INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
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CERTIFICATE

SMURFIT HOLDINGS B.V.

v.

BOLIVARIAN REPUBLIC OF VENEZUELA

(ICSID CASE NO. ARB/18/49)

I hereby certify that the attached documents are true copies of the English and Spanish versions of the Tribunal's Award dated August 28, 2024, and the English and Spanish versions of the Dissenting Opinion of Mr. Howard Mann and the Concurrent Statement of Mr. Elliot E. Polebaum.

Martina Polasek
Secretary-General

Washington, D.C., August 28, 2024

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

SMURFIT HOLDINGS B.V.

Claimant

and

BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

ICSID CASE NO. ARB/18/49

AWARD

Members of the Tribunal
Prof. Ricardo Ramírez Hernández, President
Mr. Elliot Polebaum, Arbitrator
Mr. Howard Mann, Arbitrator

Secretary of the Tribunal
Ms. Catherine Kettlewell

Date of dispatch to the Parties: 28 August 2024

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REPRESENTATION OF THE PARTIES

Representing Smurfit Holdings B.V.:

Mr. Nigel Blackaby KC
Ms. Caroline Richard
Mr. Alexander Wilbraham*
Ms. Hinda Rabkin
Ms. Sofía Klot**
Mr. Ezequiel Vetulli***
Ms. Brianna Gorence
Ms. Daniela Cala Perez

Freshfields Bruckhaus Deringer US LLP
700 13th Street, NW
10th Floor
Washington, DC 20005-3960
United States of America

* Until December 2022
** Until January 2024
*** Until April 2024

and

Mr. José H. Frías
D'Empaire
Edificio Bancaracas, P.H.
Plaza La Castellana
1060, Venezuela

Representing Bolivarian Republic of Venezuela:

Mr. Reinaldo Enrique Muñoz Pedroza
Procurador General de la República
Mr. Henry Rodríguez Facchinetti
Gerente General de Litigio - Coordinación de Juicios Internacionales

Procuraduría General de la República
Av. Los Ilustres, cruce con calle Francisco Lazo Martí
Edif. Procuraduría General de la República
Urb. Santa Monica - Caracas
Venezuela

and

Mr. Osvaldo Guglielmino
Mr. Guillermo Moro
Mr. Alejandro Vulejser
Ms. María de la Colina
Mr. Francisco Calvo
Mr. Miguel Colquicocha
Ms. Clara Depietri
Ms. Camila Guglielmino
Mr. Matías Toselli
Ms. Catalina Aguirre Jones

Guglielmino Derecho Internacional
Cerrito 1320 – Piso 11,
Buenos Aires, C1010ABB
Argentina

TABLE OF CONTENTS

TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS

(PIH) B.V.	Packaging Investments Holdings (PIH) B.V.
(PIN) B.V.	Packaging Investments Netherlands (PIN) B.V.
AAD	Authorization for the Purchase of Foreign Currency (in Spanish, *autorización para la adquisición de divisas*)
Agropecuaria Tacamajaca	Agropecuaria Tacamajaca C.A.
ALD	Authorization for the Liquidation of Foreign Currency (in Spanish, *autorización para la liquidación de divisas*)
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
BIT or Treaty	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, signed on 22 October 1991 and entered into force on 1 November 1993, which was terminated by Venezuela by notice dated 30 April 2008
BITs	Other Bilateral Investment Treaties different from the Treaty
C-[#]	Claimant's Exhibit
CCA	Container Corporation America, a Delaware corporation, then merged with JSC/MS Holdings Inc. CCA was the surviving entity.
CADIVI	Currency Administration Commission (in Spanish, *Comisión de Administración de Divisas)*
Cartón or SKCV	Cartón de Venezuela S.A. or Smurfit Kappa Cartón de Venezuela

CENCOEX	National Foreign Trade Centre (in Spanish, *Centro Nacional de Comercio Exterior*)
CL-[#]	Claimant's Legal Authority
Claimant or Smurfit	Smurfit Holdings B.V.
Claimant's Memorial	Claimant's Memorial on the Merits, 12 May 2020
Claimant's PHB	Claimant's Post Hearing Brief, 23 December 2022
Claimant's Rejoinder	Claimant's Rejoinder on Jurisdiction, 6 December 2021
Claimant's Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Counterclaim, 13 May 2021
Claimant's Reply PHB	Claimant's Reply Post Hearing Brief, 10 February 2023
Colombates	Colombo Venezolana de Empaques Bates Colombates C.A.
Corrugadora Latina	Corrugadora Latina & Cía.
Corsuca	Corrugadora Suramericana, C.A.
DCF	Discounted-cash flow
DGCIM	Directorate General of Military Counterintelligence (in Spanish, *Dirección General de Contrainteligencia Militar*)
DICOM	Complementary Floating Exchange Rate System for Non-Essential Imports (in Spanish, *Sistema de Divisas de Tipo de Cambio Complementario Flotante de Mercado*)
EBITDA	Earnings Before Interest, Taxes, Depreciation and Amortization

EV	Enterprise value
FET	Fair and Equitable Treatment
Foreign Exchange Authority	CADIVI/CENCOEX[1]
FPS	Full Protection and Security
FX	Foreign Exchange Rate
GDP	Gross Domestic Product
Hearing	Hearing on Jurisdiction, Merits, Counterclaim and Quantum held from September 26 to 30, 2022
ICJ	International Court of Justice
ICSID Convention or Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966
ICSID or the Centre	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
IMF	International Monetary Fund
INDEPABIS	Institute for Defense of People in Access to Goods and Services (in Spanish, (*Instituto para la Defensa de las Personas en el Acceso a los Bienes y Servicios*). In 2014, the INDEPABIS merged with the National Superintendence of Fair Costs and Prices (in Spanish, *Superintendencia Nacional de Costos y Precios Justos or SUNDECOP*) to form SUNDDE
INTI	National Land Institute (in Spanish, *Instituto Nacional de Tierras)*
Isica or Isica C.A.	Inversiones Isica C.A.

[1] The Claimant indicates CENCOEX replaced CADIVI in 2015, the Respondent indicates it was in 2014.

JSC/MS	JCS/MS Holdings Inc., a Delaware corporation and subsidiary of SKG. JSC/MS merged with CCA, the latter was the surviving entity.
Law on Fair Prices	Decree No. 600 on the Organic Law on Fair Prices, 21 November 2013, published in the Gaceta Oficial No. 40,340 on 23 January 2014. The Law was amended in 2014 by Decree No. 1,467 and in 2015 by Decree No. 2,092, 8 November 2015, published in the Gaceta Oficial No. 40,787 on 12 November 2015
Letter	Letter sent on 29 September 2011 by the Claimant's Managing Director to the Minister for Foreign Affairs of Venezuela prior to Venezuela's notice of denunciation of the ICSID Convention
MFN	Most Favoured Nation
Observations on Bifurcation	Claimant's Observations on Respondent's Request for Bifurcation, 12 August 2020
OECD	Organisation for Economic Cooperation and Development
Packaging Finance	Packaging Finance N.V. (Curaçao)
PO1	Procedural Order No.1, 10 April 2020
PO2	Procedural Order No. 2, 1 March 2021
PO3	Procedural Order No. 3, 31 March 2021
PO4	Procedural Order No. 4, 16 December 2021
PO5	Procedural Order No. 5, 5 September 2022
PRLL	Partial Regulation of the Land Law
R-[#]	Respondent's Exhibit
Refordos	Reforestadora Dos, Refordos C.A.

Request for Arbitration	Claimant's Request for Arbitration submitted on 3 December 2018
Request for Bifurcation	Respondent's Summary of Jurisdictional Objections and Request for Bifurcation, 27 June 2020
Respondent or Venezuela	Bolivarian Republic of Venezuela
Respondent's Counter-Memorial	Respondent's Memorial on Jurisdictional Objections and Counter-Memorial on the Merits and Counterclaim, 30 December 2020
Respondent's PHB	Respondent's Post Hearing Brief, 23 December 2022
Respondent's Rejoinder	Respondent's Reply on Jurisdictional Objections and Counterclaim and Rejoinder on the Merits, 7 September 2021
Respondent's Reply PHB	Respondent's Reply Post Hearing Brief, 10 February 2023
RISI	Fastmarkets RISI North American Paper Packaging Forecast
RL-[#]	Respondent's Legal Authority
RLO/RLOs	Regional Land Office/s
RUSAD	User Registry for the Currency Administration System (in Spanish, *Registro de Usuarios del Sistema de Administración de Divisas)*
SEBIN	Bolivarian National Intelligence Service (in Spanish, *Servicio Bolivariano de Inteligencia Nacional*)
SENIAT	National Integrated Customs and Tax Administration Service (in Spanish, *Servicio Nacional Integrado de Administración Aduanera y Tributaria*)
SI Holdings	SI Holdings Limited

SICAD I	Complementary System for the Administration of Foreign Currency (in Spanish, *Sistema Complementario de Administración de Divisas*)
SICAD II	Alternative Foreign Currency Exchange System, (in Spanish, *Sistema Cambiario Alternativo de Divisas*)
SIEX	Superintendency of Foreign Investments, (in Spanish *Superintendencia de Inversiones Extranjeras)*
SITME	System for Transactions with Securities in Foreign Currency, (in Spanish, *Sistema de Transacciones con Títulos en Moneda Extranjera)*
SKG	Smurfit Kappa Group plc
Smurfit Kappa	Smurfit Kappa Curaçao N.V.
Smurfit Sellers	Cartón, Refordos, Corsuca and Corrugadora Latina
SUNDDE	National Superintendency for the Defense of Socioeconomic Rights (in Spanish, *Superintendencia Nacional para la Defensa para los Derechos Socioeconómicos*)
2001 Land Law	Decree No.1,546 on the Force of Law on Land and Agrarian Development, 9 November 2001, published in the Gaceta Oficial No. 37,323 on 13 November 2001
2005 Land Law	Law of Partial Reform to Decree No. 1,546, 28 April 2005 published in the Gaceta Oficial No. 5,771 on 18 May 2005
2010 Land Law	Law of Partial Reform to the 2005 Land Law, 17 June 2010, published in the Gaceta Oficial No. 5,991 on 29 July 2010
Technical School	Agricultural Technical School founded in 1995 by the Smurfit Foundation in the state of

	Portuguesa (in Spanish, *Escuela Técnica Agropecuaria*)
Tr. Day [#] [Speaker(s)] [page:line]	Transcript of the Hearing
Transbosnal	Empresa de Transporte Bosques Nacionales S.A.
Tribunal	Arbitral tribunal constituted on 21 October 2019. Its members are Ricardo Ramírez Hernández, a national of Mexico, President, appointed by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention; Elliot Polebaum, a national of the U.S., appointed by the Claimant; and Zachary Douglas, a national of Australia, appointed by the Respondent. On 16 December 2021, Professor Zachary Douglas submitted his resignation as an arbitrator. On 5 February 2022, the Respondent appointed Mr. Howard Mann, a national of Canada, who accepted his appointment on 8 February 2022
VAT	Value Added Tax
VAT Law	Decree No. 1,434 on the Organic Tax Code Law, 17 November 2014, published in the Gaceta Oficial No. 6,152 on 18 November 2014
VCLT or Vienna Convention	Vienna Convention on the Law of Treaties, United Nations, May 23, 1969
WACC	Weighted Average Cost of Capital

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, signed on 22 October 1991 and entered into force on 1 November 1993, which was terminated by Venezuela by notice dated 30 April 2008 (the "**BIT**" or "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966 (the "**ICSID Convention**" or "**Convention**").

2. The Claimant is Smurfit Holdings B.V. ("**Smurfit**" or the "**Claimant**"), a company incorporated under the laws of the Kingdom of the Netherlands.

3. The Respondent is the Bolivarian Republic of Venezuela ("**Venezuela**" or the "**Respondent**").

4. The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

5. This dispute relates to a series of actions and omissions taken by the Respondent which allegedly destroyed the value of the Claimant's investment in the manufacturing of paper-based packaging materials.

II. PROCEDURAL BACKGROUND

6. On 3 December 2018, ICSID received a request for arbitration dated 3 December 2018, from Smurfit Holdings B.V. against the Bolivarian Republic of Venezuela (the "**Request for Arbitration**").

7. On 28 December 2018, the Acting Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Acting Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in

accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

8. On 1 March 2019, Mr. Pablo Parrilla informed the Centre that Guglielmino Derecho Internacional had been retained to act as counsel for Venezuela. On 7 March 2019, Mr. Henry Rodríguez Facchinetti, *Gerente General de Litigio* from the *Procuraduría General de la República* submitted the power of attorney by the *Procurador General de la República*, Mr. Reinaldo Enrique Muñoz Pedroza, granted to Guglielmino & Asociados.

9. On 28 March 2019, the Centre circulated a letter from Mr. José Ignacio Hernández G. dated 27 March 2019.

10. On 29 March 2019, the Claimant appointed Mr. Elliot Polebaum as an arbitrator.

11. On 30 March 2019, the Respondent informed the Centre that the Parties had not reached an agreement on the method of constitution of the Tribunal.

12. On 1 April 2019, the Centre informed the Parties that the 60-day period provided for in ICSID Arbitration Rule 2(3) had elapsed and therefore in the absence of an agreement between the Parties on the method of constituting the Tribunal, the Tribunal would be constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention. In accordance with ICSID Arbitration Rule 5(2), the Centre sought the acceptance of Mr. Polebaum's appointment by the Claimant.

13. Mr. Polebaum accepted his appointment on 2 April 2019.

14. On 5 April 2019, the Centre circulated a letter from Mr. Reinaldo Enrique Muñoz Pedroza dated 4 April 2019.

15. On 12 April 2019, the Respondent appointed Prof. Zachary Douglas as an arbitrator. Prof. Douglas accepted his appointment on 16 April 2019.

16. On 30 April 2019, the Centre circulated a letter from Mr. José Ignacio Hernández G. dated 29 April 2019.

17. On 5 June 2019, the Claimant requested that the Chairman of the ICSID Administrative Council appoint the arbitrator not yet appointed and designate him or her to be the President of the Tribunal, pursuant to Article 38 of the ICSID Convention and ICSID Arbitration Rule 4.

18. On 16 July 2019, the Centre sent the Parties ballots to complete and return by 25 July 2019. On 25 July 2019, the Centre informed the Parties that the ballot did not result in a mutually agreeable candidate.

19. On 30 September 2019, the Centre informed the Parties that it would propose to the Chairman of the ICSID Administrative Council the appointment of Prof. Ricardo Ramírez Hernández, a national of Mexico, as presiding arbitrator. Having received no observations from the Parties as to Prof. Ramírez's appointment, the Chairman of the ICSID Administrative Council proceeded to appoint Prof. Ramírez.

20. As of that date, the Tribunal was composed of Ricardo Ramírez Hernández, a national of Mexico, President, appointed by the Chairman of the ICSID Administrative Council in accordance with Article 38 of the ICSID Convention; Elliot Polebaum, a national of the U.S., appointed by the Claimant; and Zachary Douglas, a national of Australia, appointed by the Respondent.

