 104.

125. The Claimants' investments in Venezuela consisted of the operation of the two largest glass container production and distribution businesses in Venezuela (together, the "Businesses" or the "Plants"). OIdV's plant was located in the town of Los Guayos and Favianca's plant in Valera. According to the Claimants, these Plants were among the most advanced and state-of-the-art glass production and distribution facilities in the world.<sup>8</sup>
126. The Claimants were glass suppliers in the Venezuelan market for major brands such as Heinz, Kraft, Nestle and Gerber, among others. Its largest customer was Polar, the largest company in Venezuela selling the consumer staples of beer, soft drinks and food products.<sup>9</sup>

## **(2) Governmental Reforms prior to the Expropriation**

127. Following the election of President Hugo Chavez in December 1998, Venezuela undertook a series of measures in strategic sectors of the economy which included, among others, an expropriation law and the establishment of a new exchange control system.
128. In 2001, the Republic issued a seven-year development plan ("Plan for Economic and Social Development of the Nation 2001-2007") that prioritized improvement in agricultural productivity to meet domestic demand for food.<sup>10</sup>
129. On 2002, Venezuela adopted the Law of Expropriation for Reasons of Public Use or Social Interest ("LECUPS") which regulates the forcible acquisition of rights and properties belonging to private persons in Venezuela.<sup>11</sup>
130. On April 2003, Venezuela launched the so-called Misión Mercal, which established a State-run company known as Mercados de Alimentos, C.A. (Mercal), whose objective was to create warehouses and supermarkets with low-cost staple foods and products.<sup>12</sup>

---

<sup>8</sup> Claimants' Memorial, ¶ 20.

<sup>9</sup> Machaen I WS, ¶ 30; Gómez I WS, ¶ 12;

<sup>10</sup> Presidency of the Bolivarian Republic of Venezuela, Plan for Economic and Social Development of the Nation 2001-2007, September 2001, R-50 ¶ 1.1.3.

<sup>11</sup> Law on Expropriation for Reasons of Public or Social Interest published in Official Gazette No. 37,475 dated July 1, 2002, C-6.

<sup>12</sup> Ministry of Popular Power for Food, Mercal Historical Review, R-47.

131. In late 2004, Venezuela established the Ministry of Popular Power for Food<sup>13</sup> to ensure the population's adequate access to food by promoting policies and regulations relating to food production, storage, and transport.<sup>14</sup>
132. In 2008, Venezuela passed the Organic Law of Agro-Food Security and Sovereignty, in order to ensure that its policy objectives were backed by a robust legal framework.<sup>15</sup>
133. Finally, in 2010, Venezuela enacted the Law for the Defence of People in the Access to Goods and Services (creating the INDEPABIS).<sup>16</sup>

#### The Creation of CADIVI

134. In 2003, Venezuela adopted a currency exchange control regime in which the Venezuelan Central Bank fixed foreign exchange rates and the newly created *Comisión de Administración de Divisas* ("CADIVI")<sup>17</sup> would grant approvals for individuals or companies to complete foreign currency transactions.<sup>18</sup> In addition, CADIVI is tasked with authorizing, *inter alia*, the repatriation of international investment capital, the remittal of international investment profits, earnings, and dividends, and the compensation of international investors for the expropriation of international investment dividends.<sup>19</sup>
135. Consequently, a company that wishes to buy raw materials abroad, pay dividends to its shareholders or make any other transaction that requires the conversion of Bolivars into US Dollars must obtain the approval of CADIVI.<sup>20</sup>

---

<sup>13</sup> Ministry of Popular Power for Food, Report and Accounting 2007, R-56, p. 3.

<sup>14</sup> Ministry of Popular Power for Food, Mission and Vision, R-48.

<sup>15</sup> Decree Having the Force and Rank of Organic Law of Agro-Food Security and Sovereignty dated May 14, 2008, published in Special Official Gazette No. 5,889 dated July 31, 2008, RLA-88.

<sup>16</sup> Law for the Defense of People in the Access to Goods and Services dated January 21, 2010, published in Official Gazette No. 39,358 dated February 1, 2010, RLA-89.

<sup>17</sup> Decree No. 2,330 dated March 6, 2003, published in Official Gazette No. 37,644 dated March 6, 2003, RLA-84.

<sup>18</sup> Providencia Cambiaria No. 56 dated August 18, 2004, published in Official Gazette No. 38,006 dated August 23, 2004, RLA-85.

<sup>19</sup> *Ibid.*

<sup>20</sup> Claimants' Memorial, ¶ 104; *See, for example*, letter from the Respondent to OIdV, dated February 7, 2011, C-76.

136. In 2008 and 2009, the Claimants made a request to CADIVI for authorization to acquire foreign currency for distribution of the dividends declared in May 2008, November 2008 and June 2009.<sup>21</sup> On September 8, 2011, CADIVI denied the three requests, concluding that the dividends referred to in the request had already been paid to the shareholders.<sup>22</sup>

## **B. The Expropriation**

### **(1) The Expropriation Decree**

137. On the evening of October 25, 2010, President Hugo Chavez, made a television broadcast announcing the expropriation of Favianca and OIdV in which he stated:

The expropriation of this glass company is ready, how is it called? Owens-Illinois! Be it expropriated. [Vice-President] Elías [Jaua] proceed. Owens-Illinois, a company of North American capital that has been here for years, years exploiting its workers, destroying the environment there, in... there, in ... in Trujillo. Go see the hills that they have destroyed. And they have taken the money of Venezuelans. Carry out an environment study, [Environmental Minister] Hitcher; all environmental damages. So, proceed, Vice-President. And there is another list there, right? Leave it there for today, for today leave it there. Owens-Illinois, be it expropriated. In the meantime, the bourgeois can keep laughing; keep laughing.<sup>23</sup>

138. On October 26, 2010, Venezuela promulgated Presidential Decree 7.751 (the “Expropriation Decree”), which was the formal instrument to implement President Chavez’s announcement of October 25, 2010.<sup>24</sup> The Expropriation Decree became effective on that same date.

139. The Expropriation Decree read, in relevant part, as follows:

---

<sup>21</sup> Claimants’ Reply, ¶ 337 (a); *See* OIdV CADIVI application No. 7973822 dated May 23, 2008, NAV-112; OIdV CADIVI application No.11414277 dated July 16, 2009, NAV-113; FAVIANCA CADIVI application No. 11575749 dated August 5, 2009, NAV-114.

<sup>22</sup> Request for Arbitration in *OIEG v. Venezuela*, dated 2 September 2011, C-167; CADIVI Decision to OIdV’s application No. 7973822 dated September 8, 2011, R-32; CADIVI Decision to OIdV’s application No. 11414277 dated September 8, 2011, R-33; CADIVI Decision to FAVIANCA’s application No. 11575749 dated September 8, 2011, R-34.

<sup>23</sup> Video of President Chavez’s expropriation announcement on October 25, 2010, C-29;

<sup>24</sup> Claimants’ Memorial, ¶ 62; Expropriation Decree, C-32.

The compulsory acquisition of the movable and immovable property and improvements allegedly owned by the company OWENS ILLINOIS DE VENEZUELA, C.A. that can be used for the production, processing and distribution of glass containers at the aforesaid company and which are essential for the performance of the work “STRENGTHENING OF THE INDUSTRIAL CAPACITY OF THE PUBLIC SECTOR IN THE MANUFACTURE OF GLASS CONTAINERS FOR THE VENEZUELAN PEOPLE,” aimed at carrying out the industrial activity involving the production and distribution of glass containers, as well as for the promotion of endogenous development and job creation, as specified below:

- A) Immovable property, consisting of:
- OWENS ILLINOIS DE VENEZUELA, C.A. Plant, located at Carretera National Guaraca camino vecinal Las Garcitas, in front of the Centro Comercial Las Garcitas, Los Guayos, Carabobo State; and,
  - Fabrica de Vidrios los Andes C.A. (FAVIANCA) Plant, also known as the OWENS ILLINOIS PLANTA VALERA, located in the Carmen Sanchez de Jelambi Industrial Park in the Valera Municipality of the State of Trujillo.
- B) Movable property, such as machinery, equipment and materials forming part or kept within the immovable property identified above and that are necessary for the implementation of the work ‘STRENGTHENING OF THE INDUSTRIAL CAPACITY OF THE PUBLIC SECTOR IN THE MANUFACTURE OF GLASS CONTAINERS FOR THE VENEZUELAN PEOPLE.’
- C) The means of transportation used in the processes performed by the company OWENS ILLINOIS DE VENEZUELA that are necessary to perform the work.
- D) Any other tangible goods that form part of the company OWENS ILLINOIS DE VENEZUELA C.A and that are necessary to perform the work ‘STRENGTHENING OF THE INDUSTRIAL CAPACITY OF THE PUBLIC SECTOR IN THE MANUFACTURE OF GLASS CONTAINERS FOR THE VENEZUELAN PEOPLE.’”<sup>25</sup>

140. On October 26, 2010, following President Chavez’s announcement of the expropriation, Venezuela sent its National Guard to the Plants, where it took control of the main entrance gate to each of the Plants, secured the premises and seized control over all movements in and out of the Plants. A few hours later, the workers arrived at the Plants and began

---

<sup>25</sup> Expropriation Decree, C-32, Art. 1.



protesting against the expropriation outside the facilities. The National Guard remained at the Plants for several weeks.<sup>26</sup>

141. On October 27, 2010, Minister Menendez of MINCIT, joined by Deputy Minister Yuri Pimentel, met with OIdV's management in Caracas<sup>27</sup> in order to make a first attempt of contact following the announcement of the measure:

The Minister also explained how the Ministry wished to proceed from that point forward. He did not intend for the Ministry to take over the management of the Plants in an abrupt and immediate manner. Rather, while the Ministry progressed the legal proceedings necessary to secure the management and, eventually, the compulsory purchase of the Plant's assets, OIdV and its personnel would continue operating the Plants as usual, whereas the Ministry would limit itself to supervising OIdV's management activities, without interfering with them but, insofar as necessary, offering OIdV any support requested by its employees. To this end, the next day the Ministry would appoint supervisory bodies tasked with organizing the transition of the management of the Plants.<sup>28</sup>

142. During these exchanges, the Minister stated that "any action taken with the intention of paralyzing the Plants' operativity would be considered an act of sabotage."<sup>29</sup>
143. Further to this meeting. Minister Menendez, joined by Deputy Minister Yuri Pimentel, visited the Plants on October 28, 2010.<sup>30</sup>
144. Following this, a transition period began, initially led by Deputy Minister Pimentel, who assumed responsibility on a *de facto* basis until January 2011 when responsibility was taken over by Mr. Alejandro Sarmiento.<sup>31</sup>

---

<sup>26</sup> Claimants' Memorial, ¶¶ 66-67; Video clip of "*Trabajadores de Owens Illinois rechazan expropiación de la empresa*", dated 27 October 2010, C-43; Transcript of Video clip of "*Trabajadores de Owens Illinois rechazan expropiación de la empresa*", dated October 27, 2010, C-44; Machaen I WS, ¶¶ 42, 51-52. Gómez I WS, ¶¶ 23-24.

<sup>27</sup> *Menéndez informa sobre primera reunión entre el Gobierno y Owens*, Video Clip, October 27, 2010, R-115.

<sup>28</sup> Pimentel I WS, ¶ 31.

<sup>29</sup> Pimentel I WS, ¶ 36; Machaen I WS ¶56.

<sup>30</sup> *Gobierno Revolucionario se reúne con trabajadores de Owens Illinois*, Video Clip, October 28, 2010, R-116; *Inician mesas de trabajo para nacionalizar Owens Illinois*, Video Clip, October 28, 2010, R-117.

<sup>31</sup> Pimentel I WS, ¶ 59; Sarmiento I WS, ¶ 5. *See also Alexander Sarmiento asume riendas de Owens Illinois*, La Calle, January 26, 2011, R-89.

145. The first objective was for the Plants to continue operating normally; Venezuela therefore decided that OIdV and Favianca’s workers should continue to work at the facilities. The second objective was for all of the knowledge and experience in managing and operating the Plants to be transmitted to a new management team. To do this, the Respondent implemented what was termed “Operation Mirror” in the Plants, which consisted of forming a management team comprised of five members of the work force, distinguishing the areas of priority and identifying certain essential profiles. Each of these individuals was required to shadow the corresponding OIdV manager in order to acquire the necessary know-how for managing the Plants autonomously.<sup>32</sup>

## **(2) Measures taken by Venezuela following the Expropriation Decree**

### **a. The INDEPABIS Audits**

146. On October 27 and 28, 2010, the INDEPABIS conducted an audit of Favianca and OIdV respectively, for “preventative measure[s] for temporary occupancy” and constituted interim administrative boards for OIdV and Favianca in order to oversee their “operability, administration, and benefiting.”<sup>33</sup>

### **b. The INPSASEL Review and Fine**

147. In November 2010, Venezuela deployed INPSASEL, its occupational health and safety agency, to the Los Guayos plant to conduct a review of historic occupational health and safety compliance by OIdV.<sup>34</sup> On August 25, 2011, INPSASEL issued a report proposing sanctions and on August 30, 2011 initiated a sanctions proceeding against OIdV due to the alleged commission of five violations of the Organic Law on Prevention, Working Conditions and the Work Environment (“LOPCYMAT”).<sup>35</sup>

---

<sup>32</sup> The priority areas selected were: logistics, sales and marketing, human resources, finance, and plant management. Sarmiento I WS, ¶ 21.

<sup>33</sup> Acta Indepabis (Valera plant), dated October 27, 2010, C-46; Acta Indepabis (Valera plant), dated October 28, 2010, C-52. Acta Indepabis (Los Guayos plant), dated October 29, 2010, C-53.

<sup>34</sup> INPSASEL Records of November 22, 23 and 29 and December 2, 2010, C-64.

<sup>35</sup> INPSASEL Commencement of Proceedings of August 30, 2011, C-97; INPSASEL Notification to OIdV of August 30, 2011, C-98.

