

International Centre for Settlement of Investment Disputes

**Kimberly-Clark Dutch Holdings, B.V., Kimberly-Clark S.L.U.,
and Kimberly-Clark BVBA**

Claimants

v.

Bolivarian Republic of Venezuela

Respondent

ICSID Case No. ARB(AF)/18/3

**Award
5 November 2021**

Arbitral Tribunal

Prof. Gabrielle Kaufmann-Kohler, President
Mr. David R. Haigh, Arbitrator
Prof. Brigitte Stern, Arbitrator

Secretaries of the Tribunal

Mr. Francisco Grob
Ms. Natalí Sequeira

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TABLE OF ABBREVIATIONS AND DEFINITIONS

AF Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (Additional Facility Rules) in force as of April 10, 2006
AF Arbitration Rules	Arbitration (Additional Facility) Rules – Schedule C in force as of April 10, 2006
Belgian BIT	Agreement Between the Belgo-Luxembourg Economic Union and the Government of the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments, 2254 UNTS I-40183 (entered into force 28 April 2004)
BCV	Central Bank of Venezuela
CADIVI	Commission for the Administration of Foreign Exchange (“ <i>Comisión de Administración de Divisas</i> ”)
Claimants	(i) Kimberly-Clark BVBA, a private limited liability company constituted in accordance with the laws of Belgium (“KCB”), which claims under the Belgian BIT; (ii) Kimberly-Clark Dutch Holdings, B.V., a private limited liability company constituted in accordance with the laws of the Netherlands (“KCN”), which claims under the Dutch BIT; and (iii) Kimberly-Clark S.L.U., a private limited liability company constituted in accordance with the laws of Spain (“KCS”), which claims under the Spanish BIT.
Claimants’ Memorial	Claimants’ Memorial on Jurisdiction, Merits & Quantum dated 24 January 2020
Claimants’ Rejoinder	Claimants’ Rejoinder on Jurisdiction dated 31 July 2020
Claimants’ Response	Claimants’ Response on Jurisdiction dated 22 May 2020
Claimants’ Costs Submission	Claimants’ Costs Submissions dated 2 October 2020
Dutch BIT	Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of Venezuela and the Kingdom of the Netherlands, 1788 UNTS I-31069 (entered into force 1 November 1993)
Exchange Agreement No. 1	Foreign exchange regulation introduced by the Ministry of Finance and the Central Bank of Venezuela on 5 February 2003 through the <i>Convenio Cambiario No. 1</i>
ICJ	International Court of Justice

ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
KCB	Kimberly-Clark BVBA, a private limited liability company constituted in accordance with the laws of Belgium, which claims under the Belgian BIT
KCN	Kimberly-Clark Dutch Holdings, B.V., a private limited liability company constituted in accordance with the laws of the Netherlands, which claims under the Dutch BIT
KCS	Kimberly-Clark S.L.U., a private limited liability company constituted in accordance with the laws of Spain, which claims under the Spanish BIT
KCV	Kimberly-Clark Venezuela, C.A., a company incorporated in Venezuela in 1992
MFN	Most-favored-nation treatment
Notice of Dispute	Letter dated 19 June 2017 from the Kimberly-Clark investors (KCN, Kimberly-Clark Amsterdam Holdings WV., Kimberly-Clark European Investment B.V., KCS, KCB, Kimberly-Clark Ecuador S.A. and Kimberly-Clark Intercontinental Limited) to Venezuela's Attorney General giving notice of dispute
Parties	The Claimants and the Respondent
Respondent's Reply	Respondent's Reply on Jurisdiction dated 3 July 2020
Respondent's Request for Bifurcation	Respondent's Request for Bifurcation dated 6 March 2020
Request for Arbitration	Request for Arbitration dated 6 April 2018, submitted by KCN, KCS and KCB under the AF Arbitration Rules
Respondent or Venezuela	The Bolivarian Republic of Venezuela
Respondent's Costs Submissions	Respondent's Costs Submissions dated 2 October 2020
SENIAT	National Integrated Service for the Administration of Customs Duties and Taxes (" <i>Servicio Nacional Integrado de Administración Aduanera y Tributaria</i> ")
Spanish BIT	Agreement Between the Kingdom of Spain and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments, 1996 UNTS I-34150 (entered into force 10 September 1997)

SUNDECOP	National Superintendency of Costs and Prices (“ <i>Superintendencia Nacional de Costos y Precios</i> ”)
UK BIT	Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, 1957 UNTS 75 (entered into force 1 August 1996)
UNTS	United Nations Treaty Series
VAT	value added tax
VCLT	Vienna Convention on the Law of Treaties of 23 May 1969

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to arbitration in accordance with the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) Arbitration (Additional Facility) Rules (the “**AF Rules**”) on the basis of (i) the Agreement between the Belgo-Luxembourg Economic Union and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments signed on 17 March 1998 (the “**Belgian BIT**”);¹ (ii) the Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Venezuela and the Kingdom of Netherlands signed on 22 October 1991 and terminated since 1 November 2008 (the “**Dutch BIT**”);² and, (iii) the Agreement between the Kingdom of Spain and the Republic of Venezuela on the Reciprocal Promotion and Protection of Investments signed on 2 November 1995 (the “**Spanish BIT**”)³, collectively the “**BITs**”).

2. The Claimants are:

(i) Kimberly-Clark BVBA, a private limited liability company constituted in accordance with the laws of Belgium (“**KCB**”), which claims under the Belgian BIT;

(ii) Kimberly-Clark Dutch Holdings, B.V., a private limited liability company constituted in accordance with the laws of the Netherlands (“**KCN**”), which claims under the Dutch BIT; and

(iii) Kimberly-Clark S.L.U., a private limited liability company constituted in accordance with the laws of Spain (“**KCS**”), which claims under the Spanish BIT.

3. The “**Claimants**” are represented in this arbitration by:

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¹ Belgian BIT, **Exh. CL-0003**.

² Dutch BIT, **Exh. CL-0001**.

³ Spanish BIT, **Exh. CL-0002**.

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4. The respondent is the Bolivian Republic of Venezuela (the “**Respondent**” or “**Venezuela**”). The Respondent is represented in this arbitration by:

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5. The Claimants and the Respondent are collectively referred to as the “**Parties**”.
6. This dispute arises out of alleged interference by Venezuela with the production and distribution of Kimberly Clark brand products in Venezuela.

II. PROCEDURAL HISTORY

7. On 15 December 2017, the Claimants submitted a request for approval of access to ICSID's Additional Facility, along with Appendices A to F.
8. On 29 December 2017, the Acting Secretary-General of ICSID approved access to the Additional Facility in respect of the dispute referred to in the above-mentioned request.
9. On 6 April 2018, the Claimants submitted to the Centre a request for arbitration under the AF Rules regarding a dispute with Venezuela, pursuant to the investment treaties concluded by Venezuela with the Netherlands in 1991, with Belgium in 1998 and with Spain in 1997. The request for arbitration was submitted together with (i) Annexes A to E; (ii) Exhibits C-001 to C-053; and (iii) Legal Authorities CL-001 to CL-003 (the “**Request for Arbitration**”). The Claimants instructed the law firm Gibson, Dunn & Crutcher LLP to represent them in these proceedings.
10. On 17 April 2018, the Secretary-General of ICSID registered the Request for Arbitration as ICSID Case No. ARB(AF)/18/3.
11. On 23 April 2018, the Office of the *Procuraduría General de la República* informed the Centre that it had instructed the law firm De Jesús & De Jesús, S.A. to represent Venezuela in these proceedings.
12. On June 15, 2018, the Claimants and the Respondent informed the Centre that they had reached an agreement on the number of arbitrators and the method of

their appointment. In accordance with their agreement, the Tribunal would be comprised of three arbitrators; one appointed by the Claimants, another appointed by the Respondent, and the third, presiding arbitrator, to be appointed by agreement of the Parties. Failing such agreement, “either Party may ask ICSID to appoint the Tribunal President through its customary process”.

13. On the same date, 15 June 2018, the Claimants appointed as arbitrator Mr. David Haigh, a Canadian national and, on 6 July 2018, the Respondent appointed as arbitrator Prof. Brigitte Stern, a French national.
14. Following a ballot procedure that failed to result in a mutually agreeable candidate for presiding arbitrator, on 29 March 2019, the Chairman of the Administrative Council appointed Prof. Stephan Schill, a German national, as presiding arbitrator.
15. On 28 March 2019, the Centre transmitted to the Parties (i) a letter from Mr. José Ignacio Hernández G., *Procurador Especial de la República Bolivariana de Venezuela*, to ICSID, dated 27 March 2019, and (ii) a letter from ICSID to Mr. Hernández, acknowledging receipt of his correspondence dated 27 March 2019. In his letter, Mr. Hernández claimed that the judicial representation of Venezuela, including in arbitration proceedings, was vested exclusively in him, in his capacity as *Procurador Especial*.
16. Following the acceptance of all arbitrators’ appointments, on 29 March 2019, the Tribunal was constituted in accordance with Article 10 of the AF Arbitration Rules, and the proceedings were deemed to have begun on that day pursuant to Article 13(1) of the AF Arbitration Rules. Mr. Francisco Grob, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
17. Following consultations with the President of the Tribunal, on 1 April 2019, the Centre requested that each Party make an advance payment of USD 150,000 to cover the costs of the proceeding over the first three to six months. ICSID received Claimants’ share (*i.e.* USD 150,000) on 6 May 2019. As the Respondent defaulted on its obligation to pay its share, the Claimants advanced Respondent’s share (*i.e.* USD 150,000), while reserving their rights to seek appropriate relief.
18. On 4 April 2019, the Tribunal invited (i) counsel acting for the Claimants, (ii) counsel acting for the Respondent, and (iii) Mr. José Ignacio Hernández, to simultaneously submit any observations on the issue of Venezuela’s representation by 25 April 2019.

19. On 25 April 2019, Mr. Alfredo de Jesús filed a proposal to disqualify Prof. Schill as presiding arbitrator. The proceedings were suspended pursuant to Article 15(7) of the AF Arbitration Rules.
20. On the same day, counsel acting for the Claimants and counsel acting for the Respondent filed their respective observations on the issue of Venezuela's representation, and Mr. José Ignacio Hernández filed his observations on 29 April 2019.
21. On 15 May 2019, the Parties were informed that the proposal for the disqualification of Prof. Schill would be decided by the co-arbitrators, who would provide a schedule for the Parties' submissions.
22. Upon completion of the briefing schedule, on 22 July 2019, the Centre informed the Parties that Prof. Stern and Mr. Haigh "could regretfully not reach a common decision".
23. On 1 August 2019, Prof. Schill tendered his resignation. Pursuant to Article 17(1) of the AF Arbitration Rules, the Chairman of the Administrative Council would fill the vacancy in the Tribunal and appoint its president.
24. On 12 August 2019, the Centre proposed Prof. Gabrielle Kaufmann-Kohler as president. Following Prof. Kaufmann-Kohler's acceptance of her appointment as presiding arbitrator on 26 August 2019, the Tribunal was reconstituted and the proceedings resumed on that date.
25. On 27 August 2019, the Tribunal invited (i) counsel for the Claimants, (ii) counsel appearing on behalf of the Respondent at the time, and (iii) Mr. José Ignacio Hernández to make any final observations in respect of Venezuela's representation by 11 September 2019.
26. On 11 September 2019, the Office of the Special Attorney General of the Bolivarian Republic of Venezuela informed the Centre that it would henceforth be represented by Ms. Geraldine Afiuni and the legal counsel appointed by her.
27. On 19 September 2019, the Tribunal informed all involved participants that, in light of the difficulties finding a common date to hold a first session with the Parties, it would hold its first session on 25 September 2019 among its members only pursuant to Article 21(1) of the AF Arbitration Rules.

28. On 25 September 2019, the Tribunal held its first session. Among other matters, the Tribunal discussed the issue of Venezuela's representation and the subsequent procedural steps.
29. On 26 September 2019, the participants in the proceedings were informed that the Tribunal intended to hold the preliminary procedural consultation referred to in Article 28 the AF Arbitration Rules on 5 November 2019 by teleconference.
30. On 1 October 2019, Ms. Irene Loreto of the Attorney General Office filed further observations on the issue of Venezuela's representation in this arbitration.
31. On 15 October 2019, the Tribunal issued a procedural order ruling that the arbitration would continue with counsel of record for Venezuela, namely the attorneys of the law firm De Jesús & De Jesús.
32. By letter dated 24 October 2019, the Centre (i) informed the Parties that the Tribunal confirmed that the preliminary procedural consultation would be held by teleconference; (ii) circulated a draft Procedural Order No. 1 for the Parties to comment in preparation of the procedural consultation; and (iii) proposed the appointment of Mr. Christophe Cachat of Lévy Kaufmann-Kohler as Assistant to the President.
33. On 18 November 2019, the Tribunal issued Procedural Order No. 1, recording the agreement of the Parties on procedural matters ("**PO1**"). PO1 provides, *inter alia*, that the 2006 ICSID Arbitration (Additional Facility) Rules would apply to the present proceedings, that the procedural languages would be English and Spanish, and that the place of arbitration would be Paris, France. PO1 also set out a schedule for the Parties' submissions.
34. On 24 January 2020, the Claimants filed their Memorial on Jurisdiction, Merits, and Quantum together with (i) Exhibits C-0001 to C-0318; (ii) Legal Authorities CL-0001 to CL-0071; (iii) the witness statement of Suzan Frueh; (iv) the witness statement of Fernando A. Solano; and (v) an expert report prepared by Compass Lexecon, titled "Damage Assessment of Claimants' Investments in Venezuela", along with exhibits CLEX-0001 to CLEX-0077 ("**Claimants' Memorial**").
35. On 6 March 2020, the Respondent filed a request for bifurcation pursuant to Article 14.1 of PO1 ("**Respondent's Request for Bifurcation**"). The Respondent proposed that "a first phase [be] dedicated to the Republic's objections to

jurisdiction of the Arbitral Tribunal and a second phase, if necessary, to issues of merits and quantum”. Together with its Request for Bifurcation, the Respondent submitted (i) Exhibits R-0001 to R-0009; and (ii) Legal Authorities RL-0001 to RL-0041.

36. On 26 March 2020, the Claimants advised the Tribunal that, “in light of the abbreviated schedule set by the Tribunal in the event of bifurcation (Scenario 1), and because the Respondent has agreed that its Request for Bifurcation will stand as its primary submission on its Objections to Jurisdiction”, they agreed to bifurcate the proceedings. Accordingly, the Claimants and the Respondent submitted a joint schedule for addressing the jurisdictional issues raised in the Respondent’s Request for Bifurcation.
37. On 30 March 2020, the Tribunal approved the agreed calendar, save for the date of the pre-hearing teleconference, which was moved one day forward.
38. On 22 May 2020, the Claimants filed their Response on Jurisdiction together with (i) Exhibits C-0319 to C-0327; (ii) Legal Authorities CL-0072 to CL-0139; and (iii) an expert report prepared by Prof. Christoph Schreuer, along with exhibits CS-0001 to CS-0024 (“**Claimants’ Response**”).
39. On 8 June 2020, the Tribunal suggested that the hearing be held by virtual means in view of the uncertainty created by the COVID-19 crisis and the likely continuation of travel restrictions.
40. On 15 June 2020, the Parties informed the Tribunal that they had no objection to holding a virtual hearing.
41. To facilitate the organization of a virtual hearing, on 22 June 2020, the Tribunal circulated a draft Procedural Order No. 2, which included proposals for technical and logistical arrangements, as well as a schedule for the Parties’ consideration. The Tribunal also proposed dates and times for a pre-hearing conference call.
42. On 4 July 2020, the Respondent submitted its Reply on Jurisdiction, together with (i) Exhibits R-0010 to R-0014; and (ii) Legal Authorities RL-0042 to RL-0097 (“**Respondent’s Reply**”).
43. On 13 July 2020, the Parties submitted their comments and proposals concerning the draft Procedural Order No. 2 circulated by the Tribunal on 22 June 2020.

44. On 16 July 2020, the Tribunal issued a revised PO1 reflecting the Parties' agreement to modify certain provisions of such Order as set out in their communications of 13 July 2020, and issued Procedural Order No. 2 ("**PO2**") concerning the organization of the hearing.
45. Following consultation with the President of the Tribunal, on 20 July 2020, the Centre requested that each Party make a second advance payment of USD 200,000 to cover the costs of the proceedings. ICSID received Claimants' share (*i.e.* USD 200,000) on 26 August 2020. As the Respondent defaulted on its obligation to pay its share, the Claimants advanced Respondent's share (*i.e.* USD 200,000), while reserving their rights to seek appropriate relief.
46. On 31 July 2020, the Claimants filed a Rejoinder on Jurisdiction together (i) Exhibits C-0328 to C-0334; (ii) Legal Authorities CL-0140 to CL-0183; and (iii) an expert opinion prepared by Prof. Bas Aarts, along with exhibits BA-0001 to BA-0004 ("**Claimants' Rejoinder**").
47. On 4 August 2020, the Claimants requested leave to introduce the Decision on Jurisdiction in the case of *Luís García Armas v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/16/1, which was issued on 24 July 2020. The Respondent consented to the introduction of this legal authority into the record.
48. On 6 August 2020, the President of the Tribunal held a pre-hearing conference call with the Parties.
49. On 10 August 2020, the Respondent applied for the exclusion from the record of the expert opinion of Prof. Bas Aarts on the ground that the Claimants should have submitted the expert's opinion with the Response on Jurisdiction according to Article 15.2 of PO1. The Respondent argued that the Claimants could have done so because the expert opinion merely confirms the literal interpretation of Article 9(2) of the Dutch BIT, which the Claimants put forward in the Response on Jurisdiction.
50. Following an invitation from the Tribunal, on 14 August 2020, the Claimants filed a response to Venezuela's application for the exclusion from the record of the expert opinion of Prof. Bas Aarts. They argued that Article 15.2 of PO1 only applies to submissions on the merits and that, in any event, Article 17.2 of PO1 allows the Parties to file additional expert reports with their second submission. The

Claimants further argued that the Respondent only revealed its grammatical reading of Article 9(2) of the Dutch BIT in the Reply on Jurisdiction.

51. In a letter dated 17 August 2020, the Tribunal indicated to the Parties that, without prejudice to their right to address all the issues they deem appropriate during the forthcoming hearing, the Tribunal would be more particularly interested in submissions in respect of (i) the first objection on the availability of arbitration under the ICSID AF Rules under the relevant treaty dispute resolution clauses with regard to KCN and KCS; (ii) the third objection on *jus standi*; and (iii) the fourth objection, specifically on KCN's and KCS's contributions and risk taking (under the assumption that the term "investment" has an implied meaning that requires the presence of these elements).
52. On 20 August 2020, the Tribunal issued Procedural Order No. 3 ("PO3"), granting the Respondent's request to exclude the expert opinion of Prof. Bas Aarts from the record and reserved costs for a later decision.
53. On 24 August 2020, the Respondent objected to the Claimants' proposed list of participants to the hearing. The Respondent noted that four individuals belonged to a related company not a Party to these proceedings.
54. On 25 August 2020, the Claimants submitted their response to the Respondent's request of 24 August. The Claimants stated that there is no basis for excluding the Claimants' chosen representatives from the hearing, whether under PO2 or otherwise, arguing that it is common in investor-State arbitration for individuals affiliated with parent companies to attend as representatives of subsidiary claimants and that to exclude such representatives from attending would infringe upon principles of natural justice and due process. The Claimants also sought confirmation from the Tribunal that, while the expert opinion of Prof. Bas Aarts had been excluded, the five exhibits submitted alongside the report could remain on the record. The Claimants stated that these documents could have been introduced as exhibits with the Claimants' Rejoinder as they were responsive to an exhibit initially filed with the Respondent's Reply.
55. On 27 August 2020, the Tribunal allowed the four individuals affiliated to a company related to the Claimants to attend the hearing, "provided that one or more of the Claimants submit a proof of the fact that these individuals serve as its or their representatives for purposes of this hearing." The Tribunal also communicated that it was inclined to admit four of the five documents proposed by

the Claimants, unless Venezuela opposed this admission with compelling reasons within 24 hours, in which case the Tribunal would reconsider its determination. The Respondent did not raise any further objection in this connection.