21. On 21 October 2019, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Catherine Kettlewell, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

22. On 18 November 2019, the Parties were informed that the first session would be held only among the Members of the Tribunal on Monday, 25 November 2019, and that a preliminary procedural consultation pursuant to ICSID Arbitration Rule 20 would be

held at a later time. The Tribunal also referred to the letters of Mr. José Ignacio Hernández G., previously circulated to the Parties by the Centre. The Tribunal invited the Parties to submit observations on the issue of Venezuela's representation which would be addressed as a preliminary question.

23. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session on 25 November 2019, by teleconference.

24. On 9 December 2019, the Claimant submitted observations as to the representation issue informing the Tribunal that the legitimate representation of Venezuela was an "internal issue for Venezuela on which Claimant takes no position."

25. On 16 December 2019, Mr. Henry Rodríguez Facchinetti, *Gerente General de Litigio de la Procuraduría General de la República Bolivariana de Venezuela* submitted observations in relation to the Tribunal's instructions of 18 November 2019.

26. On 20 December 2019, Guglielmino Derecho Internacional submitted further observations on behalf of Mr. Henry Rodríguez Facchinetti, *Gerente General de Litigio de la Procuraduría General de la República Bolivariana de Venezuela*.

27. On 31 January 2020, Guglielmino Derecho Internacional submitted further observations on behalf of Mr. Henry Rodríguez Facchinetti, *Gerente General de Litigio de la Procuraduría General de la República Bolivariana de Venezuela.*

28. On 9 March 2020, the Claimant wrote to the Tribunal requesting "an update on the estimated timing of the Tribunal's decision on the issue of Venezuela's representation, and the resumption of the proceedings."

29. On 9 March 2020, the Tribunal decided as follows with regard to the issue of Venezuela's representation:

> "The Tribunal has considered the submissions received and, after deliberating in this regard, has decided that it is unnecessary to address the issue of the Tribunal's power to rule or decide on the question of who is the legitimate

> representative of the Bolivarian Republic of Venezuela in these proceedings at this point in time.
>
> The only party that has put before the Tribunal arguments and evidence pertaining to the question of the representation of the Respondent in these proceedings is Mr. Henry Rodríguez Facchinetti and the attorneys designated by him as representatives of the Bolivarian Republic of Venezuela. Accordingly, the arbitration will proceed with Mr. Facchinetti and the attorneys he has designated as representatives of the Respondent."

30. Also on the same date, the Tribunal proposed to hold the procedural consultation meeting by telephone conference on 19 March 2020, and transmitted a draft Procedural Order No. 1 to facilitate the Parties' preparation for the procedural consultation meeting.

31. On 11 March 2020, the Parties informed the Tribunal of their unavailability for the proposed date for the procedural consultation meeting and proposed alternate dates. On 13 March 2020, the Tribunal confirmed that the procedural consultation meeting would be held on Tuesday, 7 April 2020, at 10:00 a.m. (Washington D.C. time).

32. Following an extension request, the Parties submitted their comments on the draft Procedural Order No. 1 on 1 April 2020.

33. The procedural consultation with the Parties was held on 7 April 2020, via telephone conference.

34. Following the first session and the procedural consultation meeting, on 10 April 2020, the Tribunal issued Procedural Order No. 1 recording the agreement of the Parties on procedural matters and the decision of the Tribunal on disputed issues. Procedural Order No. 1 provides, *inter alia*, that the applicable ICSID Arbitration Rules would be those in effect from 10 April 2006, that the procedural languages would be English and Spanish, and that the place of proceeding would be Washington, D.C. Procedural Order No. 1 also set out a procedural calendar (Annex A) for the jurisdictional/merits phase of the proceedings envisioning three possible scenarios: *Scenario 1* – applicable in the event that objections to jurisdiction (if any) were made with the counter-memorial, and there was no request for bifurcation; *Scenario 2* – applicable in the event that objections to jurisdiction were made in response to the memorial on the merits, and there was a request

for bifurcation which is granted; and *Scenario 3* – applicable in the event that objections to jurisdiction were made in response to the memorial on the merits, and there was a request for bifurcation which was refused ("**PO1**").

35. On 12 May 2020, Claimant filed its Memorial on the Merits, together with Resubmitted Exhibits C-024Q bis, C-024R bis, C-025F, C-025I, C-025J, C-026J, C-027I, C-29 bis, C-033 bis, C-051 bis, C-066 bis, C-109 bis, C-124 bis, C-132 bis, C-142 bis, C-167 bis, Exhibits C-174, to C-315; Legal Authorities CL-001 to CL-096; Witness Statements of Messrs. Luis Fernando Lugo Díaz and Alberto Ramírez; and the Expert Report of Messrs. Manuel A. Abdala and Pablo D. López Zadicoff of Compass Lexecon ("**Claimant's Memorial**").

36. On 25 June 2020, the Parties informed the Tribunal of a 24-hour agreed extension of the deadline for the filing of Respondent's Summary of Jurisdictional Objections and Request for Bifurcation. Pursuant to the agreement of the Parties, Claimant would also have an additional day to submit its Observations on the Request for Bifurcation. The Tribunal confirmed the Parties' agreement on the same day.

37. On 27 June 2020, the Respondent filed its Summary of Jurisdictional Objections and Request for Bifurcation, together with Exhibits R-001 to R-016; and Legal Authorities RL-001 to RL-073 ("**Request for Bifurcation**").

38. On 12 August 2020, Claimant filed its Observations to Respondent's Request for Bifurcation. Claimant also submitted the following: Exhibits C-003E, C-005B, C- 006B, C-007E, C-008C, C-010C, C-012D, C-016D, C-022C, C-022D, C-023D, C-316 to C-324, resubmitted Exhibits, C-030 bis, C-0176 bis, C-0178 bis; Legal Authorities CL-097 to CL-144; and resubmitted Legal Authority CL-056 bis ("**Observations on Bifurcation**").

39. On 20 August 2020, Respondent submitted a letter to the Tribunal in response to Claimant's Observations of 12 August 2020. On 22 August 2020, the Tribunal invited the Claimant to comment on Respondent's letter and Claimant submitted its comments on 26 August 2020.

40. By letter dated 9 September 2020, the majority of the Tribunal denied the Respondent's Request for Bifurcation and informed the Parties that a reasoned decision would follow. Consequently, the Parties were informed that Scenario 3 of the Procedural Calendar (Annex A) would apply and therefore the Respondent's Memorial on Jurisdictional Objections and Counter-Memorial on the Merits would be due on Tuesday, 8 December 2020.

41. On 5 October 2020, the Tribunal issued its reasoned decision on the Respondent's Request for Bifurcation, together with Prof. Zachary Douglas' dissenting opinion.

42. On 9 October 2020, the Tribunal proposed to hold the hearing in the week of 14 February 2022, and asked the Parties to confirm their availability. By communications of 14 and 16 October 2020, the Claimant and Respondent respectively confirmed their availability. On 21 October 2020, the Tribunal confirmed that the hearing would be held the week of 14 February 2022 in Paris, France, pursuant to section 10.1 of Procedural Order No. 1.

43. On 19 November 2020, the Parties agreed on a modified Procedural Calendar and the Tribunal confirmed the agreement and circulated an Amended Procedural Calendar (Annex A) on 24 November 2020.

44. On 30 December 2020, the Respondent filed its Memorial on Jurisdictional Objections, Counter-Memorial on the Merits and Counterclaim, together with Exhibits R-017 to R- 052; Legal Authorities RL-074 to RL-163; Witness Statements of Messrs. Juan Carlos Loyo and Simón Alberto Lujano Vergara, and the Expert Report of Messrs. Guillermo Sabbioni and Andrés Ferraris of EconLogic Consulting ("**Respondent's Counter-Memorial**").

45. On 12 February 2021, the Claimant wrote to the Tribunal proposing a timetable for the production of documents. Following the Tribunal's invitation, the Respondent submitted on 20 February 2021, their observations to Claimant's letter.

46. The Tribunal issued Procedural Order No. 2 on 1 March 2021, regarding production of documents ("**PO2**").

47. On 23 March 2021, the Parties respectively filed requests for the Tribunal to rule on production of documents. On 31 March 2021, the Tribunal issued Procedural Order No. 3 with its ruling on the Parties' document production requests ("**PO3**").

48. On 27 April 2021, and 4 May 2021, following the Parties' agreement, the Tribunal circulated an Amended Procedural Calendar (Annex A).

49. On 13 May 2021, the Claimant filed its Reply on the Merits and Counter-Memorial on Jurisdiction and Counterclaim, together with Exhibits C-327 to C-422 and the resubmitted Exhibit C-149 bis; Legal Authorities CL-145 to CL-191; the Second Witness Statement of Mr. Alberto Ramírez; and the Second Expert Report of Messrs. Manuel A. Abdala and Pablo D. López Zadicoff of Compass Lexecon ("**Claimant's Reply**").

50. On 28 June 2021, the Secretary of the Tribunal transmitted to the Parties a disclosure from Mr. Elliot Polebaum.

51. On 2 September 2021, following the Parties' agreement, the Tribunal circulated an Amended Procedural Calendar (Annex A).

52. On 7 September 2021, the Respondent submitted its Rejoinder on the Merits and Reply on Jurisdiction and Counterclaim, together with Factual Exhibits R-053 to R-125; Legal Authorities RL-022 bis, RL-031 bis and RL-164 to RL-268; the Witness Statement of Mr. Joel José Arias Nieves, the Second Witness Statements of Messrs. Juan Carlos Loyo and Simón Alberto Lujano Vergara; and the Second Expert Report of Guillermo Sabbioni and Andrés Ferraris of EconLogic Consulting ("**Respondent's Rejoinder**").

53. On 4 November 2021, the Tribunal wrote to the Parties inviting them to submit their views on the modalities for the hearing.

54. On the same date, the Claimant wrote to the Tribunal requesting a ruling on: (i) the admissibility of Respondent's evidence produced with its Rejoinder, (ii) the Respondent's failure to comply with PO3, and (iii) the Respondent's quantification of their Counterclaim.

55. Following a short extension, on 11 November 2021, the Parties jointly filed their views with regards to the modalities for the hearing, confirming their preference for an in-person hearing in Paris, France.

56. Pursuant to the Tribunal's invitation, on 16 November 2021, the Respondent filed its observations on Claimant's request of 4 November 2021.

57. After each Party requested leave to submit further comments on the Claimant's request of 4 November 2021, the Tribunal granted this request on 17 November 2021.

58. On 18 November 2021, the Claimant filed a response to Respondent's letter of 16 November 2021, together with copy of Exhibit R-105. The Respondent filed further observations on 23 November 2021.

59. On 24 November 2021, the Respondent filed a request to introduce into the record the additional documents that Claimant requested, namely the Minutes of Requests (*Actas de Requerimiento*), the Minutes of Reception (*Actas de Recepción*) by the National Superintendecy for the Defense of Socioeconomic Rights ("**SUNDDE**"), and the documents listed in pages 20 to 22 of Exhibit R-060.

60. On 29 November 2021, the Claimant filed its observations on Respondent's request for the introduction of new evidence. The Respondent filed a brief response on 1 December 2021, and requested permission to submit further comments. The Tribunal granted this request on 2 December 2021, and on 3 December 2021, the Respondent submitted further comments.

61. On 6 December 2021, the Claimant filed a response to Respondent's letter of 3 December 2021.

62. On 6 December 2021, the Claimant filed its Rejoinder on Jurisdiction, together with Annex A, Exhibits C-423 to C-429; Legal Authorities CL-192 to CL-226 ("**Claimant's Rejoinder**").

63. On 13 December 2021, the Tribunal wrote to the Parties with regard to: (i) the hearing modalities, (ii) the Pre-Hearing Conference, and (iii) the draft procedural order on the hearing logistics.

64. On 15 December 2021, further to the Tribunal's directions, the Parties confirmed their availability for the Pre-Hearing Conference.

65. On 16 December 2021, the Tribunal issued Procedural Order No. 4 in relation to Claimant's request of 4 November 2021 ("**PO4**").

66. On the same date, the Secretary of the Tribunal wrote to the Parties informing them that Prof. Zachary Douglas had submitted his resignation and his co-arbitrators had consented to his resignation. The Parties were informed that the proceeding was suspended until the vacancy resulting from the resignation was filled and the Secretary-General invited the Respondent to appoint an arbitrator.

67. On 5 February 2022, the Respondent appointed Mr. Howard Mann, a national of Canada and he accepted his appointment on 8 February 2022. On the same date, the Parties were informed that in accordance with ICSID Arbitration Rule 12, the proceeding resumed on that day.

68. By letter of 11 February 2022, the Tribunal set out new deadlines in paragraph 38 of PO4 and indicated to the Parties that it would be available for a five-day hearing within the period of 18 to 29 April 2022. The Parties later indicated they were not available on those dates.

69. By letter of 21 February 2022, each Party was asked to submit to the Tribunal only, its availability for a hearing between the months of May and December 2022. Having received the Parties' responses, on 24 February 2022, the Tribunal set dates for the hearing on 26 to 30 September 2022.

70. By letter of 2 March 2022, the Parties were informed of the new deadline for the notification of witnesses and the date for the pre-hearing organizational meeting and

were asked to provide comments on the venue and modalities for the hearing and on the draft procedural order concerning the organization of the hearing.

71. On 9 March 2022, the Parties confirmed their availability for a Pre-Hearing Conference to be held on 17 August 2022.

72. On 17 March 2022, in accordance with paragraph 38(b) of PO4, the Claimant filed the Witness Statement of Mr. César Augusto Agelviz, together with Annex A and Exhibits C-430 to C-466, and R-060 bis and R-068 bis.

73. On 3 June 2022, the Parties submitted their comments on the draft Procedural Order concerning the organization of the hearing.

74. On 26 July 2022, each Party submitted their respective list of witnesses and experts to be called and examined at the hearing.

75. On 17 August 2022, the Tribunal held a Pre-Hearing Conference call with the Parties.

76. On 5 September 2022, the Tribunal issued Procedural Order No. 5 concerning the organization of the hearing ("**PO5**").