148. OIdV responded on September 16, 2011, denying any accusation and requesting that the proposed fine be annulled.<sup>36</sup>
149. On February 28, 2012, INPSASEL issued an administrative decision indicating that OIdV had not complied with certain provisions of the LOPCYMAT, and imposing a fine of VEB 10,988,550 for such violation.<sup>37</sup>

**c. The Provisional Remedy granted by the First Administrative Court**

150. On November 18, 2010, the Office of the Attorney General filed an application with the First Administrative Court for a provisional remedy consisting of the occupation, possession and use of the movable and immovable properties and improvements presumably owned by OIdV and Favianca.<sup>38</sup>
151. On 20 December 2010, the First Administrative Court granted the Attorney General's *ex parte* application and ordered the provisional remedy in favour of Venezuela for the occupation, possession and use of these properties.<sup>39</sup>

**d. Visits to the Plants by Third Parties**

152. In November 2010, Venezuela invited a delegation from a Uruguayan company called Envidrio to visit the Plants and inspect the machinery, equipment and processes. A second visit by this same company was arranged in January 2011. The Claimants objected to both visits out of their concern to protect the proprietary information at the Plants.<sup>40</sup>
153. Following this visit, Envidrio produced a preliminary report on the condition of the machinery and equipment at the Plants.<sup>41</sup>

---

<sup>36</sup> Letter from OIdV to INPSASEL on September 16, 2011, C-99.

<sup>37</sup> INPSASEL Administrative Decision dated February 28, 2012, p. 21, C-106.

<sup>38</sup> Judicial Decision of the First Court for Administrative-Contentious Matters of the Metropolitan Area of Caracas dated December 20, 2010, C-67.

<sup>39</sup> *Ibid.*

<sup>40</sup> *See Machaen I WS*, ¶ 76.

<sup>41</sup> Preliminary Envidrio Report, R-30.

**e. The MINCIT Resolution**

154. On March 15, 2011, as a result of the decision of the First Administrative Court and Article 8 of the Expropriation Decree, MINCIT issued a Resolution to authorize the creation of an *ad hoc* management board to replace the interim boards and to manage “the companies OWENS ILLINOIS DE VENEZUELA, C.A., Plant OWENS ILLINOIS DE VENEZUELA, C.A. and FABRICA DE VIDRIOS LOS ANDES, C.A. (FAVINCA) [sic]” with Mr. Alexander Sarmiento as Chairman of this board.<sup>42</sup>
155. On March 16 and 25, 2011,<sup>43</sup> respectively, the Enforcement Courts for the Los Guayos and Valera municipalities enforced the provisional remedy authorised by the First Administrative Court for the occupation, possession and use of the Claimants’ assets; installed the *ad hoc* Management Board; and ordered that the Claimants’ bank accounts could only be used with the express authorization of the *ad hoc* Management Board. At the request of Mr. Sarmiento, the Enforcement Courts granted two consecutive 30-day extensions for each plant.<sup>44</sup>

**f. The Creation of Venvidrio**

156. On April 5, 2011, President Chavez promulgated Presidential Decree 8.134 in which he established a “State Company [...] by the name of VENEZOLANA DEL VIDRIO, C.A.” (“Venvidrio”) to take over management from the *ad hoc* administrative board in order to produce, manufacture and commercialize glass containers through the Businesses.<sup>45</sup> Mr. Sarmiento was appointed President of Venvidrio.<sup>46</sup>

---

<sup>42</sup> See MINCIT Resolution No. 34 dated March 11, 2011, published in Official Gazette No. 39,634 dated March 15, 2011, Articles 1 and 2, C- 79; Sarmiento I WS, ¶ 23.

<sup>43</sup> Judicial Order of the Tribunal Tercero Ejecutor de Medidas de los Municipios Valencia, Libertador, Los Guayos, Naguanagua, San Diego y Carlos Arvelo de la Circunscripción Judicial del Estado Carabobo, dated March 16, 2011, C-81; Judicial Order of the Juzgado Ejecutor de Medidas de los Municipios Valera, Urdaneta, Escuque, San Rafael de Carvajal y Motatán de la Circunscripción Judicial del Estado Trujillo, dated March 25, 2011, C-83.

<sup>44</sup> *Id.*, p.3.

<sup>45</sup> Venvidrio Decree, Presidential Decree 8.134, Official Gazette Number 39.649, dated 5 April 2011, C-84.

<sup>46</sup> Letter from Owens Illinois Inc. to the Respondent, dated 19 May 2011, C-91.

157. On April 30, 2011, Venvidrio directly took over management of the Plants. At that time, the formation of the new boards of directors had been completed and the process of employer substitution from OIdV to Venvidrio had been finalised.<sup>47</sup>
158. Once Venvidrio had been formed and a bank account had been opened in its name, the Respondent requested that the Claimants transfer all available cash funds into Venvidrio's account. After informing the Respondent about the bank accounts that were held in their name and the balances available at the time in those accounts, the Claimants forwarded the cash they held in their bank accounts to Venvidrio's account.<sup>48</sup>

### **(3) The Expropriation Procedure and the Compensation Negotiations**

#### **a. The Amicable Settlement Phase**

159. In late 2010, Venezuela's Attorney General sought to commence the Amicable Settlement Phase provided for in the LECUPS. On December 9, 2010, the Claimants wrote to Minister Menendez to express their refusal to participate in any proceeding under the LECUPS,<sup>49</sup> and that fair compensation should be determined based on the provisions of the BIT.<sup>50</sup>
160. On March 16 and 25, 2011, the Claimants stated before the Enforcement Courts of Los Guayos and Valera, respectively, that they were not going to participate in any court or administrative proceeding initiated by Venezuela in relation to this matter.<sup>51</sup>
161. On March 14, 2011, in view of the fact that the Claimants were not going to participate in the amicable Settlement Phase, the Office of the Attorney General initiated a legal procedure

---

<sup>47</sup> Pimentel I WS, ¶¶ 58 and 67; Sarmiento I WS, ¶ 27.

<sup>48</sup> Letter from OIdV to the Respondent dated May 13, 2011, C-90; Letter from OIdV to the Respondent dated January 25, 2012, C-104.

<sup>49</sup> Letter from OIdV to the Respondent dated December 9, 2010, R-20; Cabrera ER, ¶ 194.

<sup>50</sup> Claimants' Reply, ¶ 258; Letter from OIdV to the Respondent dated December 9, 2010, R-20.

<sup>51</sup> Judicial Order of the Tribunal Tercero Ejecutor de Medidas de los Municipios Valencia, Libertador, Los Guayos, Naguanagua, San Diego y Carlos Arvelo de la Circunscripción Judicial del Estado Carabobo dated March 16, 2011, C-81; Judicial Order of the Juzgado Ejecutor de Medidas de los Municipios Valera, Urdaneta, Escuque, San Rafael de Carvajal y Motatán de la Circunscripción Judicial del Estado Trujillo dated March 25, 2011, C-83.

under the LECUPS, filing an expropriation petition with the First and Second Administrative Courts.<sup>52</sup>

162. On April 5, 2011, the Trial Court of the Second Court for Administrative-Contentious Matters issued a decision in which it granted the request for expropriation made by the Attorney General and ordered that notice be served to the Claimants so that the respective judicial inspections could be conducted.<sup>53</sup>
163. The expropriation proceeding was subsequently joined with the case involving the provisional remedy that had been authorised by the First Administrative Court (see ¶ 150 above).
164. Currently, the proceedings before the Second Administrative Court are pending.<sup>54</sup>

**b. The Negotiations for Compensation**

165. From January to July 2011, the Claimants and Venezuela held four meetings in order to negotiate the compensation due for the Plants.
166. The first two meetings were held, respectively, on January 20 and 24, 2011. In the course of these meetings, the Parties agreed on a roadmap for the negotiations.<sup>55</sup>
167. At the third meeting on March 17, 2011, the Claimants presented an appraisal of slightly over USD 1 billion for 100% of the Claimants' Businesses.<sup>56</sup> On July 11, 2011, at the fourth and last meeting, Venezuela made a counter-offer of USD 100-120 million.<sup>57</sup> The meeting concluded without any agreement being reached about the amount of compensation payable.<sup>58</sup>

---

<sup>52</sup> Respondent's particulars of claim in LECUPS proceedings, dated March 14, 2011, R-31.

<sup>53</sup> See Hernández I ER, Exhibit 114.

<sup>54</sup> Hernández I ER, ¶ 46.

<sup>55</sup> Summary of meeting, dated January 20, 2011, C-71; Summary of meeting, dated January 24, 2011, C-72.

<sup>56</sup> Summary of meeting, dated March 17, 2011, C-82, p. 1.

<sup>57</sup> Summary of meeting, dated July 11, 2011, C-96.

<sup>58</sup> Claimants' Memorial, ¶ 141.

### C. Impact of the Parallel Arbitration in this case

168. The Respondent notes that OIEG has obtained an award in the Parallel Arbitration that covered all of its shareholding in the Claimants, and which amount to 72.983% of the damages sought by the Claimants in this case. Accordingly, the Respondent submits, the Tribunal should consider the outcome of the OIEG Award to avoid double recovery arising from the Parallel Arbitration and the present proceeding, as allowing the Claimants to do so would constitute an abuse of process.<sup>59</sup>
169. The Respondent further argues that the remaining 27.017% of the damages sought in this case would also fall outside the Tribunal's jurisdiction because the ultimate beneficiaries of those shares were not foreign nationals and thus would not meet the requirements of Article 25(2)(b) of the ICSID Convention. On September 21, 2015, pursuant to ICSID Arbitration Rule 41(1), the Tribunal decided to dismiss as untimely this jurisdictional objection.<sup>60</sup>
170. The Respondent also notes that OIEG has not sought any remedy under the ICSID Convention against the OIEG Award and is seeking to enforce it before the United States Courts. Accordingly, the Respondent concludes, OIEG's consent to the decision made by the tribunal in the Parallel Arbitration would preclude the Claimants from seeking double recovery by making the same claims in this arbitration.<sup>61</sup>
171. In its Memorial on the Merits, the Claimants stated "[t]o the extent that OIEG recovers compensation in that separate arbitration, whether by way of settlement or satisfaction of an award or otherwise, such recoveries shall be set off against the compensation payable to the Claimants in this proceeding."<sup>62</sup> According to the Claimants, since Venezuela has failed to pay any compensation to OIEG and has initiated annulment proceedings against the award

---

<sup>59</sup> Respondent's Comments on the Relevance of the Award issued in the Separate Arbitration, dated October 5, 2015.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> Claimants' Memorial, ¶ 368; *See also* Claimants' Response, n.118.

rendered in the Parallel Arbitration, at the moment, there is no need to readjust their claim in this arbitration.<sup>63</sup>

172. According to the Claimants, there is a risk that the Claimants could be deprived of redress and denied justice if the OIEG Award was annulled. Moreover, the OIEG Award did not cover 100% of the Claimants' businesses expropriated by Venezuela. On this basis, the Claimants state that the Tribunal should exercise its jurisdiction and address any concern of potential double-recovery by specifying in its award "that the Respondent shall pay compensation to the Claimants equal to: (a) 27.017% of the Tribunal's valuation of the Claimants' investment; and (b) 72.983% of the Tribunal's valuation minus any amounts collected by OIEG pursuant to the *OIEG* Award." The Claimants add that, in its Award, the Tribunal could also add a provision stating that "if the Claimants collect on an award issued by this Tribunal before OIEG collects compensation pursuant to the *OIEG* Award, any amount to be paid to OIEG pursuant to the *OIEG* Award must be reduced by any collections by the Claimants that are above 27.017% of the Tribunal's valuation in the present case."<sup>64</sup>

#### **D. Venezuela's Denunciation of the BIT and the ICSID Convention**

173. On April 30, 2008, the Respondent provided to the Netherlands a notice of termination of the BIT.<sup>65</sup>
174. In accordance with the terms of Article 14(2) of the BIT, the termination took effect six months from the date of the notice. The BIT therefore terminated as of November 1, 2008, subject to Article 14(3) (see below ¶ 184).
175. On January 8, 2012, President Hugo Chávez Frías announced that Venezuela would denounce the ICSID Convention.<sup>66</sup>

---

<sup>63</sup> Claimants' Reply to the Respondent's Comments on the Relevance of the Award issued in the Separate Arbitration, dated November 16, 2015.

<sup>64</sup> Claimants' Post-Hearing Brief, ¶ 18.

<sup>65</sup> Respondent's Notice of Termination, (2008) Treaties Bulletin of the Kingdom of the Netherlands, No. 124, published on 26 June 2008, CLA-97.

<sup>66</sup> See Video from Aló Presidente Program No. 376 dated January 8, 2012, R-1.



176. On January 24, 2012, and pursuant to Art. 71 of the Convention, the Republic formally and irrevocably denounced the Convention through a written notice addressed to the depositary, the World Bank.<sup>67</sup> In this notice, Venezuela stated that it was denouncing the ICSID Convention because its provisions were contrary to Article 151 of the 1999 Constitution of the Bolivarian Republic of Venezuela.<sup>68</sup>

177. In its letter of denunciation, Venezuela stated:

Beyond this legal consideration, modern Venezuelan society does not conceive constraints on its ability to make decisions about the great strategic guidelines along which its economic and social life should develop.

Accordingly, the government of the Bolivarian Republic of Venezuela has implemented policies to reaffirm national sovereignty, especially concerning property of strategic assets, always offering just compensation to the affected individuals and companies.<sup>69</sup>

## V. JURISDICTION

178. The Respondent objects to the jurisdiction of the Tribunal *ratione voluntatis* alleging that there was no mutual consent by the Parties to submit the dispute to ICSID before Venezuela's denunciation of the ICSID Convention on January 24, 2012, and that Article 9 of the BIT was rendered ineffective by Venezuela's denunciation of the ICSID Convention and therefore does not provide an alternative basis for the jurisdiction of the Tribunal. In addition, the Respondent objects to the jurisdiction of the Tribunal *ratione temporis* over the investments made by the Claimants after the termination of the BIT.

---

<sup>67</sup> Letter from the Ministry of Popular Power for Foreign Relations of the Republic, Mr. Nicolás Maduro Moros, to the President of the World Bank, Mr. Robert Zoellick, dated January 24, 2012, R-2; "Venezuela Submits a Notice under Article 71 of the ICSID Convention", ICSID News Release, 26 January 2012, C-105.