56. On 27 August 2020, the Tribunal held a pre-hearing organizational meeting with the Parties by video conference.
57. On 28 August 2020, the Claimants submitted a power of attorney signed by an authorized officer of KCS, granting representation authorization to the four individuals whose hearing participation had been objected to. On 30 August 2020, the Tribunal took note of this power and deemed the four individuals authorized to attend the hearing. The Claimants also submitted Exhibits C-0339 to C-0342, which the Tribunal had decided to admit into the record, which had been previously submitted as BA-0001, BA-0003, BA-0004 and BA-0005 along with the Expert Opinion of Prof. Bas Aarts.
58. On the same date, each Party submitted the demonstrative exhibits that they intended to refer to during their PowerPoint presentations at the hearing. In addition, during the hearing each Party submitted a PowerPoint presentation immediately prior to its oral arguments.
59. The hearing on jurisdiction was held by video conference from 31 August to 1 September 2020 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

Prof. Gabrielle Kaufmann-Kohler	President
Mr. David Haigh	Co-Arbitrator
Prof. Brigitte Stern	Co-Arbitrator
Mr. Christophe Chat	Assistant to the President

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60. On 3 September 2020, the Tribunal issued Procedural Order No. 4 (“**PO4**”) concerning post-hearing procedural matters, including the audio and video recordings of the Hearing, transcript corrections, and costs submissions.
61. On 23 September 2020, the Respondent submitted the Parties’ agreed revised English and Spanish transcripts of the Hearing.

62. On 2 October 2020, the Parties filed their respective costs submissions.
63. On 11 October 2020, the Claimants objected to the Respondent's accusations against the Claimants contained in Venezuela's costs submissions, particularly those of bad faith. Following the Tribunal's invitation, the Respondent replied on 19 October 2020. The Parties were informed the same day that the Tribunal had taken note of their most recent communications and did not require additional submissions on costs.
64. By letter of 9 December 2020, the Tribunal provided the Parties with an update as to its deliberations. Four more updates followed, on 4 February 2021, 4 June 2021, 30 July 2021 and 14 October 2021.
65. On 24 June 2021, the Claimants advised the Tribunal that Ecuador, which denounced the ICSID Convention in 2009, had re-acceded to the ICSID Convention. The Claimants noted that this fact was relevant to the Tribunal's consideration of Venezuela's jurisdictional objections.
66. By letter of 10 September 2021, ICSID's Secretary-General informed the Parties that Mr. Francisco Grob would take a temporary leave and that Ms. Natalí Sequeira would act as Secretary of the Tribunal during his absence.
67. On 23 September 2021, Prof. Stern and Mr. Haigh circulated a joint disclosure informing the Parties that both of them had been appointed as arbitrators in an UNCITRAL Rules investment arbitration and that their "independent judgment is not and will not be affected by this development".
68. The proceeding closed on 5 November 2021.

III. FACTS RELEVANT TO JURISDICTION

69. The purpose of this section is merely to give the reader an overview of the main factual aspects of the present dispute. It relies on the Claimants' submissions as Venezuela has limited its submissions to matters of procedure and jurisdiction and deemed it "appropriate to accept the facts presented by KCN, KCS and KCB in

relation to the merits and quantum *pro tempore* at this jurisdictional stage of the proceedings”.⁴

A. Origins and development of the Claimants’ investments

70. The Claimants are part of the Kimberly-Clark group, one of the world’s leading multinational in the sector of personal care and hygiene products, with brands such as Kleenex and Scott. Together, they indirectly owned the majority of Kimberly-Clark Venezuela, C.A. (“**KCV**”), a company incorporated in Venezuela in 1992, which was active in manufacturing, importing and selling personal care products in Venezuela.⁵ KCN held approximately 33.06% of KCV from 26 September 2007 until 21 April 2016,⁶ while KCS held approximately 31.32% of KCV from 23 January 2009 until 3 November 2015⁷ and KCB – after having acquired KCS’s shares in KCV – held 31.32% in KCV from 3 November 2015 until 21 April 2016.⁸
71. The Claimants depict KCV’s shareholding structure on 23 January 2009 when KCS started holding its participation as follows:⁹

⁴ Respondent’s Request for Bifurcation, ¶ 159, which in the relevant and more complete part reads as follows: “[a]lthough the Republic objects to all of the characterization of facts made by KCN, KCS and KCB in respect of these allegedly wrongful measures, the Republic deems appropriate to accept the facts presented by KCN, KCS and KCB in relation to the merits and quantum *pro tempore* at this jurisdictional stage of the proceedings”.

⁵ Claimants’ Memorial, ¶ 13, referring to the extract of the Companies Registry with Deed of Incorporation and Bylaws of Venekim, C.A., 12 June 1992, **Exh. C-0001**.

⁶ Claimants’ Memorial, ¶ 11(a), referring to Quota Purchase Agreement between Kimberly-Clark Worldwide, Inc. and KCN, 18 September 2007, **Exh. C-0008**; Agreement for the transfer of the entire issued capital of KCV, 21 April 2016, **Exh. C-0046**.

⁷ Claimants’ Memorial, ¶ 11(b), referring to Share Certificate of Colombiana Kimberly Colpapel S.A., 23 January 2009, **Exh. C-0010**; Share Purchase Agreement between Kimberly-Clark, S.L. Sociedad Unipersonal and KCB, 3 November 2015, **Exh. C-0042**.

⁸ Claimants’ Memorial, ¶ 11(c), referring to Share Purchase Agreement between Kimberly-Clark, S.L. Sociedad Unipersonal and KCB, 3 November 2015, **Exh. C-0042**; Agreement for the transfer of the entire issued capital of KCV, 21 April 2016, **Exh. C-0046**.

⁹ Claimants’ Memorial, ¶ 12.

- As of 23 January 2009

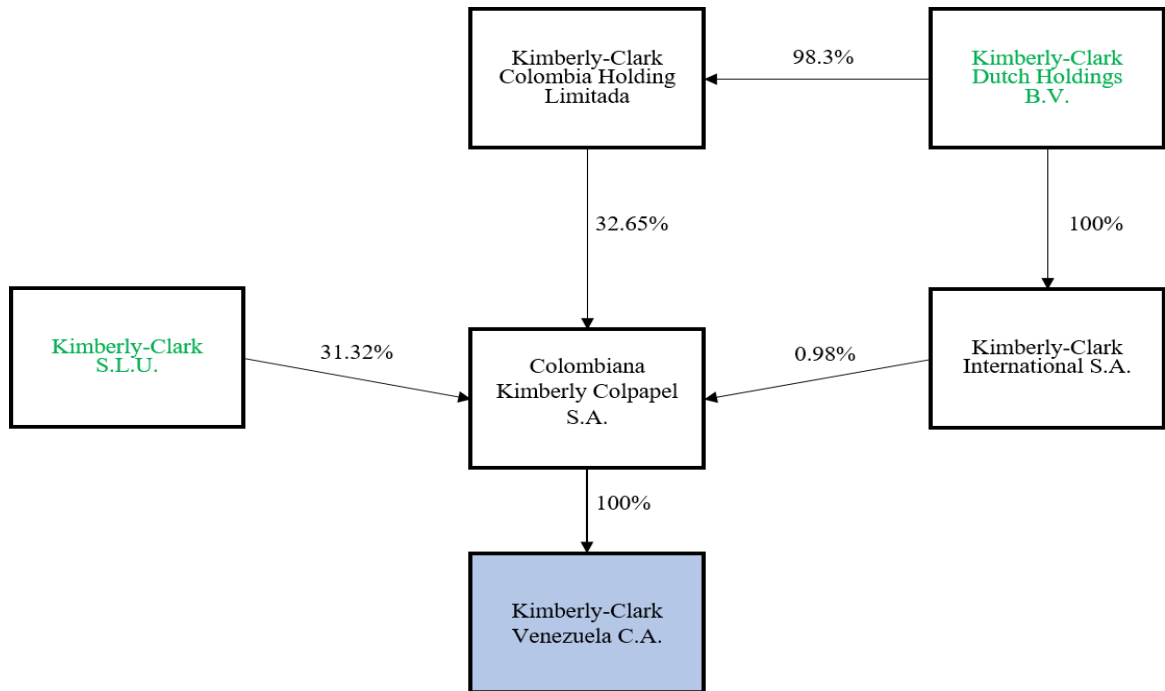


Figure 1: Ownership structure of KCV as of 23 January 2009

- As of 3 November 2015

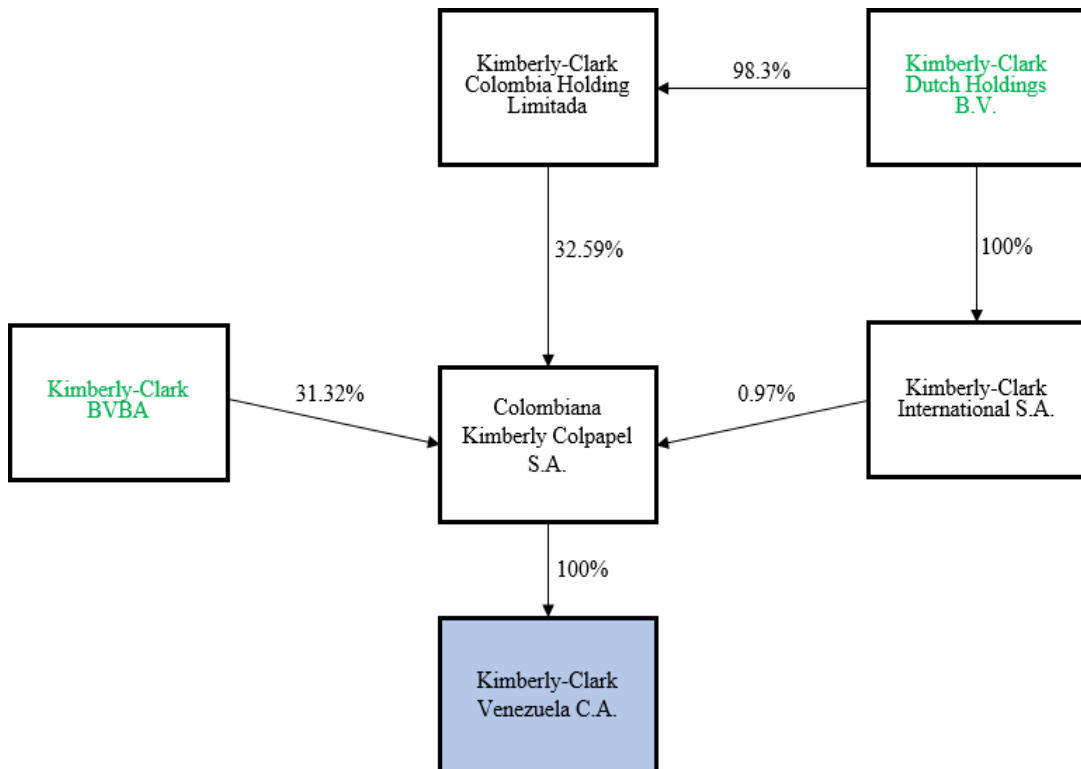


Figure 2: Ownership structure of KCV as of 3 November 2015

72. The shareholding structure just set out ended on 21 April 2016, when Colpapel, the company directly holding 100% of KCV's capital, transferred the entirety of such capital to two affiliates of the Kimberly-Clark group registered in England.¹⁰

B. Measures that affected the Claimants' participation in KCV

73. The Claimants assert that, during the years when they held their interests in KCV, Venezuela adopted several measures which ruined the sustainability of KCV's business, with the result that, by 31 December 2015, their investments had lost their entire value.¹¹ Specifically, the Claimants identify three sets of measures.

74. The first set of measures concerned currency controls. On 5 February 2003, Venezuela introduced a regulation on foreign exchange through the *Convenio Cambiario No. 1* ("**Exchange Agreement No. 1**") issued by the Respondent's Ministry of Finance and the Central Bank of Venezuela ("**BCV**"). The Exchange Agreement No. 1 entrusted the *Comisión Administrativa de Divisas* ("**CADIVI**") with the establishment, administration and control of the procedures and restrictions on sale and import of foreign currency in Venezuela.¹² Pursuant to the Exchange Agreement No. 1, the BCV was responsible for determining the exchange rate for foreign currencies and the requirements to access to foreign currency.¹³ Between 2003 and mid-2004, CADIVI issued three guidelines setting up a mechanism through which private persons were allowed to sell and import foreign currency, among others, to (i) repatriate the initial capital of international investments, (ii) operate international investments and (iii) transfer dividends arising out of international investments.¹⁴

¹⁰ Claimants' Memorial, ¶ 11(a)-(c), referring to Agreement for the transfer of the entire issued capital of KCV, 21 April 2016, **Exh. C-0046**. See also, Claimants' Memorial, ¶¶ 81, 85.

¹¹ Request for Arbitration, ¶ 7.

¹² Claimants' Memorial, ¶ 21, referring to Exchange Agreement No. 1, 5 February 2003, published in the Official Gazette of Venezuela No. 37.625 of 5 February 2003, **Exh. C-0004**, Chapter I, Article 2.

¹³ Claimants' Memorial, ¶ 21. See also, Claimants' Memorial, ¶ 20, fn. 26, referring to Exchange Agreement No. 1, 5 February 2003, published in the Official Gazette of Venezuela No. 37.625 of 5 February 2003, **Exh. C-0004**, Chapter I, Article 8.

¹⁴ Claimants' Memorial, ¶ 20, fn. 26, referring to Ordinance No. 034 of CADIVI, 12 June 2003, published in the Official Gazette of Venezuela No. 37.714 of 18 June 2003, **Exh. C-0057**; Resolution No. 056 of CADIVI, 18 August 2004, published in the Official Gazette of Venezuela No. 38.006 of 23 August 2004, **Exh. C-0058**; Ordinance No. 058 of CADIVI, 2 September 2004, published in the Official Gazette of Venezuela No. 38.015 of 3 September 2004, **Exh. C-0059**.

75. Further restrictions and regulation on the sale and import of foreign currency were subsequently implemented. On 4 June 2010, the *Sistema de Transacciones con Títulos de Moneda Extranjera* was established to limit the access to foreign currency to importers subject to a ceiling of USD 350,000.00 per month.¹⁵ In addition, the *Sistema Complementario de Administración de Divisas* was created in July 2013 as an alternative to acquire foreign currency through periodic auctions.¹⁶ Under both systems, the BCV was in charge of regulating and controlling the sale and import of foreign currency by private persons.¹⁷ In February 2015, the Respondent launched a further system called *Sistema Marginal de Divisas*.¹⁸
76. Finally, in March 2016, the Respondent replaced the prior exchange control systems by a dual mechanism which was comprised of (i) the *Divisas con Tipo de Cambio Protegido* for “essential imports” and (ii) the *Divisas con Tipo de Cambio Complementario Flotante de Mercado*.¹⁹
77. The Claimants submit that these foreign currency controls negatively impacted their investments:
- (i) Due to these restrictions, KCV was “prevented” from importing raw materials, semi-finished and finished products from outside of Venezuela, with the result

¹⁵ Claimants’ Memorial, ¶ 21(c), referring to Ministry of the Popular Power of Planning and Finance and BCV, Exchange Agreement No. 18, 4 June 2010, published in the Official Gazette of Venezuela No. 39.439 of 4 June 2010, **Exh. C-0011**; BCV, Resolution No. 11-11-03, 24 January 2012, published in the Official Gazette of Venezuela No. 39.849 of 24 January 2012, **Exh. C-0089**, Article 6.

¹⁶ Claimants’ Memorial, ¶ 21(d), referring to Ministry of the Popular Power of Planning and Finance and BCV, Exchange Agreement No. 21, 18 March 2013, published in the Official Gazette of Venezuela No. 40.134 of 22 March 2013, **Exh. C-0184**.

¹⁷ Ministry of the Popular Power of Planning and Finance and BCV, Exchange Agreement No. 18, 4 June 2010, published in the Official Gazette of Venezuela No. 39.439 of 4 June 2010, **Exh. C-0011**, Article 1; Ministry of the Popular Power of Planning and Finance and BCV, Exchange Agreement No. 21, 18 March 2013, published in the Official Gazette of Venezuela No. 40.134 of 22 March 2013, **Exh. C-0184**, Article 1.

¹⁸ Claimants’ Memorial, ¶ 21(f), referring to Ministry of Economy, Finance and Public Banking and BCV, Official Notice and Exchange Agreement No. 33, 10 February 2015, published in the Official Gazette of Venezuela No. 6.171 (extraordinary) of 10 February 2015, **Exh. C-0040**.

¹⁹ Claimants’ Memorial, ¶ 21(g), referring to Ministry of Economy, Finance and Public Banking and BCV, Exchange Agreement No. 35, 9 March 2016, published in the Official Gazette of Venezuela No. 40.865 of 9 March 2016, **Exh. C-0044**, pp. 9-11 (unofficial translation provided by the Claimants).

that the currency restrictions effectively “blocked KCV’s access to this essential supply”.²⁰

(ii) These restrictions caused KCV to resort to other means of financing imported goods, namely by taking loans from its parent Colpapel. By 2015, the amount of KCV’s outstanding loans to Colpapel reached up to USD 103.4 million. Yet, due to the “volatility of the economic [...] situation in Venezuela” and the currency restrictions, the Kimberly-Clark group, including Colpapel, had limited its financial assistance to KCV in 2014 already.²¹ It then completely stopped financing KCV’s import operations in 2015, which allegedly reduced KCV’s production levels by 51%.²²

(iii) The currency control measures also prevented KCV from paying dividends to its shareholders. In April 2008, it declared a dividend of around USD 8 million and, in August of that year, it requested CADIVI to exchange Bolivars for USD to pay this dividend. CADIVI issued the relevant authorization three years later in mid-2011. By that time, the applicable exchange rate had increased and the amount approved by CADIVI was equivalent to only USD 4 million. Not only was the amount authorized half of the sum requested, but in the three years during which the request was pending before CADIVI, KCV was unable to pay out any other dividends.²³

78. The second set of measures related to the maximum retail price of certain goods, including some of KCV’s products. On 18 July 2011, Venezuela issued the *Ley de Costos y Precios Justos* (Law on Fair Costs and Prices) which entrusted the *Superintendencia Nacional de Costos y Precios* (“**SUNDECOP**”) with “[s]et[ting] Maximum Selling Prices to the Public or price ranges for goods and services based on their economic importance and strategic nature, in benefit of the population”.²⁴

²⁰ Claimants’ Memorial, ¶ 27. See also, Claimants’ Memorial, ¶¶ 28-30.

²¹ Claimants’ Memorial, ¶¶ 31-35.

²² Claimants’ Memorial, ¶ 36.

²³ Claimants’ Memorial, ¶¶ 39-44. See also, Witness Statement of Fernando A. Solano, 23 January 2020, ¶ 28.

²⁴ Claimants’ Memorial, ¶ 47, referring to Decree No. 8.331, 14 July 2011, published in the Official Gazette of Venezuela No. 39.715 of 18 July 2011, **Exh. C-0013**, Title III, Chapter II, Article 31, ¶ 6 (unofficial translation provided by the Claimants).

Accordingly, SUNDECOP ordered all persons selling many categories of personal care and hygiene products to freeze the current prices on 22 November 2011.²⁵

79. On 27 February 2012, SUNDECOP again set maximum retail prices for those product categories as of 1 April 2012. The Claimants submit that these prices remained frozen until 2014 despite the high inflation suffered by Venezuela and the increase in the price of raw materials.²⁶ Subsequently, the Respondent issued a new statute on retail prices, the *Ley Orgánica de Precios Justos*, which replaced the SUNDECOP by the *Superintendencia Nacional para la Defensa de los Derechos Socioeconómicos*. That body set new maximum prices for the same products, which remained unchanged until 23 May 2016.²⁷
80. The third set of measures adopted by Venezuela, which are said to have adversely affected the Claimants' investment, involved the reimbursement of the value added tax ("VAT"). In 2005, the Respondent implemented a special tax regime for certain enterprises, including KCV, whereby they would transfer 75% of the payable VAT directly to the Venezuelan Tax Authority ("SENIAT") rather than to their suppliers that are generally responsible for paying the VAT.²⁸ If – after applying the necessary quotas and deductions – the amount transferred to SENIAT was greater than the payable amount of the VAT, these enterprises could recover the overpaid amount.²⁹
81. The Claimants assert that by the end of 2014 the amount of the VAT overpaid by KCV reached 203.6 million Bolivars. Between 2009 and 2014, KCV had filed several applications within SENIAT to recover this amount, yet none of them were

²⁵ Claimants' Memorial, ¶ 47, referring to Administrative Orders Nos. 006 and 007 of SUNDECOP, 22 November 2011, published in the Official Gazette of Venezuela No. 39.805 of 22 November 2011, **Exh. C-0014**, Articles 1, 2, 5.

²⁶ Expert Report of Compass Lexecon, 24 January 2020, ¶ 69; Claimants' Memorial, ¶ 51.