77. A hearing on Jurisdiction, Merits, Counterclaim and Quantum was held at the Delos Dispute Resolution Centre in Paris, France from 26 to 30 September 2022 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

Prof. Ricardo Ramírez Hernández	President
Mr. Elliot Polebaum	Arbitrator
Mr. Howard Mann	Arbitrator

ICSID Secretariat:

Ms. Catherine Kettlewell	Secretary of the Tribunal

For the Claimant:

Mr. Nigel Blackaby KC	Freshfields Bruckhaus Deringer
Ms. Caroline Richard	Freshfields Bruckhaus Deringer
Mr. Alex Wilbraham	Freshfields Bruckhaus Deringer
Ms. Sofía Klot	Freshfields Bruckhaus Deringer
Mr. Ezequiel Vetulli	Freshfields Bruckhaus Deringer
Ms. Brianna Gorence	Freshfields Bruckhaus Deringer
Ms. Daniela Cala Pérez	Freshfields Bruckhaus Deringer
Mr. Rubén Castro	Freshfields Bruckhaus Deringer
Ms. Cassia Cheung	Freshfields Bruckhaus Deringer
Mr. José Humberto Frías	D'Empaire
Ms. T-zady Guzman	FTI Consulting (support)
Mr. Brian Marshall	Claimant
Ms. Hannah Cowley	Claimant
Mr. Juan Guillermo Castaneda	Claimant
Mr. Eduardo Olmos	Claimant
Mr. Marc van der Velden (virtual participant)	Claimant
Mr. Steven Stoffer (virtual participant)	Claimant
Mr. Niall Keane (virtual participant)	Claimant
Mr. Juan Pablo Pérez (virtual participant)	Claimant

For the Respondent:

Mr. Osvaldo Guglielmino	Guglielmino Derecho Internacional
Mr. Guillermo Moro	Guglielmino Derecho Internacional
Ms. María de la Colina	Guglielmino Derecho Internacional
Mr. Alejandro Vulejser	Guglielmino Derecho Internacional
Mr. Miguel Colquicocha Martínez	Guglielmino Derecho Internacional
Mrs. Clara Depietri	Guglielmino Derecho Internacional
Mr. Francisco Calvo	Guglielmino Derecho Internacional
Ms. Camila Guglielmino	Guglielmino Derecho Internacional
Mr. Henry Rodríguez Facchinetti	Procuraduría General de la República

Court Reporter(s):

Mr. David Kasdan	B&B Reporters
Mr. Timoteo Rinaldi	D.R. Esteno
Ms. Regina Spector	D.R. Esteno

Interpreters:

Ms. Anna Sophia Chapman
Ms. Carmen Solino
Mr. Luis Arango

78. During the Hearing, the following persons were examined:

On behalf of the Claimant:

Mr. Alberto Regino Ramírez	
Mr. Luis Lugo	
Mr. César Augusto Agelviz	
Mr. Manuel Abdala	Compass Lexecon

Mr. Pablo López Zadicoff	Compass Lexecon

On behalf of the Respondent:

Mr. Juan Carlos Loyo	Ministry of Agriculture and Fishing
Mr. Simón Alberto Lujano	SINTRACART Union
Mr. Joel Arias	SUNDDE (former officer of)
Mr. Guillermo Sabbioni	EconLogic Consulting (formerly at)
Mr. Andrés Ferraris	EconLogic Consulting

79. On 14 October 2022, as instructed by the Tribunal during the Hearing, the Parties jointly informed the Tribunal of their continuing discussions on the deadlines and format of the post-hearing briefs and asked whether the Tribunal had any additional questions that the Parties should address in such briefs.

80. On 20 October 2022, the Tribunal informed the Parties that there were no further questions. On 28 October 2022, the Tribunal provided guidelines to the Parties on the post-hearing briefs and invited the Parties to confer and agree on the deadlines and format. On 10 November 2022, the Parties informed the Tribunal of (i) the deadline for the corrected transcripts, (ii) the format and deadlines of the post-hearing briefs and reply post-hearing briefs, and (iii) the simultaneous filing of a five-page statement of costs upon closure of the proceedings in accordance with ICSID Arbitration Rule 28.

81. After a one-day extension request granted by the Tribunal, the Parties filed simultaneous post-hearing briefs on 23 December 2022. On 10 February 2023, the Parties filed simultaneous reply post-hearing briefs.

82. On 19 January 2023, the Claimant requested leave to submit a revised Exhibit CLEX-053 bis and asked if the Tribunal would require the Parties to submit a joint expert report. On 27 January 2023, upon invitation of the Tribunal, the Respondent submitted its observations to the Claimant's communication of 19 January 2023.

83. On 17 May 2024, the Tribunal invited the Claimant to submit Exhibit CLEX-053 bis and invited both Parties to submit an update to Exhibits CLEX-099 and EL-081. In the same communication, the Tribunal invited the Parties to confer on the format for the cost submissions. On 31 May 2024, the Parties submitted the requested exhibits and their agreement on the format for the cost submissions.

84. The Tribunal closed the proceeding on 11 June 2024.

85. The Parties filed their submissions on costs on 25 June 2024.

III. FACTUAL BACKGROUND OF THE DISPUTE

1. Landholdings and Business

A. Legal Framework

86. Between 1990 and 1996, two of Smurfit's Venezuelan subsidiaries, Reforestadora Dos, Refordos C.A. ("**Refordos**") and Agropecuaria Tacamajaca C.A. ("**Agropecuaria Tacamajaca**"), acquired over 35,000 hectares of land divided into 23 landholdings.[2] Refordos owned 22 landholdings.[3] Cartón de Venezuela S.A. ("**Cartón**" or "**SKCV**"), through its wholly-owned subsidiary, Agropecuaria Tacamajaca, owned one landholding.[4]

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[2] Claimant's Memorial on the Merits ("**Claimant's Memorial**"), 12 May 2020, ¶ 25. *See also* ¶ 14 for the landholdings name, location, size and title of property.

[3] Registered Title of Bumbi, 28 September 1990, **C-024T**; Registered Title of El Hierro, 28 September 1990, **C-024S**; Registered Title of Los Garzones, 28 September 1990, **C-024D**; Registered Title of El Jaguito, 9 November 1990, **C-024E**; Registered Title of El Morador, 9 November 1990, **C-024O**; Registered Title of Hacienda Río Morador, 9 November 1990, **C-024P**; Registered Title of Quebrada Seca, 9 November 1990, **C-024V**; Registered Title of Saltanejas, 22 January 1991, **C-024I**; Registered Title of Santo Tomás, 9 August 1991, **C-024Q** ("Santo Tomás was first acquired by Cartón in 1981 […] In 1990, Cartón transferred its title to the Santo Tomás property to Refordos"); Registered Title of La Pastoreña, 20 December 1991, **C-024U**; Refordos's Title of Trees on El Toco and La Tigrera, 15 October 1990, **C-024R**; Refordos's Registered Title of Trees on El Toco and La Tigrera, 15 October 1990, **C-029**; Registered Title of Certain Portions of Los Alacranes and La Cabaña, 17 February 1993, **C-024H**; Registered Title of La Cabaña, 17 April 1995, **C-024M**; Registered Title of La Joya, 15 March 1993, **C-024L**; Registered Title of El Piñal, 27 August 1993, **C-024A**; Registered Title of Cujicito, 7 September 1994, **C-024N**; Registered Title of La Tigrera, 1 August 1990, **C-024G**; Registered Title of La Linareña, 2 November 1994, **C-024J**; Registered Title of La Yaguara, 2 December 1994, **C-024C**; Registered Title of Las Minas, 20 September 1995, **C-024F**; Registered Title of Garachico, 10 October 1995, **C-024K**; Registered Title of La Productora, 17 October 1996, **C-024B**.

[4] "'THE BUYER' declares that it acknowledges that the only assets of the Commercial Company 'AGROPECUARIA TACAMAJACA, C.A.' are represented by a property it owns with an area of approximately One Thousand Seven Hundred Ninety-Eight Hectares (1,798 ha)." Sale and Purchase Agreement transferring Agropecuaria Tacamajaca

87. In addition to the landholdings, Smurfit's Venezuelan business also consisted of three paper mills located in Caracas, Valencia and San Felipe, as well as 15 production facilities, including recycling plants, corrugated cardboard plants, a sack plant and a folding carton plant.[5]

88. On 13 November 2001, Venezuela enacted the *Decreto Con Fuerza de Ley de Tierras y Desarrollo Agrario* (the "**2001 Land Law**").[6] In its Preamble, the 2001 Land Law states that: "[…] the affectation of the use of all lands, whether public or private, with a vocation for agri-food development is established."[7] It defines as beneficiaries "the citizens who dedicate themselves to rural agricultural activity." Additionally, it classifies three basic levels of productivity: (i) idle or uncultivated estate, (ii) improvable estate, and (iii) productive estate.[8] Through this Law, Venezuela created the National Land Institute ("**INTI**") and the Regional Land Offices ("**RLO**s").[9]

89. In November 2002, in a decision of the Supreme Court of Venezuela, the Court determined that Articles 89 and 90 of the 2001 Land Law were unconstitutional.[10]

C.A. to Cartón, 11 February 1993, **C-031,** p. 3, *see also* pp.1-2. Agropecuaria Tacamajaca is 100 percent owned by Cariven Investment Limited, which is in turn 100 percent owned by Cartón; Share purchase agreement transferring Agropecuaria Tacamajaca C.A. to Cariven Investment Limited, 22 December 1993, **C-032** (showing that Cariven Investment Limited holds 100 percent of the shares of Agropecuaria Tacamajaca); Capital Stock Ledger of Cariven Investment Limited, 30 August 2002, **C-011C**; and Register of Members of Cariven Investment Limited, 23 October 2018, **C-011D** (showing that Cartón owns 100 percent of the shares of Cariven Investment Limited).

[5] Claimant's Memorial, ¶ 14(b) (c).

[6] Decree No. 1,546 on the Force of Law on Land and Agrarian Development, 9 November 2001, published in the Gaceta Oficial No. 37,323 on 13 November 2001 (the "**2001 Land Law**"), **C-034**, p. 3. *See also* Art. 2.

[7] 2001 Land Law, **C-034**, p. 3. (Unofficial translation)

[8] 2001 Land Law, **C-034**, p. 3. *See also* Arts. 13, 37-61.

[9] 2001 Land Law, **C-034**, Arts. 120-135.

[10] Decision of the Constitutional Chamber of the Venezuelan Supreme Court, *Federación Nacional de Ganaderos de Venezuela*, 20 November 2002, **C-036**, p. 19. Regarding Art. 89, the decision determined on page 15 that "[…] administrative procedures, those whose objective is to reduce the legal sphere of those administered by restricting a right, must be bestowed with greater guarantees for those, so that the administrative power is exercised in a manner consistent and appropriate to the purposes proposed by the statute, thus guaranteeing adherence to the law of administrative action […] in this situation, and there being no proportionality between the intervention instituted by the article and the idle or uncultivated nature of the land, since once the corresponding administrative procedure is completed, the Administration, by principle of execution and enforceability of administrative acts, may enter into direct possession of the property, which does not justify a momentary intervention, this Chamber declares the unconstitutionality of the norm in reference because it transgresses the constitutional right to property […]." As to Art. 90, the decision declared on pages 17 and 18 that "[n]ot recognizing the ownership of the assets that exist on the lands of the indicated National Land Institute, violates the right to property, and causes the Institute to incur unjust enrichment, since it subverts the idea of real estate accession in a vertical sense, which entails the unconstitutionality

90. In 2003, President Chávez enacted Decree No. 2,292 which empowered the INTI to issue "land letters" (*cartas agrarias*) to certify the occupation of land by collective groups as well as to "promote and permit the participation of organized communities of collective groups in the cultivation of the land owned by it and by the Republic while the proceedings aimed at determining the appropriateness of the permanent adjudication of occupied land […] are being conducted."[11]

91. On 9 February 2005, President Chávez issued the Partial Regulation of the Land Law (*Reglamento Parcial de la Ley de Tierras*) ("**PRLL**") which required the INTI to classify rural land according to the categories of land use established in the 2001 Land Law.[12] The PRLL also established factors and qualities to determine the classes and subclasses of land and the classes and subclasses of land use capacity as well as to classify the land in accordance with the country's agro-ecological characteristics.[13]

92. On 18 May 2005, a new law amending the 2001 Land Law was passed, (the "**2005 Land Law**"). Articles 89 and 90 previously determined as unconstitutional were removed and Articles 85 and 86 on Land Recovery Proceedings were introduced.[14]

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of the norm [...] since with the norm in reference the right to property over the improvements carried out by the occupants of the lands of the National Land Institute is absolutely ignored, this Chamber declares the nullity […]." Art. 89 provided that "[o]nce the proceedings have been initiated, the National Land Institute may intervene in land under recovery proceedings if it is idle or uncultivated, pursuant to the provisions of this Decree of Law […]." Art. 90 established that "[i]llegal or unlawful occupants of public land under recovery proceedings may not claim any compensation for improvements on or fruits of illegally occupied land." (Unofficial translation), *see* 2001 Land Law, **C-034**.

[11] Decree No. 2,292, 4 February 2003, published in the Gaceta Oficial No. 37,624, 4 February 2003, **C-184**, Arts. 1 and 5; INTI Decision No. 177, 5 February 2003, published in the Gaceta Oficial No. 37,629, 11 February 2003, **C-185**, Arts. 1-7.

[12] Art. 2, paragraphs 9-14 define the following uses: agricultural, vegetable, livestock, forestry, conservation and protection of the environment, and agrotourism. *See also* Arts. 9, 10-12-14 on INTI's power to authorize the use of land for forest production, mixed systems or mixed uses, to determine the soil classes, to classify products in accordance with the soil classes as well as to determine the area for production in relation to the soil classes and in accordance with its use. Decree No. 3,463 on the Partial Regulation of the 2001 Land Law for the determination of the use of rural land, 9 February 2005, published in the Gaceta Oficial No. 38,126 on 14 February 2005, **C-039**.

[13] Decree No. 3,463 on the Partial Regulation of the 2001 Land Law for the determination of the use of rural land, 9 February 2005, published in the Gaceta Oficial No. 38,126 on 14 February 2005, **C-039**. *See* Arts. 4, 6-8.

[14] Art. 85 provided that after initiating the procedure to recover land, the INTI could order interim measures. Notice of such measures had to be given personally to occupants directly affected, who in turn could exercise appeals. The interim measures had to set forth the duration of the measures. According to Art. 86: "[…] illegal or unlawful occupation of land with designated agrarian use shall not generate any rights; therefore, the agrarian administration will not be obligated to indemnify illegal or unlawful occupants for improvements that have been made to land with

93. On 29 July 2010, the Law of Partial Reform of the 2005 Land Law (the "**2010 Land Law**") was passed. According to Article 82 of the Law: "The [INTI] may also recover land in cases in which ownership is attributed to private parties, when after a documentary analysis of the sufficient title requested from the party to whom ownership rights are attributed, the person is unable to show a perfect sequence and chain of title for the property and other alleged rights, from the valid granting by the Venezuelan Nation until the title of acquisition duly registered by the party who asserts ownership."[15] Pursuant to Article 84, the INTI could initiate recovery proceedings if the lands were "in the area of influence of strategic agri-production or agri-ecological projects developed by the National Executive [and] when exceptional circumstances of social interest or public utility so require."[16]

94. In January 2014, a new system of price controls was established through Decree No. 600 on the Organic Law on Fair Prices ("**Law on Fair Prices**"). The Law on Fair Prices allowed prices to be fixed and established a maximum profit margin of 30 percent on the sale of all consumer goods, sanctions, and criminal penalties. The Law also created the SUNDDE, which was in charge of its implementation.[17] In 2014 and 2015 the Law was amended; however, the maximum profit margin of 30 percent remained.[18]

designated agrarian use that may be the subject to recovery." (Unofficial translation) Law of Partial Reform to Decree No. 1,546 (the 2001 Land Law), 28 April 2005, published in the Gaceta Oficial No. 5,771 on 18 May 2005 (the "**2005 Land Law**"), **C-043**.