<sup>68</sup> Constitution of the Bolivarian Republic of Venezuela, dated December 20, 1999, published in the Supplemental Official Gazette No. 5.453, dated March 24, 2000, RLA-1, whose Art. 151 states: "In the public interest contracts, unless inapplicable by reason of the nature of such contracts, a clause shall be deemed included even if not expressed, whereby any doubts and controversies which may arise concerning such contracts and which cannot be resolved amicably by the contracting parties, shall be decided by the competent courts of the Republic, in accordance with its laws and shall not on any grounds or for any reason give rise to foreign claims."

<sup>69</sup> Letter from the Ministry of Popular Power for Foreign Relations of the Republic, Mr. Nicolás Maduro Moros, to the President of the World Bank, Mr. Robert Zoellick, dated January 24, 2012, R-2.

179. The Claimants, in turn, contend that the Tribunal has jurisdiction over the dispute because, pursuant to Article 71 of the ICSID Convention, Venezuela's denunciation of the ICSID Convention only took effect six months after receipt of the notice of denunciation. The Claimants further state that the denunciation of the ICSID Convention cannot limit or qualify the "unconditional" consent to arbitrate contained in a BIT and that, accordingly, Venezuela's consent to ICSID Arbitration in the BIT subsisted at the time of Venezuela's denunciation of the ICSID Convention. Furthermore, as to the jurisdictional objection *ratione temporis*, the Claimants investments pre-date the BIT's termination date and, by operation of Article 14(3) of the BIT, are covered by the protections afforded by the BIT.

#### **A. The Relevant Provisions of the ICSID Convention and the BIT**

180. Article 71 of the ICSID Convention provides:

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

181. Article 72 of the ICSID Convention states:

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

182. Paragraphs (1) and (4) of Article 9 of the BIT provide:

1. Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965.

[...]

4. Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in Paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.

183. Article 14(2) of the BIT reads:

Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, each Contracting Party reserving the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.

184. Article 14(3) of the BIT further provides:

In respect of investments made before the date of the termination of the present Agreement [the provisions of the BIT] shall continue to be effective for a further period of fifteen years from that date.

## **B. The Parties' Positions**

### **(1) The Respondent's Position**

#### **a. The Tribunal's Jurisdiction under the ICSID Convention**

185. According to the Respondent, it is clear from Article 25 (1) of the ICSID Convention that the jurisdiction of ICSID depends upon the existence of mutual consent by the Host State and the investor.<sup>70</sup> By operation of Article 72 of the ICSID Convention, for the rights and obligations of the parties arising out of consent to the ICSID jurisdiction to survive, this mutual consent is to be established prior to the denunciation of the ICSID Convention by the Host state.<sup>71</sup>

186. In this case, the Respondent had already withdrawn from the ICSID Convention when the Claimants consented to the jurisdiction of ICSID on July 20, 2012.<sup>72</sup> Accordingly, the Tribunal lacks jurisdiction over the present dispute because the Parties failed to give mutual

---

<sup>70</sup> Respondent's Preliminary Objections, ¶ 12

<sup>71</sup> Respondent's Preliminary Objections, ¶¶ 19 and 31-33.

<sup>72</sup> Respondent's Preliminary Objections, ¶¶ 5, 21

consent to ICSID jurisdiction prior to Venezuela's denunciation of the ICSID Convention on January 24, 2012.<sup>73</sup>

Scope of Application of Article 71 and 72 of the ICSID Convention

187. The Respondent explains that there exist under the ICSID Convention certain rights and obligations that arise out of the consent of the parties and other rights and obligations that do not arise out of the same, but which nevertheless bind the Contracting States to the Convention.<sup>74</sup>
188. According to the Respondent, the rights and obligations arising out of mutual consent to the parties are: "The right to initiate arbitration (Art. 36); The right to participate in the constitution of the arbitral tribunal (Art. 37); The right to participate in the arbitral proceeding (Arts. 41 and 44); The rights to access the post-award mechanisms of Arts. 49(2) (requiring the Tribunal to rectify errors, or to try a question omitted by the Tribunal); 50 (to request clarification of the award); 51 (to request revision of the award due to the discovery of a fact that would decisively influence the award); and 52 (to request the annulment of an award on certain established grounds); The obligation to abide by and comply with the award (Art. 53); and The obligation to not pursue other remedies, such as diplomatic protection (Arts. 26, 27)."<sup>75</sup>
189. These would be the rights and obligations which Article 72 safeguards from the effects of the denunciation of the ICSID Convention. Article 72 does so by providing, in essence, that the denunciation of the Convention by a Contracting State does not affect the said rights when both parties have given their consent to the jurisdiction of ICSID before the denunciation.<sup>76</sup>
190. On the contrary, Article 71 of the ICSID Convention regulates the effects of the denunciation

---

<sup>73</sup> Respondent's Preliminary Objections, ¶ 34.

<sup>74</sup> Respondent's Reply, ¶ 12.

<sup>75</sup> Respondent's Preliminary Objections, ¶ 24.

<sup>76</sup> Respondent's Preliminary Objections, ¶ 31; Respondent's Reply, ¶ 6.

on those other rights and obligations not arising out of consent of the parties.<sup>77</sup>

191. Those rights and obligations are: (i) the right of the Contracting States to participate in the ICSID Administrative Council (Articles 4 to 7); (ii) the right to nominate individuals to the Panel of Conciliators and Arbitrators (Art. 14); and (iii) the obligation to respect the immunities and privileges contemplated in the Convention (Articles 18-24).<sup>78</sup>
192. The fact that Articles 71 and 72 have different critical dates further evidences that these Articles have different scopes of application and that there can be no overlap between the two provisions. According to the Respondent, “Article 71 produces its effects six months *after* the date of receipt of the notice of denunciation whereas Article 72 applies to consent performed *until* the date of receipt of the notice of denunciation.”<sup>79</sup>
193. In support of this interpretation of Articles 71 and 72, the Respondent cites Prof. Schreuer,<sup>80</sup> who describes the relationship between Articles 71 and 72 as follows:

Article 71 of the ICSID Convention provides that the denunciation of the Convention by a Contracting State takes effect six months after receipt of the notice of denunciation. Therefore, for the period of six months the rights and

---

<sup>77</sup> Respondent’s Preliminary Objections, ¶ 25; Respondent’s Reply, ¶ 12.

<sup>78</sup> Respondent’s Reply, ¶ 12.

<sup>79</sup> Respondent’s Reply, ¶ 14 (emphasis in the original).

<sup>80</sup> Respondent’s Reply, ¶ 15. The Respondent notes that Prof. Schreuer’s view is shared by other scholars, and cites to this effect the following articles: Barrie Sanders, *Venezuela: the consequences of ICSID Denunciation*, in 7 GAR 2, at 4, RLA-104: “[W]hen read in the context of the ICSID Convention as a whole, the more persuasive view is that the phrase ‘consent to the jurisdiction of the Centre’ in article 72 refers to the reciprocal consent of the investor and the host state. Several provisions of the ICSID Convention point in this direction. [I]t would be a strange result for a host state to be permitted to withdraw its unilateral consent under article 25(1) prior to such consent being perfected by an investor, but to be bound by that same unilateral consent under article 72 upon denouncing the convention. In addition, article 72 only preserves ‘the rights or obligations under this Convention [...] arising out of consent’. Whereas several provisions of the ICSID Convention are triggered by the perfected consent of the investor and the host State...none of [them is] triggered by a mere unilateral consent on the part of the host state. With this in mind, construing the phrase ‘consent to the jurisdiction of the Centre’ as merely referring to the unilateral consent of a host state would render article 72 meaningless [...]” Julien Fouret for whom the interpretation whereby Article 72 would require only the unilateral consent of the host State “is rather a minority view” (Julien Fouret, *Denunciation of the Washington Convention and Non- Contractual Investment Arbitration: “Manufacturing Consent” to ICSID Arbitration?*, in 25 Journal Of International Arbitration 1, (Kluwer Law International 2008), at 74-75, RLA-11) and Castro de Figueiredo, Roberto, *Euro Telecom v. Bolivia: the denunciation of the ICSID Convention and ICSID Arbitration under BITs*, in 6 Transnational Dispute Management 1, (March 2009) at 14:unilateral consent is an offer to arbitrate which “does not create [ICSID] jurisdiction unless the investor accepts [it]”, RLA-102.

obligations arising from the Convention continue to apply to the denouncing state, in principle.

Article 72 contains a different rule on the effective date of the denunciation with respect to consent. If consent was given before the notice of denunciation rights or obligations arising therefrom shall remain unaffected. Therefore, Article 72 modifies the general rule of Article 71 in two ways:

a) The critical date for the denunciation's effect on consent is not the general rule on the taking of effect of the notice of denunciation (6 months after its receipt) but rather the date of its receipt.

b) Rights or obligations arising from consent to jurisdiction remain unaffected by the denunciation even beyond the date the denunciation takes effect i.e. beyond the six-month period.<sup>81</sup>

194. Accordingly, the Respondent continues, since the six-month period established by Article 71 does not extend to the rights or obligations arising out of Venezuela's consent to the jurisdiction of the Centre, this Article cannot be relied upon by investors to extend the denouncing party's consent to ICSID jurisdiction beyond the denunciation of the Convention.<sup>82</sup>

195. Furthermore, under the Claimants' interpretation, both Article 71 and 72 would have the same purpose *i.e.*, to establish the survival of the State's consent to the jurisdiction of ICSID during six months after denunciation of the Convention by the State. This interpretation would be "on its face contrary to basic principles of Treaty interpretation as it denies *in fine* any effectiveness to Article 72 of the ICSID Convention."<sup>83</sup>

#### The ordinary meaning and context of Article 72

196. Venezuela submits that the wording of Article 72 supports its interpretation of this Article, and that the phrase "*given by one of them*" in Article 72 can only refer to the parties that can

---

<sup>81</sup> Christoph Schreuer, Denunciation of the ICSID Convention and Consent to Arbitration, in *The Backlash Against Investment Arbitration* (Michael Waibel, Asha Kaushal, eds., 2010), at 355, RLA-14.

<sup>82</sup> Respondent's Reply, ¶ 16.

<sup>83</sup> Respondent's Reply, ¶ 9 (emphasis in the original)

express their consent to submit to the Centre’s jurisdiction, namely, the Contracting State, its constituent subdivisions or agencies or any national of that State.<sup>84</sup>

197. Accordingly, Venezuela continues, Article 72 deals with the consequences of denouncing the Convention only for the denouncing side: the denouncing state as a host State, its entities, and its own nationals as investors in other Contracting States.<sup>85</sup>
198. On the basis of this provision, a Contracting State is prevented from relying on the denunciation of another Contracting State “as an excuse to escape its obligation to arbitrate against a national of that denouncing State who already gave its consent to arbitration,” and, by the same token, the denouncing State will also “remain bound in the event its offer of ICSID arbitration is accepted by an investor from another Contracting State before the denunciation.”<sup>86</sup>
199. The Respondent further notes the Claimants’ argument that Article 72 does not refer to the parties’ mutual consent because of the absence in the text of this Article of the full expression “mutual consent”, in comparison with the text of Article 25. On the contrary, the Respondent asserts, the principle underlying both Articles is the same: that consent may not be unilaterally withdrawn so long as both parties have already given consent. Article 72 applies the principle of Article 25(1) to the context of denunciation.<sup>87</sup>

#### The Drafting History of Article 72

200. According to Venezuela, the drafting history of Article 72 also supports its interpretation of this provision.
201. The Respondent cites Aron Broches’ opening comment on the discussion about Article 72, in which he stated that Article 72 “was intended to deal with the effects of denunciation of the Convention... on consents to...arbitration...already given.”<sup>88</sup> The Respondent submits

---

<sup>84</sup> Respondent’s Reply, ¶ 26.

<sup>85</sup> *Ibid.*

<sup>86</sup> Respondent’s Reply, ¶ 27.

<sup>87</sup> Respondent’s Reply, ¶ 28.

<sup>88</sup> Respondent’s Reply, ¶ 30 (emphasis in the original).

that the use of the passive voice of the plural “*consents*” in this sentence could only mean that Mr. Broches was referring to the mutual consent of the parties to arbitration.<sup>89</sup>

202. The Respondent also recalls that, when explaining the purpose of Article 72, Mr. Broches stated that “the intention...was to make it clear that if a State had consented to arbitration, *for instance by entering into an arbitration clause with an investor*, the subsequent denunciation of the Convention by that State would not relieve it from its obligation to go to arbitration if a dispute arose.” According to the Respondent, the example given by Mr. Broches in this sentence shows that the intention behind this provision was one where mutual consent is required for Article 72 to apply.<sup>90</sup>
203. The Respondent opposes the Claimants’ argument according to which Article 72 should apply to consent in both an arbitration clause in a contract and to a general offer to arbitrate in a BIT. According to the Respondent, in his comments, “Mr Broches was referring to the only situation he had in mind when discussing Article 72: an arbitration clause where there is *already* mutual consent to arbitrate – not an investment treaty.”<sup>91</sup>
204. The Respondent also cites the following passage from Mr. Broches’ comments:

[T]he consent of the State may be embodied...in an investment protection treaty with another State, which provides that investors meeting certain conditions or falling within certain categories will have the right to submit investment disputes with the host State to the Centre. The consent of the investor may be evidenced by an express statement to that effect made to the host State, or it may be given at the time when the investor institutes proceedings against the host State. It must, however, be remembered that each party’s consent becomes irrevocable only after both parties have given it. Therefore, in the examples last mentioned, the host State could withdraw its consent as long as the investor had not equally consented.<sup>92</sup>

---

<sup>89</sup> *Ibid.*

<sup>90</sup> Respondent’s Reply, ¶ 31 (emphasis in the original).

<sup>91</sup> Respondent’s Reply, ¶ 34 (emphasis in the original).