²⁷ Claimants' Memorial, ¶¶ 47-52, referring to Decree No. 600, 23 January 2014, published in the Official Gazette of Venezuela No. 40.340 of 23 January 2014, **Exh. C-0035**, Articles 10, 11; National Superintendence for the Defense of Socioeconomic Rights, Toilet Paper Price List, 6 June 2014, **Exh. CLEX-0049**; National Superintendence for the Defense of Socioeconomic Rights, Administrative Ordinance No. 039/2014, 30 August 2014, **Exh. CLEX-0050**; National Superintendence for the Defense of Socioeconomic Rights, Administrative Ordinance No. 043/2014, 5 September 2014, **Exh. CLEX-0051**; National Superintendence for the Defense of Socioeconomic Rights, Administrative Ordinance No. 054/2016, 23 May 2016, **Exh. C-0047**.

²⁸ Claimants' Memorial, ¶ 63, referring to Administrative Order No. SNAT/2005/0056 of SENIAT, 27 January 2005, published in the Official Gazette of Venezuela No. 38.136 of 28 February 2005, **Exh. C-0005**, Article 4 (unofficial translation provided by the Claimants).

²⁹ See generally Organic Tax Code, published in the Official Gazette of Venezuela No. 37.305 of 17 October 2001, **Exh. C-0003**, Article 194 (unofficial translation provided by the Claimants).

approved. Thus, so say the Claimants, by 2014, SENIAT had been unjustifiably withholding 203.6 million Bolivars that should have been reimbursed to KCV.³⁰

82. As a consequence of these measures, so argue the Claimants, in early July 2016, the Kimberly-Clark group announced that it was “halting its Venezuela operations due to the deteriorating economic situation that includes soaring consumer prices and shortages of basic goods”.³¹ A few days later, on 11 July 2016, the government issued Resolution No. 9846 ordering “[t]he **immediate occupation of the work unit *KIMBERLY CLARK VENEZUELA, C.A.*, located at Zona Industrial La Hamaca, galpón N° 160-4, calle 2da. Transversal, Parroquia Los Tacangua, Municipio Girardot, Maracay, Aragua State [...] and the recommencement of productive activities, for the protection of the social labor process, and of the working men and women and their families**”.³²

C. The Notice of Dispute and the filing of the requests for arbitration

83. In reaction to these measures, on 19 June 2017, the Claimants wrote to Venezuela’s Attorney General (*Procurador General*) giving notice of a “dispute [arising] out of certain measures taken by Venezuela in breach of the protections provided to the Kimberly-Clark Investors [Kimberly-Clark Dutch Holdings B.V., Kimberly-Clark Amsterdam Holdings WV., Kimberly-Clark European Investment B.V., Kimberly-Clark S.L.U., Kimberly-Clark BVBA, Kimberly-Clark Ecuador S.A. and Kimberly-Clark Intercontinental Limited] under several international treaties”. The Claimants also invited the Respondent to meet and discuss a solution to the dispute (the “**Notice of Dispute**”).³³
84. In the Notice of Dispute, the Claimants stated that Venezuela had breached its international obligations by (i) imposing unfair and discriminatory price controls over their products; (ii) imposing unfair and discriminatory foreign exchange and transfer controls; (iii) refusing to provide for timely reimbursement of sales tax; and

³⁰ Claimants’ Memorial, ¶¶ 67-68.

³¹ Claimants’ Memorial, ¶ 73, referring to Reuters, *Kimberly-Clark halts Venezuela operations on deteriorating economy*, 9 July 2016, **Exh. C-0048**.

³² Circular issued by Acting Director-General of the Autonomous Service of Registries and Notary Public’s Offices, 15 July 2016, **Exh. C-0051** (unofficial translation provided by the Claimants) (emphasis in the original).

³³ Letter from Gibson Dunn to Procuraduría General de la República, 19 June 2017, **Exh. R-0006**. The Notice of Dispute refers to the BITs as well as to the Agreement between the Republic of Venezuela and the Republic of Ecuador on the reciprocal promotion and protection of investments and the UK BIT.

(iv) expropriating KCV's assets in Venezuela.³⁴ It is not disputed that Venezuela did not reply to the Notice of Dispute.³⁵

85. On 2 January 2018, the Claimants submitted to ICSID a request for arbitration under Article 36 of the ICSID Convention and Articles 2(a) and 4(2) of the AF Rules.³⁶
86. On 23 March 2018, ICSID informed the Claimants that it could not register their request for arbitration because "Articles 2(a), 3 and 4(2) of the Additional Facility Rules and Articles 3 and 4 of the Arbitration (Additional Facility) Rules prevent the Secretary-General from registering one request for arbitration under the ICSID Convention and the Additional Facility Rules in the terms proposed".³⁷
87. As a result, on 6 April 2018, the Claimants filed an amended request, the Request for Arbitration, limited to arbitration under the AF Rules.³⁸

IV. REQUESTS FOR RELIEF ON JURISDICTION

88. In its Reply on Jurisdiction, the Respondent submitted the following requests for relief:

For the foregoing reasons, the Bolivarian Republic of Venezuela respectfully requests that the Arbitral Tribunal:

a. DECLARE that the dispute submitted to arbitration by Kimberly-Clark Dutch Holdings B.V. is not within the jurisdiction of the Arbitral Tribunal, and, at the very least that the Arbitral Tribunal lacks jurisdiction over any investment that Kimberly-Clark Dutch Holdings B.V. may have made in the territory of the Republic after 1 November 2008;

b. DECLARE that the dispute submitted to arbitration by Kimberly-Clark S.L.U. is not within the jurisdiction of the Arbitral Tribunal, and, at the very least, that the Arbitral Tribunal lacks jurisdiction regarding Kimberly-Clark S.L.U. for facts that occurred after 3 November 2015;

c. DECLARE that the dispute (if any) submitted to arbitration by Kimberly Clark BVBA is not within the jurisdiction of the Arbitral

³⁴ Letter from Gibson Dunn to Procuraduría General de la República, 19 June 2017, **Exh. R-0006**, p. 2.

³⁵ Claimants' Response, ¶ 71; Respondent's Reply, ¶ 235.

³⁶ Request for Arbitration, 2 January 2018, **Exh. R-0002**, ¶¶ 1-2 (not registered).

³⁷ Letter from ICSID Acting Secretary-General to KCN, KCS and KCB, 23 March 2018, **Exh. R-0003**.

³⁸ Request for Arbitration, ¶ 2.

Tribunal, and, at the very least, that the Arbitral Tribunal lacks jurisdiction for facts that occurred prior to 3 November 2015;

d. ORDER Kimberly-Clark Dutch Holdings B.V., and/or Kimberly-Clark S.L.U., and/or Kimberly Clark BVBA to pay, jointly and severally, all costs incurred by the Bolivarian Republic of Venezuela, including all of the Arbitral Tribunal's fees and expenses, and all legal fees and expenses incurred by the Bolivarian Republic of Venezuela (including, but not limited to lawyer's fees and expenses).

e. DECLARE that the amount awarded to the Bolivarian Republic of Venezuela under item (d) above shall bear interest as the Arbitral Tribunal may consider appropriate, as from the date of the award on costs and until complete payment.

f. ORDER any additional measure it may deem appropriate.³⁹

89. These requests remained unchanged.

90. In their Rejoinder on Jurisdiction, the Claimants submitted the following requests for relief:

The Claimants respectfully request that the Tribunal:

(a) **DECLARE** that the Tribunal has jurisdiction over this dispute with respect to each Claimant and that each of their claims are admissible;

(b) **DISMISS** all of Venezuela's objections;

(c) **ORDER** Venezuela to pay all costs of, and associated with, this jurisdiction phase, including the Claimants' legal fees and expenses, management time, witnesses, experts and consultants' fees and expenses, administrative fees and expenses of the administration of this case by the Secretariat of the International Centre for Settlement of Investment Disputes, and the fees and expenses of the Tribunal, together with post-award interest on those costs so awarded; and

(d) **GRANT** such other and further relief as the Tribunal deems just and proper.⁴⁰

91. These requests remained unchanged.

V. OVERVIEW OF THE PARTIES' POSITIONS

92. Venezuela raises five objections to the Tribunal's jurisdiction:

(i) First, it has not consented to arbitrate disputes under the AF Rules. The Spanish and the Dutch BITs contained a time-limited offer which expired when Venezuela

³⁹ Respondent's Reply, ¶ 363.

⁴⁰ Claimants' Rejoinder, ¶ 123.

became a party to the ICSID Convention. The Belgian BIT never contained any offer of arbitration under the AF Rules. Therefore, the Tribunal lacks jurisdiction *ratione voluntatis* over the claims.

- (ii) Second, KCS and KCB failed to notify the dispute to the Respondent in a sufficiently detailed manner. As a consequence of this failure, the Tribunal cannot entertain KCS and KCB's claims.
- (iii) Third, the Claimants lack standing because they no longer held their investment when they started this arbitration.
- (iv) Fourth, the Claimants are not protected investors as they have made no investment within the meaning of the BITs. The term "investment" has an inherent meaning, which requires investors to show that their investment involved (i) a contribution, (ii) an element of risk, and (iii) a certain duration. The Claimants rely on their former indirect participations in KCV. However, it is not established that they made a contribution to acquire such participations and that they have incurred a risk. Therefore, the Tribunal lacks jurisdiction *ratione materiae* over the present dispute. In addition, KCB is not a protected investor because it has not shown that its effective place of management is located in Belgium, with the result that the Tribunal thus lacks jurisdiction *ratione personae* over KCB.
- (v) Fifth, the Tribunal lacks jurisdiction *ratione temporis* over the claims raised by KCB, which made its alleged investment after the challenged measures.

93. By contrast, the Claimants submit that the Tribunal has jurisdiction to entertain the dispute and that the Respondent's objections are unfounded:

- (i) First, the BITs all contain the Respondent's consent to arbitration under the AF Rules. As far as KCN and KCS are concerned, the Claimants dispute that Venezuela's offer to arbitrate under the AF Rules was only temporary and has expired. What matters under the Dutch and Spanish BITs is whether the Respondent is a Party to the ICSID Convention. In the affirmative, investors must refer their dispute to arbitration under the ICSID Convention. In the negative, they must refer their dispute to arbitration under the AF Rules. Since Venezuela denounced the ICSID Convention, the Claimants correctly submitted their dispute to arbitration under the AF Rules. As far as KCB is concerned, Venezuela has consented to resolve disputes with Belgian investors by submitting such disputes to ICSID. The Belgian BIT does not limit consent to arbitration pursuant to the

ICSID Convention, but expresses Venezuela's consent to arbitrate either under the ICSID Convention or under the AF Rules.

- (ii) Second, KCS and KCB's Notice of Dispute set forth in sufficient detail the challenged measures, their claims and the applicable treaties.
- (iii) Third, the Claimants have standing in these arbitration proceedings since there is no requirement under international law that they hold their investments at the time when they initiate arbitration.
- (iv) Fourth, the Claimants' investments qualify for protection under the broad definition of the BITs. The Respondent's proposed test has no application under the BITs and the AF Rules. In any event, the investments satisfy the alleged additional requirements. Therefore, the Tribunal has jurisdiction *ratione materiae*. Moreover, KCB is a protected investor because it has a registered office in Belgium. Accordingly, the requirement for jurisdiction *ratione personae* is fulfilled.
- (v) Fifth, the Tribunal has jurisdiction *ratione temporis* over KCB's claims, as the alleged breaches of the Belgian BIT took place while KCB held its investment.

VI. ANALYSIS

A. LEGAL FRAMEWORK

94. As agreed by the Parties⁴¹ and reflected in the Procedural Calendar of 30 March 2020, the arbitration proceedings have been bifurcated between jurisdiction and merits. This Award addresses the Respondent's jurisdictional defenses. After identifying the governing law, it will start by reviewing Venezuela's first objection of lack of so-called "*ratione voluntatis*" jurisdiction. Depending on the outcome, it will either continue with the analysis of their other defenses or conclude on jurisdiction.

1. In general

95. It is undisputed that the Tribunal's jurisdiction is governed by the AF Rules ((2) below), the BITs ((3) to (5) below), and international law.⁴² The Parties agree that the interpretation of the BITs is governed by customary international law as codified

⁴¹ See the Respondent's Request for Bifurcation and the Claimants' email of 26 March 2020 whereby they agreed to the bifurcation of the proceedings.

⁴² Dutch BIT, **Exh. CL-0001**, Article 9(5); Spanish BIT, **Exh. CL-0002**, Article XI(4); Belgian BIT, **Exh. CL-0003**, Article 9(5).

in the Vienna Convention on the Law of Treaties of 23 May 1969 (“**VCLT**”). It is also undisputed that the Tribunal has the power to rule on its own jurisdiction.

96. Unlike arbitrations under the ICSID Convention, proceedings conducted under the AF Rules have a legal seat and are subject to the international arbitration law of the seat. By agreement of the Parties, the seat was set in Paris, France, with the result that this arbitration is also governed by French law on international arbitration.
97. When applying the governing law, be it international or national, the Tribunal is not bound by the arguments and sources invoked by the Parties. Under the maxim *jura novit curia* – or, better, *jura novit arbiter* – the Tribunal is required to apply the law of its own motion, provided it seeks the Parties’ views if it intends to base its decision on a legal theory that was not addressed and that the Parties could not reasonably anticipate.

2. AF Rules

98. In accordance with Articles 2⁴³ and 4(1) of the AF Rules⁴⁴, for an arbitration to validly proceed under such Rules, the following conditions must be met:
- (i) The disputing parties must have consented to refer their disputes to arbitration under the AF Rules;

⁴³ Article 2 of the AF Rules provides:

The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:

- a. conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State; [...].”

⁴⁴ Article 4(1) of the AF Rules reads:

Any agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General. The parties may apply for such approval at any time prior to the institution of proceedings by submitting to the Secretariat a copy of the agreement concluded or proposed to be concluded between them together with other relevant documentation and such additional information as the Secretariat may reasonably request.

- (ii) The Secretary-General of ICSID must have approved the parties' agreement to arbitrate under the AF Rules;
- (iii) There must be a legal dispute;
- (iv) The dispute must be between a State and a national of another State;
- (v) The dispute must fall outside the jurisdiction of ICSID, in particular because the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State to the ICSID Convention.

99. The Respondent does not challenge conditions (ii) to (v). It is therefore undisputed – and rightly so – that the present arbitration satisfies the requirements for an arbitration under the AF Rules except in respect of consent to arbitration. The requirement of consent to AF arbitration is examined in Section E below.

3. Dutch BIT

100. On 22 October 1991, Venezuela and the Netherlands signed the Dutch BIT which has authentic versions drafted in Dutch, English and Spanish.⁴⁵ Venezuela terminated the Dutch BIT on 1 November 2008.⁴⁶ It is common ground that such termination is without effect on the present proceedings.⁴⁷

101. The dispute settlement clause embodied in Article 9 of the Dutch BIT reads as follows:

(i) Authentic English version:

1) Disputes between one Contracting Party and a national of 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).

⁴⁵ Dutch BIT, **Exh. CL-0001**.

⁴⁶ Notice of Termination by Venezuela of the Dutch BIT, 21 April 2008, **Exh. R-0005**.

⁴⁷ Respondent's Request for Bifurcation, ¶ 36(e); Claimants' Response, ¶ 46.

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 I 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.

(ii) Authentic Spanish version:

1) Las controversias entre una Parte Contratante y un nacional de la otra Parte Contratante respecto a una obligación de la primera bajo el presente Convenio en relación a una inversión de la última, serán sometidas, a solicitud del nacional interesado, al Centro Internacional para el Arreglo de Controversias de Inversión, a fin de ser resueltas mediante el arbitraje o la conciliación bajo la Convención para el Arreglo de Controversias de Inversión entre Estados y Nacionales de otros Estados abierta para la suscripción en Washington el 18 de marzo de 1965.

2) Mientras la República de Venezuela no se hiciere Estado Contratante de la Convención mencionada en el párrafo 1 de este Artículo, las controversias referidas en dicho párrafo serán sometidas al Centro Internacional para el Arreglo de Controversias de Inversión bajo las Reglas que Rigen la Facilidad Adicional para la administración de Procedimientos por el Secretariado del Centro (Reglas de Facilidad Adicional).

3) El laudo arbitral se limitará a determinar si existe un incumplimiento por la Parte Contratante de sus obligaciones bajo el presente Convenio, si tal incumplimiento de obligaciones ha causado daños al nacional interesado y, en tal caso, el monto de la compensación.

4) Cada Parte Contratante por medio de la presente otorga su consentimiento incondicional para que las controversias sean sometidas en la forma prevista en el párrafo 1 de este Artículo al arbitraje internacional de acuerdo con las disposiciones de este Artículo.

5) El laudo arbitral estará basado en:

- Las leyes de la Parte Contratante respectiva;
- Las disposiciones del presente Convenio o demás Convenios pertinentes entre las Partes Contratantes.
- Las disposiciones de convenios especiales relacionados con la inversión;
- Los principios generales del derecho internacional; y las normas jurídicas que pudieren ser convenidas por las partes de la controversia.

(iii) Authentic Dutch version:

(1) Geschillen tussen de ene Overeenkomstsluitende Partij en een onderdaan van de andere Overeenkomstsluitende Partij betreffende een verplichting die de eerstgenoemde krachtens deze Overeenkomst heeft met betrekking tot

een investering van laatstgenoemde, worden op verzoek van de betrokken onderdaan voorgelegd aan het Internationale Centrum voor Beslechting van Investeringsgeschillen voor arbitrage of bemiddeling in overeenstemming met het Verdrag inzake de beslechting van geschillen met betrekking tot investeringen tussen Staten en onderdanen van andere Staten, dat op 18 maart 1965 te Washington D.C. ter ondertekening werd opengesteld.

(2) Zolang de Republiek Venezuela geen partij is bij het in het eerste lid van dit artikel genoemde Verdrag, worden geschillen zoals bedoeld in dat lid voorgelegd aan het Internationale Centrum voor Beslechting van Investeringsgeschillen in overeenstemming met de regels betreffende de Aanvullende Voorziening voor de verlening van administratieve diensten bij procedures door het Secretariaat van het Centrum.

(3) De scheidsrechterlijke uitspraak dient zich te beperken tot de vaststelling of de betrokken Overeenkomstsluitende Partij heeft verzuimd haar verplichtingen krachtens deze Overeenkomst na te komen, of de betrokken onderdaan door dat verzuim schade heeft geleden en, indien dat het geval is, het bedrag van de schadeloosstelling.

(4) Elke Overeenkomstsluitende Partij stemt hierbij onvoorwaardelijk in met de onderwerping van geschillen zoals bedoeld in het eerste lid van dit artikel aan internationale arbitrage in overeenstemming met de bepalingen van dit artikel.

(5) De scheidsrechterlijke uitspraak dient te berusten op:

- de wetgeving van de betrokken Overeenkomstsluitende Partij;
- de bepalingen van deze Overeenkomst en andere desbetreffende Overeenkomsten tussen de Overeenkomstsluitende Partijen;
- de bepalingen van bijzondere overeenkomsten betreffende de investering;
- de algemene beginselen van het internationale recht; en
- de rechtsregels die kunnen worden overeengekomen door de partijen bij het geschil.

4. Spanish BIT

102. On 2 November 1995, Spain and Venezuela signed the Spanish BIT, the only authentic language of which is Spanish.⁴⁸

103. The dispute resolution provision is found in Article XI of the Spanish BIT, which provides as follows:

1.- Toda controversia que surja entre un inversor de una Parte Contratante y la otra Parte Contratante respecto del cumplimiento por esta de las obligaciones establecidas en el presente Acuerdo será notificada por escrito, incluyendo una información detallada, por el inversor a la Parte Contratante receptora de la inversión. En la medida de lo posible las partes en controversia tratarán de arreglar estas diferencias mediante un acuerdo amistoso.

2.- Si la controversia no pudiera ser resuelta de esta forma en un plazo de seis meses, a contar desde la fecha de notificación escrita mencionada en el párrafo 1, será sometida a la elección del inversor:

a) A los tribunales competentes de la Parte Contratante en cuyo territorio se realizó la inversión,

b) Al Centro Internacional para el Arreglo de Diferencias Relativas a Inversiones (C.I.A.D.I.) creado por el Convenio para Arreglo de Diferencias

⁴⁸ Spanish BIT, **Exh. CL-0002**.

relativas a Inversiones entre Estados y Nacionales de otros Estados, abierto a la firma en Washington el 18 de marzo de 1965, cuando cada Estado parte en el presente Acuerdo se haya adherido a aquel. En caso de que una de las Partes Contratantes no se haya adherido al citado Convenio, se recurrirá al Mecanismo Complementario para la Administración de Procedimientos de Conciliación, Arbitraje y Comprobación de Hechos por la Secretaria de C.I.A.D.I.;

3.- Si por cualquier motive no estuvieran disponibles las instancias arbitrales contempladas en el Punto 2.b. de este Artículo, o si ambas partes así lo acordaren, la controversia se someterá a un tribunal de arbitraje ad hoc establecido conforme al Reglamento de Arbitraje de la Comisión de las Naciones Unidas para el Derecho Comercial Internacional.