[15] Law of Partial Reform to the 2005 Land Law (the "**2010 Land Law**"), 17 June 2010, published in the Gaceta Oficial No. 5,991 on 29 July 2010, **C-083**, Art. 82. (Unofficial translation)

[16] 2010 Land Law, **C-083**, Art. 84. (Unofficial translation). Pursuant to the Final Provisions, notaries must require the certificates of improvable estate or productive estate for the formalization or granting of any document presented of the property located within the lands intended for agricultural use. *See* Final Provisions, Fifth.

[17] Decree No. 600 on the Organic Law on Fair Prices, 21 November 2013, published in the Gaceta Oficial No. 40,340 on 23 January 2014, **C-126**. "[T]he products of Cartón and its affiliates were not subject to government price-fixing" but were "subject to the 30 percent cap on profits." Claimant's Memorial, ¶ 122. *See* Arts. 10-12, 16, 24, 32, 45-64.

[18] Decree No. 1,467 on the Organic Law on Fair Prices, 18 November 2014, published in the Gaceta Oficial No. 6,156, on 19 November 2014, **C-239**, Arts. 37-54; Decree No. 2,092 on the Organic Law on Fair Prices, 8 November 2015, published in the Gaceta Oficial No. 40,787 on 12 November 2015, **C-140**, Arts. 37-38, 49-72.

B. The Seizures

i. La Productora

95. On 23 March 2003, a local group denounced the alleged illegal occupation of the landholding by Refordos before the INTI. Following this denunciation, the Portuguesa RLO issued a report on the examination of the chain of title indicating that the documents presented were insufficient to demonstrate a right to property. Taking this into consideration, on 27 September 2006, the INTI initiated proceedings to recover the La Productora landholding.[19]

96. By a notice issued on 31 October 2006, the INTI imposed interim measures on La Productora that would be in force until the decision on the recovery proceeding was rendered. The notice provided that the recovery proceeding would continue, urges the Portuguesa RLO to protect the agricultural production activities being conducted by the current occupants, and indicates that the incorporation of groups of farmers authorized by the measure would be done progressively.[20] Refordos was notified of the 27 September and 31 October 2006 decisions on 19 January 2007.[21]

97. On 31 January 2007, Refordos filed an application before the INTI requesting the suspension of the interim measures as well as termination of the recovery proceeding.[22]

98. On 19 March 2007, Refordos filed an application before an agrarian court requesting the admission of an administrative agrarian annulment appeal of the interim measures and an injunctive measure to suspend the measures issued by the INTI.[23]

99. On 25 March 2007, President Chávez announced on national television that La Productora property was being "recovered" as part of the "agrarian revolution."[24] Since

[19] INTI Notice regarding La Productora, 27 September 2006, **C-046**, pp. 1-2.
[20] INTI Notice regarding La Productora, 31 October 2006, **C-047**, pp. 1-2.
[21] Refordos's administrative challenge regarding La Productora filed with INTI, 31 January 2007, **C-051**, pp. 1, 2.
[22] Refordos's administrative challenge regarding La Productora filed with INTI, 31 January 2007, **C-051**, pp. 28, 29.
[23] Refordos's annulment appeal regarding La Productora filed with the High Agrarian Court, 19 March 2007, **C-052**, pp. 4-5.
[24] Transcript of Aló Presidente No. 278, *Todo Chávez*, 25 March 2007, **C-195**, pp. 2, 3, 5, 37. On 26 March 2007, a member of the National Assembly declared that the state's taking of land in Portuguesa of Smurfit was "an act of social justice." "Intervention in latifundios should continue in Portuguesa," *El Regional*, 27 March 2007, **C-054**.

then, La Productora landholding has remained under the control of the INTI and the local occupants.[25]

100. Refordos's requests for appeal and revision were dismissed on various court instances[26] and its March 2014 administrative challenge seeking annulment of INTI's October 2006 interim measures was never decided.[27]

ii. Santo Tomás

101. On 15 July 2005, the Lara RLO began an investigation to determine whether the land at Santo Tomás was idle.[28]

102. On 15 February 2006, the Lara RLO issued a report finding that approximately 80 percent of the land at Santo Tomás was suitable for livestock activity and 20 percent of the land was suitable for forestry activities. The report indicated that the existing natural resources were not being used; however, the report also recognized that the land was used for agroforestry exploitation of various crops (*e.g.*, Eucalyptus, Gmelina, as well as various pine species). According to the report, for the determination of the soil classification, only the characteristics observed during the inspection were considered since there was no analysis of the soil of the property inspected.[29]

103. On 31 March 2006, Refordos was notified that the Lara RLO had initiated proceedings to declare the Santo Tomás landholding idle.[30] On 9 May 2006, Refordos requested the annulment of the act and a declaration that the land was not idle, also reiterating its November 2005 request for the issuance of a Productive Farm Certificate.[31]

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[25] First Witness Statement of Alberto Ramírez, ¶ 27(a); "La Productora farm taken by the State," *El Regional*, 26 March 2007, **C-053**; Claimant's Memorial, ¶ 43.
[26] Decision of the constitutional chamber of the Venezuelan Supreme Court regarding La Productora, 8 October 2013, **C-124**, pp. 8-9.
[27] Refordos's administrative challenge regarding La Productora filed with INTI, 11 March 2014, **C-128**; Claimant's Memorial, ¶ 42.
[28] INTI Notice regarding Santo Tomás, 31 March 2006, **C-044**, p. 1.
[29] INTI Lara RLO Technical Report regarding Santo Tomás, 15 February 2006, **C-189**, pp. 4-9.
[30] INTI Notice regarding Santo Tomás, 31 March 2006, **C-044**, p. 1.
[31] Refordos's administrative challenge regarding Santo Tomás filed with INTI, 9 May 2006, **C-190**, pp. 1, 2, 21, 23, 24.

104. Between March 2010 and May 2011, Refordos denounced before several authorities invasions of the Santo Tomás estate by groups of occupants noting, in particular, the damage caused to natural resources such as intentional burning and deforestation, the removal of a gate, planting without consent, blocking of access, and moreover requesting the inspection and intervention of said authorities (the Prefecture of the municipality of Sarare, the Ministry for the People's Power for the Environment, the Chief of the Environmental Care Unit, the National Guard, the Environmental Director and the Prefect of the Municipality of Simón Planas).[32]

105. On 5 May 2011, the Yaracuy RLO issued a decision guaranteeing the right of the agricultural cooperatives to remain on the property and instructing the Courts to refrain from issuing measures that would directly or indirectly lead to their eviction. Refordos requested the annulment of this decision before INTI but received no response.[33]

106. Representatives of Refordos sought to recover equipment located on the Santo Tomás property. However, the occupants refused to allow the removal of the equipment. Refordos has been unable to access its land or its equipment since then.[34]

107. On 16 June 2011, the Palavecino and Simón Planas District Court of the state of Lara conducted, at Refordos's request, a judicial inspection of the land at Santo Tomás. The inspection file indicates that Refordos had title to the land at Santo Tomás, the land at Santo Tomás was occupied by individuals who were not employees of Refordos, there were burned and damaged trees, as well as damaged equipment on the property, some

[32] Letter from Refordos (Mr. Arrieche) to Prefecture of the Sarare Municipality (Mr. Díaz), 5 May 2011, **C-214**; Letter from Refordos (Mr. Cordobes) to Ministry of the Environment - Director of the Lara state (Ms. Arrieta), 16 May 2011, **C-215**.
[33] Refordos's annulment appeal regarding Santo Tomás filed with the High Agrarian Court of the State of Lara, 14 December 2016, **C-142**, p. 4.
[34] Claimant's Memorial, ¶ 50. First Witness Statement of Alberto Ramírez, ¶ 27(c); Minutes of Inspection conducted by the Prefecture of the Simón Planas Municipality at Santo Tomás, 13 May 2011, **C-090**, p. 1. Refordos filed a formal complaint listing the equipment that it was unable to recover from the property. *See* Complaint regarding Santo Tomás, 3 July 2011, **C-217**, pp. 1-2.

areas had been recently cultivated with corn, a sign identifying the property and its owner had been painted over, and several access points to the property were blocked.[35]

108. On 3 July 2011, Refordos denounced these conditions before the Public Prosecutor and Criminal Circuit of Barquisimeto.[36]

109. On 19 October 2011, the INTI issued a decision declaring the nonconforming use of the land, denying the Productive Farm Certificate initially requested by Refordos in November 2005, initiating proceedings for the "recovery" of the land by the State, and imposing an interim measure authorizing the occupation of the Santo Tomás property.[37]

110. In April 2013, the Lara RLO opened an administrative file for the recovery of the Santo Tomás estate and ordered an inspection of the estate as well as the issuance of a report. Additionally, it determined that a social study of the possible beneficiaries of the interim measures was to be conducted. On 15 June 2013, a report was issued confirming that 147 individuals (4 collective groups and 5 individuals) had been occupying the property since May 2011.[38] The report recorded livestock activities (84 animals) and the use of 1.5 percent of the land to cultivate corn. Additionally, the report recognized that the occupants had committed acts of deforestation by indiscriminate clearing and burning in various sectors of the property without having obtained permits to do so.[39]

111. Another report from 22 May 2014 did not record any livestock activities or the presence of corn crops on the property.[40] The June 2013 and May 2014 reports indicated the prevailing soil classes of the estate and noted that the land was within its conforming use.

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[35] Palavecino and Simón Planas District Court of the State of Lara Judicial Inspection file regarding Santo Tomás, June 2011, **C-216**, pp. 43-55.
[36] Complaint regarding Santo Tomás, 3 July 2011, **C-217**.
[37] INTI Notice regarding Santo Tomás, 19 October 2011, **C-222**, pp. 18-20. Refordos learned of this on 27 July 2012 after requesting an update from INTI on the status of the proceedings against its landholding. *See* Refordos's annulment appeal regarding Santo Tomás filed with the High Agrarian Court of the State of Lara, 14 December 2016, **C-142**, pp. 4, 5.
[38] INTI Decision No. 75-01-13 regarding Santo Tomás, 25 April 2013, **C-229**, p. 7; INTI Technical Report regarding Santo Tomás, 15 June 2013, **C-230**, pp. 4-7.
[39] INTI Technical Report regarding Santo Tomás, 15 June 2013, **C-230**, pp. 20-22, 33, 34.
[40] INTI Technical Report regarding Santo Tomás, 22 May 2014, **C-237**, pp. 15-26.

Both also noted that a majority of the exploitable land contained plantations of pine, gmelina and eucalyptus wood.[41]

112. In June 2014, the Lara RLO issued a decision recommending formal recovery of the land and regularization of the status of the individuals that had been allowed to occupy the property pursuant to INTI's October 2011 decision.[42]

113. On 27 January 2015, the INTI issued a decision ordering the formal recovery of the Santo Tomás estate and the regularization of the collective groups and individuals that had occupied the land and guaranteeing the occupation and productivity of the land. The decision was notified to the occupiers of Santo Tomás on 10 February 2015. Refordos was notified nearly two years later, on 1 November 2016. Refordos appealed and sought to annul this decision.[43]

114. In March and April of 2015, Refordos complained to the Ministry of Housing and Habitat and to an environmental prosecutor, denouncing the occupations and the intentional burning and deforestation and requesting an inspection and the issuance of pertinent measures or the initiation of the corresponding investigations.[44]

115. On 28 April 2015, the INTI issued a *carta agraria* authorizing the cooperative group *Asociación Civil de Consejo Socialista de Campesinos Camarada Sirio Lobo* to occupy and exploit 949 hectares (or 43 percent) of the Santo Tomás landholding.[45]

[41] INTI Technical Report regarding Santo Tomás, 15 June 2013, **C-230**, pp. 15, 33-34; INTI Technical Report regarding Santo Tomás, 22 May 2014, **C-237**, pp. 11, 26.
[42] INTI Decision No. 113-05-14 regarding Santo Tomás, 19 June 2014, **C-238**, pp. 4, 5.
[43] INTI Notice regarding Santo Tomás, 27 January 2015, **C-134**, pp. 25-27; INTI Notice regarding Santo Tomás, 10 February 2015, **C-244**; Refordos's annulment appeal regarding Santo Tomás filed with the High Agrarian Court of the State of Lara, 14 December 2016, **C-142**, pp. 75, 76.
[44] Letter from Refordos (Mr. Arrieche) to the Ministry of Housing and Habitat (Mr. Silva), 27 March 2015, **C-245**; Complaint regarding Santo Tomás, 13 April 2015, **C-246**.
[45] Land title (*carta agraria*) issued by INTI to Asociación Civil de Consejo Socialista de Campesinos Camarada Sirio Lobo, 28 April 2015, **C-247**. Refordos was made aware of this authorization three years later in April 2018 and filed an annulment request against the *carta agraria*. *See* Refordos's annulment appeal regarding Santo Tomás filed with the High Agrarian Court of the State of Lara, 16 April 2018, **C-263**, pp. 3, 4, 29.

116. On 14 April 2016, Refordos filed a request before an agrarian court to issue an injunction to stop further damage to the property caused by the local occupants.[46] The measures were granted nearly a year later.[47]

iii. El Piñal

117. On 15 July 2005, the Lara RLO began an investigation to determine whether the land at El Piñal was idle.[48]

118. On 29 November 2005, Refordos applied to the Lara RLO for a Productive Farm Certificate for El Piñal.[49]

119. On 7 March 2006, the Lara RLO issued a report concluding that El Piñal was suitable for agricultural use and its non-conforming use.[50]

120. On 16 November 2006, Refordos was notified that the INTI had begun proceedings to declare Refordos's landholding at El Piñal as idle.[51] Refordos filed in December 2006 an administrative challenge requesting the annulment of the act, a declaration that the land was not idle, and the issuance of the Productive Farm Certificate it had requested a year earlier.[52]

121. On 13 August 2007, the Lara RLO issued a report recommending that INTI declare the El Piñal property to be idle and refused the issuance of the Productive Farm Certificate requested by Refordos two years earlier. That same day, the Lara RLO issued a decision

[46] Refordos's environmental protection measure request regarding Santo Tomás filed with the First Instance Agrarian Court of the State of Lara, 14 April 2016, **C-249**, p. 15.
[47] Decision of the First Instance Agrarian Court of the State of Lara regarding Santo Tomás, 15 March 2017, **C-252**.
[48] Refordos's administrative challenge regarding El Piñal filed with INTI, 18 December 2006, **C-049**, p. 5. This was the same day on which it initiated an investigation into Refordos's Santo Tomás property as described above.
[49] Refordos's administrative challenge regarding El Piñal filed with INTI, 18 December 2006, **C-049**, pp. 2, 4, 8, 16, 23, 25, 26, 27; INTI Notice regarding El Piñal (Notificación), 25 February 2009, **C-066**, pp. 1, 20, 30.
[50] Refordos's administrative challenge regarding El Piñal filed with INTI, 18 December 2006, **C-049**, pp. 20-24; INTI Notice regarding El Piñal (Notificación), 25 February 2009, **C-066**, pp. 4, 5.
[51] INTI Notice regarding El Piñal (Notificación), 25 February 2009, **C-066**, pp. 17, 18.
[52] Refordos's administrative challenge regarding El Piñal filed with INTI, 18 December 2006, **C-049**, p. 26.

declaring that it had concluded the idleness proceedings and was remitting the file to INTI.[53]

122. On 25 February 2009, the INTI declared the El Piñal property as "idle," initiated "recovery" proceedings, denied the request for a Productive Farm Certificate, and issued an interim measure authorizing individuals to occupy the property.[54]

123. On 1 March 2009, the INTI officials went to El Piñal to notify Refordos of its 25 February decision.[55] The notification was attached to the gate.