<sup>92</sup> Respondent’s Reply, ¶ 32 citing Broches, Aron, *The Convention on the Settlement of Investment Disputes between States and Nationals of other States*, in *Recueil des cours — Collected Courses of The Hague Academy of International Law* 136 (1972-II), at 353, RLA-101



205. Venezuela contends that this passage shows that “Mr Broches believed that states could withdraw their consent to arbitration in an investment treaty ‘as long as the investor had not equally consented,’” and that, therefore, “Article 72 only becomes relevant when the investor [has] ‘equally consented’.”<sup>93</sup>

**b. The Tribunal’s Jurisdiction under the BIT**

206. According to the Respondent, as a consequence of the denunciation, Venezuela’s consent to arbitrate in Article 9 of the BIT, which was expressly limited to ICSID arbitration, was withdrawn forthwith.<sup>94</sup>

Principles of Treaty Interpretation

207. The Respondent explains that, in Article 9 of the BIT, the Contracting States agreed to submit to arbitration “*under the Convention.*” Venezuela examines the ordinary meaning of this word and states that “*under*” in Article 9(1) of the BIT means “arbitration ‘as provided for by the rules of’ the ICSID Convention.”<sup>95</sup> Accordingly, the consent of the Republic in Article 9 is expressly subject to and conditioned upon the Convention.<sup>96</sup>

208. Venezuela further argues that the context of the word “*under*” confirms its interpretation. The consent to arbitration expressed in Article 9(4) of the BIT is for the submission of disputes (i) “as referred to in Paragraph 1 of this Article” and (ii) “in accordance with the provisions of this Article.” According to the Respondent, this means that Venezuela’s consent to arbitration “is subject to ‘Paragraph 1’ and ‘the provisions of this article [9]’ and hence to the ICSID Convention.”<sup>97</sup>

209. Moreover, the Respondent notes that “before making a reference to ‘under the [ICSID] Convention,’ paragraph 1 already specifies that disputes are to be submitted to ICSID.”

---

<sup>93</sup> Respondent’s Reply, ¶ 33.

<sup>94</sup> Respondent’s Reply, ¶ 4.

<sup>95</sup> Respondent’s Reply, ¶ 48.

<sup>96</sup> Respondent’s Reply, ¶ 47.

<sup>97</sup> Respondent’s Reply, ¶ 49.

Accordingly, Venezuela continues, “if the reference to ‘under the ICSID Convention’ did not play any limiting role, [...] the wording of paragraph 1 would be redundant.”<sup>98</sup>

210. The Respondent concludes that the Claimants’ interpretation according to which the term “under” would explain the mode in which the “unconditional” consent to arbitration is to be acted upon, *i.e.*, pursuant to the ICSID Convention, deprives the term “under the ICSID Convention” of any real meaning and leads to a result contradictory to the principle of effectiveness.<sup>99</sup>
211. Furthermore, the Respondent argues, a review of other BITs concluded by Venezuela, confirms that the use of the word “under” (instead of “established by” or “created by” in other BITs concluded by Venezuela), shows that “this [was] a “deliberate choice by the Contracting parties - the Netherlands and Venezuela - to ensure their consent would be subject to the provisions of the ICSID Convention.”<sup>100</sup>
212. Venezuela further submits that “when the Republic denounced the ICSID Convention on January 24, 2012, it automatically withdrew its consent to ICSID arbitration under the BIT, and rendered Article 9 of the BIT ineffective. The date of the Republic’s denunciation of the Convention was the last day the Claimants could have accepted the offer to arbitrate in the BIT.”<sup>101</sup>
213. Venezuela concludes that the only effect that the denunciation had on the BIT was that consent to ICSID Arbitration in Article 9 was rendered ineffective. The denunciation had no effect on the other provisions of the BIT which, according to Article 14(3) of the BIT, remain in force until 2023.<sup>102</sup>

---

<sup>98</sup> Respondent’s Reply, ¶ 50.

<sup>99</sup> *Ibid*, citing Claimants’ Reply, ¶ 34.

<sup>100</sup> Respondent’s Reply, ¶ 51.

<sup>101</sup> Respondent’s Reply, ¶ 52.

<sup>102</sup> Respondent’s Reply, ¶ 54.

### Principle of Effectiveness

214. Venezuela argues, in application of the rule of effectiveness or *effet utile*, that the term “unconditional” in Article 9 means that “for as long as the consent is extant, it is unconditional: it is subject to no conditions or qualifications.” Accordingly, an unconditional consent to arbitration may still be withdrawn.<sup>103</sup>
215. On this point, the Respondent recalls that only two of the 28 bilateral investment treaties entered into by Venezuela provide that consent to arbitration is “irrevocable”, and the BIT at hand is not one of them.<sup>104</sup> Venezuela further submits that “[i]n an ICSID-only BIT as this one, the spirit of the BIT [...] is to offer recourse to arbitration as long as each Contracting Party to the BIT is willing to remain part of ICSID.”<sup>105</sup>

### Pacta Sunt Servanda

216. As to the Claimants’ argument that absence of any recourse to ICSID arbitration in this case would amount to a “denial of justice,” the Respondent defends that “arbitration is not the only means to have claims formed pursuant to the substantive protections offered by the BIT heard and tried,” and that “the BIT is part and parcel of the Venezuelan order and the Venezuelan courts have jurisdiction to apply these provisions.”<sup>106</sup>
217. The Respondent further notes that “the consequences of the Compulsory Acquisition of the Plants which are at the core of the Claimants’ case are already before the Venezuelan courts” and “the Claimants have deliberately chosen to ignore these proceedings.” Furthermore, the Respondent adds, the BIT claim arising out of the Compulsory Acquisition of the Plants has already been heard by an ICSID tribunal in the Parallel Arbitration.<sup>107</sup>
218. Venezuela denies that, as the Claimants allege, it “does not intend to perform” Article 9 of the BIT. On the contrary, its position is compatible with the principle of *pacta sunt servanda*

---

<sup>103</sup> Respondent’s Reply, ¶¶ 55-58, citing Yearbook of the International Law Commission (1966) vol. II, p. 219, CLA-118.

<sup>104</sup> Respondent’s Reply, ¶ 56.

<sup>105</sup> Respondent’s Reply, ¶ 61.

<sup>106</sup> Respondent’s Reply, ¶ 66.

<sup>107</sup> *Ibid.*

as Venezuela is “fully committed to meeting all of its obligations under the BIT and the ICSID Convention, provided they exist.”<sup>108</sup>

## **(2) The Claimants’ Position**

### **a. The Tribunal’s Jurisdiction under the ICSID Convention**

219. According to the Claimants, Articles 71 and 72 of the ICSID Convention establish that, at a minimum an ICSID Contracting State’s consent to ICSID arbitration will subsist for six months after a notice of denunciation has been lodged with the World Bank, *i.e.*, until the denunciation takes effect.<sup>109</sup> The Tribunal has jurisdiction to hear the dispute in this case on the basis that at the time the Claimants consented to ICSID jurisdiction on July 20, 2017, the Respondent was still an ICSID Contracting State and its consent to arbitration in the BIT was extant.<sup>110</sup>
220. Furthermore, in their Post Hearing Brief, the Claimants stated the following: “at the Hearing, [...] the Respondent’s witnesses accepted that, in 2011, long before the Respondent’s denunciation of the ICSID Convention, the Claimants had notified the Respondent of their intention to refer the dispute to arbitration under the BIT.” The Claimants submit that “that reference can be understood only as consent to the jurisdiction of ICSID and of this Tribunal, with the result that the Claimants and the Respondent consented to ICSID arbitration prior to the Respondent’s denunciation,”<sup>111</sup> and that “the contemporaneous record bears out the fact that the Claimants had expressed their consent to ICSID arbitration repeatedly over the course of late 2010 and early 2011.”<sup>112</sup>

---

<sup>108</sup> Respondent’s Reply, ¶ 65.

<sup>109</sup> Claimants’ Rejoinder, ¶ 116.

<sup>110</sup> Claimants’ Rejoinder, ¶ 117.

<sup>111</sup> Claimants’ Post-Hearing Brief, ¶ 3 citing Tr. Day 3, 103:10-106:11, and Tr. Day 3, 292:1-5.

<sup>112</sup> Claimants’ Post-Hearing Brief, ¶ 3, citing Letter from OIdV to the Respondent dated November 8, 2010, p. 5, C-55; Letter from OIdV to the Respondent dated November 12, 2010, p. 4, C-58.

## Scope of Application of Article 71 and 72 of the ICSID Convention

221. According to the Claimants, the ordinary meaning of Article 71 is clear: the article explains in simple terms, and without any textual limit, that all consequences of denunciation of the ICSID Convention shall take effect six months after receipt of the notice of denunciation.<sup>113</sup>
222. The Claimants submit that their interpretation of Article 71 “respects the object and purpose of the ICSID Convention by achieving a result that ensures the availability of dispute settlement by arbitration for at least as long as the ICSID Convention is effective vis-à-vis a denouncing State.”<sup>114</sup> This is further confirmed by Article 70 of the VCLT, pursuant to which “explicit language is required in order for a treaty’s denunciation to ‘release’ the denouncing State from obligations that accrued during the life of the treaty.”<sup>115</sup> Accordingly, the Claimants conclude, the denunciation of the ICSID Convention operates to release the denouncing party from the ICSID Convention “only from the end of the six-month waiting period.”<sup>116</sup>
223. The Claimants qualify Prof. Schreuer’s interpretation of Articles 71 and 72 as the “minority opinion”,<sup>117</sup> and submit that the scholarship “leans strongly against the Respondent’s interpretation, and supports the Claimants’ interpretation [of Article 71].”<sup>118</sup> On this point, the Claimants differentiate between those authors who state that investors can consent to and initiate arbitration within the six-month period in Article 71 but not after,<sup>119</sup> and those other

---

<sup>113</sup> Claimants’ Rejoinder, ¶ 126.

<sup>114</sup> Claimants’ Rejoinder, ¶ 129.

<sup>115</sup> Claimants’ Rejoinder, ¶ 130.

<sup>116</sup> Claimants’ Rejoinder, ¶ 131.

<sup>117</sup> Claimants’ Rejoinder, ¶ 134.

<sup>118</sup> Claimants’ Rejoinder, ¶ 135.

<sup>119</sup> Claimants’ Rejoinder, ¶ 136. The Claimants cite, among others, S. Manciaux, “Bolivia’s withdrawal from ICSID” (2007) 4 *Transnational Dispute Management* 5, pp. 1-6, CLA-13 (cited by the Claimants in Claimants’ Memorial, ¶ 178). Manciaux has since reiterated this view in S. Manciaux, “Le Venezuela se Retire du CIRDI” (2012) 1 *Revue de l’Arbitrage* 215, p. 218, CLA-189; S. Ripinsky, “Venezuela’s Withdrawal From ICSID: What It Does and Does Not Achieve”, *Investment Treaty News*, 13 April 2012, p. 1, CLA-190; O. M. Garibaldi, “On the Denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the Limits of the Contract Analogy” in C. Binder *et. al.* (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009), pp. 254 and 259, CLA-191, and M. D. Nolan and F. G. Sourgens, “A Preliminary Comment – The Interplay between State Consent to ICSID Arbitration and Denunciation of the ICSID Convention: The (Possible) Venezuela Case Study” (2007) *Transnational Dispute Management* 1, pp. 34-35, CLA-11.

authors who go further and conclude that if the relevant consent to ICSID arbitration, *e.g.* in the applicable BIT, survives and extends beyond that six-month period, then ICSID jurisdiction will subsist for the full duration of that extended period.<sup>120</sup> Both groups construe Article 71 in a manner which permits investors to perfect consent and to start ICSID arbitration against a Contracting State within the six-month period.<sup>121</sup> The Claimants cite, among others, the *Nicaragua v. United States* case before the ICJ, to submit that international jurisprudence relating to the denunciation of treaties confirms this point.<sup>122</sup>

224. Furthermore, the Claimants continue, Article 72 confirms that this Tribunal has jurisdiction over the dispute when it establishes that the rights and obligations arising out of a State's consent to ICSID arbitration given before the filing of a notice of denunciation of the ICSID Convention by a State are not affected by the filing of a notice of denunciation. According to the Claimants, "it does so, by permitting the instrument containing the consent to determine on its own terms how long the consent will last." In this case, Articles 9 and 14(3) of the BIT determine that the consent to arbitration runs for a number of years after the instrument of consent is terminated, pursuant to the termination provisions in that instrument, irrespective of the status as a party to the ICSID Convention.<sup>123</sup>
225. The Claimants' interpretation of Article 72 is not, as alleged by the Respondent, that it merely clarifies Article 71, but gives "independent, albeit related, operation to Articles 71 and 72." The fact that the proper interpretation of those provisions leads to the same result in this case does not alter this.<sup>124</sup>

---

<sup>120</sup> Claimants' Response, ¶ 36; Claimants' Reply, ¶ 62. The Claimants cite, among others, E. Gaillard, "The Denunciation of the ICSID Convention" (2007) 237(122) *New York Law Journal*, 26 June 2007, CLA-5; F. Mantilla-Serrano, "La denuncia de la Convención de Washington, ¿impide el recurso al CIADI?" (2008) 6 *Revista Peruana de Arbitraje* 205, CLA-6; F. Mantilla-Serrano, Comment in *Investment Treaty News*, 9 May 2007, CLA-7; F. Mantilla-Serrano, "¿Existe Hostilidad hacia el arbitraje de inversión en América Latina?" in M. Fernández-Ballesteros and D. Arias (eds.), *Liber Amicorum Bernardo Cremades* (La Ley, 2010), p. 789, CLA-8.

<sup>121</sup> Claimants' Rejoinder, ¶ 140.

<sup>122</sup> Claimants' Reply ¶¶ 50-54, citing *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), Judgment on Jurisdiction and Admissibility, 1984 I.C.J. 392 (November 26), paras 13, 60, 61 and 65, ("*Nicaragua v United States*") CLA-130.

<sup>123</sup> Claimants' Rejoinder, ¶ 116.

<sup>124</sup> Claimants' Rejoinder, ¶ 119, referring to the Respondent's Reply, ¶¶ 8-9 and 13.