4.- El arbitraje se basará en:

- a. - las disposiciones del presente Acuerdo y las de otros acuerdos concluidos entre las Partes Contratantes;
- b.- las reglas y principios de Derecho Internacional.
- c. - el derecho nacional de la Parte Contratante en cuyo territorio se ha realizado la inversión, incluidas las reglas relativas a los conflictos de Ley.

5.- El laudo arbitral se limitará a determinar si existe incumplimiento por la Parte Contratante de sus obligaciones bajo el presente Acuerdo, si tal incumplimiento de obligaciones ha causado daño al inversor de la otra Parte Contratante, y, en tal caso, a fijar el monto de la compensación.

6.- Las sentencias de arbitraje serán definitivas y vinculantes para las partes en la controversia. Cada parte Contratante se compromete a ejecutar las sentencias de acuerdo con su legislación nacional.

5. Belgian BIT

104. On 17 March 1998, Belgium and Venezuela entered into the Belgian BIT which was made in French, Spanish and Dutch.⁴⁹

105. The arbitration clause is included in Article 9 of the Belgian BIT, which has the following content in its three authentic languages:

(i) Authentic Spanish version:

1.-Cualquier controversia entre un inversor y la otra Parte Contratante que se refiera a la aplicación del presente Acuerdo, será objeto de una notificación escrita, acompañada de un memorándum suficientemente detallado de la Parte del inversor.

En la medida de lo posible, las Partes intentaran resolver la controversia amigablemente mediante la negociación, pudiendo recurrir a la experticia de un tercero, mediante la conciliación.

2.-A falta de arreglo amigable dentro de los seis meses contados a partir de la fecha de la notificación, la controversia se someterá, a opción del Inversor, bien sea a la jurisdicción competente del Estado en el cual se ha efectuado la inversión o bien al arbitraje intencional. Una vez ejercida de esta opción, será definitiva.

⁴⁹ Belgian BIT, **Exh. CL-0003**.

A este fin, cada una de las Partes Contratantes otorga su consentimiento irrevocable por adelantado para que cualquier sea sometida a este arbitraje.

3.- En caso de recurso al arbitraje internacional, la controversia se someterá al Centro Internacional para la Solución de Diferencias relativas a Inversiones (C.I.A.D.I.), creado por la "Convención para el Arreglo de Diferencias Relativas a Inversión es entre Estados y Nacionales de otros Esta dos", abierta a la firma en Washington el 18 de Marzo de 1965.

En caso de que el recurso a C.I.A.D.I. resulte imposible, el inversor podrá someter la controversia a un tribunal de arbitraje ad hoc establecido conforme a las reglas de arbitraje de la Comisión Internacional de las Naciones Unidas para el Derecho Mercantil Internacional. (C.N.U.D.M.I.).

4.- Ninguna de las Partes Contratantes qua sea parte en una controversia formulara come objeción, en ningún estado ni del procedimiento de arbitraje ni de la ejecución de una sentencia arbitral, el hecho de que el inversor que sea la parte contraria en la controversia, haya recibido una indemnización que cubra todas sus pérdidas o parte de ellas, en virtud de una póliza de seguro o de la garantía prevista en el artículo 6 del presente Acuerdo.

5.- El tribunal arbitral decidirá sobre la base del derecho interno de la Parte Contratante, parte en el litigio y en cuyo territorio se encuentre la inversión, inclusive las reglas relativas a conflictos de leyes, de las disposiciones del presente Acuerdo, de los términos de cualquier acuerdo específico existente respecto del trato de la inversión, así come de los principios de derecho internacional.

6.- La sentencia arbitral determinará únicamente acerca de si la Parte Contratante de que se trate ha incumplido una obligación derivada del presente Acuerdo y, si se ha producido un daño al Inversor fijará el monto de la indemnización que dicha Parte Contratante deberá pagar al Inversor.

7.- Las sentencias arbitrales serán definitivas y obligatorias para las partes en la controversia. Cada Parte Contratante se obliga a ejecutar las sentencias de conformidad con su legislación nacional.

(ii) Authentic French version:

1. Tout différend entre l'investisseur d'une Partie contractante et l'autre Partie contractante qui a trait à l'application de cet Accord, fait l'objet d'une notification écrite, accompagnée d'un aide-mémoire suffisamment détaillé, de la part de l'investisseur.

Dans la mesure du possible, les parties tenteront de régler le différend à l'amiable par la négociation, en ayant éventuellement recours à l'expertise d'un tiers, ou par la conciliation.

2. A défaut de règlement amiable dans les six mois à compter de la notification, le différend est soumis, au choix de l'investisseur, soit à la juridiction compétente de l'Etat ou l'investissement a été fait, soit à l'arbitrage international. Ce choix étant fait, il sera définitif.

A cette fin, chacune des Parties contractantes donne son consentement anticipé et irrévocable à ce que tout différend soit soumis à cet arbitrage.

3. En cas de recours à l'arbitrage international, le différend est soumis au Centre International pour le Règlement des différends relatifs aux Investissements (C.I.R.D.I.), créé par "la Convention pour le Règlement des Différends Relatifs aux Investissements entre Etats et Ressortissants d'autre Etats", ouverte à la signature à Washington, le 18 mars 1965.

Au cas où le recours à CIRDI s'avérerait impossible, l'investisseur pourra soumettre le différend à un tribunal d'arbitrage ad hoc, établi selon les règles d'arbitrage de la Commission des Nations Unies pour le Droit Commercial International (C.N.U.D.C.I.);

4. Aucune des Parties contractantes, partie à un différend, ne soulèvera comme objection, à aucun stade, ni de la procédure d'arbitrage, ni de l'exécution d'une sentence d'arbitrage, le fait que l'investisseur, partie adverse au différend, aurait perçu une indemnité couvrant tout, ou partie de ses pertes, suite à l'exécution d'une police d'assurance ou de la garantie prévue à l'Article 6 du présent Accord.

5. Le tribunal arbitral statuera sur la base du droit interne de la Partie contractante partie en litige sur le territoire de laquelle l'investissement est situé, y compris les règles relatives aux conflits de lois, des dispositions du présent Accord, des termes de l'accord particulier qui serait intervenu au sujet du traitement de l'investissement, ainsi que des principes de droit international.

6. La sentence arbitrale statuera uniquement sur les points à savoir si la Partie contractante en cause a manqué de remplir une obligation en vertu du présent Accord et s'il en a résulté un dommage pour l'investisseur, et fixera le montant de l'indemnité que cette Partie contractante devra payer à l'investisseur.

7. Les sentences d'arbitrage sont définitives et obligatoires pour les parties au différend. Chaque Partie contractante s'engage à exécuter les sentences en conformité avec sa législation nationale.

(iii) Authentic Dutch version:

1. Van elk geschil tussen de investeerder van een Overeenkomstsluitende Partij en de andere Overeenkomstsluitende Partij dat betrekking heeft op de toepassing van deze Overeenkomst, wordt schriftelijk kennis gegeven. De kennisgeving gaat vergezeld van een naar behoren door de investeerder toegelicht memorandum.

De partijen dienen er in de mate van het mogelijke naar te streven het geschil in der minne te regelen door onderhandeling en daarbij, indien nodig, deskundig advies in te winnen van een derde of nog door bemiddeling.

2. Wanneer het geschil niet binnen zes maanden na de kennisgeving in der minne kan worden geregeld, wordt het, naar keuze van de investeerder, voorgelegd aan hetzij de bevoegde rechtsmacht van de Staat waar de investering werd gedaan, hetzij aan internationale arbitrage. Deze keuze kan niet meer worden gewijzigd. Elke Overeenkomstsluitende Partij geeft te dien einde haar voorafgaande en onherroepelijke toestemming elk geschil aan zodanige arbitrage te onderwerpen.

3. Als internationale arbitrage wordt gevraagd, wordt het geschil voorgelegd aan het Internationaal Centrum voor Regeling van Investeringsgeschillen (I.C.S.I.D.), dat is opgericht door het te Washington op 18 maart 1965 voor ondertekening opengestelde "Verdrag tot regeling van investeringsgeschillen tussen Staten en onderdanen van andere Staten".

Indien het niet mogelijk is het geschil aan het I.C.S.I.D. voor te leggen, kan de investeerder zich wenden tot een ad-hoc arbitragehof dat wordt samengesteld volgens de arbitrageregels van de Commissie van de Verenigde Naties voor Internationaal Handelsrecht (UNCITRAL).

4. Geen van de bij een geschil betrokken Overeenkomstsluitende Partijen, zal in enig stadium van de arbitrageprocedure of van de uitvoering van een scheidsrechterlijke uitspraak als verweer kunnen aanvoeren dat de

investeerder die tegenpartij is bij het geschil, een vergoeding ter uitvoering van een verzekeringspolis of van de in artikel 6 van deze Overeenkomst vermelde waarborg heeft ontvangen, die het geheel of een gedeelte van zijn verliezen dekt.

5. Het arbitragehof doet uitspraak op grond van het nationaal recht van de Overeenkomstsluitende Partij die partij is bij het geschil en de investering op haar grondgebied heeft, met inbegrip van de regels inzake conflicten tussen wetgevingen, de bepalingen van deze Overeenkomst, de bepalingen van de eventueel gesloten bijzondere overeenkomst met betrekking tot de behandeling van de investering, en de beginselen van het internationaal recht.

6. Het arbitragehof doet enkel uitspraak over de punten die antwoord geven op de vraag of de betrokken Overeenkomstsluitende Partij heeft verzuimd haar verplichtingen krachtens deze Overeenkomst na te komen en of de investeerder hierdoor schade heeft geleden. Het bepaalt ook het bedrag van de schadeloosstelling die deze Overeenkomstsluitende Partij aan de investeerder dient te betalen.

7. De arbitragevonnissen zijn definitief en bindend voor de partijen bij het geschil. Elke Overeenkomstsluitende Partij verbindt zich ertoe ze uit te voeren overeenkomstig haar nationale wetgeving.

6. ICSID Convention

106. While this is not an arbitration under the ICSID Convention, the status of the ICSID Convention in respect of Venezuela is relevant to the analysis of the Respondent's first objection, which is addressed here.
107. On 18 August 1993, the Respondent signed the ICSID Convention. It deposited its instrument of ratification on 2 May 1995. On 1 June 1995, the ICSID Convention entered into force for Venezuela.⁵⁰
108. On 24 January 2012, Venezuela denounced the ICSID Convention according to Article 71 of the ICSID Convention. The denunciation became effective on 25 July 2012.⁵¹

B. Jurisdiction *ratione voluntatis*

1. KCN and the Dutch BIT

a. The Respondent's position

- (i) Article 9(2) of the Dutch BIT contains no consent to arbitrate under the AF Rules

⁵⁰ List of Contracting States and Other Signatories of the ICSID Convention, 12 April 2019, **Exh. R-0007**, p. 5 (footnote).

⁵¹ List of Contracting States and Other Signatories of the ICSID Convention, 12 April 2019, **Exh. R-0007**, p. 5 (footnote).

109. In Venezuela’s submission, its offer to arbitrate disputes under the AF Rules was temporary and had expired at the time when KCN sent its Notice of Dispute on 19 June 2017. As a result, no arbitration agreement was concluded and the Tribunal lacks jurisdiction *ratione voluntatis* over the dispute.⁵²
110. At the outset, the Respondent stresses that the English, Spanish and Dutch texts of Article 9(2) of the Dutch BIT, the full text of which is quoted above, show two differences. First, the English and Spanish versions of Article 9(2) provide for recourse to AF arbitration if one of the States “has not become a Contracting State of the Convention”, respectively “*no se hiciera Estado Contratante*”.⁵³ The Dutch version, by contrast, uses the words “*geen partij is*” (“is not a party”).⁵⁴ For the Respondent, the English and Spanish expressions refer to a positive act of the State, namely “the act whereby the State has consented to be bound by the treaty of which it becomes a Contracting Party”,⁵⁵ while the Dutch wording lacks such a reference.
111. Second, each version uses different tenses. The English text uses the present perfect (“has become”), which refers to an action that started in the past and continues in the present. The Spanish text uses the future subjunctive (“*no se hiciera*”, *i.e.*, “will not make itself”), which refers to the hypothetical fulfillment of a condition in the future. The Dutch version uses the present tense (“*geen partij is*”, *i.e.*, “is not a party”), which refers to the state of affairs at the time of assessment.⁵⁶
112. In light of these differences, Venezuela invokes Article 3 of the Protocol to the Dutch BIT, according to which the English text shall prevail in case of inconsistencies.
113. Relying thus on the English version, the Respondent argues that the Parties’ disagreement on the interpretation of Article 9 stems from the first part of the sentence, which reads “[a]s long as the Republic of Venezuela has not become a Contracting State to the [ICSID] Convention”.⁵⁷ This would mean “as long as the Respondent has not *adhered* to the ICSID Convention” and not, as advocated by

⁵² Respondent’s Request for Bifurcation, ¶ 67.

⁵³ Respondent’s Request for Bifurcation, ¶ 61; Respondent’s Reply, ¶ 40.

⁵⁴ Respondent’s Reply, ¶ 40.

⁵⁵ Respondent’s Reply, ¶ 40.

⁵⁶ Respondent’s Reply, ¶ 41.

⁵⁷ Respondent’s Reply, ¶ 46.

KCN, “as long as the Respondent *is* not a Contracting State to the ICSID Convention at the time the dispute is submitted”.⁵⁸ For the Respondent, its interpretation must be given preference for the following reasons.

114. First, such interpretation is consistent with the literal meaning of Article 9(2). Indeed, the conjunction “as long as” refers to the duration of a future endeavor or is used to subordinate the application of a given situation to a condition.⁵⁹ In other words, the Respondent argues that “the ordinary meaning of those terms is to express the idea of a temporary situation ‘until such time’ or a qualified situation ‘under the condition that’”.⁶⁰ In addition, the present perfect used in this sentence implies that an event has started in the past and continues in the present. In this case, that event is the accession of Venezuela to the ICSID Convention.⁶¹
115. Second, the Respondent contends that its interpretation is consistent with the circumstances of the Dutch BIT’s conclusion. In the context of international law, the expression “has become a Contracting State” refers to the ratification or accession by a State to a treaty.⁶²
116. Third, the Respondent stresses that it ratified the ICSID Convention on 18 August 1993, which entered into force on 1 June 1995. Accordingly, the offer to arbitrate under the AF Rules provided in Article 9(2) of the Dutch BIT expired on 1 June 1995, *i.e.*, before KCN submitted its Notice of Dispute.⁶³
117. Finally, the Respondent argues that its interpretation of Article 9 of the Dutch BIT is correct, even if it results in KCN being left without a forum to arbitrate.⁶⁴ Relying on *ICS Inspection v. Argentina*, the Respondent emphasizes that the absence of an arbitral forum is the default position under international law.⁶⁵

⁵⁸ Respondent’s Reply, ¶ 46 (emphasis added).

⁵⁹ Respondent’s Reply, ¶ 47.

⁶⁰ Respondent’s Reply, ¶ 48.

⁶¹ Respondent’s Reply, ¶ 40.

⁶² Respondent’s Reply, ¶ 50.

⁶³ Respondent’s Request for Bifurcation, ¶ 62.

⁶⁴ Respondent’s Reply, ¶ 53.

⁶⁵ Respondent’s Reply, ¶ 53; *ICS Inspection and Control Services Limited (United Kingdom) v. Argentine Republic*, PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012, **Exh. RL-0047**, ¶ 281.

118. The Respondent further submits that various supplementary means of interpretation confirm its reading of Article 9(2) of the Dutch BIT. First, the *raison d'être* of Article 9(2) was to provide investors access to arbitration through the AF Rules on a temporal basis while Venezuela had not yet become a party to the ICSID Convention.⁶⁶
119. Second, the Netherlands' treaty practice corroborates that the contracting parties to the Dutch BIT intended to provide their investors only with access to arbitration under the ICSID Convention. Indeed, the Netherlands concluded various bilateral investment treaties containing a dispute resolution clause referring exclusively to ICSID arbitration.⁶⁷
120. Third, the Respondent asserts that "it appears highly unlikely that the Republic and the Kingdom of the Netherlands would have had in mind in 1991 the potential denunciation of the ICSID Convention by the Republic".⁶⁸
121. Furthermore, the Respondent insists that KCN's interpretation is based only on the Dutch wording of Article 9(2), allegedly on the ground of Article 33(3) of the VCLT.⁶⁹ However, Article 33(3) of the VCLT does not apply in the present case since Article 3 of the Protocol to the Dutch BIT provides that the English version shall prevail in case of divergences between the different versions.⁷⁰ Venezuela also observes that KCN's interpretation would grant Dutch investors more favorable access to arbitration than Venezuelan investors. Dutch investors would have access to AF arbitration in the event that Venezuela denounces the ICSID Convention, while Venezuelan investors would have no such access if the denunciation were made by the Netherlands.
122. Finally, the Respondent asserts that several investment tribunals, including *Valores Mundiales v. Venezuela* and *Heemsen v. Venezuela*, have reached a similar conclusion.⁷¹

⁶⁶ Respondent's Reply, ¶ 58.

⁶⁷ Respondent's Reply, ¶ 59.

⁶⁸ Respondent's Reply, ¶ 60.

⁶⁹ Respondent's Reply, ¶ 66.

⁷⁰ Respondent's Reply, ¶¶ 66, 70.

⁷¹ Respondent's Reply, ¶ 61; *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, **Exh. CL-0060**, ¶ 255;

(ii) Jurisdiction cannot be established through the MFN clause

123. It is the Respondent's further submission that KCN cannot invoke substantive provisions of the Dutch BIT, which include a most-favoured-nation treatment clause ("MFN"), if consent to arbitration is not established.⁷² For the Respondent, "[i]t is a well-established principle of international law that, to be able to rely on an MFN clause in the basic treaty, a party must indeed first establish the tribunal's jurisdiction under that treaty".⁷³ In support, the Respondent refers to the bridge metaphor of the late Judge Crawford, pursuant to which "the investor is on one side of the bridge; the substantive provisions of the treaty (including MFN) are on the other; the bridge is made up of the jurisdictional provisions of the treaty – the investor can only cross if jurisdiction is established".⁷⁴
124. The Respondent further contends that this principle is widely recognized including by the International Court of Justice ("ICJ") and the International Law Commission ("ILC"). In the *Anglo Iranian Oil Case*, the United Kingdom intended to rely on the MFN clause provided in a treaty with Iran in order to benefit from provisions of Iran's other treaties. The ICJ found that the United Kingdom was not entitled to invoke the MFN clause since the ICJ had no jurisdiction over the basic treaty.⁷⁵ For its part, the ILC confirmed that "[a]n investor who has not met the requirements for commencing a claim against the respondent State cannot avoid those requirements by invoking the procedural provisions of another BIT".⁷⁶
125. Venezuela also cites investment awards, in particular *ST-AD v. Bulgaria*, where the tribunal held that the principle of *compétence-compétence* does not allow arbitrators to "use the MFN [...] to create a jurisdiction that it does not possess to

Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019, **Exh. RL-0009**.

⁷² Respondent's Reply, ¶ 79.

⁷³ Respondent's Reply, ¶ 81.

⁷⁴ Respondent's Reply, ¶ 86.

⁷⁵ Respondent's Reply, ¶ 81; *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Preliminary Objection, Judgement, 22 July 1952, ICJ Rep. 1952, p. 93, **Exh. RL-0052**, p. 109.