124. On 6 March 2009, President Hugo Chávez announced that the government had "intervened" El Piñal the previous day, on 5 March 2009, as part of the "agrarian revolution."[56] During his announcement, President Chávez stated that El Piñal "is no longer private property, but property of the people" and he declared that the people would "rationally exploit" the wood and harvest crops on the property. He declared that it was "crucial" that the ownership structure of lands be changed to ensure the success of "Socialist Venezuela."[57]

125. On 9 March 2009, Refordos filed a challenge to this decision. Additionally, in April 2009 it filed a request to annul INTI's decision before the agrarian courts, which was denied.[58] On 21 October 2009, the INTI took possession of El Piñal.[59]

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[53] Refordos's annulment appeal regarding El Piñal filed with the High Agrarian Court of the State of Lara, 23 April 2009, **C-206**, p. 7.
[54] INTI Notice regarding El Piñal (Cartel de Notificación), 25 February 2009, **C-065**, pp. 1-3.
[55] Refordos's annulment appeal regarding El Piñal filed with the High Agrarian Court of the State of Lara, 23 April 2009, **C-206**, p. 8.
[56] "Chávez announces the intervention over the lands of paper company Smurfit Kappa," *ABC Internacional*, 6 March 2009, **C-202**, pp. 1-2.
[57] "Chávez orders the expropriation of the lands of Irish paper company Smurfit Kappa," *20 minutos*, 6 March 2009, **C-203**; "Venezuela takes farm from Irish paper company," *La Nación*, 7 March 2009, **C-204**, p. 2.
[58] Refordos's annulment appeal regarding El Piñal filed with the High Agrarian Court of the State of Lara, 23 April 2009, **C-206**, p. 8. Decision of the Constitutional Chamber of the Venezuelan Supreme Court regarding El Piñal, 5 May 2014, **C-236**, p. 11. Through this proceeding, Refordos requested the revocation of the resolution issued on 14 December 2010, by a court specialized in agrarian matters, which dismissed an appeal against a decision rendered on 4 May 2009.
[59] INTI Takeover Minutes regarding El Piñal, 21 October 2009, **C-074**.

126. Between 20 August 2013 and 28 April 2015, the INTI issued four *cartas agrarias* authorizing the occupation and exploitation of portions of the El Piñal landholding. Refordos was not made aware of these authorizations until August 2017. Refordos requested the annulment of these *cartas agrarias* in August 2017.[60]

127. On 7 December 2016, the INTI notified Refordos of its decision to "recover" El Piñal that had been issued in August 2012. Refordos appealed in January 2017.[61]

C. Substantial Interference with Other Landholdings

i. Cujicito

128. On 16 May 2006, the Lara RLO initiated proceedings to declare Refordos's Cujicito landholding idle.[62]

129. The Lara RLO notified Refordos of these proceedings on 15 November 2006. Refordos filed a defense with the Lara RLO in December 2006 requesting annulment of the act, a declaration that the land was not idle and the issuance of a Productive Farm Certificate.[63]

130. The idleness proceedings were not concluded. Refordos was able to continue its activities at Cujicito until August 2018.[64]

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[60] Land title (*carta agraria*) issued by INTI to Colectivo San Antonio, 20 August 2013, **C-231**; Land title (*carta agraria*) issued by INTI to Consejo Campesino Forjadores, 9 January 2015, **C-241**; Land title (*carta agraria*) issued by INTI to Asociación Civil Campesino La Vaquera del Piñal, 16 January 2015, **C-242**; Land title (*carta agraria*) issued by INTI to Agrícola y Pecuaria Productoras Agrícolas Los Rieles del Piñal, 16 January 2015, **C-243**. Refordos's annulment appeal regarding El Piñal filed with the High Agrarian Court of the State of Lara (re: Colectivo San Antonio), 14 August 2017, **C-257**, p. 3; Refordos's annulment appeal regarding El Piñal filed with the High Agrarian Court of the State of Lara (re: Consejo Campesino Forjadores), 14 August 2017, **C-258**, p. 3; Refordos's annulment appeal regarding El Piñal filed with the High Agrarian Court of the State of Lara (re: Asociación Civil Campesino La Vaquera del Piñal), 14 August 2017, **C-259**, p. 3; Refordos's annulment appeal regarding El Piñal filed with the High Agrarian Court of the State of Lara (re: Agrícola y Pecuaria Productoras Agrícolas Los Rieles del Piñal), 14 August 2017, **C-260**, p. 3. Claimant's Memorial, ¶ 69.

[61] *See* INTI Notice regarding El Piñal, 14 August 2012, **C-109**, pp. 36-38; Refordos's annulment appeal regarding El Piñal filed with the High Agrarian Court of the State of Lara, 27 January 2017, **C-143**, pp. 1, 4.

[62] INTI Notice regarding Cujicito, 16 May 2006, **C-045**.

[63] Refordos's administrative challenge regarding Cujicito filed with INTI, 18 December 2006, **C-048**, pp. 3, 26, 27.

[64] Claimant's Memorial, ¶ 72.

ii. El Hierro

131. In April 2007, the Portuguesa RLO began an investigation into the productivity of El Hierro, based on a complaint made by individuals alleging that the El Hierro landholding was idle.[65] Days later, over one thousand individuals blocked access to the El Hierro and La Yaguara landholdings.[66]

132. On 7 August 2007, Refordos was notified that the Portuguesa RLO had initiated proceedings to declare the El Hierro landholding idle. Refordos presented its defense to the RLO and also reiterated its request for a Productive Farm Certificate for El Hierro, for which it had initially applied on 28 March 2005.[67]

133. On 27 December 2007, the Portuguesa RLO issued a report recognizing that Refordos had been carrying out productive forestry activities at El Hierro for 17 years and declared the land was suitable for agricultural activities.[68]

134. On 15 February 2008, the INTI issued a decision declaring approximately 82 hectares of the land at El Hierro to be idle, denying the Productive Farm Certificate requested by Refordos nearly three years earlier, ordering the initiation of "recovery" proceedings in relation to a portion of El Hierro property, and imposing an interim measure allowing occupation of the property to carry out agricultural activities.[69] Refordos was not formally notified of this decision until July 2011.[70]

135. Refordos requested that municipal authorities from the Public Registry inspect the land at El Hierro. These authorities issued a report on 7 March 2008 confirming that Refordos

[65] INTI Notice regarding El Hierro, 15 February 2008, **C-057**, pp. 1-2.
[66] "*Campesinos* from Ospino go for another 11 thousand hectares from Smurfit," *Última Hora*, 20 April 2007, **C-196**.
[67] INTI Notice regarding El Hierro, 6 August 2007, **C-197**; INTI Notice regarding El Hierro and La Yaguara, 7 August 2007, **C-198**; INTI Notice regarding El Hierro, 15 February 2008, **C-057**, pp. 3-4.
[68] INTI Notice regarding El Hierro, 15 February 2008, **C-057**, pp. 5-6.
[69] INTI Notice regarding El Hierro, 15 February 2008, **C-057**, pp. 16, 17. The INTI also declared that since there was no evidence of title, it presumed the land at El Hierro to be "public land." *See also* p. 9.
[70] Refordos's administrative challenge regarding El Hierro filed with INTI, 15 September 2011, **C-218**, p. 3.

showed a property title over El Hierro during the inspection and recorded the forestry activities that were being carried out on the property.[71]

136. On 28 January 2011, the National Guard issued minutes of an inspection of the El Hierro property that it had conducted that same day. The minutes noted that there were trees cut down in Refordos's forestry plantations and some crop planting in the land by individuals carrying out those activities.[72]

137. On 6 April 2011, the INTI issued a new decision declaring El Hierro to be a large estate (*latifundio*) and extending both the "recovery" proceeding and the interim measures imposed in February 2008 to the entirety of the El Hierro property.[73]

138. Refordos's 21 September 2011 request to annul and suspend the effects of INTI's decision was declared inadmissible in November 2011.[74] On 15 February 2012, the Special Agrarian Chamber of the Supreme Court overturned the November 2011 ruling and ordered the lower court to admit Refordos's appeal. The Claimant contends that the lower court failed to do so.[75]

139. On 29 December 2016, José Ávila, the president of the INTI announced that the INTI had authorized over 280 individuals to occupy approximately 3,800 hectares of land in El Hierro (over 97 percent of the property).[76]

140. Refordos was able to continue harvesting some of the wood at El Hierro (but not replant trees) until August 2018. The "recovery" proceedings regarding the El Hierro property were not completed.[77]

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[71] Inspection Minutes by Public Registry of Ospino Municipality regarding El Hierro, 5 March 2008, **C-199**, pp. 1, 4, 5.
[72] Inspection Minutes regarding El Hierro, 28 January 2011, **C-213**.
[73] INTI Notice regarding El Hierro, 6 April 2011, **C-087**, pp. 20-42.
[74] Decision of the High Agrarian Court regarding El Hierro, 1 November 2011, **C-098**, p. 15.
[75] Decision of the Special Agrarian Chamber of the Supreme Court regarding El Hierro, 15 February 2012, **C-103**, p. 4; Claimant's Memorial, ¶ 81.
[76] "INTI grants over 40,000 land titles and regularized 1,400,000 hectares of land," *Última Hora*, 29 December 2016, **C-250**.
[77] Claimant's Memorial, ¶ 83.

iii. La Yaguara

141. In April 2007, the Portuguesa RLO began an investigation into the productivity of La Yaguara.[78] Days later, a group of over a thousand individuals temporarily blocked the entrance to La Yaguara.[79]

142. On 24 May 2007, the Portuguesa RLO issued a report declaring the land to be suitable for agricultural production and "underutilized" given its use for forestry activities.[80]

143. On 6 August 2007, the Portuguesa RLO notified Refordos that it had initiated proceedings to declare the La Yaguara property idle.[81]

144. On 16 August 2007, Refordos filed its defense with the INTI and reiterated its request for a Productive Farm Certificate (for which Refordos had applied in November 2002).[82]

145. On 15 February 2008, the INTI issued a decision declaring a portion of the La Yaguara property to be idle, refusing to grant a Productive Farm Certificate, initiating recovery proceedings, and imposing interim measures allowing the occupation of a significant portion of the property. Refordos was notified of this decision on 3 May 2008.[83]

146. On 6 April 2011, the INTI declared that the remaining portion of the land at La Yaguara was of "non-conforming use." The INTI extended both the recovery proceedings and the interim measures imposed in February 2008 to the entirety of the land at La Yaguara.[84]

[78] INTI Notice regarding La Yaguara, 15 February 2008, **C-058**, p. 3; INTI Notice regarding El Hierro and La Yaguara, 7 August 2007, **C-198**; Refordos's administrative challenge regarding La Yaguara filed with INTI, 16 August 2007, **C-056**, pp. 3, 4.
[79] "*Campesinos* from Ospino go for another 11 thousand hectares from Smurfit," *Última Hora*, 20 April 2007, **C-196**.
[80] INTI Notice regarding La Yaguara, 15 February 2008, **C-058**, pp. 3, 11-12. The Report also indicates that La Yaguara "has considerable productivity."
[81] INTI Notice regarding La Yaguara, 6 August 2007, **C-055**.
[82] Refordos's administrative challenge regarding La Yaguara filed with INTI, 16 August 2007, **C-056**, pp. 25-26.
[83] Refordos's annulment appeal regarding La Yaguara filed with the High Agrarian Court, 27 August 2008, **C-062**, p. 8. Refordos's request to annul this decision has been pending since it was filed over eleven years ago. Claimant's Memorial, ¶ 88.
[84] INTI Notice regarding La Yaguara, 6 April 2011, **C-089**, pp. 9, 11, 16-19.

147. Refordos was notified of the INTI's decision on 19 July 2011. Refordos's September 2011 request to annul this decision was denied by the agrarian courts two years later.[85]

148. In March 2012, the governor of the state of Portuguesa, Wilmar Castro Soteldo, the president of the INTI, Luis Motta Domínguez, and other regional authorities announced that the INTI had authorized over 160 individuals to occupy approximately 1,400 hectares of land in the La Yaguara and La Joya landholdings.[86]

149. In May 2017, the governor of the state of Portuguesa, Reinaldo Castañeda, and Rafael Ávila, president of the INTI, authorized additional individuals to occupy more than 3,200 hectares of land in the La Yaguara and La Joya landholdings, nearly 70 percent of the totality of these two landholdings.[87]

150. Refordos was given limited authorizations to harvest wood, but not to replant trees, at the La Yaguara property until August 2018. No decision was issued in the government's recovery proceedings.[88]

iv. La Joya

151. On 15 September 2009, the Portuguesa RLO carried out an inspection of the La Joya property to determine whether to initiate recovery proceedings.[89]

152. On 29 October 2009, the INTI began recovery proceedings in relation to the La Joya property due to "exceptional circumstances of public utility and social interest."[90]

[85] Refordos's annulment appeal regarding La Yaguara filed with the High Agrarian Court, 16 September 2011, **C-084**; Decision of the High Agrarian Court for the State of Portuguesa regarding La Yaguara, 24 September 2013, **C-232**, pp. 2, 16-17.
[86] "*Campesino* families are granted title to 1,460 hectares in La Joya and La Yaguara," *Última Hora*, 31 March 2012, **C-106**; "Approximately 1,400 hectares given to *campesino* families," *El Regional*, 31 March 2012, **C-107**.
[87] "We are reaping the seeds of social justice sown by Chávez," *Última Hora*, 2 May 2017, **C-254**.
[88] Claimant's Memorial, ¶ 92.
[89] INTI Notice regarding La Joya, 29 October 2009, **C-207**, p. 1.
[90] INTI Notice regarding La Joya, 29 October 2009, **C-207**, p. 6; INTI Notice regarding La Joya, 29 October 2009, **C-208**; INTI Notice regarding La Joya, 1 February 2010, **C-076**, p. 1.