### The Ordinary Meaning and Context of Article 72

226. According to the Claimants, Article 72 does not regulate or specify when consent can be perfected, nor does it require “mutual consent” as a precedent condition. Rather the reference to “consent” in Article 72 “relates *only* to a singular consent to ICSID arbitration given by the denouncing State (or the other listed entities connected to it)”.<sup>125</sup>
227. The ordinary meaning of the words indicates that the word “them”, as used in Article 72, is a reference to one of the denouncing “State or... any of its constituent subdivisions of agencies or... any national of that State.” Accordingly, the Claimants argue, Article 72 cannot refer to the “consent of current or future investor-claimants that might bring a claim against the denouncing State.” Consequently, “if potential investor-claimants are excluded from the concept of ‘consent’ in Article 72, then ‘consent’ cannot be a reference to mutual consent.”<sup>126</sup>
228. The French version of Article 72, which refers to the singular “*un consentement*”, and excludes the plural “*consentements*” that appeared in an earlier draft of that provision, further contradicts the Respondent’s thesis that Article 72 refers to mutual reciprocated consents provided by both of the parties to an ICSID arbitration.<sup>127</sup>
229. The Claimants add that “authors are overwhelmingly critical of the ‘offer and acceptance’ theory” on which the Respondent relies to substantiate its interpretation of Article 72, which is “predicated entirely upon the minority opinion of Professor Schreuer.”<sup>128</sup> On this point, the Claimants cite, among others, Sourgens,<sup>129</sup> who states:

[T]he offer-and-acceptance model is incoherent. Its focus on the relationship between host state and investor blocks out the existing relationship between the host state and the home state. It transforms a three dimensional relationship into a two dimensional playing field. . . . [D]enunciation of the ICSID Convention cannot have the effect of foreclosing ICSID as a potential forum for dispute

---

<sup>125</sup> Claimants’ Rejoinder, ¶ 165 (emphasis in the original).

<sup>126</sup> Claimants’ Rejoinder, ¶¶ 165 and 171.

<sup>127</sup> Claimants’ Rejoinder, ¶ 166.

<sup>128</sup> Claimants’ Rejoinder, ¶¶ 172 and 176.

<sup>129</sup> Claimants’ Rejoinder, ¶ 172.

resolution under a bilateral investment treaty. . . . Had the drafters intended what Professor Schreuer submits, Article 72 would have had to read ‘given by one of them and a national of another Contracting State or another Contracting State.’ . . . By contextual analysis, the Convention could not be clearer: if a state wishes to withdraw its consent to arbitration, it must do so according to the terms of the consent instrument, not through denunciation of the ICSID Convention.<sup>130</sup>

230. The Claimants further state that “Prof. Scheuer explicitly acknowledges that there is a ‘possible alternative interpretation’”<sup>131</sup> of Article 72.
231. As to the context of Article 72, the Claimants submit that when the ICSID Convention refers to mutual consent, instead of the consent of only one of the parties to an arbitration, it does so expressly in the relevant provision, and cites the Preamble of the ICSID Convention and Chapter II (Articles 25 to 27) which deals with the jurisdiction of ICSID and in which, according to the Claimants, the Convention distinguishes between instances where mutual consent is relevant and those others where it is not. The absence of any “mutual consent” condition in Article 72 is a clear indication that no such condition exists in that provision.<sup>132</sup>

#### The Drafting History of Article 72

232. According to the Claimants, the Respondent’s attempt to invoke Article 72’s drafting history in order to reverse its ordinary meaning, as understood in its proper context, is contrary to Articles 31 and 32 of the VCLT.<sup>133</sup>
233. The Claimants submit that the drafting history of the ICSID Convention “does not justify the Respondent’s attempt to narrow the scope of Article 72 by focusing on the drafters’ discussion of an agreement between a State and an investor (e.g. a contract) as the source of mutual consent.”<sup>134</sup>

---

<sup>130</sup> F. G. Sourgens, “Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements” (2013) 11(2) Santa Clara Journal of International Law 335, pp. 366, 369 and 391, CLA-179.

<sup>131</sup> Claimants’ Rejoinder, ¶ 177.

<sup>132</sup> Claimants’ Rejoinder, ¶¶ 185-188.

<sup>133</sup> Claimants’ Rejoinder, ¶ 193.

<sup>134</sup> Claimants’ Rejoinder, ¶ 196.



234. The Claimants refer to the paragraph of the drafting history of the ICSID Convention in which Mr Broches refers to the “consents to . . . arbitration . . . already given” quoted by the Respondent to show that Mr Broches was referring to “mutual consent”. The Claimants argue that this paragraph is to be read together with Mr Broches’ next comment, *i.e.*, that “the intention of Article [72] . . . was to make it clear that if a State had consented to arbitration . . . the subsequent denunciation of the Convention by that State would not relieve it from its obligation to go to arbitration if a dispute arose”. These two statements read together would show that Mr Broches was citing the singular consent of the denouncing State as the consent relevant to Article 72.<sup>135</sup>

#### **b. The Tribunal’s Jurisdiction under the BIT**

235. According to the Claimants, the Respondent’s “unconditional” consent to ICSID Arbitration in the BIT subsisted at the time of Venezuela’s denunciation of the ICSID Convention.<sup>136</sup> The Claimants argue that the BIT contains in its Articles 9(1) and (4) the “unconditional” consent to the jurisdiction of ICSID, and that such consent remains in force until the year 2023. The denunciation of the ICSID Convention cannot limit or qualify the “unconditional” consent to arbitrate contained in the BIT.<sup>137</sup>

#### Principles of Treaty Interpretation

236. According to the Claimants, the interpretation of Article 9 of the BIT proposed by Venezuela runs contrary to the object and purpose of the BIT and is not conducted in good faith.<sup>138</sup>

237. The Claimants start by noting that, “the Respondent entirely ignores the meaning and effect of the phrase ‘shall at the request of the national concerned.’”<sup>139</sup> According to the Claimants, the ordinary meaning of this phrase is that, “once Venezuela became a Contracting State to

---

<sup>135</sup> Claimants’ Rejoinder, ¶¶ 194-198, citing the History of the ICSID Convention: Analysis of Documents Concerning the Origin and the Formulation of the Convention, 25 February 1965, vol. II, Part 2, p. 1009, para. 54, CLA-12. The Claimants add that the Respondent has been unable to cite to the drafting history (or to the text of Article 72) to argue that Article 72 refers to “mutual consent” of the kind inherent to a contract between a State and an investor.

<sup>136</sup> Claimants’ Rejoinder, ¶ 45.

<sup>137</sup> Claimants’ Reply ¶¶ 30-35; Claimants’ Rejoinder, ¶ 133.

<sup>138</sup> Claimants’ Reply, ¶ 35; Claimants’ Rejoinder, ¶ 80.

<sup>139</sup> Claimants’ Rejoinder, ¶ 51.

the ICSID Convention on June 1, 1995, the only step needed to commence an ICSID arbitration was for an aggrieved investor to request it.”<sup>140</sup>

238. The Claimants further state that this is not altered by the word “under” in Article 9(1) of the BIT which, in this context, means “in accordance with”, and not the “dominance or control” of the ICSID Convention under the BIT as defended by the Respondent. This term prescribes how Venezuela’s unconditional consent to ICSID arbitration is to be acted upon by a claimant under the BIT, *i.e.*, pursuant to the ICSID Convention.<sup>141</sup>
239. As to the other relevant provisions of the BIT, the Claimants state that Article 9(2) and Article 10 of the BIT establish the only temporal condition to the Respondent’s consent to ICSID arbitration. This temporal condition operates so that the ICSID Convention does not apply until the Respondent becomes a party to it, but then continues to apply after it has become a party for as long as the consent to ICSID arbitration given in Article 9(1) is extant.<sup>142</sup>
240. As to the Respondent’s reliance in other BITs concluded by Venezuela, the Claimants submit that other treaties cannot provide interpretative guidance in the construction of the BIT. On this point, the Claimants add that only five of the 29 BITs signed by Venezuela “use the English word ‘under’ at the equivalent point of their consent to arbitrate,” and that, “in four of those five BITs, the word English ‘under’ is mirrored in the authentic Spanish version by the words ‘*de conformidad con*’, which means literally, ‘in accordance with.’ ”<sup>143</sup>
241. The Claimants also examine the meaning of the phrase “unconditional consent.” On this point, the Claimants submit that “the ordinary meaning of this phrase is that the Contracting Parties to the BIT agreed that there be no conditions limiting their consent to ICSID arbitration,” and that “both the scope of the consent to ICSID arbitration, and the giving of

---

<sup>140</sup> Claimants’ Rejoinder, ¶ 52.

<sup>141</sup> Claimants’ Rejoinder, ¶ 53.

<sup>142</sup> Claimants’ Rejoinder, ¶¶ 58-60.

<sup>143</sup> Claimants’ Rejoinder, ¶ 65. The Claimants conclude that the Respondent’s interpretation cannot be considered in good faith as, pursuant to it, “a single word in Article 9 of the BIT is constructed in a manner that allows a Contracting Party to remove the protections in the BIT by denouncing an entirely separate treaty.” Claimants’ Rejoinder, ¶ 67.

the consent, are complete upon the entry into force of the BIT and upon Venezuela becoming an ICSID Contracting State.”<sup>144</sup>

242. Furthermore, the Claimants continue, the Respondent’s construction of the word “under” in Article 9(1) of the BIT would impose a “condition subsequent” on Venezuela’s consent to ICSID arbitration, *i.e.*, Venezuela only consents to ICSID arbitration on the condition that it has not submitted a notice of denunciation of the ICSID Convention to the World Bank. This is not a condition expressly or implicitly contemplated by the BIT and would deprive the word “unconditional” of any meaning whatsoever.<sup>145</sup>

#### The Principle of Effectiveness

243. The Claimants argue that the Respondent’s interpretation of Article 9(1) runs contrary to the principle of effectiveness and deprives multiple BIT provisions of any effect.<sup>146</sup> In particular, it denudes the fundamental right it confers on foreign investors to submit disputes to ICSID arbitration of any effect, and renders Article 14(3) a “dead letter” as “there would be nothing of consequence left for Article 14(3) to preserve.”<sup>147</sup>
244. The Claimants submit that the principle of “definite limits” to the rule of effectiveness ensures that a single word in Article 9(1) of the BIT cannot overwhelm either the full text of Articles 9(1), 9(4) and 14(3) or their context. On the contrary, this principle further confirms that the Respondent’s consent to ICSID arbitration given in the BIT survived the Respondent’s notice of denunciation of the ICSID Convention.<sup>148</sup>

---

<sup>144</sup> Claimants’ Rejoinder, ¶ 70.

<sup>145</sup> Claimants’ Rejoinder, ¶ 71.

<sup>146</sup> Claimants’ Rejoinder, ¶ 80.

<sup>147</sup> Claimants’ Rejoinder, ¶ 81(c).

<sup>148</sup> Claimants’ Rejoinder, ¶ 83.

Pacta Sunt Servanda

245. The Claimants submit that the Respondent's interpretation of Article 9 of the BIT would result in a denial of justice in this case, as these arguments would deprive the Claimants of ICSID arbitration.<sup>149</sup>
246. According to the Claimants, the Tribunal in *Murphy v. Ecuador*<sup>150</sup> confirmed that the denunciation of the ICSID Convention by a Contracting State cannot have the effect of revoking the consent to ICSID arbitration given by that Contracting State in a BIT, as this would be contrary to the principle of *pacta sunt servanda*.<sup>151</sup> The operation of this principle precludes Venezuela from disregarding the unconditional consent to ICSID arbitration embodied in Article 9 of the BIT.
247. On the contrary, the Respondent's interpretation of this principle would insulate it from claims under the BIT and thus would deprive the substantive protections contained in the BIT of any meaningful effect.<sup>152</sup>
248. Finally, the Claimants submit, the Respondent's obligation to respect its unconditional consent to ICSID arbitration is independent of the ICSID Convention. On this point, the Claimants cite Article 43 of the VCLT, which states in relevant part: "denunciation of a treaty. . . as a result of the application . . . of the provisions of the treaty, shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty."<sup>153</sup>
249. According to the Claimants, "this article is an outgrowth of the principle that the denunciation of a treaty does not impair obligations which a denouncing State has assumed independently of that Treaty." Its application to this case means that "denunciation of the

---

<sup>149</sup> Claimants' Rejoinder, ¶ 97.

<sup>150</sup> *Murphy Exploration and Production Company International v. Republic of Ecuador*, ICSID Case No. ARB/08/4, Award on Jurisdiction, December 15, 2010, (*Murphy v. Ecuador*) CLA-234.

<sup>151</sup> Claimants' Rejoinder, ¶¶ 91-94.

<sup>152</sup> Claimants' Rejoinder, ¶¶ 95-96.

<sup>153</sup> VCLT, Article 43, CLA-2.

ICSID Convention does not in any way impair the Respondent's duty to fulfill its obligations under the BIT.”<sup>154</sup>

### **(3) The Tribunal's Analysis**

#### **a. Introduction**

250. The Bolivarian Republic of Venezuela gave notice of its denunciation of the ICSID Convention on January 24, 2012. In accordance with Article 71 of the ICSID Convention, that denunciation took effect six months later on July 25, 2012 and hence the Respondent ceased to have rights or obligations as a Contracting State to the ICSID Convention as of that date.
251. The Claimants consented to the jurisdiction of ICSID on July 20, 2012.<sup>155</sup>
252. The Claimants submit that either the Republic's denunciation of the ICSID Convention had no effect on its consent to arbitration in Article 9 of the BIT or that, pursuant to Article 71 of the ICSID Convention, it did not have effect until July 25, 2012, which was after the Claimants consented to the jurisdiction of ICSID. The Respondent submits that the Republic's denunciation had an immediate impact upon its consent to arbitration in Article 9 of the BIT in so far as, pursuant to Article 72 of the ICSID Convention, only existing agreements to submit a dispute to ICSID arbitration survive after a notice of denunciation is received by the depository.
253. The core provisions of the two international instruments relevant to the Tribunal's jurisdiction in these proceedings are Article 9 of the BIT and Articles 71 and 72 of the ICSID Convention. To the extent that the parties have referred to other provisions of the two international instruments to support their interpretations of the aforementioned core

---

<sup>154</sup> Claimants' Rejoinder, ¶ 105.

<sup>155</sup> The Claimants have, in their Post-Hearing Brief, ¶ 3, raised a new argument to the effect that their earlier correspondence with the Respondent manifested their consent to ICSID arbitration (*see supra* ¶ 220). Not only was this point raised very late, it contradicts the Claimants' earlier position that they consented on July 20, 2012 Claimants' Memorial, ¶¶ 154, 180. Moreover, the correspondence referred to by the Claimants makes no reference to the ICSID Convention (*see* C-55 and C-58). The Tribunal dismisses this new argument and finds that the Claimants purported to consent to ICSID arbitration on July 20, 2012.

provisions, the Tribunal will of course make reference to them as part of the context in its analysis.