⁷⁶ Respondent's Reply, ¶ 82, citing ILC, *Final Report of the Study Group on the Most-Favoured-Nation Clause*, 29 May 2015, **Exh. RL-0053**, ¶ 105. See also, Respondent's Reply, ¶ 83, citing Z. Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2(1) Journal IDS 97, **Exh. RL-0054**, p. 107.

begin with”.⁷⁷ In its understanding, this is the consequence of the lack of an adjudicatory forum with general jurisdiction. Relying on the ICJ decisions in *East Timor* and *Armed Activities on the Territory of the Congo (Rwanda)*, the Respondent also notes that “the ICJ distinguished between the ‘rule of consent’ (the jurisdictional requirements) and ‘the substantive rights’ (the rights to which access is granted upon satisfaction of the jurisdictional requirements), and emphasized that even a substantive norm having the character of *jus cogens* does not imply that there exists a right to have this norm enforced in an international jurisdiction”.⁷⁸

126. It is the Respondent’s further submission that, even assuming that KCN could invoke the MFN clause, its attempt would nevertheless fail.⁷⁹ Invoking a scholarly article by Prof. Douglas, it stresses that the arbitration agreement is severable from the rest of the treaty,⁸⁰ and thus falls outside the scope of application of the MFN clause, unless otherwise stated.⁸¹
127. Venezuela equally emphasizes that most investment tribunals have reached conclusions in line with its position.⁸² According to the Respondent, only two out of over 40 decisions allowed the use of MFN for purposes of dispute settlement.⁸³ Indeed, in *Venezuela US v. Venezuela* and in *Garanti Koza v. Turkmenistan*, the

⁷⁷ Respondent’s Reply, ¶ 89, citing *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, **Exh. RL-0035**, ¶ 398. See also, Respondent’s Reply ¶ 90, citing, in particular, *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, **Exh. CL-0038**, ¶ 79; Respondent’s Reply, ¶¶ 91-92; *Itisaluna Iraq LLC and others v. Republic of Iraq*, ICSID Case No. ARB/17/10, Award, 3 April 2020, **Exh. RL-0059**, ¶ 150; *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, **Exh. CL-0013**, ¶ 69.

⁷⁸ Respondent’s Reply, ¶ 84; *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Rep. 1995, p. 90, **Exh. RL-0056**; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 3 February 2006, ICJ Rep. 2006, p. 6, **Exh. RL-0057**.

⁷⁹ Respondent’s Reply, ¶ 96.

⁸⁰ Respondent’s Reply, ¶ 99; Z. Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2(1) Journal IDS 97, **Exh. RL-0054**, p. 103.

⁸¹ Respondent’s Reply, ¶ 99.

⁸² Respondent’s Reply, ¶ 101.

⁸³ Respondent’s Reply, ¶ 102.

tribunals held that a MFN clause could be used for jurisdictional purposes since the specific MFN clause expressly covered dispute resolution.⁸⁴

128. Finally, the Respondent underlines that the MFN clause of the Dutch BIT found in Article 3(2), in any event does not capture dispute settlement as it aims at “physical security and protection”, which cannot be assimilated to dispute resolution under the *ejusdem generis* principle.⁸⁵

b. KCN’s position

- (i) Article 9(2) contains the Respondent’s consent to AF arbitration

129. KCN disagrees with the Respondent’s position that the offer to arbitrate under the AF Rules was limited to the purported “pre-ICSID period” and elapsed when Venezuela became a Contracting State to the ICSID Convention.

130. For KCN, the Respondent’s interpretation of Article 9(2) is contrary to the ordinary meaning of its terms. The Dutch BIT was drafted in Dutch, Spanish and English. Pursuant to Article 33(3) of the VCLT, all three versions “are presumed to have the same meaning”.⁸⁶ Relying on the ILC, KCN advances that “[t]his presumption requires that every effort should be made to find a common meaning for the texts before preferring one to another”.⁸⁷ The English version should only be preferred if no common interpretation is possible among the three versions of the Dutch BIT.⁸⁸

131. Resorting to a common interpretation, KCN contends that “when Venezuela is not a party to the ICSID Convention, disputes shall be submitted to Additional Facility arbitration”.⁸⁹ According to KCN’s English translation, the Dutch version of the BIT expressly provides that AF arbitration is available “[a]s long as [the Respondent] is

⁸⁴ Respondent’s Reply, ¶ 102; citing *Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction (on the Respondent’s Objection to Jurisdiction *Ratione Voluntatis*), 26 July 2016, **Exh. CS-0019**; *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Objection to Jurisdiction for Lack of Consent, Dissenting Opinion of Laurence Boisson de Chazournes, 3 July 2013, **Exh. RL-0065**.

⁸⁵ Respondent’s Reply, ¶ 110.

⁸⁶ Claimants’ Response, ¶ 36.

⁸⁷ Claimants’ Rejoinder, ¶ 31 citing ILC, *Draft Articles on the Law of Treaties, with commentaries* (1966), **Exh. CL-0148**, p. 225, ¶ 7.

⁸⁸ Claimants’ Rejoinder, ¶ 33.

⁸⁹ Claimants’ Rejoinder, ¶ 35.

not a party to the Convention”.⁹⁰ With respect to the English and Spanish versions, the expression “[a]s long as it has not become a Contracting State”/ “mientras no se hiciera Estado Contratante” shows that what matters is whether the host State is a party to the ICSID Convention at the time when the dispute is submitted to arbitration.⁹¹ KCN therefore concludes that “contrary to Venezuela’s reading, there is nothing in the ordinary terms of the Dutch BIT which suggests that the period in which Venezuela ‘is not’ / ‘has not become’ / ‘does not become’ a Contracting State is a **one-time, temporary period**”.⁹² It adds that “[w]hile Article 9(2) may have been dormant for the period in which Venezuela was a Contracting State [...], it was revived when Venezuela reverted to its prior status as a non-Contracting State to the ICSID Convention”.⁹³

132. In addition, KCN notes that the Respondent’s interpretation of Article 9(2) is contrary to that provision’s purpose. Indeed, it deprives investors of recourse to arbitration while the very purpose of Article 9 is to grant them the right to arbitrate. More generally, that meaning is contrary to the object of the Dutch BIT, which is to create favorable conditions for nationals of one Contracting Party investing in the other Contracting Party.⁹⁴
133. Although KCN submits that there is no need to refer to supplementary means of interpretation, since the literal meaning of Article 9(2) of the Dutch BIT is clear,⁹⁵ it observes that its interpretation is consistent with the circumstances of the Dutch BIT’s conclusion. Venezuela was not yet a party to the ICSID Convention when it signed the Dutch BIT. The contracting parties therefore intended to ensure that “an investor of either Contracting Party would have an avenue to arbitrate disputes against the other Contracting Party, whether it was pursuant to the ICSID Convention or the [AF Rules]”.⁹⁶ KCN further asserts that Venezuela’s arguments

⁹⁰ Claimants’ Rejoinder, ¶ 36.

⁹¹ Claimants’ Response, ¶¶ 40-42; Claimants’ Rejoinder, ¶¶ 39-40.

⁹² Claimants’ Response, ¶ 43 (emphasis in the original).

⁹³ Claimants’ Response, ¶ 43.

⁹⁴ Claimants’ Response, ¶¶ 32-33.

⁹⁵ Claimants’ Rejoinder, ¶ 46.

⁹⁶ Claimants’ Response, ¶ 45.

about supplementary means of interpretation are speculative and do not justify departing from the ordinary meaning of Article 9(2) of the Dutch BIT.⁹⁷

134. Moreover, for KCN, the decisions which the Respondent invokes do no support Venezuela's position. In *Valores Mundiales*, the tribunal was not asked to consider whether it had jurisdiction under the AF Rules or the Dutch BIT. Rather, it assessed whether Venezuela had consented to ICSID Convention arbitration in the Spanish BIT. KCN emphasizes that, in *Valores Mundiales*, Venezuela argued that the investor should have submitted the dispute under the AF Rules since Venezuela had denounced the ICSID Convention, which is consistent with KCS's reading of the Spanish BIT and KCN's reading of the Dutch BIT in the present arbitration.⁹⁸

135. Regarding *Heemsen v. Venezuela*, KCN argues that the tribunal's reasoning should not be transposed to the present dispute because:

- (i) the issue there was whether UNCITRAL arbitration, not AF arbitration, was available to the claimants;
- (ii) the Spanish version of the dispute resolution clause in the Germany-Venezuela BIT applicable in *Heemsen v. Venezuela* is not the same as the one of the Dutch BIT (namely, the translation of the Spanish version of the Germany-Venezuela BIT reads "[a]s long as the Republic of Venezuela has not become a Party" while the translation of the Spanish version of the Dutch BIT reads "[a]s long as the Republic of Venezuela does not become a Party"); and
- (iii) the investor's arguments in *Heemsen v. Venezuela* were different from KCN's position in these proceedings, since it appears that the former did not specifically argue that Venezuela could again become a party to the ICSID Convention with the consequence that "has not become" could not relate to a one-time event.⁹⁹

(ii) The Tribunal has jurisdiction through the MFN clause

136. Alternatively, KCN submits that, under the MFN clause provided in Article 3(2) of the Dutch BIT, it can invoke a more favorable investor-State dispute resolution clause contained in other investment treaties concluded by the Respondent. Article 3(2) guarantees full physical security and protection not less than that accorded to

⁹⁷ Claimants' Rejoinder, ¶ 46.

⁹⁸ Claimants' Response, ¶ 48. See also, Claimants' Rejoinder, ¶ 47(a).

⁹⁹ Claimants' Response, ¶ 50. See also, Claimants' Rejoinder, ¶ 47(b).

nationals of third states. For KCN, the word “protection” includes dispute settlement, with the result that it may rely on the arbitration clause of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Venezuela for the Promotion and Protection of Investments signed on 15 March 1995 (the “UK BIT”), *i.e.*, on Article 8(2) of the UK BIT, which expressly permits AF arbitration.¹⁰⁰ It also claims that the term “protection” includes MFN provisions of third State treaties and adds that, in the event the Tribunal does not accept that it is entitled to invoke the dispute settlement provision of the UK BIT, it may apply the MFN provision contained in Article 3 of that treaty, which explicitly covers dispute settlement.¹⁰¹

137. In support, KCN calls the Tribunal’s attention to decisions which held that investors may rely on MFN provisions, if they qualify for protection under *ratione personae* and *materiae* criteria,¹⁰² even in the absence of express wording extending the MFN clause to dispute settlement.¹⁰³

c. Discussion

(i) Interpretation of Article 9(2)

138. The Parties’ disagreement hinges on the content of Article 9 of the Dutch BIT, which provision is quoted in full above and is restated here in relevant part for convenience:

¹⁰⁰ Claimants’ Response, ¶ 52. See also, Claimants’ Rejoinder, ¶ 57, referring to the UK BIT, **Exh. CL-0008**.

¹⁰¹ Claimants’ Response, ¶ 53. See also, Claimants’ Rejoinder, ¶¶ 57-60, 65-67, 71-78.

¹⁰² Claimants’ Rejoinder, ¶ 59, citing *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on Objection to Jurisdiction for Lack of Consent, 3 July 2013, **Exh. CL-0138**, ¶¶ 61-62; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, **Exh. CL-0106**, ¶ 200; *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013, **Exh. CL-0169**, ¶ 14; *Dawood Rawat v. Republic of Mauritius*, PCA Case No. 2016-20, Award on Jurisdiction, 6 April 2018, **Exh. CS-0023**, ¶¶ 160-161; *Itisaluna Iraq LLC and Others v. Republic of Iraq*, ICSID Case No. ARB/17/10, Award, 3 April 2020, **Exh. RL-0059**, ¶ 150.

¹⁰³ Claimants’ Rejoinder, ¶ 60, citing *Le Chèque Déjeuner and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, **Exh. CL-0139**, ¶ 159; *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, 1 October 2007, **Exh. RL-0066**, ¶ 135; *National Grid Plc v. Argentine Republic*, Decision on Jurisdiction, 20 June 2006, **Exh. CL-0087**, ¶¶ 82, 93; *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/08, Decision on Jurisdiction, 3 August 2004, **Exh. CL-0082**, ¶ 85.

In English:

2) As long as the Republic of Venezuela has not become a Contracting State of the [ICSID] 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).

In Spanish:

2) Mientras la República de Venezuela no se hiciera Estado Contratante de la Convención [CIADI] mencionada en el párrafo 1 de este Artículo, las controversias referidas en dicho párrafo serán sometidas al Centro Internacional para el Arreglo de Controversias de Inversión bajo las Reglas que Rigen la Facilidad Adicional para la administración de Procedimientos por el Secretariado del Centro (Reglas de Facilidad Adicional).

In Dutch:

2) Zolang de Republiek Venezuela geen partij is bij het in het eerste lid van dit artikel genoemde Verdrag, worden geschillen zoals bedoeld in dat lid voorgelegd aan het Internationale Centrum voor Beslechting van Investeringsgeschillen in overeenstemming met de regels betreffende de Aanvullende Voorziening voor de verlening van administratieve diensten bij procedures door het Secretariaat van het Centrum.

139. The divergence centers on whether Venezuela's offer to arbitrate under the AF Rules was limited to the pre-ICSID period, *i.e.*, the period until Venezuela acceded to the ICSID Convention, or whether it applies at any time when Venezuela is not an ICSID Contracting State. It is common ground between the Parties – and rightly so – that the Dutch BIT must be interpreted in accordance with the VCLT.¹⁰⁴ As mandated by Article 31(1) of the VCLT, the Tribunal will start by establishing in good faith the ordinary meaning of the terms in their context and in light of the BIT's object and purpose ((1) below).¹⁰⁵ Thereafter, it will confirm such ordinary meaning

¹⁰⁴ Respondent's Reply, ¶ 22; Claimants' Rejoinder, ¶ 13.

¹⁰⁵ Article 31 VCLT reads as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

by resorting to supplementary means of interpretation under Article 32 of the VCLT ((2) below).

(1) *Ordinary meaning*

140. Speaking of the ordinary meaning of the terms, for the Respondent, the present perfect tense “*has not become*” a Contracting State of ICSID used in the English version of the BIT “refer[s] to something that started in the past and continues in the present or remains important in the present”.¹⁰⁶ The Spanish version (“[m]ientras la República de Venezuela no se *hiciera* Estado Contratante”), Venezuela continues to argue, translates into English as “has not become” and is thus identical to the English text.¹⁰⁷ Still according to the Respondent, Venezuela’s consent to AF arbitration was therefore limited to the period during which it had *not yet* become an ICSID Contracting State. It follows that “becoming a Contracting State” is similar to a condition precedent which, once fulfilled, deprives Article 9(2) of any effect in the future.
141. The Respondent concurs with the Claimants that the words used in the Dutch version should be translated as “is not a Contracting State”. Therefore, they imply a test that differs from the other authentic versions. In accordance with Article 3 of the Protocol to the Dutch BIT, so says Venezuela, the English version must thus prevail.¹⁰⁸
142. On this basis, the Respondent argues that the Tribunal must enquire whether *at some point* Venezuela has become an ICSID Member State and that, since this condition is fulfilled, the Tribunal lacks jurisdiction, a position consistent with the historical context of the BIT’s conclusion at the time when Venezuela had not yet adhered to the ICSID Convention.

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- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

¹⁰⁶ Respondent’s Reply, ¶ 49.

¹⁰⁷ Respondent’s Reply, ¶ 49.

¹⁰⁸ Respondent’s Reply, ¶ 70.

143. By contrast, KCN submits that Article 9(2) requires the Tribunal to determine whether Venezuela was a Contracting State, not at some time, but at the time when it filed its Request for Arbitration. The Dutch version expressly allows Dutch investors to initiate an arbitration under the AF Rules if Venezuela is not a Contracting State to the Convention.¹⁰⁹ Even if the English and Spanish versions use the present perfect instead of the present tense, the jurisdictional test is identical despite grammatical differences and the three versions of the BIT share the same meaning. KCN contends that the present perfect tense “directs the interpreter to identify at the time of reading the result of that clause”, and that the result of “becoming a Contracting State” is “being a Contracting State”. Therefore, the Tribunal should assess whether Venezuela *was a Contracting State* when KCN initiated this arbitration. As this condition is met, the Tribunal has jurisdiction over KCN’s claims.
144. The Tribunal first turns to the meaning of the terms “as long as [...] Venezuela has not become a Contracting State” / “mientras [...] Venezuela no se hiciera Estado Contratante” / “zolang [...] Venezuela geen partij is”. Doing so, it notes a difference between the English and Spanish texts, on the one hand, and the Dutch version, on the other, in the use of the tenses and verbs. The Dutch language employs the present tense of the verb “to be”, when the two other languages use the perfect tense of the verb “to become”. As for the perfect tense, the Parties agree that it denotes a statement about a fact having occurred in the past, the result of which is still relevant in the present.¹¹⁰ In contrast, the present tense of “to be” refers to a state that exists at a specific moment. Similarly, the verbs used have different connotations: “to be” implies a state, while “to become” indicates an action.
145. These differences are material for the present inquiry. KCN is right to argue that the Dutch meaning imposes on the Tribunal to enquire whether Venezuela had the status of a Contracting Party at the specific moment when the arbitration was initiated. This inquiry does not correspond to the meaning of the terms in English and Spanish. There, the question is whether Venezuela has in the past taken the action of becoming an ICSID Contracting State which action continues to produce

¹⁰⁹ Claimants’ Response, ¶ 34.

¹¹⁰ Claimants’ Rejoinder, ¶ 40. See also, Respondent’s Reply, ¶ 41; British Council, *Present perfect*, **Exh. R-0010**; B. Aarts, *Oxford Modern English Grammar* (2011) (excerpts, pp. 70-71, 255-260), **Exh. C-0335**, pp. 1-2; R. Huddleston and G. Pullum, *The Cambridge Grammar of the English Language* (2002) (excerpt, p. 145), **Exh. C-0336**; G. Leech, *Meaning and The English Verb* (2004) (excerpt, p. 39), **Exh. C-0337**; R. Declerck, *The Grammar of the English Tense System* (2006) (excerpt, pp. 302-303), **Exh. C-0338**.

effects in the present. As a result of this material difference between the authentic texts, the Tribunal must give preference to the English version pursuant to Article 3 of the Protocol to the Dutch BIT, which reads as follows:

3. In case of difference of interpretation between the three equally authentic texts of the present Agreement, reference shall be made to the English text.

146. Relying therefore on the words employed in English, the Tribunal notes that, according to KCN, it should focus on the *result* of “not becoming” a Contracting State. The Tribunal does not find that KCN’s interpretation conforms to the ordinary meaning of Article 9(2). The test proposed by KCN departs from the wording of the English version of Article 9(2), pursuant to which the Tribunal must establish that Venezuela has not become a Contracting State to the Convention.
147. Moreover, KCN’s argumentation fails to take into consideration the significance of the verb “to become”, which means “starting to be something” or “to come to be [something]”.¹¹¹ Accordingly, the ordinary meaning of “to become” refers to the completion of a transition process, namely Venezuela’s accession to the Convention. In other words, the expression “has [not] become a Contracting State” does not require the reader to verify whether the Respondent *is* a Contracting State at a given time, but whether it has completed the accession process.
148. The Tribunal’s understanding of the terms “has not become” is strengthened by the presence in the sentence of the subordinator “as long as”, which can either mean “for or during just the length of time that” or “provided that”.¹¹² Differently put, the expression “as long as” refers to a finite period ending in the future upon the occurrence of a specific event. The word “*mientras*” used in Spanish is to the same effect, being defined as “[d]urante el tiempo que transcurre hasta la realización de lo que se expresa”.¹¹³ In the Tribunal’s understanding, the Dutch word “*zolang*” also has the meaning of “as long”. Hence, in respect of these words, the three

¹¹¹ The Tribunal finds confirmation of its understanding of the ordinary meaning of the words in dictionaries, such as Oxford University Press’s Online English Dictionary, Merriam-Webster’s Unabridged Online Dictionary and the dictionary of the *Real Academia Española*.

¹¹² Respondent’s Reply, ¶ 46; Collins English Dictionary, definition of “as long as”, <https://www.collinsdictionary.com/dictionary/english/as-long-as>, cited by the Respondent in the Respondent’s Reply, ¶ 47, fn. 37.

¹¹³ Again, the Tribunal sees its understanding corroborated by dictionaries, such as the Diccionario de la lengua española of the *Real Academia Española*, definition of “*mientras*”, <https://dle.rae.es/mientras>.

authentic texts coincide; all three designate the time span until a specific event, materializes, *i.e.*, until Venezuela's accedes to the ICSID Convention.