Refordos was notified of these proceedings on 1 February 2010 and in February and March it requested their termination.[91]

153. According to the INTI's Agrarian Registry Office, no private party had presented documentation that sufficiently demonstrated its ownership of the land; therefore, the land was presumed to be in the public domain.[92]

154. On 6 April 2011, the INTI issued another decision initiating recovery proceedings against La Joya for "exceptional circumstances of public utility and social interest," imposed interim measures, and requested a study on the possible beneficiaries of these measures.[93] Refordos was notified in August 2011 and in September it requested the annulment of this decision.[94]

155. In March 2012, the governor of the state of Portuguesa, Wilmar Castro Soteldo, the president of the INTI, Luis Motta Domínguez, and other regional authorities announced that the INTI had authorized over 160 individuals to occupy approximately 1,400 hectares of land in the La Joya and La Yaguara landholdings. Five years later, in May 2017, the governor of the state of Portuguesa, Reinaldo Castañeda, and Rafael Ávila, the president of INTI, authorized occupations in more than 3,200 hectares of land in the La Joya and La Yaguara landholdings.[95]

[91] INTI Notice regarding La Joya, 1 February 2010, **C-076**, p. 1; Refordos's administrative challenge regarding La Joya filed with INTI, 10 February 2010, **C-077**, pp. 1, 48; Refordos's administrative challenge regarding La Joya filed with INTI, 8 March 2010, **C-078**, pp. 1, 48.
[92] INTI Notice regarding La Joya, 6 April 2011, **C-088**, p. 5.
[93] INTI Notice regarding La Joya, 6 April 2011, **C-088**, pp. 12-16.
[94] Refordos's annulment appeal regarding La Joya filed with the High Agrarian Court, 28 September 2011, **C-219**, pp. 1, 2, 76.
[95] "*Campesino* families are granted title to 1,460 hectares in La Joya and La Yaguara," *Última Hora*, 31 March 2012, **C-106**; "Approximately 1,400 hectares given to *campesino* families," *El Regional*, 31 March 2012, **C-107**; "We are reaping the seeds of social justice sown by Chávez," *Última Hora*, 2 May 2017, **C-254**. *See also* "GNB and police took farm of Smurfit Cartón of Venezuela," *El Informador*, 7 September 2012, **C-110**; Minutes of Judicial Inspection of La Joya, High Agrarian Court of the State of Portuguesa and of the Municipality of Juan Vicente Campo Elías of the State of Trujillo, 2 May 2012, **C-108**, pp. 2-45, the latter indicating the presence of tree cutting, burning and deforestation areas within the land.

156. Refordos was given limited authorizations to harvest wood, but not to replant trees, at the La Joya property until August 2018. No decision was issued in the government's recovery proceedings.[96]

v. Garachico

157. On 4 January 2010, the Cojedes RLO began an investigation into the productivity of the land at Garachico. An inspection of the land took place and a technical report was issued by the Cojedes RLO. The report characterized the land as suitable for agricultural production and "underutilized" given that it was being used for commercial forestry activities.[97]

158. Refordos was notified of the initiation of the idleness proceedings on 26 January 2010. Shortly thereafter, on 4 February 2010, Refordos filed an administrative challenge before the INTI contesting the allegations of idleness.[98]

159. On 23 March 2010, the INTI issued a decision declaring the land at Garachico to be idle, initiating recovery proceedings, and imposing interim measures allowing individuals to occupy the land.[99] Refordos was notified of this decision on 11 May 2010. In July, Refordos requested the annulment of INTI's decision.[100]

[96] Claimant's Memorial, ¶ 98.
[97] INTI Notice regarding Garachico, 26 January 2010, **C-075**; INTI Notice regarding Garachico, 23 March 2010, **C-081**, pp. 1-4.
[98] INTI Notice regarding Garachico, 26 January 2010, **C-075**; INTI Notice regarding Garachico, 23 March 2010, **C-081**, p. 5.
[99] INTI Notice regarding Garachico, 23 March 2010, **C-081**, pp. 1, 13-15. In 2010 and 2011, inspections confirmed the presence of individuals and their activities in the land. Judicial Inspection Report regarding Garachico, 11 October 2010, **C-211**, pp. 23-25; Ministry of Environment – Cojedes Environmental State Directorate Inspection Report of Garachico, 7 December 2010, **C-212**, pp. 3-6; Ministry of Environment – Cojedes Environmental State Directorate Inspection Report of Garachico, 5 October 2011, **C-221**, pp. 4-5.
[100] Refordos's annulment appeal regarding Garachico filed with the High Agrarian Court of the State of Cojedes, 13 July 2010, **C-082**, p. 99.

160. In November 2010, the Cojedes High Agrarian Court issued an environmental protection measure prohibiting individuals from continuing to cause environmental damage. In December, Refordos requested the execution of the measure.[101]

161. In 2013, Refordos continued warning and denouncing to the Venezuelan authorities of the damage being caused to the property.[102]

162. Refordos was able to access certain areas of the Garachico property in order to harvest wood until August 2018. The government's recovery proceedings were not resolved and remained pending when the government took over Smurfit's Venezuelan business.[103]

vi. Los Garzones

163. In February 2013, a group of individuals invaded Refordos's landholding at Los Garzones causing damage to the property and seriously injuring one of Refordos's employees. Refordos sought protective measures from an agrarian court to prevent further damage.[104]

164. In November 2013, the Portuguesa RLO ordered an inspection in accordance with the initiation of a procedure to determine idleness in relation to Los Garzones.[105] Refordos denounced the situation with trespassers to the National Guard in 2013, 2014 and 2015.[106]

[101] Refordos's Request to the High Agrarian Court of the State of Cojedes regarding Garachico for Enforcement of the Environmental Protection Measure of 2 November 2010, 5 December 2012, **C-111**, pp. 1-3.
[102] Venezuelan National Guard Complaint No. GNB/CR2/D23/SIP/054-13 regarding Garachico, 1 March 2013, **C-119**.
[103] Claimant's Memorial, ¶ 103.
[104] Refordos's Request for Protective Measures regarding Los Garzones before the First Instance Agrarian Judge of the Judicial District of the State of Portuguesa, 22 February 2013, **C-116**, p. 4; Photographs taken at Los Garzones, 13 February 2013, **C-115**.
[105] INTI Notice regarding Los Garzones, 5 November 2013, **C-233**.
[106] Letter from Refordos (Mr. Linares) to the Bolivarian National Guard regarding Los Garzones, 2 May 2013, **C-121**; Letters from Refordos (Mr. Arrieche) to the Bolivarian National Guard regarding Los Garzones, 28-29 April 2015, **C-137**.

165. The Venezuelan government took control of Smurfit's Venezuelan business in August 2018.[107]

D. 2018 Measures on Smurfit's Business

166. On 12 July 2018, SUNDDE inspected and requested Cartón's subsidiary, Corrugadora Suramericana C.A. ("**Corsuca**"), to provide various information, including information related to its commercial activity, clients, productions costs, workers, and imports, which was to be provided within 72 hours. On 13 July, SUNDDE delivered a second request for information on several items, including products, production, suppliers, production cost structures, financial situation, and workers, which was to be provided within 72 hours. The company provided the information requested and, although SUNDDE's officials continued to visit periodically the facilities, no charges or further actions were taken.[108]

167. On 25 July 2018, President Maduro announced a monetary reconversion that would take place on 20 August of that same year.[109]

168. On 28 July 2018, President Maduro announced that "[t]he communist party is proposing me the revolutionary nationalization of part of the country's economy. And we do not reject it, we are examining it […] We are going to bring about an economic change […] I say this with a great deal of conviction, because we have had enough of so much abuse by the oligopolies […] New rules are coming."[110]

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[107] Claimant's Memorial, ¶ 105.
[108] Claimant's Memorial, ¶¶ 130-131. SUNDDE Request for Information from Corrugadora Suramericana, C.A., 11 July 2018, **C-264**, pp. 1-4; SUNDDE Request for Information from Corrugadora Suramericana, C.A., 12 July 2018, **C-266**, pp. 2-4. Corrugadora Suramericana, C.A. Delivery of Information to SUNDDE, 12 July 2018, **C-267**; Corrugadora Suramericana, C.A. Delivery of Information to SUNDDE and Request for Extension, 17 July 2018, **C-268**; Corrugadora Suramericana, C.A. Delivery of Information to SUNDDE, 19 July 2018, **C-269**; Witness Statement of Luis Lugo, ¶¶ 10-18; First Witness Statement of Alberto Ramírez, ¶ 41.
[109] "Venezuela to remove five zeroes from ailing currency," *Reuters*, 25 July 2018, **C-154**.
[110] "Maduro does not deny the possibility of nationalizing part of the economy," *El Carabobeño*, 28 July 2018, **C-156**; "IV PSUV Congress": Complete address of Nicolás Maduro at the National Pantheon, 28 July 2018, **C-155**, at 1:56:20. (Unofficial translation)

169. On 20 August 2018, the Venezuelan Government declared a bank holiday to allow banks and companies to adjust their systems to the newly reconverted currency.

170. On 21 and 22 August 2018 SUNDDE came to Cartón's office in Valencia in order to carry out an inspection and request information. The inspection and requests were undertaken by government officials as well as military officers and military counter-intelligence officials.[111] During the inspection, employees were arrested.[112] Between 21 and 27 August, coordinated inspections were carried out in Cartón's other facilities and of its subsidiaries in San Felipe, Caracas, Guacara, and Acarigua.[113]

171. On the day of the first inspection, 21 August 2018, SUNDDE announced on social media the sanctions that would be imposed on Cartón, such as the government's occupation and price adjustments.[114]

172. On 22 August 2018, two of Cartón's employees were detained and questioned for several hours in a conference room. In the early morning of 23 August, they were arrested.[115] This same day, local labor unions that worked for Smurfit's Venezuelan entities released a statement indicating:

> "The labor unions that comprise the Smurfit Kappa Cartón de Venezuela Group (Sindicato Planta Petare, Sindicato Planta Cartoenvases Valencia, Sindicato Planta Unión Grafica, Sindicato Planta Corrugadora Suramericana, Sindicato

[111] First Witness Statement of Alberto Ramírez, ¶ 43; Witness Statement of Luis Lugo, ¶¶ 19-44; SUNDDE Notice No. 022966 of Commencement of Proceedings to Determine Compliance, 21 August 2018, **C-271**; SUNDDE Minutes of Inspection No. 022966, 21 August 2018, **C-280**; SUNDDE Minutes of Inspection No. 022966 regarding the presumption of socioeconomic crimes, 21 August 2018, **C-158**; SUNDDE Requests for Information from Cartón (Valencia, 11:09am), 21 August 2018, **C-272**. The information requested was to be provided "immediately."
[112] Claimant's Memorial, ¶ 139; Witness Statement of Luis Lugo, ¶¶ 22, 48, 49, 56; First Witness Statement of Alberto Ramírez, ¶¶ 43, 57, 58; Criminal Court Decision from Preliminary Hearing, 27 August 2018, **C-287**.
[113] SUNDDE Notice No. 022966 of Commencement of Proceedings to Determine Compliance, 21 August 2018, **C-271**; SUNDDE Notice No. 023098 of Commencement of Proceedings to Determine Compliance, 22 August 2018, **C-281**; SUNDDE Notice No. 023732 of Commencement of Proceedings to Determine Compliance, 27 August 2018, **C-288**; SUNDDE Requests for Information from Cartón (Carbonero, 3:34pm), 21 August 2018, **C-275**; SUNDDE Request for Information from Refordos, 22 August 2018, **C-282**, p. 1; Minutes of Inspection of Refordos, 22 August 2018, **C-283**, pp. 1, 2; SUNDDE Request for Information from Corrugadora Latina, 23 August 2018, **C-285**; SUNDDE Request for Information from Cartón, 27 August 2018, **C-289**; SUNDDE Request for Information from Colombates, 27 August 2018, **C-290**.
[114] Compiled SUNDDE tweets, **C-159**, pp. 13-14.
[115] Criminal Court file No. GP01-P-2018, 24 August 2018, **C-286**, pp. 2-8; Criminal Court Decision from Preliminary Hearing, 27 August 2018, **C-287**.

> Planta Corrugadora Latina, Sindicato Planta Molino de Cartón y Papel, Sindicato Planta Fibras Industriales, Sindicato Planta Corrugadora Maracay, Sindicato de Planta Colombate, gathered today […] we hereby manifest our support and backing to SKV [sic] because of the events that occurred on 22 August 2018 when government authorities approached our corporate offices, which created a sense of discomfort and uncertainty to our workers and their families. Considering that Smurfit Kappa Cartón de Venezuela, as a company, has always respected and complied with labor and occupational health regulations, improving the same through union contracts and an understanding between the parties. This is why we affirm our utmost support and interest in continuing to work with Smurfit Kappa Cartón de Venezuela to continue to boost the productivity and welfare of our country […]."[116]

173. On 23 August 2018, SUNDDE issued an order to occupy the business for 90 days and appoint a Management Board,[117] and on 18 September 2018 it issued an order for the adjustment of prices.[118]

174. On 24 September 2018, Smurfit wrote a letter to President Nicolás Maduro, denying the accusations of abuse of dominant position, price speculation, boycotting, economic destabilization and smuggling, and notifying the Government that, due to the continuing actions and interferences by the State, it was no longer able to carry out and exercise control over its operations in accordance with the company policies and applicable regulations, including those relating to the health and safety of its employees. Therefore, full responsibility for its Venezuelan operations and compliance with all applicable regulations passed to the Venezuelan State from the date of the notification of SUNDDE's occupation order on 28 August 2018.[119] That same day, the company informed its employees that:

> "[…] as a consequence of the arbitrary actions and continuous interferences referred to above to which our employees and operations have been subjected

[116] Press Release from Smurfit Labor Unions, 23 August 2018, **C-284**. (Unofficial translation)
[117] SUNDDE Ruling OTB-DNEMP No. 04-2018, 23 August 2018, **C-160**, pp. 7-8. This order was notified to Cartón, on 28 August 2018. According to this document, on 21 August 2018 SUNDDE had previously ordered an immediate occupation for 180 days. *See* p. 3.
[118] SUNDDE Ruling EIBC-DNEMP No. 123-2018, 18 September 2018, **C-165**. A price adjustment had already been ordered since 21 August 2018 according to SUNDDE Ruling OTB-DNEMP No. 04-2018, 23 August 2018, **C-160**, p. 3.
[119] Letters from Smurfit Holdings B.V. (Mr. O'Riordan) to the President of the Bolivarian Republic of Venezuela (Mr. Maduro), the Attorney General (Mr. Muñoz) and the *ad interim Chargé d'affaires* of the Venezuelan Embassy in the Netherlands (Mr. Díaz), 24 September 2018, **C-166**, pp. 2, 3.