**b. Article 9 of the BIT**

254. Article 9 of the BIT is alleged to be the primary source of the Tribunal's jurisdiction in this case. It is reproduced below in full:

1. Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter, shall at the request of the national concerned be submitted to the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965.

2. As long as the Republic of Venezuela has not become a Contracting State of the Convention as mentioned in Paragraph 1 of this Article, disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment Disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules).

3. The arbitral award shall be limited to determining whether there is a breach by the Contracting Party concerned of its obligations under this Agreement, whether such breach of obligations has caused damages to the national concerned, and, if such is the case, the amount of compensation.

4. Each Contracting Party hereby gives its unconditional consent to the submission of disputes as referred to in Paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article.

5. The arbitral award shall be based on:

- the law of the Contracting Party concerned;
- the provisions of this Agreement and other relevant Agreements between the Contracting Parties;
- the provisions of special agreements relating to the investments;
- the general principles of international law; and
- such rules of law as may be agreed by the parties to the dispute.

255. It is the Claimants' position that the Respondent's consent to arbitrate in Article 9 of the BIT is expressed to be mandatory ("shall be submitted") and "unconditional", such that it cannot be in any way qualified by actions taken by the Respondent in relation to another international instrument (the ICSID Convention). It thus follows that, according to the Claimants, the Respondent's consent to arbitration in Article 9 of the BIT remains binding upon the Respondent until it expires by the terms of the BIT itself, which, in accordance with Article 14 of the BIT, would occur no earlier than November 1, 2023.
256. The Respondent disagrees. According to the Respondent, the consent of the Respondent in Article 9 of the BIT is affected by actions taken by the Respondent with respect to the ICSID Convention. It is the Respondent's position that this is evident from the text of Article 9 itself, which in subsection 1 refers to the submission of disputes "under the" ICSID Convention.
257. The Tribunal considers that this first issue concerns the legal relationship between two international treaties rather than a question of treaty interpretation in respect of the terms used in Article 9 of the BIT. It is manifest from the express terms of Article 9 that the Respondent's consent to ICSID arbitration is "unconditional" and there is no ambiguity attaching to that consent. The question is, rather, what effect in law does Venezuela's denunciation of the ICSID Convention have on Venezuela's consent to ICSID arbitration in the BIT?
258. The Tribunal notes at the outset that consent to ICSID arbitration has a different juridical character than consent to other forms of arbitration for a simple reason: ICSID arbitration is directly regulated by a multilateral treaty. The multilateral treaty in question—the ICSID Convention—has a legal existence entirely separate from the BIT. The ICSID Convention has its own provisions for determining how and when it is to come into force, how and when amendments are to be made to it and are to become effective, and how and when a Contracting State may withdraw from the treaty and no longer be bound by the obligations thereunder. The state parties to a bilateral investment treaty cannot, in that treaty, purport to amend their rights and obligations under the ICSID Convention, a multilateral treaty. The state parties to a bilateral investment treaty could not, by way of example, purport to contract

out of the annulment procedure for ICSID awards set out in Article 52 of the ICSID Convention by stipulating that any ICSID award rendered by a ICSID tribunal constituted on the basis of the consent to arbitration contained in the investment treaty cannot be the subject of an annulment procedure.

259. The situation is very different in relation to other types of arbitration, such as arbitration under the UNCITRAL Rules, which is obviously another common form of arbitration selected by states as a possible mechanism for the resolution of investor/state disputes in their investment treaties. Arbitration under the UNCITRAL Rules is not directly regulated by a multilateral treaty and does not depend upon the existence of a multilateral treaty.<sup>156</sup> Consent to the UNCITRAL Rules has the effect of incorporating those rules into the parties' arbitration agreement and that incorporation would be impervious to any subsequent changes that might be made to the UNCITRAL Rules. The legal operation known as incorporation by reference cannot, however, apply to a multilateral treaty. The ICSID Convention cannot be incorporated by reference into the parties' arbitration agreement because, as an instrument of international law recording a set of interrelated obligations binding upon all the contracting state parties to it, it has a life of its own. Another way of making the same point: the UNCITRAL Rules do not impose obligations upon anyone unless they are adopted by parties to an arbitration agreement, whereas the ICSID Convention imposes obligations on the Contracting States regardless of whether they are simultaneously parties to arbitration agreements referring to ICSID arbitration. The obligation in Article 54 upon each of the Contracting States of the ICSID Convention to "recognize an award rendered pursuant to [the] Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State" is but one of several examples. Furthermore, in contradistinction with an agreement to arbitrate under the ICSID Convention, there is nothing preventing the parties to an agreement to arbitrate under the UNCITRAL Rules from amending those rules or from otherwise contracting out of them in part. In the bilateral investment treaty context, this means that the state parties could consent

---

<sup>156</sup> This is not to say that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) does not play a critical role in supporting arbitrations and arbitral awards under the UNCITRAL Rules. But obviously, the relationship between the New York Convention to arbitrations under the UNCITRAL Rules is altogether different to the relationship between arbitrations under the ICSID Arbitration Rules and the ICSID Convention.



to investor/state arbitration under the UNCITRAL Rules but modify those rules in the provision recording their consent in the investment treaty. Investors would then accept that offer to arbitrate on those terms by commencing arbitration proceedings against the state parties in the usual way.

260. These fundamental distinctions between consent to ICSID arbitration and to other forms of arbitration such as arbitration under the UNCITRAL Rules are reflected in the text of Article 9 itself. Subsection 1 of Article 9 records the Contracting Parties' consent to ICSID arbitration (i.e. arbitration under the ICSID Arbitration Rules and the ICSID Convention), whereas subsection 2 recognizes that such consent cannot be operational until Venezuela takes the necessary steps to become a Contracting State under the ICSID Convention. The basic point is that consent to ICSID arbitration in the BIT is obviously conditional upon actions taken by the Contracting Parties to the BIT in their capacities as Contracting States to the ICSID Convention. And given that reality, the Contracting Parties to the BIT included an alternative route to investor/state arbitration in subsection 2 in Article 9, which is arbitration under the ICSID Additional Facility Rules. That form of arbitration is entirely independent of actions taken by Contracting States under the ICSID Convention; indeed, the ICSID Additional Facility Rules have the same juridical status as the UNCITRAL Rules in the context of this discussion.

261. The Tribunal thus rejects the Claimants' contention that Venezuela's consent to ICSID arbitration in Article 9(1) of the BIT is impervious to Venezuela's actions taken in respect of its obligations under the ICSID Convention. ICSID arbitration is only available if the conditions for access to ICSID arbitration in the investment treaty *and* the ICSID Convention have been satisfied. That is a proposition that is universally accepted in the jurisprudence and is accepted by the parties in the present case.<sup>157</sup> It is a proposition that follows inexorably from the fact that the BIT and the ICSID Convention are two separate legal instruments in international law. The fact that each Contracting Party to the BIT gave its "unconditional consent" to ICSID arbitration in Article 9(4) is not the end of the inquiry because the Contracting Parties to the BIT cannot in that instrument alter the status or scope

---

<sup>157</sup> The Claimants have in their Memorial set out their submissions on why this Tribunal has jurisdiction *both* under the ICSID Convention and the BIT: Claimants' Memorial, ¶¶ 143-169.

of their rights and obligations as Contracting States to the ICSID Convention as a multilateral instrument.

262. In reaching this conclusion, the Tribunal does not place emphasis, as the Respondent has urged it to do, on the use of the word “under” in Article 9(1) of the Treaty. The stipulation that resort to ICSID arbitration will be made “under” the ICSID Convention does not create a relationship of subordination as between the BIT and the ICSID Convention that would not otherwise exist in the absence of this linguistic formulation. It is, moreover, unhelpful to characterize the relationship as one of subordination or supremacy. The basic point is that the conditions for resorting to ICSID arbitration are set out in two separate and wholly independent international legal instruments and both must be satisfied for the Tribunal to have jurisdiction in this case.
263. For the purposes of deciding the Respondent’s first jurisdictional objection the Tribunal has assumed that all the requirements in the BIT for recourse to ICSID arbitration have been satisfied. It remains to consider the conditions under the ICSID Convention and, in particular, the significance of Venezuela’s denunciation of the ICSID Convention upon its obligations under that treaty both to the other Contracting States and to nationals of Contracting States involved in ICSID arbitration proceedings against Venezuela. These matters are regulated by Articles 71 and 72 of the ICSID Convention, to which the Tribunal now turns.

**c. Articles 71 and 72 of the ICSID Convention**

264. Articles 71 and 72 of the ICSID Convention are set out in Chapter X of the treaty entitled “Final Provisions”. As Article 72 also refers to Article 70, the text of all three provisions is set out below:

**Article 70**

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

## **Article 71**

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

## **Article 72**

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

265. The Tribunal starts with what is common ground between the parties. As a result of Venezuela's notice of denunciation of the ICSID Convention, which was received by the World Bank on January 24, 2012, Venezuela ceased to be a Contracting State under the ICSID Convention six months later on July 25, 2012 by virtue of Article 71.
266. The first difference between the parties is that the Claimants submit that, in accordance with the same provision (Article 71), Venezuela's denunciation could not have any effect on any ICSID arbitration proceedings commenced before July 25, 2012 and hence could not have any effect on the present arbitration, which was commenced on July 23, 2012 (following the Claimants' consent to the jurisdiction of ICSID on July 20, 2012). The Respondent counters this by submitting that it is Article 72 that regulates the effect of any denunciation on ICSID arbitration proceedings and not Article 71.
267. Article 71 clearly establishes the right of any Contracting State to denounce the ICSID Convention and thus to terminate its obligations towards the remaining Contracting States under the ICSID Convention. In accordance with Article 71, a Contracting State's withdrawal from the ICSID Convention takes effect six months after the Bank's receipt of the notice of denunciation. From that date onwards, the State in question will no longer have the right to participate in the Administrative Council (Articles 4-7) or to nominate individuals to the panel of conciliators and arbitrators (Article 13), or to propose amendments to the ICSID Convention (Article 65). That State will also no longer be under a duty to contribute to the financing of the Centre (Article 17), or to accord immunities and privileges to the Centre within its territory (Article 19), or to refrain from exercising diplomatic

protection in respect of its nationals (Article 27), or to recognize and enforce ICSID awards within its territory (Article 54), or to submit to the jurisdiction of the International Court of Justice in respect of any dispute concerning the interpretation or application of the ICSID Convention (Article 64).

268. Article 72 addresses the consequences of a Contracting State's denunciation of the ICSID Convention pursuant to Article 71 on that Contracting State's acceptance of the jurisdiction of the Centre, as well as the acceptance by any constituent subdivisions or agencies or of any national of that State.

269. This division of labour between Article 71 and Article 72 is important. Article 71 establishes the right of denunciation of the ICSID Convention and regulates the consequences that flow from the exercise of that right in respect of the Contracting State's position as a state party to the ICSID Convention. This is clear from the ordinary meaning of the terms "[a]ny Contracting State may denounce this Convention" in Article 71. Article 72 regulates the consequences that flow from the exercise of the right of denunciation in Article 71 on the Contracting State's position as a party (or potential party) in an ICSID arbitration. In other words, and for the purposes of this case, Article 71 is addressed to Venezuela as a Contracting State to the ICSID Convention, whereas Article 72 is addressed to Venezuela as a party (or potential party) in ICSID arbitrations. This division of labour is not unique to Articles 71 and 72: the contrast between provisions that are addressed to the Contracting States as parties to an international treaty, and provisions that are addressed to parties in ICSID arbitration proceedings, permeates the entire ICSID Convention.

270. To adjudge whether Venezuela's denunciation of the ICSID Convention has any effect on its position as a party (or as a potential party) to ICSID arbitrations, the Tribunal must, therefore, interpret and apply Article 72 of the ICSID Convention.

271. Starting with the ordinary meaning of the words used in that provision, it is clear that it is addressed to all entities that have the possibility to consent to the jurisdiction of the Centre by virtue of their link to the Contracting State that has denounced the ICSID Convention pursuant to Article 71. Article 72 thus preserves the consent to the jurisdiction of the Centre that has been given by the denouncing Contracting State itself, its constituent subdivisions

or agencies or of any national of that State. It is also clear from the express terms of Article 72 that the consent to the jurisdiction of the Centre is preserved up until the point in time at which the depository receives the notice of the Contracting State's denunciation of the ICSID Convention pursuant to Article 71. This means that consent to the jurisdiction of the Centre is preserved if it was given prior to the notice of denunciation being received by the depository in accordance with Article 72, but the Contracting State's rights and obligations as a party to the ICSID Convention terminate six months later in accordance with Article 71.

272. The principal interpretative disagreement between the parties in respect of Article 72 relates to the phrase "arising out of consent to the jurisdiction of the Centre given by one of them". The Respondent submits that the reference to "consent to the jurisdiction" means an agreement to submit to the jurisdiction of the Centre (in other words to a perfected arbitration agreement), whereas the Claimants argue that the same reference is to a party's own consent to the jurisdiction of the Centre, whether or not that consent has resulted in the formation of an arbitration agreement. If the Respondent is correct, then "consent" to the jurisdiction of the Centre in the present case only came into existence when the Claimants consented to ICSID arbitration on July 20, 2012. This would mean that the Tribunal would not have jurisdiction in accordance with Article 72 because Venezuela's notice of denunciation was received by the depository on January 24, 2012. If the Claimants are correct, then it is Venezuela's "consent" to the jurisdiction of the Centre that counts and that was given in the BIT long before Venezuela sent its notice of denunciation and hence, on that analysis, the Tribunal would have jurisdiction over this dispute.

273. The starting point is that the ordinary meaning of "consent to the jurisdiction" could encompass either interpretation proffered by the parties because it is perfectly possible to use those words to mean the unilateral act of consenting (i.e. one party's engagement to submit to the jurisdiction of the Centre which needs to be met by another party's engagement to result in an arbitration agreement) or the multilateral result of consenting (i.e. the one party's engagement to submit to the jurisdiction of the Centre which has been matched by another party's engagement and as thus resulted in an arbitration agreement). The distinction between "unilateral consent" and "perfected consent" encapsulates these different possible interpretations. Once the Tribunal moves to the text of Article 72 as a whole and in the

context of the other provisions of the ICSID Convention, however, the meaning of “consent to the jurisdiction” becomes quite obvious.