149. Under Article 31(1) of the VCLT, the ordinary meaning of terms must be viewed in their context. In this connection, it is striking that the BIT provides for arbitrations under the AF Rules unilaterally, that is only for the event that Venezuela is not a party to the ICSID Convention. That reflects the position when the BIT was concluded. If the AF mechanism had also been intended for a situation of later denunciation of the ICSID Convention, there would have been no reason for not giving bilateral access to the AF mechanism.
150. Finally, the ordinary meaning of the words must also be considered in light of the object and purpose of the treaty, which is, on one hand, to promote and protect investments and, on the other, to further the economic development of the States involved.¹¹⁴ The Tribunal cannot see how the interpretation reached above could be changed by this object and purpose.
151. In this context, the Tribunal notes KCN's argument that investors would be left without any access to arbitration should the Respondent's interpretation be adopted, which would be inconsistent with the Dutch BIT's purpose to promote foreign investments flows between the Contracting States. While empirical evidence leads to divergent conclusions about the connection between the availability of investor-state arbitration and the level of investment flows into a country,¹¹⁵ one understands the argument, which is probably the reason why the Contracting States have included an offer to arbitrate in Article 9 of the Dutch BIT. Yet, doing so, they have circumscribed the scope of their offer. More specifically, they have restricted the access to arbitration under the AF Rules to the period prior to Venezuela's accession to the ICSID Convention. Policy considerations based on the BIT's purpose cannot expand the offer beyond the scope agreed by the Contracting States.

¹¹⁴ Dutch BIT, **Exh. CL-0001**, Preamble. See also, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. 03/15, Award, 27 April 2006, **Exh. CL-0086**, ¶ 70; *Joseph Charles Lemire v. Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, **Exh. CL-0033**, ¶¶ 264, 510; *Romak S.A. v. Republic of Uzbekistan*, PCA Case No. 2007-07/AA280, Award, 26 November 2009, **Exh. RL-0018**, ¶ 181; *Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Award, 11 December 2013, **Exh. CL-0044**, ¶ 232.

¹¹⁵ See for instance references in G. Kaufmann-Kohler and M. Potestà, *Investor-State Dispute Settlement and National Courts*, 2020 EYIEL (SpringerOpen), ¶ 25. See also, J. Bonnitcha and others, *The political economy of the investment treaty regime* (2017), pp. 155-180.

152. KCN also asserts that accession to a treaty is not a “one-time event”, as it can occur several times. Ecuador’s recent re-accession to the ICSID Convention, to which the Claimants drew the Tribunal’s attention, provides an illustration.¹¹⁶ The Tribunal is of the opinion that the Respondent’s interpretation of Article 9(2) is not inconsistent with the fact that Venezuela could again become a Contracting State to the Convention. The phrase “as long as Venezuela has not become a Contracting State” means that the right to AF arbitration only exists until Venezuela ratifies the ICSID Convention.¹¹⁷ The fact that later, having denounced the Convention, the Respondent could again adhere to it, does not change that meaning.
153. The Tribunal finds further support for its understanding of Article 9(2) in several investment awards. In *Heemsen v. Venezuela*, the tribunal assessed whether it had jurisdiction to hear the investor’s case on the basis of Article 10 of the Protocol of the Germany-Venezuela BIT and, particularly, the ordinary meaning of the expression “[m]ientras [Venezuela] no se haya hecho Parte del Convenio [CIADI]” used in that provision. The tribunal held that “*mientras*” referred to the time until the accession by Venezuela to the ICSID Convention, which it deemed confirmed by the sole mention of Venezuela.¹¹⁸ In *Venezuela US v. Venezuela*, the tribunal held that the expression “[a]s long as [Venezuela] has not become a Contracting State of the [ICSID Convention]”¹¹⁹ leaves no doubt that the Contracting States referred to the period prior to Venezuela becoming a Member State to the Convention. The tribunal also noted that, had the Contracting States wished to cover the period after a denunciation, “they could have easily used the formula ‘as long as one of the Parties is not a Contracting State to the Convention’”.¹²⁰ Finally, in *Valores Mundiales*, the question was whether the Spanish BIT required that both Spain and Venezuela be Contracting States of the ICSID Convention at the time when the arbitration is started for ICSID jurisdiction to exist. Interpreting the

¹¹⁶ Claimants’ Letter, 24 June 2021.

¹¹⁷ See above, ¶ 146.

¹¹⁸ *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019, **Exh. RL-0009**, ¶¶ 377-379.

¹¹⁹ Agreement Between the Government of the Republic of Venezuela and the Government of Barbados for the Promotion and Protection of Investments, 1984 UNTS I-33949 (entered into force 31 October 1995), **Exh. CL-0153**, Article 8(3).

¹²⁰ *Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction (on the Respondent’s Objection to Jurisdiction *Ratione Voluntatis*), 26 July 2016, **Exh. CS-0019**, ¶ 83 (emphasis on the original).

expression “*cuando cada Estado [...] se haya adherido al Convenio CIADI*” at the end of the first sentence of Article XI(2)(b) of the Spanish BIT, the tribunal emphasized that the verb “adhere” or “join” targets accession, which is an act “diametrically opposed” to denunciation.¹²¹ Moreover, the tribunal stressed that the present perfect tense used in Article XI(2)(b) (“has joined”) implies that “accession occurs at a single moment” in time.¹²²

154. The Tribunal is not convinced by KCN’s argument that these awards are irrelevant because the arguments addressed and the background of the disputes were different.¹²³ In those cases, the tribunals assessed the ordinary meaning of the applicable dispute resolution provisions. They conducted an objective interpretation of the arbitration clauses, which is relevant here because of the similarities in the pertinent language with the wording contained in Article 9(2) of the Dutch BIT, irrespective of the specificities of the dispute and the arguments presented.
155. In conclusion, in the Tribunal’s opinion, the ordinary meaning of the words used in Article 9(2) of the Dutch BIT indicates that the offer to arbitrate under the AF Rules was only valid until Venezuela (first) acceded to the ICSID Convention.

(2) *Supplementary means of interpretation*

156. Article 32 of the VCLT allows the interpreter of an international treaty to take into consideration supplementary means of interpretation in order to confirm the meaning established pursuant to Article 31 or to determine the meaning when the result of the interpretation under Article 31 is ambiguous, obscure, unreasonable, or absurd.¹²⁴ Since the ordinary meaning of Article 9(2) as it was just discussed is

¹²¹ *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, **Exh. CL-0060**, ¶ 252.

¹²² *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, **Exh. CL-0060**, ¶ 254.

¹²³ Claimants’ Response, ¶ 50.

¹²⁴ Article 32 reads as follows:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

clear, the Tribunal merely refers to Article 32 for purposes of confirmation in light of the strong opposition between the Parties.

157. Supplementary means include *travaux préparatoires* and the circumstances of the treaty's conclusion, as well as other materials and information outside the treaty text.¹²⁵ While the Tribunal does not have the benefit of *travaux préparatoires*, the historical context at the time of the conclusion of the Dutch BIT buttresses the interpretation reached earlier.
158. The Dutch BIT was signed on 22 October 1991 and entered into force on 1 November 1993. Venezuela signed the ICSID Convention on 18 August 1993 and the Convention entered into force for Venezuela on 1 June 1995, *i.e.*, almost three years after the Dutch BIT.¹²⁶ At that time, following a crisis which impacted its economy in the 1980s, Venezuela sought to liberalize its market and attract foreign investment through various legal reforms and through the ratification of international treaties.¹²⁷ It is reasonable to infer that, as part of these endeavors, Venezuela and the Netherlands intended for their investors to have access to arbitration under the ICSID Convention and that, since Venezuela was not yet a Party to the ICSID Convention, they agreed on AF arbitration as a temporary solution. This explains why such temporary mechanism was framed in a unilateral manner, which would have made no sense if denunciation had been envisaged.
159. Further, the BIT as it is entered in the United Nations Treaty Series ("**UNTS**") includes a French translation in addition to its three authentic languages. That translation reproduces Article 9(2) as follows:

La République du Venezuela n'étant pas partie à la Convention visée au paragraphe 1 du présent article, les différends décrits audit paragraphe sont soumis au Centre international pour le règlement des différends relatifs aux investissements en vertu des règles régissant le mécanisme supplémentaire pour l'administration des procédures par le Secrétariat du Centre (règles relatives au mécanisme supplémentaire).¹²⁸

¹²⁵ O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties, A Commentary* (2nd ed., 2018), pp. 617, 624.

¹²⁶ List of Contracting States and Other Signatories of the ICSID Convention, 12 April 2019, **Exh. R-0007**, p. 5. Venezuela deposited its instrument of ratification on 2 May 1995.

¹²⁷ Transcript, Day 1, p. 20, lines 18-22 and p. 21, lines 1-19.

¹²⁸ UNTS of 1994, Vol. 1788, I-31069, **Exh. CL-0001**, pp. 37-43, specifically p. 40 (emphasis added).

160. Even though it is not authentic, this text is informative as it was recorded in the UNTS and can thus be deemed accepted by Venezuela and the Netherlands as a proper reflection of the authentic versions. Interestingly, the text does not use a subordinator (“as long as” / “mientras”), but resorts to the present participle tense “n’étant pas” (“not being”). Thereby, it suggests the reason for making the AF mechanism available to Dutch investors. More importantly, it states this reason in the present tense. Thereby it appears to reflect the drafters’ view at the time when the statement was made, namely on conclusion of the Dutch BIT. This choice of words reinforces the understanding that the AF mechanism was only meant for the pre-ICSID period.

161. On this basis, the Tribunal reaches the conclusion that the Respondent did not consent to submit the present dispute in respect of KCN to arbitration under the AF Rules pursuant to Article 9(2) of the Dutch BIT, and that it thus lacks jurisdiction over KCN.

(ii) Is KCN entitled to establish jurisdiction in reliance on the MFN clause?

162. KCN submits that, should the Tribunal hold that it lacks jurisdiction *ratione voluntatis*, it may rely on the MFN clause enshrined in Article 3(2) of the Dutch BIT and invoke a more favorable dispute resolution provision found in a treaty concluded by Venezuela with a third state. Specifically, KCN seeks to import Article 8(2) of the UK BIT, which offers investors the option to pursue arbitration under the AF Rules without restrictions.¹²⁹

163. The Respondent objects that KCN cannot invoke the MFN clause, which confers substantive protection to investors, because the Tribunal lacks jurisdiction to enforce this protection. In any event, Article 3(2) of the Dutch BIT does not allow KCN to rely on more favorable procedural provisions because the scope of this article is limited to physical security and protection.¹³⁰

164. Article 3(2), which is set out in the Dutch BIT treaty following the fair and equitable treatment guarantee, has the following content:

More particularly, each Contracting Party shall accord to such investments full physical security and protection which in any case shall not be less than that accorded either to investments of its own nationals

¹²⁹ Claimants’ Response, ¶ 52.

¹³⁰ Respondent’s Reply, ¶¶ 79- 85.

or to investments of nationals of any third State, whichever is more favourable to the national concerned.

165. According to the Tribunal, there are two main reasons, each outcome-determinative, why it cannot adopt KCN's position. First, as a matter of principle, a Tribunal which lacks jurisdiction (*ratione voluntatis*) is barred from applying the treaty's substantive guarantees, including the MFN clause.
166. Most investment treaties contain a MFN clause which compels a Contracting State to treat investors of the other Contracting State *no less favourably* with respect to their investment than an investor from any third state.¹³¹ In the event of a breach of the MFN clause, the investor may bring a claim for damages against the host state before the competent adjudicatory body for that state's failure to provide more favorable treatment.
167. The MFN standard contained in the (basic) treaty does not operate to automatically incorporate provisions of third treaties.¹³² Like for other substantive protections, an arbitral tribunal can only assess whether the host state breached the MFN clause of a treaty if it has jurisdiction to do so. Unless the Contracting States agree otherwise,¹³³ a tribunal has no power to incorporate into the treaty more favorable dispute resolution terms so as to create or expand the Contracting States' consent to arbitrate. As the tribunal in *Venezuela US v. Venezuela* put it, as a matter of principle "the MFN clause cannot serve the purpose of importing consent to arbitration when none exists under the [basic treaty]".¹³⁴
168. The Tribunal is aware that some investment tribunals, first and foremost the *Maffezini* tribunal, decided otherwise.¹³⁵ However, it notes that its conclusion,

¹³¹ See, for instance, ILC, *Final Report of the Study Group on the Most-Favoured-Nation Clause*, 29 May 2015, **Exh. RL-0053**, ¶ 37.

¹³² Z. Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2(1) *Journal IDS* 97, **Exh. RL-0054**, pp. 104-105.

¹³³ This is the case, for instance, in investment treaties the MFN clause of which expressly states that it applies to the investor-state dispute resolution clause. See, for instance, UK BIT, **Exh. CL-0008**.

¹³⁴ *Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction (on the Respondent's Objection to Jurisdiction *Ratione Voluntatis*), 26 July 2016, **Exh. CS-0019**, ¶ 105. It is noted that the tribunal in that case ultimately applied the MFN clause provided in Article 3(2) of the Barbados-Venezuela BIT to dispute settlement because Article 3(3) expressly extended the scope of the MFN clause to the contracting states' consent to arbitration.

¹³⁵ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000, **Exh. RL-0063**, ¶ 64. See also, *Le*

which is the consequence of the mode of operation of investment treaty tribunals (*i.e.*, a tribunal must have jurisdiction to apply the substantive treaty protections), finds strong support in both contemporaneous doctrine¹³⁶ and more recent awards.¹³⁷

169. The second outcome-decisive reason why the Tribunal cannot follow KCN's thesis lies in the limitations affecting the MFN clause of the Dutch BIT. Even if the first ground just discussed were not well-founded, *quod non*, the MFN clause of the Dutch BIT would not cover dispute settlement, as it is restricted to claims for breach of the physical security and protection standard.
170. Relying on *ConocoPhillips*, KCN alleges that Article 3(2) extends to any kind of "protection", which comprises more favorable dispute resolution provisions and is not limited to physical protection as suggested by the Respondent.¹³⁸ The Tribunal starts by observing that the tribunal in *ConocoPhillips* did not address this specific issue.¹³⁹ More importantly, Article 3(2) of the Dutch BIT, which was quoted above, provides that the host state must accord to investments of the other Contracting State "physical security and protection" no less than to investments of third states. From a grammatical point of view, the adjective "physical" relates to both "security"

Chèque Déjeuner and C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, **Exh. CL-0139**, ¶ 205.

¹³⁶ Z. Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2(1) Journal IDS 97, **Exh. RL-0054**; S. Luttrell and C. Packer, *Case comment: Dawood Rawat v The Republic of Mauritius* (2017), published on the website of the Australian Dispute Centre, **Exh. RL-0058** (referring to Judge Crawford's "bridge metaphor").

¹³⁷ Among others, *ST-AD GmbH v. Republic of Bulgaria*, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, **Exh. RL-0035**, ¶ 398; *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, **Exh. CL-0038**, ¶ 79; *Enrique Heemsen and Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award, 29 October 2019, **Exh. RL-0009**, ¶ 408; *Venezuela US, S.R.L. (Barbados) v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-34, Interim Award on Jurisdiction (on the Respondent's Objection to Jurisdiction *Ratione Voluntatis*), 26 July 2016, **Exh. CS-0019**, ¶ 105. See also, *Kiliç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Award, 2 July 2013, **Exh. RL-0055**, ¶¶ 7.8.6-7.9.1.

¹³⁸ Claimants' Rejoinder, ¶¶ 66-67; *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, **Exh. CL-0112**, ¶¶ 304(b), 308 ("Article 3(1), when read with the Protocol, requires, among other things, national and MFN treatment. Article 3(2) also requires such treatment").

¹³⁹ The tribunal in *ConocoPhillips* assessed whether Article 4 of the Dutch BIT, which relates to fiscal matters, is an exception to the MFN standard provided in Article 3 of the Dutch BIT or whether Article 3 also applies to tax-related matters. See *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, **Exh. CL-0112**, ¶¶ 296-300.

and “protection”, with the consequence that there is no room to include “procedural” protection as suggested by KCN.

171. It is true that the Spanish version of Article 3(2) might tend to support a different interpretation as the adjective “física” attaches to the word “seguridad”. The Parties have not debated this version and rightly so, as the English version must prevail over the others by virtue of Article 3 of the Protocol to the Dutch BIT.

172. Consequently, the Tribunal is not empowered to resort to the MFN clause, and, even if it were, Article 3(2) would not entitle KCN to obtain more favorable dispute settlement terms as it is restricted to physical protection. Hence, it cannot invoke Article 8 of the UK BIT through the application of Article 3(2).

(iii) Conclusion in respect of KCN

173. In conclusion, the Tribunal lacks jurisdiction over KCN’s claims because (i) the Respondent’s offer to refer disputes to arbitration under the AF Rules was limited to the period until it first acceded to the ICSID Convention and has thus ceased to be effective, and (ii) KCN is not entitled to import a more favorable dispute resolution provision from another treaty through the MFN provision in Article 3(2) of the Dutch BIT.

2. KCS and the Spanish BIT

a. The Respondent’s position

(i) Article XI(2) contains no consent to AF arbitration

174. The Respondent submits that it did not consent to refer disputes to arbitration under the AF Rules.¹⁴⁰ It relies on the interpretation of Article XI(2) of the Spanish BIT as drafted in Spanish, which is the only authentic version of the Treaty text and was quoted above.¹⁴¹

175. Venezuela starts by noting that KCS has failed to submit an interpretation of Article XI(2) of the Spanish BIT under Article 31 of the VCLT, although it has the burden of establishing jurisdiction.¹⁴² In any event, the interpretation in good faith of Article XI(2)(b) of the Spanish BIT confirms that the Contracting States’ offer to arbitrate

¹⁴⁰ Respondent’s Request for Bifurcation, ¶¶ 68.

¹⁴¹ See above, Section VI.A.4.

¹⁴² Respondent’s Reply, ¶¶ 117.

disputes under the AF Rules “was limited to a period predating the accession by the Republic and the Kingdom of Spain to the ICSID Convention, *i.e.*, to the Pre-ICSID period”.¹⁴³

176. For the Respondent, access to AF arbitration is limited by the condition that “una de las Partes no se haya adherido al citado Convenio” / “one of the Contracting Parties has not acceded to the mentioned Convention”. On its terms, that condition cannot be deemed satisfied once both Venezuela and Spain have acceded to the ICSID Convention.¹⁴⁴ Since the two States adhered to the Spanish BIT between 1994 and 1995, the Respondent submits that “the negative condition of the absence of adhesion by both the Republic and Spain embedded in Article XI(2)(b) of the [Spanish BIT] ceased to be met and the temporary offer to arbitrate under the AF Rules during the Pre-ICSID Period contained therein was extinguished”.¹⁴⁵
177. Venezuela further disputes that its denunciation of the ICSID Convention “revived” the offer for AF arbitration existing during the pre-ICSID period.¹⁴⁶ It challenges KCS’s view pursuant to which “has not acceded” should be read as “has not acceded or has denounced”, an interpretation that departs from the literal meaning of Article XI(2)(b) and attempts to rewrite the Spanish BIT for KCS’s benefit.¹⁴⁷
178. In support, the Respondent cites *Valores Mundiales v. Venezuela*, where the tribunal held that “(i) the term ‘*adhesión*’ used in Article XI(2)(b) refers to ‘*a single moment when the State Party expresses its consent*’; (ii) the terms ‘*has not acceded*’ in Article XI(2)(b) do not equate the wording ‘*is a party*’; (iii) the expression ‘*[if one of the Contracting Parties has not acceded to the [ICSID Convention]]*’ does not refer to the event in which one of the States has denounced the ICSID Convention”.¹⁴⁸ The *Valores Mundiales* tribunal also stated that Venezuela’s interpretation was in conformity with the object and purpose of the treaty.¹⁴⁹

¹⁴³ Respondent’s Reply, ¶ 127.

¹⁴⁴ Respondent’s Reply, ¶ 123.

¹⁴⁵ Respondent’s Reply, ¶ 124.

¹⁴⁶ Respondent’s Reply, ¶ 125.

¹⁴⁷ Respondent’s Reply, ¶ 126.

¹⁴⁸ Respondent’s Reply, ¶ 126.

¹⁴⁹ Respondent’s Reply, ¶ 128.

179. Finally, so says the Respondent, supplementary means of interpretation confirm that the offer to arbitrate under the AF Rules was meant to be temporary. Indeed, Spain and Venezuela had signed but not yet ratified the ICSID Convention when they concluded the Spanish BIT. The last draft of Article XI(2)(b) of the Spanish BIT was significantly different from its final version.¹⁵⁰ It provided the investors with four different options: domestic courts, *ad hoc* arbitration, ICSID Convention arbitration and ICC arbitration. The Contracting States therefore “had to maintain a temporary offer to arbitrate in the final text of the [Spanish BIT]” which “is the one embodied in the second sentence of Article XI(2)(b)”.¹⁵¹

(ii) The MFN clause cannot be used

180. Venezuela argues that “[o]nly the Republic’s consent to arbitrate disputes under the AF Rules in the basic treaty could give the right to KCS to invoke, and the Arbitral Tribunal the power to consider, substantive clauses of the [Spanish BIT], such as the MFN provision of Article IV(2)”.¹⁵² It specifies that its position with respect to KCN applies *mutatis mutandis* to KCS.¹⁵³

b. KCS’s position

(i) Article XI(2) contains the Respondent’s consent to AF arbitration

181. KCS explains that Article XI of the Spanish BIT provides investors with three alternative fora, each of which is available in different circumstances:

- Arbitration under the ICSID Convention if both States are parties to such Convention;
- Arbitration under the AF Rules if one of the States is not a party to the ICSID Convention; and
- Arbitration under the UNCITRAL Rules if none of the two prior fora is accessible.¹⁵⁴

¹⁵⁰ Respondent’s Reply, ¶¶ 131-132.