> by the Government of Venezuela, Smurfit Kappa Group (SKG) was impeded, for reasons beyond its control, from continuing to exercise control over SKCV's business in the country. For this reason, SKG and SKCV have notified the Government of the Bolivarian Republic of Venezuela that from the notification of the temporary occupation measure by SUNDDE on 28 August 2018, responsibility for the operations of the company and compliance with applicable laws and regulations had passed to the Venezuelan state. […] SKG and SKCV thank each and every one of you for your dedication to the Company and for your constant and immense efforts. We deeply regret that the Venezuelan Government's actions have led to the current situation, and we hope that sooner rather than later, the Company will be in a position to retake control over its business and its investments in Venezuela and thus continue to contribute, together with all of you, to the development of the country."[120]

175. On 16 October 2018, the Labor Minister visited Cartón's Valencia Facility and announced that a new management board would be appointed to manage Cartón. The announcement indicated as well that:

> "It is not the government that is occupying Smurfit, it is the working class. [...] the workers have told Venezuela and the world that they are able to start production at the various industrial plants throughout the country that make up Smurfit Kappa Cartones de Venezuela […] and we as the government are supporting them with the occupation order […]. There is no change of name, no expropriation nor much less nationalization, simply the employers of this company abandoned it and the one thousand 600 workers are occupying it to put it to produce [...] We must guarantee that Smurfit revitalizes itself, not to serve an owner or capitalist, or a headquarters from abroad, but rather to serve for the happiness and support of the people."[121]

176. On 18 October 2018, the Minister of Labor issued several resolutions ordering the immediate occupation of Cartón and its affiliates (Refordos, Corsuca, Corrugadora Latina & Cía. ("**Corrugadora Latina**"), Colombo Venezolana de Empaques Bates Colombates C.A. ("**Colombates**") and the *Escuela Técnica Agropecuaria* ("**Technical School**"), resumption of productive activities, as well as the establishment of a Special Management Board that would manage each entity.[122]

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[120] Communication from Smurfit Kappa Venezuela to its workers, 24 September 2018, **C-389**.
[121] "Smurfit Kappa Cartones de Venezuela plant is handed over to the workers," *El Carabobeño*, 17 October 2018, **C-167 bis**, pp. 1, 2.
[122] Resolutions Nos. 618, 619, 620, 621, 622 and 623 of the Ministry of Labor, 16 October 2018, published in the Gaceta Oficial No. 41,505 on 18 October 2018, **C-168**.

177. Throughout this period, the two employees of Cartón who had been arrested on 23 August 2018 remained in custody. On 25 October 2018, because the prosecution failed to present the accusatory brief, and thus in the Tribunal's understanding did not formally press charges, the Court of First Instance determined to substitute the precautionary measure to periodic presentations every sixty days before the corresponding authority (*oficina del alguacilazgo*).[123]

178. On 29 October 2018, the Ministry of Labor announced the appointment of the General Manager of Cartón.[124]

2. VAT Certificates

A. Legal Framework

179. Sales of goods and services are subject to Value Added Tax ("**VAT**") in Venezuela. Taxpayers like Cartón and its affiliates have the right to deduct the VAT they pay when they buy goods or services from the VAT they charge to their customers.[125]

[123] According to the document, on 19 September and 1 October 2018, the judicial measure had been reviewed and substituted for House Arrest. Opinion of the Court of First Instance with competence in economic crimes, Criminal Judicial Circuit Court in the State of Carabobo, 25 October 2018, **C-306**.

[124] "Hugo Cabezas takes over the operation of Smurfit Kappa de Venezuela," *Banca y negocios,* 30 October 2018, **C-307**; Compiled Ministry of Labor tweets quoting government-appointed General Manager of Cartón, 29 October 2018, **C-171**. *See also* Resolutions Nos. 637, 638, 639, 640 and 641 of the Ministry of Labor, 23 October 2018, published in the Gaceta Oficial No. 41,518 on 6 November 2018, **C-308**, establishing the Special Management Boards.

[125] Decree No. 1,436 on the Value-Added Tax Law, 17 November 2014, published in the Gaceta Oficial No. 6,152 on 18 November 2014, **C-132**, Arts. 1, 3; Decree No. 5,212 on the Value-Added Tax Law, 26 February 2007, published in the Gaceta Oficial No. 38,632 on 26 February 2007, **C-194**, Arts. 1, 3; Decree No. 5,189 on the Value-Added Tax Law, 13 February 2007, published in the Gaceta Oficial No. 38,625 on 13 February 2007, **C-193**, Arts. 1, 3; Law on the Value-Added Tax, 25 April 2006, published in the Gaceta Oficial No. 38,435 on 12 May 2006, **C-191**, Arts. 1, 3; Law on the Value-Added Tax, 29 August 2005, published in the Gaceta Oficial No. 38,263 on 1 September 2005, **C-188**, Arts. 1, 3. The VAT rate in Venezuela was: (i) 15 percent from 1 September 2004 to 31 September 2005, (ii) 14 percent from 1 October 2005 to 28 February 2006, (iii) 11 percent from 1 March 2006 to 30 June 2007, (iv) 9 percent from 1 July 2007 to 31 March 2009, (v) 12 percent from 1 April 2009 to 31 August 2018, and (vi) 16 percent since 1 September 2018 (this rate remains in force). *See* Law on the Value-Added Tax, 29 July 2004, published in the Gaceta Oficial No. 37,999 on 11 August 2004, **C-186**, Art 62; Law on the Value-Added Tax, 29 August 2005, published in the Gaceta Oficial No. 38,263 on 1 September 2005, **C-188**, Art. 62; Decree No. 5,212 on the Value-Added Tax Law, 26 February 2007, published in the Gaceta Oficial No. 38,632 on 26 February 2007, **C-194**, Art. 62; Amendment of the Annual Budget Law, 26 March 2009, published in the Gaceta Oficial No. 39,147 on 26 March 2009, **C-205**, Art. 30; Decree No. 1,436 on the Value-Added Tax Law, 17 November 2014, published in the Gaceta Oficial No. 6,152 on 18 November 2014, **C-132**, Art. 62; Decree No. 3,584, 17 August 2018, published in the Gaceta Oficial No. 6,395 on 17 August 2018, **C-270**, Art. 1.

180. The applicable law provides for a specific type of taxpayer, called: "special taxpayers."[126] These taxpayers are "subject to the rules contained in [SENIAT Administration Provision No. 0685], for the purposes of filing tax returns and paying tax obligations, compliance with formal duties, and compliance with duties as tax withholding or receiving agents." Special taxpayers include State-owned and governmental entities, as well as those with revenues above a specified threshold or engaged in a list of particular economic activities.[127]

181. The tax authority, the *Servicio Nacional Integrado de Administración Aduanera y Tributaria* ("**SENIAT**"), requires entities subject to this system to withhold and send 75% of the VAT due on their transactions.[128]

182. According to the Claimant, due to these withholdings, Cartón and its affiliates are unable to completely recoup the VAT they have already paid to their third-party suppliers when they sell to "special taxpayers."[129] As a result, they pay VAT, which they have to claim

[126] "[C]lassified as special and expressly notified of such status" by the Special Taxpayer Office of the Capital Region and by the Regional Internal Tax Offices.
[127] SENIAT Administration Provision No. 0685, 6 November 2006, published in the Gaceta Oficial No. 38,622 on 8 February 2007, **C-192**, Arts. 1 and 2.
[128] Administrative Provisions Nos. 1,418 and 1,419, which designate "special taxpayers" as VAT withholding agents and mandate the withholding of 75% of the VAT due on their purchases (or 100 percent in exceptional cases), were announced by the government on November 19, 2002. Following their repeal, these administrative provisions were replaced on 27 January 2005, by two new administrative provisions identified with the same No. 2005-0056. (Administration Provisions No. 2005-0056 were published on 28 February 2005, and the Administration Provision applicable to governmental entities and state-owned entities was subsequently replaced by Administration Provision No. 2005-0056A a few months later to correct the material error of identifying the two Administration Provisions with the same number). On 20 May 2013, the government revoked these provisions that had been in existence for eight years and replaced them with Administrative Provisions Nos. 2013-0029 and 0030. On 15 September 2015, Administrative Provision No. 2015-0049 replaced Administration Provision 0030, which had been in effect for two years (Administration Provision No. 2015-0049 was originally published on 10 August 2015, but was subsequently replaced a few weeks later to correct a material error). *See* SENIAT Ruling Nos. SNAT/2002/1418 and 1419, 15 November 2002, published in the Gaceta Oficial No. 37,573 on 19 November 2002, **C-035**, Arts. 4 and 3; SENIAT Ruling No. SNAT/2002/1454 and 1455, 29 November 2002, published in the Gaceta Oficial No. 37,585 on 5 December 2002, **C-037**, Arts. 4 and 3; SENIAT Ruling No. SNAT/2005/0056, 27 January 2005, published in the Gaceta Oficial No. 38,136 on 28 February 2005, **C-040**, Arts. 4 and 5; SENIAT Ruling No. SNAT/2005/0056A, 27 January 2005, published in the Gaceta Oficial No. 38,188 on 17 May 2005, **C-042**, Arts. 6 and 7; SENIAT Ruling No. SNAT/2013/0029, 20 May 2013, published in the Gaceta Oficial No. 40,170 on 20 May 2013, **C-122**, Arts. 4 and 5; SENIAT Ruling No. SNAT 2015/0049, 14 July 2015, published in the Gaceta Oficial No. 40,720 on 10 August 2015, **C-138**, Arts. 4 and 5; SENIAT Ruling No. SNAT 2015/0049, 14 July 2015, published in the Gaceta Oficial No. 40,746 on 15 September 2015, **C-139**, Arts. 4 and 5.
[129] SENIAT Ruling No. SNAT/2015/0049, 14 July 2015, published in the Gaceta Oficial No. 40,746 on 15 September 2015, **C-139**.

back directly from SENIAT.[130] This is accomplished by requesting SENIAT to issue a VAT credit certificate ("**VAT Certificate**"). VAT Certificates must be issued in accordance with Venezuelan law within 30 working days after a request is made.[131] Companies may sell VAT Certificates to third parties in the secondary market or use them to offset their income taxes and other national taxes.[132]

B. VAT Refund Requests

183. On 27 October 2017, Corrugadora Suramericana presented a VAT refund application to SENIAT for an accumulated tax credit of "four hundred three million fifty-four thousand nine hundred forty-seven bolivars and 92 cents (Bs 403,054,947.92) as at the closing of the month of September 2017, as recorded in declaration form 00030, No. 1797101560,

[130] The Claimant provides the following example as to how the withholding operates and its effect: "[…] if, hypothetically (and using round numbers) Cartón purchased Bs50 worth of supplies on which it paid Bs6 in VAT (at a 12 percent VAT rate), and it sold Bs100 worth of products to its customers in addition to a VAT charge of Bs12, Cartón was entitled to recoup the Bs6 it had paid to its suppliers from the Bs12 it collected from its purchasers, such that it only needed to remit Bs6 in VAT to the Venezuelan tax authority. However, when Cartón sells to a customer that is a 'special taxpayer', the customer withholds 75 percent of the VAT payable on the products it has purchased (*i.e.*, Bs9 out of the Bs12 VAT charge) and remits it directly to SENIAT on behalf of Cartón. Therefore, in this scenario, while Cartón owes Bs6 in VAT to SENIAT, SENIAT has already recovered Bs9 in VAT on behalf of Cartón's sales. As such, Cartón can ask SENIAT to reimburse Bs3 in "excess VAT" to Cartón, in the form of a VAT credit certificate." Claimant's Memorial, footnote 276. This example has not been contested by the Respondent.

[131] VAT Certificate requests could be requested every month for the monthly period ending three months prior to the date of the request. This rule applied at all relevant times. *See* SENIAT Ruling No. SNAT/2005/0056, 27 January 2005, published in the Gaceta Oficial No. 38,136 on 28 February 2005, **C-040**, Arts. 10 and 11; SENIAT Ruling No. SNAT/2005/0056A, 27 January 2005, published in the Gaceta Oficial No. 38,188 on 17 May 2005, **C-042**, Arts. 11 and 12; SENIAT Ruling No. SNAT/2013/0029, 20 May 2013, published in the Gaceta Oficial No. 40,170 on 20 May 2013, **C-122**, Arts. 9-12; SENIAT Ruling No. SNAT 2015/0049, 14 July 2015, published in the Gaceta Oficial No. 40,720 on 10 August 2015, **C-138**, Arts. 8 and 9 (this final SENIAT ruling remains in force). *See also* Decree No. 1,434 on the Organic Tax Code Law, 17 November 2014, published in the Gaceta Oficial No. 6,152 on 18 November 2014, **C-132**, Arts. 210-217; Organic Tax Code Law, 13 September 2001, published in the Gaceta Oficial No. 37,305 on 17 October 2001, **C-183**, Arts. 200-207.

[132] Decree No. 1,434 on the Organic Tax Code Law, 17 November 2014, published in the Gaceta Oficial No. 6,152 on 18 November 2014, **C-132**, Arts. 49 and 50; Decree No. 1,436 on the Value-Added Tax Law, 17 November 2014, published in the Gaceta Oficial No. 6,152 on 18 November 2014, **C-132**, Art. 11; Decree No. 5,212 on the Value-Added Tax Law, 26 February 2007, published in the Gaceta Oficial No. 38,632 on 26 February 2007, **C-194**, Art. 11; Decree No. 5,189 on the Value-Added Tax Law, 13 February 2007, published in the Gaceta Oficial No. 38,625 on 13 February 2007, **C-193**, Art. 11; Law on the Value-Added Tax, 25 April 2006, published in the Gaceta Oficial No. 38,435 on 12 May 2006, **C-191**, Art. 11; Law on the Value-Added Tax, 29 August 2005, published in the Gaceta Oficial No. 38,263 on 1 September 2005, **C-188**, Art. 11; Organic Tax Code Law, 13 September 2001, published in the Gaceta Oficial No. 37,305 on 17 October 2001, **C-183**, Arts. 49 and 50.

certificate No. 202100000173001388323 submitted on 18 October 2017, and as recorded in our accounting records and books."[133]

184. The same day, a letter from Refordos was sent to SENIAT requesting "the recovery of a refund of an accumulated tax credit owned by my company as a result of excess Value Added Tax (VAT) being withheld, which […] has not been credited, compensated or refunded. Said tax credit amounts to eight hundred thirty-three million one hundred twenty-one thousand five hundred fifty-seven bolivars and 72 cents (Bs 833,121,557.72) as at the closing of the month of September 2017, as recorded in declaration form 99030, No. 1797076770, certificate No. 202030000173000925450 submitted on 17 October 2017, and as recorded in our accounting records and books."[134]

185. On 17 December 2017, Cartón filed a VAT refund application for an accumulated tax credit of "ten billion forty million twenty-nine thousand nine hundred fifty-six bolivars and 73 cents (Bs 10,040,029,956.73) as at the closing of the month of November 2017, as recorded in declaration form 99030, No. 1798226601, certificate No. 202110000173000098276 submitted on 14 December 2017 and as recorded in our accounting records and books."[135]

186. The same day, Corrugadora Latina filed a refund application requesting an accumulated tax credit of "one billion six hundred thirty-three million nine hundred ninety-three thousand one hundred sixteen bolivars and 78 cents (Bs 1,633,993,116.78) as at the closing of the month of April 2017, as recorded in declaration form 99030, No. 1798228037, certificate No. 202100000173001608969 submitted on 14 December 2017 and as recorded in our accounting records and books."[136]

187. The Claimant has indicated that it "does not have in its possession all of the VAT Certificate requests made by the Smurfit Sellers [Cartón, Refordos, Corsuca, and Corrugadora Latina] over the years, as these records remain on the premises of the

[133] Corrugadora Suramericana, C.A.'s VAT refund application, 27 October 2017, **C-145**.
[134] Letter from Refordos (Mr. Arrieche) to SENIAT, 27 October 2017, **C-146**.
[135] Cartón's VAT refund application, 17 December 2017, **C-147**.
[136] Corrugadora Latina & Cía's VAT refund application, 17 December 2017, **C-148**.