274. First, if “consent to the jurisdiction” means unilateral consent rather than perfected consent, then there would have been no utility in including the words “any nationals of [the Contracting] State” (and probably the word “agencies”) in Article 72. That is because, unlike for the Contracting State itself, it does not make sense to talk about unilateral consent given by nationals of that State that could generate “rights and obligations under [the ICSID] Convention”. A Contracting State can give its unilateral consent in a legal instrument such as an investment treaty or in domestic legislation but there is no equivalent possibility for a national of that State to do so. In other words, where a national of the Contracting State gives its “consent to the jurisdiction of the Centre” that will always be as perfected consent, either in the form of an arbitration agreement in an investment contract or in the form of an arbitration agreement that comes into existence when a national of one Contracting State accepts another Contracting State’s offer to arbitrate as recorded in an investment treaty or domestic legislation. The principle of *effet utile* requires that the Tribunal interpret Article 72 in such a way so as to give effect to all its terms. The interpretation suggested by the Claimants would deprive the words “agencies or of any national of that State” in Article 72 of any utility. (On the Claimants’ interpretation, the reference to “constituent subdivisions” might still have meaning because constituent subdivisions could conceivably record their unilateral consent to the jurisdiction of the Centre in their own legislation.)
275. Second, it is also doubtful whether unilateral consent even given by the Contracting State in an investment treaty or legislation could generate “rights and obligations under [the ICSID] Convention” for the purposes of Article 72. Rights and obligations under the ICSID Convention as a party or potential party to ICSID arbitration only arise at the point of perfected consent, i.e. when there is an arbitration agreement in existence. This point can be tested with the following hypothetical: if a Contracting State to the ICSID Convention repealed its own domestic legislation that contained its unilateral consent to ICSID arbitration in circumstances where no national of another Contracting State had ever invoked that unilateral consent, then has that domestic legislation during the period in which it was in force given rise to “rights and obligations under [the ICSID] Convention”? The answer

must be “no” and, if that is the case, the Contracting State’s unilateral consent in an investment treaty cannot fall within the scope of Article 72 because Article 72 only concerns “consent to the jurisdiction of the Centre” that has given rise to “rights and obligations under [the ICSID] Convention”. It follows that the unilateral consent of even the denouncing Contracting State cannot be the object of Article 72.

276. Third, the relevant context for interpreting Article 72 includes other provisions of the ICSID Convention and in particular the core provision dealing with the “jurisdiction of the Centre”, which is Article 25. Subsection (1) of Article 25 reads:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

277. The “jurisdiction of the Centre” is thus founded upon perfected consent and that is hardly surprising as the consent of all parties to ICSID arbitration is the *sine qua non* of arbitration under the ICSID Convention. At first blush it might be thought that this provision uses the term “consent” in both senses (i.e. to mean perfected consent and unilateral consent). The phrase “consent in writing to submit to the Centre” is equivalent in meaning to an arbitration agreement and thus perfected consent. Is the phrase “no party may withdraw its consent unilaterally” consistent with the idea of unilateral consent? The answer is not in the sense that it has been advanced by the Claimants and that has formed the basis of the Tribunal’s discussion thus far. Whilst the phrase “no party may withdraw its consent unilaterally” relates to the possible conduct of one party only, the preceding phrase “[w]hen the parties have given their consent” makes it clear that “consent” in the final phrase is not directed to the idea of unilateral consent that arises where a Contracting State has given its consent to ICSID arbitration in an investment treaty or domestic legislation. In other words, it is not being used to describe the legal situation created by a unilateral engagement of a Contracting State to submit to ICSID arbitration (but before that engagement is relied upon by a national of another Contracting State). The last sentence of Article 25(1) simply means that where there is perfected consent, it cannot be undone by the conduct of one of the parties.

278. The important point to be drawn from this is that nowhere in Article 25, as the core provision governing the “jurisdiction of the Centre”, or indeed in the rest of the ICSID Convention, is the word “consent” used in the sense advocated by the Claimants in their interpretation of Article 72 (i.e. in the sense of unilateral consent). This is further support for reading “consent” in Article 72 to mean perfected consent.
279. The Claimants have placed certain emphasis on the words “given by one of them” in Article 72 as supporting their interpretation that “consent” means a unilateral act of one of the named entities or individuals covered by Article 72. The Tribunal is not persuaded that this inference can be drawn as it would be inconsistent with the Tribunal’s foregoing conclusions on the meaning of “consent” in Article 72. Article 72 does not seek to address the rights and obligations of any party that is not the Contracting State which has denounced the ICSID Convention (or one of that Contracting State’s own nationals). Put in another way, Article 72 is not addressed to the counterparties (i.e. another Contracting State or the nationals thereof) to the arbitration agreements entered into with the entities and individuals listed in Article 72. It is logical, then, for Article 72 to refer to the consent to the Centre’s jurisdiction “given by one of them” (in the sense of any one of either the denouncing Contracting State, its constituent subdivisions or agencies or a national of that State). In other words, “given by one of them” simply confirms that the rights and obligations under the ICSID Convention of the denouncing Contracting State, its constituent subdivisions or agencies or a national of that State that arise out of arbitration agreements to which any of those named entities or individuals has consented are unaffected by that Contracting State’s denunciation of the ICSID Convention.
280. It is illuminating to compare Article 72 of the ICSID Convention with Article 66(2), which regulates the effects of amendments to the ICSID Convention to the rights and obligations of all the parties to existing arbitration agreements to submit to ICSID arbitration:

No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.



281. Unlike Article 72, Article 66(2) is directed to the rights and obligations of both sides to an arbitration agreement to submit to ICSID arbitration and that makes sense because an amendment to the ICSID Convention affects each and every Contracting State. For that reason, the language in Article 66(2) is identical to that of Article 72 save that the words “by one of them” is omitted. By contrast, those words make sense in Article 72 because that provision is directed to only one Contracting State and its nationals and it is basically affirming that, despite a Contracting State’s denunciation of the ICSID Convention, that Contracting State and its nationals will continue to be bound by arbitration agreements they have entered into prior to the denunciation.
282. The Tribunal concludes based upon the ordinary meaning of the terms of Article 72 in their context that it is only where consent to arbitration to the jurisdiction of the Centre is perfected, such that it generates rights and obligations under the ICSID Convention, that those rights and obligations persist following the receipt of a notice of denunciation by a Contracting State pursuant to Article 71.
283. The Claimants have devoted a considerable part of their written submissions to demonstrating that such an interpretation would be inconsistent with the object and purpose of the ICSID Convention, which they broadly assert is to promote foreign investment by creating a mechanism for the binding third party adjudication of investment disputes. In the Claimants’ submission, this object and purpose favours an interpretation that will serve to protect and preserve the jurisdiction of ICSID tribunals as far as possible in the face of the denunciation of the ICSID Convention by a Contracting State. Whilst the Tribunal does not necessarily disagree with the Claimants’ formulation of the object and purpose of the ICSID Convention, the Tribunal cannot accept that it provides support for the Claimants’ interpretation of Article 72.
284. First, it would be very unusual for an appeal to the object and purpose of a treaty to lead to an interpretation that is fundamentally at odds with the ordinary meaning of terms in the context. In the present case, it would compel the Tribunal to accept an interpretation that would render meaningless several words in Article 72 as well as attributing a special meaning to the term “consent” that would be inconsistent with the meaning of that term in

the core provision on the jurisdiction of the Centre and in the remaining provisions of the ICSID Convention. It would also potentially leave Article 72 without any purpose at all because it is doubtful whether unilateral consent by a Contracting State to ICSID arbitration in an investment treaty or in domestic legislation could give rise to “rights and obligations” under the ICSID Convention.

285. Second, the Contracting States to the ICSID Convention have specifically agreed that a Contracting State should have the right to denounce the treaty and they have sought to regulate that right. It is not for the Tribunal to second guess the wisdom of Venezuela’s policy that caused it to exercise that right under Article 71. The object of Articles 71 and 72 is to regulate the situation where a Contracting State has elected to exercise its undisputed right to denounce the ICSID Convention and their purpose must be taken to be to ensure that the resulting “divorce” is as orderly as possible while protecting vested rights under any existing arbitration agreement with the denouncing Contracting State. No doubt the object and purpose of the ICSID Convention as a whole would be better served if Venezuela did not exercise its right under Article 71 at all, but that is not a factor that is relevant to the Tribunal’s interpretation of Articles 71 and 72.
286. The Claimants have also submitted that their interpretation of Article 72 should be preferred because it would ensure that investors could not be “caught by surprise” by a Contracting State’s denunciation, which may have effect before the investor could react by commencing ICSID arbitration proceedings by accepting the Contracting State’s offer to submit to ICSID arbitration in an investment treaty. If a Contracting State’s denunciation were to intervene between a dispute arising with the investor and the investor’s filing of a request for arbitration, then it is true that the investor would be deprived of an opportunity to commence ICSID arbitration in those circumstances. This is indeed the situation in which the Claimants find themselves in this case.
287. Once again, however, it is not this Tribunal’s function to seek to eliminate any negative consequences that might flow from a Contracting State’s denunciation of the ICSID Convention. Any system of adjudication founded upon consent is vulnerable to the possibility that consent may be withdrawn. The “optional clause” vesting the International

Court of Justice with jurisdiction in Article 36(2) of the ICJ Statute is a pertinent example. Most States that have signed up to the “optional clause” have reserved the right to denunciate it at any time. As one commentator remarked:

To be sure, clauses of that type are regrettable in that they enable States to terminate their acceptance of the Court’s jurisdiction as soon as they sense that an undesirable application might be forthcoming. However, this seems to be the price to be paid for adherence by States to the optional clause. And it corresponds to the logic of a jurisdictional system which is still largely based on unfettered sovereignty.<sup>158</sup>

288. Of course, a denunciation of the “optional clause”, just like the denunciation of the ICSID Convention, will not have an impact once proceedings have commenced.<sup>159</sup> In the ICSID context, it will not have an impact on existing ICSID arbitration agreements either.
289. Articles 71 and 72 of the ICSID Convention have to reconcile two different objectives. The first is to facilitate a Contracting State’s orderly exit from the ICSID Convention in case of a denunciation. The second is to protect the legitimate expectations of those who have relied upon that Contracting State’s consent to ICSID arbitration. If Article 72 were to be interpreted to extend to potential agreements to arbitrate in addition to existing agreements to arbitrate, it would follow that the Contracting State that has denounced the ICSID Convention could potentially be the respondent party in an unlimited and unforeseeable number of future ICSID arbitrations for decades after its denunciation comes into effect (*i.e.*, as long as its unilateral consent remained binding in investment treaties). This would be antithetical to an orderly exit from the ICSID Convention. Indeed, it would also impact detrimentally on the other Contracting States to the ICSID Convention. To take but one example, as the denouncing Contracting State would no longer be obliged to contribute to the financing of the ICSID Centre (in accordance with Article 17), it would be the other Contracting States that would in effect subsidize the activities of the ICSID Centre in so far as it relates to a potentially very large pool of future cases against the denouncing Contracting State. On the other hand, if Article 72 extends only to existing arbitration agreements (and

---

<sup>158</sup> Zimmermann, Tomuschat, Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (OUP, 2006) p. 628.

<sup>159</sup> *Nicaragua v. United States*, CLA-130.

pending arbitration proceedings) at the date of the denunciation, as the Tribunal has concluded, there will be a finite and identifiable number of residual cases that will need to run to their conclusion. That is far more consistent with the objective of providing an orderly exit from the ICSID Convention. And the objective of protecting legitimate expectations is also served because any extant ICSID arbitration agreements, whether in investment contracts or concluded on the basis of investment treaties, will also be fully respected.

290. The Tribunal also notes that a denunciation of the ICSID Convention will rarely come as a complete surprise. The denunciation of an important multilateral convention is a major step for any State to take. The decision is unlikely to be made without debate in the relevant political organs of the State in question. In many States there is a formal constitutional procedure that must be followed. The possibility of investors being caught completely by surprise by a Contracting State's denunciation is therefore remote.
291. The Tribunal has reached a firm conclusion on the proper interpretation of Articles 71 and 72 of the ICSID Convention by resorting to the general rule of interpretation in Article 31 of the VCLT. The Tribunal does not consider that resort to the supplementary means of interpretation in Article 32 is either justified or necessary. Nonetheless, in so far as the parties have made extensive reference to the *travaux préparatoires* for the ICSID Convention, the Tribunal proposes to make brief observations on the significance of these materials for the interpretation of Articles 71 and 72.
292. The critical passages of the discussion in the Legal Committee responsible for drafting the ICSID Convention are set out below:

52. Mr. Broches referred to draft Article 73 [what became Article 72] which had been presented to the meeting and explained that it was intended to deal with the effects of denunciation of the Convention or the exclusion of a territory from the scope of the application of the Convention on consents to conciliation or arbitration under the Convention already given. Mr. Malaplate had proposed a simplification of the language of that article and he would like to consider that drafting point further and to report to the Board at the next session.

53. Mr. Malaplate stated that the proposal he had made could somehow affect the substance of the provision because the article as it stood now did not seem to protect a consent given before denunciation or exclusions if proceedings under that consent had not yet started.

54. Mr. Broches replied that the intention of Article 73 in the text submitted to the Directors was to make it clear that if a State had consented to arbitration, for instance by entering into an arbitration clause with an investor, the subsequent denunciation of the Convention by that State would not relieve it from its obligation to go to arbitration if a dispute arose. He could not see any difference of substance between the text as it stood and Mr. Malaplate's proposal but in any case, he would review the language of that article to make sure that the provision was clear.

[... (irrelevant discussion of translation issue)]

57. Mr. Mejia-Palacio asked what would happen if a State which was a party to the Convention signed an agreement with a company and later withdrew from the Centre while no disputes were pending. If, say ten years later a dispute arose – would that dispute still be under the jurisdiction of the Centre?

58. Mr. Broches replied that if the agreement with the company included an arbitration clause and that agreement lasted for say 20 years, that State would still be bound to submit its disputes with that company under that agreement to the Centre.