¹⁵¹ Respondent’s Request for Bifurcation, ¶ 78.

¹⁵² Respondent’s Reply, ¶ 145 (emphasis omitted).

¹⁵³ Respondent’s Reply, ¶ 147.

¹⁵⁴ Claimants’ Response, ¶ 13.

182. Consequently, for KCS, the only available option in this case was arbitration under the AF Rules since “at the time of the Request for Arbitration, one of the Contracting Parties, Venezuela, ‘ha[d] not acceded to the Convention’”.¹⁵⁵ KCS disagrees with the Respondent’s position that the offer to arbitrate under the AF Rules lapsed once both Contracting States had adhered to the ICSID Convention.
183. More specifically, KCS rejects the Respondent’s interpretation of Article XI as contrary to the ordinary meaning of the terms. On a literal meaning, access to arbitration under the AF Rules is open “[i]f either Contracting Party has not acceded to the Convention”. Relying on Prof. Schreuer’s expert report, KCS describes the ordinary meaning of Article XI as follows:
- The ordinary meaning of these words is not that resort to the Additional Facility was limited to the period before Spain and Venezuela first became a Party to the ICSID Convention. Venezuela is entitled at any time to sign and ratify the Convention again. The right to resort to the Additional Facility during Venezuela’s non-participation in the ICSID Convention was not terminated by the now historical event of Venezuela’s ratification of the Convention. Rather, it revived with Venezuela’s denunciation of the Convention.¹⁵⁶
184. Accordingly, so says KCS, the only relevant question in order to assess the availability of AF arbitration is whether “at the time of the submission of the dispute, Venezuela (or Spain) ‘ha[d] not acceded’ to the ICSID Convention”.¹⁵⁷ KCS stresses that Venezuela itself advocated this interpretation in two prior arbitration proceedings,¹⁵⁸ *Manuel García Armas v. Venezuela* and *Valores Mundiales v. Venezuela*.
185. In addition, KCS submits that the circumstances of the conclusion of the Spanish BIT confirm its understanding of Article XI. Both Spain and Venezuela became parties to the ICSID Convention several months before the signature of the Spanish BIT. KCS therefore argues that “Venezuela’s illogical interpretation of the Spanish BIT would mean that the Contracting Parties included a dispute resolution

¹⁵⁵ Claimants’ Response, ¶ 15.

¹⁵⁶ Claimants’ Response, ¶ 19, citing the Expert Report of Christoph Schreuer, 20 May 2020, ¶¶ 47-48 (emphasis omitted).

¹⁵⁷ Claimants’ Response, ¶ 18.

¹⁵⁸ Claimants’ Response, ¶ 22; *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, **Exh. CL-0060**; *Manuel García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Decision on Jurisdiction, 13 December 2019, **Exh. CL-0130**, ¶ 242; Claimants’ Rejoinder, ¶¶ 19-20.

provision that would never have had legal significance”,¹⁵⁹ which would conflict with the principle of *effet utile*.¹⁶⁰

186. KCS further argues that its interpretation is consistent with the purpose of the AF Rules, namely to provide investors with access to arbitration when the host State is not a party to the ICSID Convention.
187. Finally, KCS challenges the argument that the offer for AF arbitration was only a temporary option. It points out that Venezuela could accede again to the ICSID Convention and that nothing in Article XI(2) of the Spanish BIT limits access to AF arbitration to the time prior to the States’ first accession to the ICSID Convention.¹⁶¹

(ii) The Tribunal has jurisdiction through the MFN clause

188. According to KCS, it is entitled to invoke a more favorable investor-State dispute resolution clause contained in other investment treaties concluded by the Respondent pursuant to the MFN clause contained in Article IV(2) of the Spanish BIT. Through the MFN clause, KCS seeks to import Article 8(2) of the UK BIT, which expressly permits investors to pursue arbitration under the AF Rules without restrictions.¹⁶²
189. KCS stresses that Article IV(2) of the Spanish BIT refers to “treatment” without substantive or territorial limitations. Therefore, it must be regarded as encompassing more favorable dispute resolution provisions.¹⁶³
190. In the alternative, KCS asserts that it can rely on the MFN provision of the UK BIT, specifically Article 3 of the UK BIT, which expressly guarantees to investors treatment no less favorable than the one afforded to third-party nationals with respect to the right to arbitration.¹⁶⁴

¹⁵⁹ Claimants’ Response, ¶ 20.

¹⁶⁰ Claimants’ Response, ¶ 20; Claimants’ Rejoinder, ¶ 22.

¹⁶¹ Claimants’ Rejoinder, ¶ 25.

¹⁶² Claimants’ Response, ¶ 29. See also, Claimants’ Rejoinder, ¶¶ 57-64, 71-78.

¹⁶³ Claimants’ Rejoinder, ¶ 64.

¹⁶⁴ Claimants’ Response, ¶¶ 29-30.

c. Discussion

(i) Interpretation of Article XI(2)(b)

191. In relevant parts, Article XI(2)(b) of the Spanish BIT, which is the sole authentic text, was already quoted above, and is again reproduced here for convenience, reads as follows:

2.- Si la controversia no pudiera ser resuelta de esta forma [...], será sometida a la elección del inversor:

[...]

b) Al Centro Internacional para el Arreglo de Diferencias Relativas a Inversiones (C.I.A.D.I.) creado por el Convenio para Arreglo de Diferencias relativas a Inversiones entre Estados y Nacionales de otros Estados, abierto a la firma en Washington el 18 de marzo de 1965, cuando cada Estado parte en el presente Acuerdo se haya adherido a aquel. En caso de que una de las Partes Contratantes no se haya adherido al citado Convenio, se recurrirá al Mecanismo Complementario para la Administración de Procedimientos de Conciliación, Arbitraje y Comprobación de Hechos por la Secretaria de C.I.A.D.I.; [...]

192. The Respondent contends that access to arbitration under the AF Rules provided in Article XI(2)(b) of the Spanish BIT was limited to the period before Venezuela and Spain adhered to the Convention for the first time. For KCS, by contrast, Article XI(2) does not restrict the right to arbitrate under the AF mechanism to a specific period. It merely requires that one of the Contracting States “has not acceded to the Convention” at the time when the investor files its request for AF arbitration.¹⁶⁵

193. As it already held above with respect to the Dutch BIT, the Tribunal must interpret Article XI(2)(b) of the Spanish BIT in accordance with the rules set out in Articles 31 and 32 of the VCLT. It will start with the ordinary meaning ((1) below) and then address the supplementary means of interpretation ((2) below).

(1) *Ordinary meaning*

194. Pursuant to Article XI(2)(b), Venezuela consented to refer disputes to arbitration under the AF Rules “[e]n caso de que una de las Partes Contratantes no se haya adherido al [Convenio CIADI]” / “[i]f one of the Contracting States has not acceded to the [ICSID Convention]”.

195. The BIT employs the verb “adherirse/to accede”, which refers to the “international act so named whereby a State established on the international plane its consent

¹⁶⁵ Claimants’ Rejoinder, ¶¶ 18, 23.

to be bound by a treaty”.¹⁶⁶ With this verb, the Treaty targets an action, *i.e.*, accession, as opposed to a status or condition, *i.e.*, being a contracting party to a treaty.¹⁶⁷ The meaning deriving from the choice of the verb is reinforced by the use of the present perfect tense. Like in the context of the Dutch BIT,¹⁶⁸ that tense denotes an action carried out in the past that is still relevant in the present. These textual elements show that what matters is that one of the States has not adhered to the ICSID Convention, *i.e.*, has not completed the adhesion process, as opposed to one of them not being a Contracting State at the time of the initiation of the arbitration. Differently put, the clause indicates that arbitration under the AF Rules is only available until both BIT Contracting States have become members of the ICSID Convention, irrespective of a later denunciation.

196. It is true that Article XI(2)(b) of the Spanish BIT uses the conjunction “en caso de que/if” and not “mientras que/as long as” like the Dutch BIT’s arbitration clause. While the latter emphasizes a time period, the former stresses the conditionality of the action. Yet, in the Tribunal’s judgment, this difference does not change the meaning that results from the choice of the verb and tense.
197. One may also ask whether the reference to “una de las Partes”, as opposed to only one of them, makes a difference in terms of the ordinary meaning. While it might in different circumstances, here the choice to refer to both States is a function of the situation at the time of the conclusion of the Treaty, which is discussed below. Again, it does not alter the significance of the language “se haya adherido”.
198. The ordinary meaning of the terms manifesting consent must be interpreted in their context. Article XI of the Spanish BIT offers four different fora, three of which are for arbitration, each one in a specific situation. Paragraph 2(a) is irrelevant for present purposes as it offers to proceed before domestic courts. Paragraph 2(b) in its first sentence then contains an offer for arbitration under the ICSID Convention “cuando cada Estado se haya adherido a aquél [the ICSID Convention]”. The second sentence of the same paragraph 2(b) goes on providing for AF arbitration “en caso de que una de las Partes no se haya adherido al citado Convenio”.

¹⁶⁶ VCLT, **Exh. CL-0005**, Article 2(1)(b).

¹⁶⁷ See also, *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, **Exh. CL-0060**, ¶¶ 250-256.

¹⁶⁸ See above, ¶ 143.

Finally, paragraph 3 provides for UNCITRAL arbitration “si por cualquier motivo no estuvieran disponibles las instancias arbitrales contempladas en el Punto 2.b”.

199. The first sentence of Article XI(2) confirms the interpretation just given of the second one. It uses – this time in the affirmative sense – the same verb and tense as the second sentence, “se haya adherido”. These words are introduced by the subordinator “cuando”, which refers to a specific moment when an event occurs or could occur. This context thus corroborates that access to AF arbitration was only open until both Spain and Venezuela had completed the process to adhere to the ICSID Convention.
200. KCS opposes the interpretation just reached, arguing that Venezuela should be estopped from putting forward such view because it pleaded in two earlier arbitrations that Article XI(2) stipulated unconditional access to AF arbitration.¹⁶⁹ The Tribunal is not convinced by KCS’s estoppel argument. Indeed, it has an *ex officio* duty to establish its jurisdiction in a treaty arbitration, which is not limited by the Parties’ arguments nor by the fact that a Party may be barred from making a certain argument. Moreover, Venezuela succumbed with the theory of unrestricted access to arbitration under the AF Rules in other proceedings¹⁷⁰ and one does not see on which ground it would be prevented from adjusting its position accordingly.

(2) *Supplementary means of interpretation*

201. The Tribunal’s understanding of Article XI(2)(b) is strengthened when resorting to supplementary means of interpretation, specifically to the circumstances of the negotiation and conclusion of the Spanish BIT.
202. Neither Spain nor Venezuela were parties to the Convention when they started to negotiate the Spanish BIT in January 1991.¹⁷¹ The last round of negotiations, during which the States agreed on the final text, took place on 14 and 15 July

¹⁶⁹ Claimants’ Rejoinder, ¶¶ 15, 19-21, citing *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, **Exh. CL-0060**; *Manuel García Armas and others v. Bolivarian Republic of Venezuela*, PCA Case No. 2016-08, Decision on Jurisdiction, 13 December 2019, **Exh. CL-0130**.

¹⁷⁰ *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017, **Exh. CL-0060**, ¶¶ 252-253.

¹⁷¹ Minutes of the First Negotiation Meeting between the Kingdom of Spain and Venezuela Regarding the Possibility to Execute a Bilateral Agreement for the Promotion and Protection of Foreign Investments, 9 February 1991, **Exh. R-0012**; List of Contracting States and Other Signatories of the ICSID Convention, 12 April 2019, **Exh. R-0007**.

1994.¹⁷² For both States, the ICSID Convention entered into force later, *i.e.*, for Spain on 17 September 1994 and for Venezuela on 1 June 1995. Venezuela proposed to sign the BIT just beforehand in May 1995.¹⁷³

203. While the two States eventually signed the Spanish BIT on 2 November 1995, it remains that both agreed on the final version of Article XI(2)(b) when none of them had yet adhered to the Convention. This circumstance explains that the States offered investors temporary access to arbitration under the AF Rules. One could obviously object that, the circumstances having changed since they agreed on the final text, the States could or should have reopened the negotiation to adjust the language to the new situation where both were member States of ICSID. There is no indication in the record of an intention to renegotiate or not renegotiate the dispute settlement clause, and it appears unsurprising that States would not think of expending resources to reopen the agreed text of a treaty to deal with a technicality of no actual significance. Indeed, the only difference that the change of circumstances made was that the option in favor of AF arbitration had become moot.
204. This same reasoning disposes of KCS's objection that the interpretation of Article XI(2) to which the Tribunal arrives is in conflict with the principle of *effet utile*. This principle mandates that a treaty be interpreted giving each term a meaning, the underlying rationale being that States do not agree to terms that serve no purpose. In the present case, when they agreed on the Treaty terms in July 1994,¹⁷⁴ neither of the Contracting States had adhered to ICSID, with the result that the terms met the test of *effet utile*.

¹⁷² Memorandum 02829 to the General Director of the Ministry of Foreign Affairs of the Republic, 22 July 1994, **Exh. R-0008** ("Las negociaciones del Acuerdo entre Venezuela y España para la Promoción y Protección Recíproca de las Inversiones se efectuaron en la sede del Ministerio de Relaciones Exteriores de Venezuela los días 14 y 15 de Julio del presente año. [...] Habiéndose puesto de acuerdo ambas delegaciones sobre todos los puntos en discusión, fue rubricado el texto por el Director General del MRE de Venezuela y por la Señora Morán, jefe de la delegación española").

¹⁷³ Letter from the Spanish Embassy in Caracas to the Ministry of Foreign Affairs of Venezuela, 24 May 1995, **Exh. R-0014**.

¹⁷⁴ Memorandum 02829 to the General Director of the Ministry of Foreign Affairs of Venezuela, 22 July 1994, **Exh, R-0008**.

205. Finally, the Tribunal notes that the result which it has reached is in line with the decisions of other tribunals ruling on identical or similar dispute settlement clauses in Venezuela’s investment treaties.¹⁷⁵

(ii) Is KCS entitled to invoke a more favorable dispute resolution provision?

206. For the reasons which the Tribunal reviewed in the context of the Dutch BIT¹⁷⁶ and which it restates here, it cannot apply the MFN clause found in Article IV(2) of the Spanish BIT to “incorporate” a more favorable dispute resolution provision. Even if the Tribunal had jurisdiction to apply Article IV(2) of the Spanish BIT, *quod non*, that provision would be limited to more favorable fair and equitable treatment as provided in Article IV(1).

207. In its relevant parts, Article IV reads as follows:

ARTÍCULO IV

TRATAMIENTO

1. Cada Parte Contratante garantizará en su territorio *un tratamiento justo y equitativo*, conforme al Derecho Internacional, a las inversiones realizadas por inversores de la otra Parte Contratante.

2. *Este tratamiento* no será menos favorable que el otorgado por cada Parte Contratante a las inversiones realizadas y a los rendimientos obtenidos en su territorio por sus propios inversores o por inversores de cualquier tercer Estado. [*italics added*]

[...]

208. KCS argues that the expression “este tratamiento” does not refer to the fair and equitable treatment described in the prior paragraph but to the title of Article IV, which reads “Tratamiento” / “Treatment”, and thus refers to “the treatment accorded to investors more generally”.¹⁷⁷

209. The Tribunal finds this argument unpersuasive. The word “este” is used to refer to something which has just been mentioned. In the context of Article IV of the Spanish BIT, the expression “este tratamiento” designates the treatment referred to in the immediately preceding paragraph, which is fair and equitable treatment.

¹⁷⁵ See above, ¶¶ 152-153

¹⁷⁶ See above, ¶¶ 164-167.

¹⁷⁷ Claimants’ Rejoinder, ¶ 64.

210. In support of its position, KCS refers to investment awards dealing with Article IV(2) of the Spain-Argentina BIT which held that the expression “such treatment” is not limited to the fair and equitable treatment provided in the prior paragraph.¹⁷⁸
211. Although the MFN clause in the Spanish BIT is similar to the one contained in the Spain-Argentina BIT, KCS ignores a significant difference in wording. Article IV(2) of the Argentine treaty provides that “[i]n all matters governed by this Agreement, such treatment shall be no less favorable than that accorded by each Party to investments made in its territory by investors of a third country [...]” [italics added]. Unlike the MFN provision in the Spanish BIT, this wording expressly refers to treatment in respect of “all matters governed by this Agreement”, which is not limited to fair and equitable treatment and includes dispute settlement. Hence, these decisions are inapposite.
212. In light of the foregoing analysis, the Tribunal reaches the conclusion that (i) it has no jurisdiction to apply the MFN clause provided in the Spanish BIT and, (ii) even if it had jurisdiction, Article IV(2) would not apply to dispute resolution.
- (iii) Conclusion in respect of KCS
213. In conclusion, the Tribunal lacks jurisdiction *ratione voluntatis* to hear KCS’s claims because (i) Venezuela did not consent to submit disputes to arbitration under the AF Rules after its denunciation of the ICSID Convention and (ii) the Tribunal has no jurisdiction to apply the MFN clause provided in the Spanish BIT to “import” a more favorable dispute resolution mechanism.

3. KCB and the Belgian BIT

a. The Respondent’s position

- (i) Article 9(3) of the Belgian BIT has never contained an offer to arbitrate under the AF Rules

¹⁷⁸ Claimants’ Rejoinder, ¶ 64(a), citing *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, **Exh. CL-0059**, ¶ 880; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005, **Exh. CL-0083**, ¶¶ 24-31; *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 and *AWG Group Ltd. v. Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 3 August 2006, **Exh. CL-0137**, ¶¶ 52-68.

214. Venezuela submits that the Belgian BIT never contained an offer to arbitrate under the AF Rules,¹⁷⁹ as it only provides for arbitration under the ICSID Convention.
215. According to the Respondent, the Parties' disagreement regarding Article 9(3) stems from the language "la controversia se someterá al Centro Internacional para la Solución de Diferencias relativas a Inversiones" / "le différend est soumis au Centre International pour le Règlement des différends relatifs aux Investissements".¹⁸⁰ That language only offers arbitration under the ICSID Convention, says the Respondent; it does not allow an investor to submit its dispute either to ICSID under the ICSID Convention or to the ICSID Secretariat under the AF Rules.¹⁸¹
216. The Respondent contends that KCB's interpretation implies that the Centre would have jurisdiction to conduct arbitration proceedings under the AF Rules. However, so it continues, "referring a dispute to ICSID does not equate to referring a dispute to the Secretariat for its resolution by arbitration under the AF Rules".¹⁸² Article 3 of the AF Rules expressly provides that the Secretariat's purpose is to administer disputes under such Rules provided that the dispute falls "outside of the jurisdiction of the Centre".¹⁸³
- (ii) Jurisdiction cannot be established through the MFN clause
217. Here again, it is the Respondent's submission that KCB cannot rely on the MFN clause in the Belgian BIT to circumvent the requirements for jurisdiction. Its position on the application of the MFN clause of the Belgian BIT is in line with the one put forward regarding KCB and KCS, to which it is referred.¹⁸⁴
218. The Respondent also argues that the MFN clause provided in Article 3(3) of the Belgian BIT gives no right to import more favorable dispute resolution provisions, even if Article 3(3) refers to "all matters governed by this Agreement",¹⁸⁵ being

¹⁷⁹ Respondent's Reply, ¶ 176.

¹⁸⁰ Respondent's Reply, ¶ 178.

¹⁸¹ Respondent's Reply, ¶ 179.

¹⁸² Respondent's Request for Bifurcation, ¶ 85.

¹⁸³ Respondent's Request for Bifurcation, ¶ 85; Respondent's Reply, ¶ 183.

¹⁸⁴ Respondent's Reply, ¶¶ 195, 203. See above, ¶¶ 48-56.