59. Mr. Mejia-Palacio stated that in certain cases agreement [sic] had no definite duration but provided that they could be terminated by denunciation.

60. Mr. Broches remarked that in the case of an arbitration clause which could be terminated by one of the parties, the jurisdiction of the Centre would come to an end on termination of the clause.

61. Mr. Gutiérrez Cano said that Article 73 in the new text was lacking a time limit beyond which the Convention would cease to apply. Unless such time limit was introduced States would be bound indefinitely. He had in mind the case in which there was no agreement between the State and the foreign investor but only a general declaration on the part of the State in favor of submission of claims to the Centre and a subsequent withdrawal from the Convention by that State before any claim had been in fact submitted to the Centre. Would the Convention still compel the State to accept the jurisdiction of the Centre?

62. Mr. Broches replied that a general statement of the kind mentioned by Mr. Gutierrez Cano would not be binding on the State which had made it until it had been accepted by an investor. If the State withdraws its unilateral statement by denouncing the Convention before it has been accepted by any investor, no investor could later bring a claim before the Centre. If, however, the unilateral offer of the State has been accepted before the denunciation of the Convention, then disputes arising between the State and the investor after the date of denunciation will still be within the jurisdiction of the Centre.

293. These questions and answers during the Legal Committee’s meeting to discuss what became Article 72 of the ICSID Convention confirm the following points:
294. If the denouncing Contracting State enters into an agreement with an investor to submit disputes to ICSID arbitration before the notice of denunciation, then the Centre will have jurisdiction over such a dispute after the notice of denunciation (see paragraphs 54, 57 & 58 of the transcript).
295. If the denouncing Contracting State had given its unilateral consent to submit disputes to ICSID arbitration before the notice of denunciation and the investor had not accepted it prior to the notice of denunciation, then the Centre will not have jurisdiction over a dispute submitted by the investor after the notice of denunciation (see paragraphs 61 and 62 of the transcript).
296. The Tribunal thus concludes that, whilst resort to the *travaux préparatoires* is not justified in accordance with the threshold established by Article 32 of the VCLT, the insights that can nevertheless be drawn from an examination of the *travaux* provide direct support for the Tribunal’s interpretation of Articles 71 and 72 of the ICSID Convention.

#### **d. Other Decisions**

297. The Tribunal has approached the questions of treaty interpretation from first principles and thus far without reference to the decisions of other ICSID tribunals. The Parties have brought to the attention of the Tribunal three relevant decisions: *Venoklim v Venezuela*<sup>160</sup>, *Tenaris v Venezuela*,<sup>161</sup> and *Blue Bank v Venezuela*<sup>162</sup>. The tribunal in *Tenaris* appears to have decided that consent in that case was perfected prior to Venezuela’s notice of denunciation, whereas the tribunals in *Venoklim* and *Blue Bank* came to the opposite conclusion to that of the present Tribunal in relation to the issue under consideration.

---

<sup>160</sup> *Venoklim Holding B.V. v Bolivarian Republic of Venezuela*, Award, April 3, 2015, (*Venoklim v. Venezuela*) CLA-284.

<sup>161</sup> *Tenaris S.A. and Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/23) Award, December 12, 2016, (*Tenaris v. Venezuela*) RLA-122.

<sup>162</sup> *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/12/20), Award and Separate Opinion, April 26, 2017, (*Blue Bank v. Venezuela*) CLA-303.

298. This Tribunal is less concerned about recording instances where other tribunals have come to the same or different results and more interested in confronting the reasons that have led tribunals to a different conclusion. The only sustained judicial engagement with the interpretation of Articles 71 and 72 to date is to be found in the Separate Opinion of Mr Söderlund in *Blue Bank*. Mr Söderlund’s agreed with the majority of the tribunal’s conclusion that Venezuela was bound by its consent to arbitrate when the claimant filed a request for arbitration after Venezuela had denounced the ICSID Convention, but disagreed with the majority’s reasoning. It is fair to surmise that the majority’s reasoning was sparse on this point: the tribunal concluded in a single sentence that Article 72 is irrelevant to the question “*inasmuch as Article 72 deals only with the post-termination survival of certain of a State’s rights or obligations*”.<sup>163</sup> There is no analysis of the text of Article 72 and no explanation of how the majority arrived at this conclusion, which is a rather surprising one given the text of Article 72 makes express reference to the Contracting State’s rights and obligations relating to its “*consent to the jurisdiction of the Centre*”. Hence the Tribunal shares Mr Söderlund’s starting point, which is that “*the Respondent’s invocation of Article 72 of the ICSID Convention requires analysis*”.<sup>164</sup>
299. Mr Söderlund’s basic thesis is that the “offer-acceptance” model is not an accurate reflection of how consent to ICSID arbitration is manifested through an investment treaty.<sup>165</sup> Whilst he acknowledges that the wording of Article 25(1) is consistent with that model, he considers that this is explicable by reason of the fact that the drafters would have had investment contracts or *ad hoc* submission agreements in mind rather than investments treaties and hence a literal interpretation of this wording is not appropriate.<sup>166</sup> (Although he does concede that the Report of the Executive Directors refers to “an example of unilateral offer of consent—investment promotion legislation”<sup>167</sup>.) He states:

[The “offer-acceptance” model] may elicit, erroneously, a perception of the existence of an offer-acceptance relationship between the contracting State and

---

<sup>163</sup> *Bluebank v. Venezuela* ¶ 108.

<sup>164</sup> *Blue Bank v. Venezuela*, Sep. Opinion, ¶ 10.

<sup>165</sup> *Blue Bank v. Venezuela*, Sep. Opinion, ¶¶ 32-33.

<sup>166</sup> *Blue Bank v. Venezuela*, Sep. Opinion, ¶¶ 34-37.

<sup>167</sup> *Blue Bank v. Venezuela*, Sep. Opinion, ¶ 36.

investors of the other contracting State, to the exclusion of the basic State-to-State relationship grounded in the treaty. This, in its turn, may lead to a misapplication in the specific instance of Article 72, as it assumes that there is a unilateral consent given, which will not be perfected until such time as when a particular “investor” declares its consent, i.e. accepts the offer.<sup>168</sup>

300. In the alternative, Mr Söderlund postulates that, in any case, the “dispute resolution chapter of a BIT constitutes mutual consent for the purposes of Article 25(1) of the ICSID Convention” in-and-of-itself.<sup>169</sup>
301. The Tribunal, with all due respect to Mr Söderlund’s sustained treatment of this problem, cannot agree with his analysis.
302. First, it is not permissible, consistently with Article 31 of the VCLT, to dismiss the relevance of the express terms of a treaty on the basis of a supposition that the drafters did not have a particular situation in mind when the ordinary meaning of those terms is clearly capable of extending to that situation. Articles 25 and 72 of the ICSID Convention cannot be emptied of content in relation to investment treaty arbitration, which depends upon the existence of an arbitration agreement between the parties to the dispute no less than any other form of international arbitration. Whilst the manner in which that arbitration agreement comes into existence in investment treaty arbitration may differ from the paradigm of an investment contract (although it is not so different from a situation where the host State’s consent is recorded in investment legislation), the end result is the same and the ICSID Convention is only concerned with that end result. In other words, the ICSID Convention does not purport to regulate the manner in which an arbitration agreement can come into existence; the rights and obligations set out in the ICSID Convention simply do not come into play unless and until it is in existence.
303. Second, the consent of each contracting State party to ICSID arbitration in the BIT itself cannot possibly constitute “mutual consent” for the purposes of Article 25 of the ICSID Convention. What Mr Söderlund refers to as the “State-to-State relationship grounded in the treaty” is no substitute for the necessary existence of an arbitration agreement between the

---

<sup>168</sup> *Blue Bank v. Venezuela*, Sep. Opinion, ¶ 33.

<sup>169</sup> *Blue Bank v Venezuela*, Sep. Opinion, ¶ 39.



investor and the host State. Mr Söderlund's theory is flatly contradicted by investment treaty practice. For example, Article 1122 of NAFTA, entitled "Consent to Arbitration", reads:

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.
2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:
  - (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;
  - (b) Article II of the New York Convention for an agreement in writing; and
  - (c) Article I of the InterAmerican Convention for an agreement.

304. This provision differentiates between the unilateral consent of the State Parties of NAFTA to arbitration and the manifestation of the investor's consent by the submission of a claim to arbitration. It confirms that the conjunction of these two different manifestations of consent (i.e. "offer-and-acceptance") satisfies the requirement "written consent of the parties" (i.e. an arbitration agreement) in Article 25 of the ICSID Convention and for the existence of an arbitration agreement under the New York Convention and the InterAmerican Convention. This provision also confirms, if confirmation were really necessary, that investment treaty arbitration is just as dependent on the existence of an arbitration agreement as every other form of international arbitration.

#### **e. Conclusions**

305. The Tribunal finds, on the basis of the foregoing reasons, that it does not have jurisdiction over the dispute that has been submitted to it. In view of this conclusion, the Tribunal will dispense with reviewing the Respondent's objection to jurisdiction *ratione temporis*.
306. Furthermore, the Tribunal decides that, in light of the Tribunal's conclusion on jurisdiction, the Respondent's pending requests of September 28, October 12, November 2, 2016 and August 4, 2017 have been rejected as moot.

## **VI. COSTS**

### **a. The Parties' Claims for Costs and Expenses**

307. The Parties filed simultaneous submissions on costs on July 8, 2016 and simultaneous reply submissions on September 28, 2016 and May 15, 2017.

#### The Claimants' Fees and Expenses

308. In their submission of July 8, 2016, the Claimants contend that they should be awarded the totality of legal fees and expenses, including its own legal fees, experts' fees, and other disbursements associated with this arbitration, as well as the entirety of the arbitration costs (*i.e.*, costs of the Tribunal and the Centre), in the amount of USD 11,434,636.09.

309. Furthermore, on September 28, 2016, the Claimants stated that their legal fees and expenses in connection with the Third Proposal for Disqualification amount to USD 26,048.07.

310. On May 15, 2017, the Claimants stated that their legal fees and expenses in connection with the Fourth Proposal for Disqualification amount to USD 119,725.64.

#### The Respondent's Fees and Expenses

311. In its submission of July 8, 2016, the Respondent argues that regardless of the outcome of this case, the Claimants shall bear all costs incurred in these proceedings *i.e.*, its own costs, the arbitration costs, and the Respondent's costs for a total amount of USD 3,031,233.51.

312. Furthermore, on September 28, 2016, the Respondent stated that its legal fees and expenses in connection with the Third Proposal for Disqualification amount to USD 95,000.

313. On May 15, 2017, the Respondent stated that its legal fees and expenses in connection with the Fourth Proposal for Disqualification amount to USD 194,492.

### **b. The Costs of the Arbitration**

314. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Hi-Taek Shin	239,840.56
L. Yves Fortier	162,315.44
Zachary Douglas	95,589.95
Alexis Mourre	57,750.00
ICSID's administrative fees	160,000.00
Direct expenses	199,600.60
<b>Total</b>	<b><u>915,096.55</u></b>

### c. The Tribunal's Decision on Costs

315. Article 61(2) of the ICSID Convention provides:

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 expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

316. This provision gives the Tribunal a discretion to allocate all costs of the arbitration, including legal fees and other costs, between the Parties as it deems appropriate.

317. The Tribunal starts with observation that the Respondent has successfully persuaded the Tribunal that it is without jurisdiction in this case. Given that starting point, the Respondent would be entitled to expect to be awarded their reasonable costs in normal circumstances. The Tribunal has come to the conclusion, however, that certain factors militate against the costs-follow-the-event approach in this case. First, there is among ICSID tribunals and commentators a large degree of conflicting views about the proper interpretation of Articles 71 and 72 of the ICSID Convention and their relationship to consent to ICSID arbitration under an investment treaty. The Claimants should not be penalised for this resultant uncertainty and for the fact that this decision on jurisdiction comes at the conclusion of a full examination of the merits of the Claimants' claims.

318. Second, the Respondent has challenged Mr Fortier, a co-arbitrator in this case, on no less than four separate occasions. This generated costs on both sides of several hundred thousand US Dollars. The two remaining arbitrators concluded in their decisions in respect of the Third and Fourth Proposals for Disqualification that the Respondent should bear the costs of each. Hence even if the Tribunal were to award the Respondent a portion of its costs, the costs incurred in relation to the Third and Forth Proposals for Disqualification would have to be set off against this amount in any case and the Tribunal would have to take account of the costs incurred relating to the First and Second Proposals for Disqualification as well.
319. Third, the Respondent has refused to pay its share of the arbitration costs throughout these proceedings. This has increased the financial burden upon the Claimants in prosecuting this arbitration from the outset and results in a corresponding benefit to the Respondent. This benefit is sufficient recognition of the Respondent's success in persuading the Tribunal that it is without jurisdiction over the dispute that has been submitted to it. This benefit also meets the Respondent's argument that it was unreasonable for the Claimants to pursue these proceedings for the full amount of the Claimants' interest in the Plants when OIEG has already obtained an award that covered all of its shareholding in the Claimants, and which amounts to 72.983% of the damages sought by the Claimants in this case. The Tribunal has some sympathy with the Respondent's position in this respect, and the question of the *res judicata* effect of the OIEG Award would have been a serious issue for the Tribunal's consideration had it proceeded to adjudicate the merits of the Claimants' claims.
320. In these circumstances, the Tribunal has concluded that each Party should bear its own legal fees and expenses.
321. The costs of the arbitration (as reflected in ¶ 314 above) shall be borne entirely by the Claimants.

## **VIII. AWARD**

322. For the reasons set forth above, the Tribunal decides as follows:

- (1) The Tribunal is without jurisdiction in respect of the dispute that has been submitted to it;
- (2) Each Party shall bear its own legal costs and expenses.
- (3) The Claimants shall bear the costs of the arbitration.

[Signed]

---

The Honorable L. Yves Fortier, C.C., Q.C.  
Arbitrator

Date: October 24, 2017

[Signed]

---

Professor Zachary Douglas, Q.C.  
Arbitrator

Date: October 21, 2017

[Signed]

---

Professor Hi-Taek Shin  
President of the Tribunal

Date: October 17, 2017