¹⁸⁵ Respondent's Reply, ¶¶ 197 ff, 214 ff.

recalled that the arbitration agreement is autonomous and severable from the other provisions in the treaty.¹⁸⁶

219. Additionally, the Respondent contends that Article 3(3) is further restricted by the reference to “treatment accorded in the host State’s territory”. Indeed, international investment arbitration is not “treatment” and does not take place in the host State’s territory.¹⁸⁷ Unless provided otherwise, the term “treatment” only covers substantive protection standards,¹⁸⁸ and the expression “all matters governed by” the BIT does not imply that the MFN clause applies to dispute resolution. This formula “actually suffered several exceptions and cannot therefore be read literally”.¹⁸⁹

b. KCB’s position

- (i) Article 9(3) of the Belgian BIT contains the Respondent’s consent to AF arbitration

220. KCB submits that Article 9(3) of the Belgian BIT allows Belgian investors to submit their disputes to ICSID, including both ICSID Convention arbitration and AF arbitration.¹⁹⁰ It asserts that “Article 9(3) does not state that such disputes shall be submitted to ICSID ‘in accordance with’ or ‘pursuant to’ or ‘under’ the ICSID Convention”,¹⁹¹ but only refers to the ICSID Convention insofar as it created the Centre.¹⁹² KCB further stresses that whether a Belgian investor must submit its dispute to one or the other forum is a matter of circumstances, namely whether the Contracting States are both parties to the ICSID Convention or not.¹⁹³
221. KCB also points to the Respondent’s treaty practice. In many treaties, the Respondent consented to arbitration on the basis that submission under the AF mechanism is equivalent to submission under the ICSID Convention.¹⁹⁴

¹⁸⁶ Respondent’s Reply, ¶ 201.

¹⁸⁷ Respondent’s Reply, ¶ 206.

¹⁸⁸ Respondent’s Reply, ¶ 208.

¹⁸⁹ Respondent’s Reply, ¶ 211.

¹⁹⁰ Claimants’ Response, ¶ 54.

¹⁹¹ Claimants’ Response, ¶ 56.

¹⁹² Claimants’ Response, ¶ 55; Claimants’ Rejoinder, ¶ 53.

¹⁹³ Claimants’ Response, ¶ 54; Claimants’ Rejoinder, ¶ 53.

¹⁹⁴ Claimants’ Rejoinder, ¶ 54.

222. In addition, KCB observes that its interpretation finds support in the approval issued by the Acting Secretary-General of ICSID in accordance with Article 4(2) of the AF Rules.¹⁹⁵

(ii) In any event, the Tribunal has jurisdiction through the MFN clause

223. KCB contends that the Tribunal in any event has jurisdiction pursuant to Article 8(2) of the UK BIT, which KCB is allowed to invoke under the MFN clause provided in Article 3(3) of the Belgian BIT.¹⁹⁶ It underlines that Article 3(3) of the Belgian BIT expressly covers “all matters governed by this Agreement” and thus allows KCB to benefit from more favorable dispute resolution conditions embodied in other bilateral investment treaties concluded by Venezuela. In any case, similarly to the positions of KCN and KCS, KCB asserts that it can rely on the MFN provision of the UK BIT, specifically Article 3 of the UK BIT, which expressly guarantees investors treatment no less favorable than the one afforded to third-party nationals with respect to the right to arbitration.¹⁹⁷

224. With respect to the applicable legal standard, KCB’s position is identical to the one adopted by KCN and KCS, to which the Tribunal refers.¹⁹⁸

c. Discussion

(i) Has the Respondent consented to AF arbitration?

225. Venezuela’s consent to arbitrate is recorded in Article 9(3) of the Belgian BIT which was quoted above, in its three authentic languages and in its unofficial English translation, and is restated here for easier reference:

3.- En caso de recurso al arbitraje internacional, la controversia se someterá al Centro Internacional para la Solución de Diferencias relativas a Inversiones (C.I.A.D.I.), creado por la “Convención para el Arreglo de Diferencias Relativas a Inversión es entre Estados y Nacionales de otros Estados”, abierta a la firma en Washington el 18 de marzo de 1965.

En caso de que el recurso a C.I.A.D.I. resulte imposible, el inversor podrá someter la controversia a un tribunal de arbitraje ad hoc establecido conforme a las reglas de arbitraje de la Comisión Internacional de las Naciones Unidas para el Derecho Mercantil Internacional. (C.N.U.D.M.I.).

¹⁹⁵ Claimants’ Response, ¶ 57.

¹⁹⁶ Claimants’ Response, ¶ 59. See also, Claimants’ Rejoinder, ¶¶ 57-61, 68-70.

¹⁹⁷ Claimants’ Rejoinder, ¶ 78.

¹⁹⁸ See above, ¶ 65.

3. En cas de recours à l'arbitrage international, le différend est soumis au Centre International pour le Règlement des différends relatifs aux Investissements (C.I.R.D.I.), créé par "la Convention pour le Règlement des Différends Relatifs aux Investissements entre Etats et Ressortissants d'autre Etats", ouverte à la signature à Washington, le 18 mars 1965.

Au cas où le recours à CIRDI s'avérerait impossible, l'investisseur pourra soumettre le différend à un tribunal d'arbitrage ad hoc, établi selon les règles d'arbitrage de la Commission des Nations Unies pour le Droit Commercial International (C.N.U.D.C.I.);

3. Als internationale arbitrage wordt gevraagd, wordt het geschil voorgelegd aan het Internationaal Centrum voor Regeling van Investeringsgeschillen (I.C.S.I.D.), dat is opgericht door het te Washington op 18 maart 1965 voor ondertekening opengestelde "Verdrag tot regeling van investeringsgeschillen tussen Staten en onderdanen van andere Staten".

Indien het niet mogelijk is het geschil aan het I.C.S.I.D. voor te leggen, kan de investeerder zich wenden tot een ad-hoc arbitragehof dat wordt samengesteld volgens de arbitrageregels van de Commissie van de Verenigde Naties voor Internationaal Handelsrecht (UNCITRAL).

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

Should recourse to ICSID prove impossible, the investor may submit the dispute to an ad hoc arbitral tribunal, set up in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

226. Article 9(3) of the Belgian BIT provides for disputes to be submitted to the "International Centre for the Settlement of Investment Disputes (ICSID) established by the [ICSID Convention]" and, if ICSID is not available, to an *ad hoc* tribunal under the UNCITRAL Rules. KCB does not dispute that the Belgian BIT does not expressly refer to the AF Rules. Rather, it contends that Article 9(3) refers to ICSID as "an institution" – as opposed to the Convention – and therefore affords investors the right to submit disputes either under the Convention or under the AF Rules. KCB thus suggests that the sole reference to ICSID is sufficient to establish the host State's consent to submit disputes under the AF Rules.
227. In the Tribunal's opinion, there can be no serious doubt that the Belgian BIT provides for arbitration under the ICSID Convention and, alternatively, for UNCITRAL arbitration. First and foremost, the Belgian BIT's dispute settlement

clause makes no mentions whatsoever of the Additional Facility, nor of the AF Rules.

228. Second, while it is true that Article 9(3) does not expressly refer to “arbitration under the ICSID Convention” it speaks of disputes being submitted to ICSID, the latter being established (“creado/créé/opgericht”) by the ICSID Convention. Pursuant to its Article 1(2), the Convention created ICSID to provide “facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention”. ICSID’s purpose under the Convention is thus to administer disputes in accordance with the Convention. In this framework, the provision for the submission of disputes to ICSID, which is established by the Convention, can only be understood as consent to arbitration under the Convention.
229. Third, even if one were to accept that ICSID is merely referenced as an arbitral institution, *quod non*, that would not suffice to establish consent to arbitration under the AF Rules. These Rules were issued in 1978 by the Administrative Council of ICSID to authorize the Secretariat to administer disputes falling outside ICSID’s jurisdiction as it is defined by Article 25 of the Convention.¹⁹⁹ The AF mechanism is thus a dispute settlement method that is distinct from ICSID Convention arbitration. It is governed by the national arbitration law of the seat of the arbitration and by the AF Rules, unlike ICSID arbitration that is subject to international law and to the ICSID Arbitration Rules. Hence, consent to AF arbitration must be manifested as such.
230. Finally, the Tribunal finds confirmation of its reading of Article 9(3) in the Respondent’s treaty practice. The Dutch BIT, as well as the investment treaties which Venezuela concluded with the UK, Germany, Denmark, and Barbados, all specifically provide that, should arbitration under the Convention not be available, investors may bring their claims to ICSID *under the AF Rules*.²⁰⁰ These treaties

¹⁹⁹ AF Rules, non-binding explanatory comments, Introductory Notes. See also, ICSID Convention, Article 1(2).

²⁰⁰ Dutch BIT, **Exh. CL-0001**, Article 9(2) (English version) (“disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment Disputes *under the [AF Rules]*” (emphasis added)); Treaty between the Republic of Venezuela and the Federal Republic of Germany for the promotion and reciprocal protection of investments (with protocol) (entered into force 16 October 1998), **Exh. CL-0075**, Protocol, ad article 10(a) (UNTS English translation) (“the dispute shall be submitted to arbitral proceedings before the International Centre for the Settlement of Investment Disputes *in accordance with the [AF*

show that when it intends to provide investors with access to AF arbitration, Venezuela knows what words to use.

231. Therefore, the Tribunal concludes that it lacks jurisdiction under Article 9(3) of the Belgian BIT.

(ii) Is KCB entitled to invoke a more favorable dispute resolution provision?

232. Just as KCN and KCS in respect of their treaties, KCB submits that it may rely on the MFN provision contained in Article 3(3) of the Belgian BIT to invoke Article 8 of the UK BIT, which grants investors access to arbitration under the AF Rules without any condition.

233. For the reasons set out in the context of the analysis of the MFN clause in the Dutch BIT, to which it refers, the Tribunal must deny jurisdiction to apply the Belgian BIT's MFN clause.

234. Even if the Tribunal had jurisdiction to apply Article 3(3), *quod non*, that provision would not achieve the goal sought by KCB. Indeed, the English translation of Article 3(3) – on which the Parties agree – reads as follows:

In respect of all matters governed by this Agreement, the investors of each Contracting Party shall be accorded, in the territory of the other Contracting Party, treatment no less favourable than that the latter Party accords to its own investors or to investors of the most favoured nation.

235. The Tribunal reads the words “in the territory of the other Contracting Party” as an indication that Article 3(3) applies to substantive treatment, as opposed to procedural matters. The settlement of investment disputes cannot qualify as “treatment in the territory” of Venezuela. Even if arbitration could be characterized as “treatment”, which is doubtful, it would not be located in the host State.

236. As a result, KCB is not entitled to benefit from more favorable dispute resolution terms through Article 3(3) of the Belgian BIT.

Rules” (emphasis added)). See also, Agreement between the Government of the Republic of Venezuela and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments, 1984 UNTS I-33950 (entered into force 19 September 1996), **Exh. CL-0155**, Article 9(2)(b) (English version) (“disputes as referred to in that section shall be submitted to the International Centre for Settlement of Investment Disputes *under [AF Rules]*” (emphasis added)); Agreement Between the Government of the Republic of Venezuela and the Government of Barbados for the Promotion and Protection of Investments, 1984 UNTS I-33949 (entered into force 31 October 1995), **Exh. CL-0153**, Article 8(2) (English version) (“disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment Disputes *under [AF Rules]*” (emphasis added)).

(iii) Conclusion with respect to KCB

237. The Tribunal finds that it has no jurisdiction *ratione voluntatis* to entertain KCB's claims as (i) Article 9(3) of the Belgian BIT contains no offer to refer disputes to arbitration under the AF Rules and (ii) the Tribunal lacks jurisdiction to apply the MFN clause enshrined in the Belgian BIT.

C. CONCLUSION ON JURISDICTION

238. As set out in the foregoing, the Tribunal comes to the conclusion that it lacks jurisdiction over the claims of all three Claimants because the Respondent has not consented to arbitrate such claims under the AF Rules.

239. As a result, the Tribunal considers that, for reasons of procedural economy, it can dispense with reviewing Venezuela's additional objections to jurisdiction. Indeed, whatever the outcome, such review could not change the conclusion reached above, namely that the Tribunal has no jurisdiction for lack of consent.

VII. COSTS

A. The Claimants' position

240. During this arbitration, the Claimants incurred in the following costs:

(i) Attorney fees: USD 1,302,467.96;²⁰¹

(ii) ICSID fees: USD 200,000.00;²⁰²

(iii) Other disbursements: USD 137,877.45.²⁰³

241. The Claimants request that the Respondent reimburse the costs incurred by each of the Claimants to the extent that it has succeeded in establishing the Tribunal's jurisdiction:

(a) The Tribunal should award all of the Claimants' costs incurred if they are successful in defeating Venezuela's jurisdiction objections.

²⁰¹ Claimants' Costs Submission, p. 2.

²⁰² Claimants' Costs Submission, p. 3, mentions an amount of USD 200,000.00. However, as indicated in ¶¶ 17 and 45 above, the Tribunal observes that ICSID received a total amount of USD 700,000 from the Claimants to cover the costs of the proceeding (see ICSID's correspondence of 7 May 2019, 30 October 2019, 30 September 2020 and 21 December 2020).

²⁰³ Claimants' Costs Submission, p. 3: Expert fees, translations, research and miscellaneous.

(b) If one of the Claimants' claims are dismissed, the remaining two Claimants should be reimbursed for two thirds of the costs that the Claimants have incurred in opposing the jurisdiction objections.

(c) If two of the Claimants' claims are dismissed, the remaining Claimant should be reimbursed for one third of the costs that the Claimants have incurred in opposing the jurisdiction objections.

242. For the Claimants, the Tribunal should also take into consideration the Respondent's "unhelpful and wasteful" conduct. They stress in this regard that the Respondent (i) submitted objections based on an interpretation of the Spanish BIT which is inconsistent with Venezuela's position in prior proceedings; (ii) refused to state whether UNCITRAL arbitration would be available to KCS; and (iii) delayed the proceedings by raising its objections after the filing of the Claimants' Memorial and by requesting the bifurcation of the arbitration.²⁰⁴
243. For these reasons, the Claimants request the Tribunal to order the Respondent to reimburse all the costs they incurred in this arbitration together with post-award interest.²⁰⁵

B. The Respondent's position

244. The Respondent submits that its costs amount to EUR 2,690,691.38 for the jurisdictional phase of this arbitration.²⁰⁶ It requests that the Tribunal allocate the Parties' costs pursuant to the principle "costs follow the event".²⁰⁷
245. Should the Tribunal depart from this principle, the Claimants should bear their own costs in light of the following circumstances:
- (i) The Claimants brought three cases under three different BITs, one of which (KCB's claims) being filed on an alternative basis. As a result, "Kimberly-Clark is undeniably at the root of all the procedural issues that arose in the arbitration to date as well as of its complexity".²⁰⁸
 - (ii) The Claimants acted in bad faith. For instance, they waited until their Rejoinder on Jurisdiction to submit their position on the MFN clauses and thus prevented Venezuela from submitting a comprehensive case on this issue. In addition, the

²⁰⁴ Claimants' Costs Submission, pp. 1-2.

²⁰⁵ See, Claimants' Rejoinder, ¶ 123(c).

²⁰⁶ Respondent's Costs Submission, ¶ 1.

²⁰⁷ Respondent's Costs Submission, ¶ 1.

²⁰⁸ Respondent's Costs Submission, ¶ 2.

Claimants unduly delayed the arbitration, as they objected to bifurcation but then agreed to it after filing the Claimants' Memorial.²⁰⁹

(iii) The Claimants consented to specific criteria with respect to the appointment of the Tribunal's president but then attempted to secure the appointment of Prof. Schill to obtain "a decision on jurisdiction based on ideology rather than the texts of the three BITs".²¹⁰

(iv) The Claimants filed two expert reports which unduly increased the Respondent's costs, as Prof. Schreuer's opinion was unnecessary and Prof. Aarts' opinion was inadmissible.²¹¹

246. Finally, the Respondent requests the Tribunal to order the payment of post-award interest "as the Arbitral Tribunal may consider appropriate, as from the date of the Arbitral Tribunal's decision on jurisdiction and until complete payment".²¹²

C. Discussion

247. Article 58 of the AF Rules provides the Tribunal with broad discretion for purposes of cost allocation:

Article 58

(1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.

(2) The decision of the Tribunal pursuant to paragraph (1) of this Article shall form part of the award.

248. The costs of an arbitration fall broadly into two categories: the costs of the proceeding (*i.e.*, the tribunals' fees and expenses the Secretariat's charges), and the parties' costs comprising the legal fees and other expenses incurred by the Parties in connection with the arbitration.

²⁰⁹ Respondent's Costs Submission, ¶ 3.

²¹⁰ Respondent's Costs Submission, ¶ 4.

²¹¹ Respondent's Costs Submission, ¶ 5.

²¹² Respondent's Costs Submission, ¶ 7(b).

249. In ICSID arbitration, one can identify two main approaches in matters of cost allocation. First, each party may be ordered to bear its own costs and to share in the costs of the proceeding. Second, costs may be allocated according to the relative success or loss of each party. Tribunals also take account of the conduct of the parties during the arbitration as well as of the reasonableness of the costs incurred.
250. Here, the Parties requested the Tribunal to decide the allocation of costs based on the outcome and in light of the Parties' conduct during the proceedings. In addition, the Tribunal considers that it should take account of the reasonableness of the Parties' costs.
251. Reviewing these three factors, the Tribunal first notes that it upheld one of the Respondent's objection to jurisdiction vis-à-vis each of the Claimants, with the result that the arbitration will not proceed to the merits phase.
252. With respect to the second factor, the Tribunal observes that the Parties on both sides conducted the proceedings in an efficient and professional manner. In particular, the Tribunal appreciated that the Parties, and especially the Claimants, agreed to bifurcate jurisdiction and merits, and accepted to comply with relatively short time limits in order not to delay the proceedings. In the same vein, the Parties agreed to hold a virtual hearing, which considerably reduced the costs and expenses which they would otherwise have incurred.
253. In connection with the third factor, the Tribunal finds the Claimants' costs reasonable in view of the complexity of the dispute, the procedural steps involved, and the fact that the Claimants filed a full-fledged memorial on the merits together with accompanying evidence. By contrast, the Respondent's costs are about twice as high, although the Respondent did not submit any brief on the merits.
254. On the basis of these factors and in exercise of its discretion in matters of allocation of costs, the Tribunal considers it appropriate that the Claimants bear the entirety of the costs of the proceeding and that each Party bear its own costs and expenses incurred in connection with this arbitration.
255. The costs of the proceeding (including the arbitrators' and the legal assistant fees and expenses, ICSID's administrative fees and direct expenses) amount in total to USD 523,818.68, which sum is broken down as follows:

Arbitrators' fees and expenses	
Prof. Gabrielle Kaufmann-Kohler, President	USD 110,037.91
Mr. David R. Haigh, Co-arbitrator	USD 45,693.31
Prof. Brigitte Stern, Co-arbitrator	USD 80,833.50
Prof. Stephan Schill, President (until 1 August 2019)	USD 26,484.38
Assistant's fees and expenses	
Mr. Cristophe Cachat	USD 56,910.00
ICSID's administrative fees	USD 168,000.00
Direct expenses	USD 35,859.58
Total	<u>USD 523,818.68</u>

256. The cost advances have been paid exclusively by the Claimants. After payment of the costs of the proceeding, ICSID will thus reimburse the remainder to the Claimants.
257. Finally, no post-award interest shall be awarded as the Tribunal's decision on the allocation of costs does not require the Parties to make any payment to each other.

VIII. OPERATIVE PART

258. For the reasons set forth above, the Arbitral Tribunal:
- (i) The Tribunal lacks jurisdiction to hear the claims before it;
 - (ii) The arbitration costs amount to USD 523,818.68 and shall be borne by the Claimants;
 - (iii) Each Party shall bear its own Costs.

Place of arbitration: Paris, France

[Signed]

Mr. David R. Haigh
Arbitrator
Date: 5 November 2021

Prof. Brigitte Stern
Arbitrator
Date:

Prof. Gabrielle Kaufmann-
Kohler
President of the Tribunal
Date:

Place of arbitration: Paris, France

[Signed]

Mr. David R. Haigh
Arbitrator
Date:

Prof. Brigitte Stern
Arbitrator
Date: 5 November 2021

Prof. Gabrielle Kaufmann-
Kohler
President of the Tribunal
Date:

Place of arbitration: Paris, France

Mr. David R. Haigh
Arbitrator
Date:

Prof. Brigitte Stern
Arbitrator
Date:

[Signed]

Prof. Gabrielle Kaufmann-
Kohler
President of the Tribunal
Date: 5 November 2021