Smurfit Sellers in Venezuela, and are therefore in Venezuela's custody and control." Therefore, Claimant submitted as evidence copies of the Smurfit Sellers' internal VAT Records, containing VAT balances and unfunded retentions broken down on a month by month basis over the period relevant to the claim.[137]

3. Dividends

A. Legal Requirements for the Payment of Dividends

188. To convert Venezuelan currency into foreign currency for the purpose of remitting dividends to foreign investors abroad, there were certain requirements that had to be followed. *First*, the company had to register before the foreign exchange users system (*Registro de Usuarios del Sistema de Administración de Divisas* ("**RUSAD**")). This had to be done one time before filing the first foreign currency authorization submission.[138]

189. *Second*, the company had to declare dividends in accordance with its bylaws. Pursuant to this requirement, a company had to provide to the Venezuelan Foreign Exchange Authority a copy of the minutes of the relevant corporate decisions in which the company declares dividends for the relevant time period (usually the previous fiscal year).[139]

190. *Third*, the company had to obtain a certificate of foreign investment registration annually.[140] The issuance of that certificate is a pre-requisite for the processing of foreign currency applications by the Foreign Exchange Authority. Pursuant to Decree No. 2095, a foreign investment in a company in Venezuela had to be registered before the

[137] Claimant's Reply, ¶ 95; VAT Model, **CLEX-005 bis**.
[138] CADIVI Ruling No. 56, 18 August 2004, published in the Gaceta Oficial No. 38,006 on 23 August 2004, **C-038**, Art. 4.
[139] CADIVI Ruling No. 56, 18 August 2004, published in the Gaceta Oficial No. 38,006 on 23 August 2004, **C-038**, Art. 5(a). In the case of both Cartón and Refordos, the bylaws required that dividends be declared through a board of directors' resolution. *See* Certification of Cartón dated 27 February 2003 of Minutes of Special Shareholders Meeting modifying the Articles of Incorporation, 31 August 1998 and of the Contract of Sale of Public Bonds, 2 September 1998, **C-009C**, Art. 25(g); Certification dated 5 April 2002 of the Articles of Incorporation of Refordos, 5 December 1989, **C-010A**, Art. 25(g). Claimant's Memorial, footnote 292.
[140] Every year, the foreign shareholder of a Venezuelan company had to apply to register its foreign investment with the Superintendency of Foreign Investments (SIEX). Decree No. 2,095 on the Regulation of the Common Regime of Treatment of Foreign Capital and of Trademarks, Patents, Licenses and Royalties, 13 February 1992, published in the Gaceta Oficial No. 34,930 on 25 March 1992, **C-030**, Art. 13. Once the application was approved, SIEX issued a certificate of foreign investment registration. Foreign shareholders with an investment in a Venezuelan company had to apply every year to renew their certificate and SIEX issued an updated certificate. *See also* Art. 15.

Superintendencia de Inversiones Extranjeras ("**SIEX**") and the registration had to be renewed annually.[141]

191. *Fourth*, the company had to obtain a foreign currency authorization. The Venezuelan entity must file an application with the Foreign Exchange Authority ("**CADIVI**"),[142] through its online portal, in order to convert the amount of dividends in Venezuelan Bolivars into foreign currency and remit such dividends abroad.[143]

192. *Fifth*, once the application was approved, the Foreign Exchange Authority would issue an "authorization for the purchase of foreign currency" (in Spanish, *autorización para la adquisición de divisas* or "**AAD**"), in conjunction with an "authorization for the liquidation of foreign currency" (in Spanish, *autorización para la liquidación de divisas* or "**ALD**"), which allowed the Venezuelan Central Bank (in Spanish, *Banco Central de Venezuela*) to sell the authorized amount of foreign currency to the Venezuelan entity at the official exchange rate.[144]

B. Dividends Declared

193. In 2007 and 2008, Cartón and Refordos declared dividends of USD 33.4 million (Cartón) and USD 8.9 million (Refordos).[145] Between February and July 2009, after SIEX issued the certificates of foreign investment registration, the companies filed applications to

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[141] Respondent's Memorial on Jurisdictional Objections and Counter-Memorial on the Merits and Counterclaim ("**Respondent's Counter-Memorial**"), 30 December 2020, ¶ 120.

[142] During the 2003-2013 period, CADIVI was a Foreign Exchange Commission of the Bolivarian Republic of Venezuela (*Comisión de Administración de Divisas de la República Bolivariana de Venezuela*) that oversaw and applied the foreign exchange control regulations in the Republic. In 2014, CADIVI was replaced by CENCOEX, the National Centre for Foreign Commerce of the Bolivarian Republic of Venezuela (Centro Nacional de Comercio Exterior de la República Bolivariana de Venezuela). Respondent's Counter-Memorial, ¶ 114. For ease of reference, the Tribunal refers to the foreign exchange authority as CADIVI.

[143] CADIVI Ruling No. 56, 18 August 2004, published in the Gaceta Oficial No. 38,006 on 23 August 2004, **C-038**, Arts. 1 and 5.

[144] CADIVI Ruling No. 56, 18 August 2004, published in the Gaceta Oficial No. 38,006 on 23 August 2004, **C-038**, Art. 6; CADIVI Disposition No. 98, 11 August 2009, published in the Gaceta Oficial No. 39,252 on 28 August 2009, **C-073**, Chapter II, Section IV. *See also* CENCOEX FAQ regarding remittances to parent companies, last accessed 31 October 2019, **C-312** (stating that once an AAD application is approved, the authorized amount of foreign currency can be purchased from the Venezuelan Central Bank).

[145] Minutes of Board of Directors Meeting of Cartón, 10 March 2008, **C-059**; Minutes of Board of Directors Meeting of Refordos, 10 March 2008, **C-060**; Minutes of Board of Directors Meeting of Cartón, 9 March 2009, **C-067**; Minutes of Board of Directors Meeting of Refordos, 9 March 2009, **C-068**.

remit those dividends.[146] Refordos's applications were approved on 30 June 2011, *i.e.*, two years later.[147] To date, there has been no decision on Cartón's applications.[148]

194. In 2009, Cartón and Refordos declared dividends totaling USD 15 million.[149] The applications for foreign investment registration were filed in July 2010.[150] SIEX issued the certificates of foreign investment registration in February 2011 (Refordos) and April 2011 (Cartón).[151] Cartón and Refordos filed their foreign currency applications later in 2011.[152] To date, there has been no decision on their applications.

195. In 2010, Cartón and Refordos declared dividends totaling approximately USD 21.6 million distributable to their foreign shareholders.[153] The applications for foreign investment registration were filed in August 2011 and the certificates were granted by SIEX in October 2011 (Cartón) and in November 2011 (Refordos).[154] Cartón (in January

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[146] *See* SIEX Certificate of Registration of Fibras Limited's foreign investment in Cartón, 2 May 2008, **C-025A**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Cartón, 23 June 2009, **C-025B**; SIEX Certificate of Registration of Packaging Investments Netherlands' foreign investment in Cartón, 2 May 2008, **C-026A**; SIEX Certificate of Registration of Packaging Investments Netherlands' foreign investment in Cartón, 23 June 2009, **C-026B**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Refordos, 2 May 2008, **C-027A**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Refordos, 28 April 2009, **C-027B**.

[147] CADIVI Online Status: Application No. 10498616, 30 June 2011, **C-092** (approving remittance of USD 1,510,941.86); CADIVI Online Status: Application No. 11107347, 30 June 2011, **C-093** (approving remittance of USD 2,953,720.93).

[148] Cartón's Foreign Currency Application No. 10327008, 19 February 2009, **C-063**; Cartón's Foreign Currency Application No. 10327408, 19 February 2009, **C-064**; Refordos's Foreign Currency Application No. 10498616, 16 March 2009, **C-069**; Refordos's Foreign Currency Application No. 11107347, 9 June 2009, **C-070**; Cartón's Foreign Currency Application No. 11500606, 27 July 2009, **C-071**; Cartón's Foreign Currency Application No. 11500708, 27 July 2009, **C-072**.

[149] Minutes of Board of Directors Meeting of Cartón, 22 March 2010, **C-079**; Minutes of Board of Directors Meeting of Refordos, 22 March 2010, **C-080**.

[150] Application for SIEX Certificate of Registration of foreign investment in Cartón, 13 July 2010, **C-209**; Application for SIEX Certificate of Registration of foreign investment in Refordos, 19 July 2010, **C-210**.

[151] *See* SIEX Certificate of Registration of Fibras Limited's foreign investment in Cartón, 25 April 2011, **C-025C**; SIEX Certificate of Registration of Packaging Investments Netherlands' foreign investment in Cartón, 25 April 2011, **C-026C**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Refordos, 23 February 2011, **C-027C**.

[152] Cartón's Foreign Currency Application No. 14259983, 14 July 2011, **C-094**; Cartón's Foreign Currency Application No. 14207763, 21 June 2011, **C-091**; Refordos's Foreign Currency Application No. 14416321, 12 September 2011, **C-095**.

[153] Minutes of Board of Directors Meeting of Cartón, 28 February 2011, **C-085**; Minutes of Board of Directors Meeting of Refordos, 28 February 2011, **C-086**.

[154] *See* SIEX Certificate of Registration of Fibras Limited's foreign investment in Cartón, 31 October 2011, **C-025D**; SIEX Certificate of Registration of Packaging Investments Netherlands' foreign investment in Cartón, 31 October 2011, **C-026D**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Refordos, 1 November 2011, **C-027D**.

2012) and Refordos (in August 2013) filed foreign currency applications to remit their 2010 dividends abroad. Cartón and Refordos have received no response to their applications.[155] The Foreign Exchange Authority never issued the ALDs.

196. In 2011, Cartón and Refordos declared dividends totaling approximately USD 52 million distributable to their foreign shareholders.[156] In April 2012, they received the foreign investment registration certificates and filed their foreign currency applications in January 2013.[157] The Foreign Exchange Authority never issued the ALDs.[158]

197. In 2012, Cartón and Refordos declared dividends totaling approximately USD 22 million distributable to their foreign shareholders.[159] In June and July 2013, SIEX issued the certificates of foreign investment registration[160] and the companies filed the foreign currency applications to remit the dividends in October 2013 and June 2014 (Cartón), and June 2014 (Refordos).[161] The Foreign Exchange Authority never issued the ALDs.

198. In 2013, Cartón declared dividends of approximately USD 50 million distributable to its foreign shareholders.[162] In June 2014, it received the certificates of foreign investment

[155] Cartón's Foreign Currency Application No. 14770622, 24 January 2012, **C-100**; Cartón's Foreign Currency Application No. 14770710, 24 January 2012, **C-101**; Refordos's Foreign Currency Application No. 17225618, 30 August 2013, **C-123**.
[156] Minutes of Board of Directors Meeting of Cartón, 5 March 2012, **C-104**; Minutes of Board of Directors Meeting of Refordos, 5 March 2012, **C-105**.
[157] *See* SIEX Certificate of Registration of Fibras Limited's foreign investment in Cartón, 30 April 2012, **C-025E**; SIEX Certificate of Registration of Packaging Investments Netherlands' foreign investment in Cartón, 30 April 2012, **C-026E**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Refordos, 30 April 2012, **C-027E**.
[158] Cartón's Foreign Currency Application No. 15788896, 10 January 2013, **C-112**; Cartón's Foreign Currency Application No. 15789051, 10 January 2013, **C-113**; Refordos's Foreign Currency Application No. 15792941, 11 January 2013, **C-114**.
[159] Minutes of Board of Directors Meeting of Cartón, 25 February 2013, **C-117**; Minutes of Board of Directors Meeting of Refordos, 25 February 2013, **C-118**.
[160] *See* SIEX Certificate of Registration of Fibras Limited's foreign investment in Cartón, 26 June 2013, **C-025F bis**; Application for SIEX Certificate of Registration of Packaging Investments Netherlands' foreign investment in Cartón, 21 May 2013, **C-026F**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Refordos, 4 June 2013, **C-027I**.
[161] Cartón's Foreign Currency Application No. 17415622, 11 October 2013, **C-125**; Cartón's Foreign Currency Application No. 18149570, 17 June 2014, **C-129**; Refordos's Foreign Currency Application No. 18150248, 17 June 2014, **C-130**.
[162] Minutes of Board of Directors Meeting of Cartón, 17 February 2014, **C-127**.

registration[163] and filed the foreign currency applications with the Foreign Investment Authority in November 2014.[164] The Foreign Exchange Authority never issued the ALDs.

199. From 2014 onwards, Cartón and Refordos were unable to repatriate their distributable profits.[165] The following chart, submitted by the Claimant and uncontested by the Respondent, summarizes the status of Smurfit's subsidiaries' Foreign Currency Applications since 2009.

[163] *See* SIEX Certificate of Registration of Fibras Limited's foreign investment in Cartón, 19 June 2014, **C-025G**; SIEX Certificate of Registration of Packaging Investments Netherlands' foreign investment in Cartón, 23 June 2014, **C-026G**.

[164] Cartón's Foreign Currency Application No. 18964494, 28 November 2014, **C-133**; Cartón's Foreign Currency Application No. 18935481, 17 November 2014, **C-131**.

[165] *See* Minutes of Board of Directors Meeting of Cartón, 13 February 2015, **C-135**; Minutes of Board of Directors Meetings of Cartón, 30 March 2017, **C-144**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Cartón, 2 November 2015, **C-025I**; SIEX Certificate of Registration of Packaging Investments Netherlands' foreign investment in Cartón, 2 November 2015, **C-026H**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Cartón, 24 February 2017, **C-025J**; SIEX Certificate of Registration of Packaging Investments Netherlands' foreign investment in Cartón, 24 February 2017, **C-026J**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Cartón, 1 August 2017, **C-025H**; SIEX Certificate of Registration of Packaging Investments Netherlands' foreign investment in Cartón, 1 August 2017, **C-026I**; Minutes of Board of Directors Meeting of Refordos, 13 February 2015, **C-136**; Minutes of Board of Directors Meeting of Refordos, 28 April 2016, **C-141**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Refordos, 29 October 2015, **C-027F**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Refordos, 8 November 2016, **C-027G**; SIEX Certificate of Registration of Fibras Limited's foreign investment in Refordos, 2 August 2017, **C-027H**.

	Fiscal Year	Dividend Decreed	Foreign Currency Application	Approved?	Undue delay since Application (as of 28 August 2018)[710]
Cartón	2007	10 Mar 2008	19 Feb 2009[711] 19 Feb 2009	No	9.4 years+
	2008	9 Mar 2009	27 Jul 2009 27 Jul 2009	No	9 years+
	2009	22 Mar 2010	21 June 2011 14 Jul 2011	No	7.1 years + 7.0 years+
	2010	28 Feb 2011	24 Jan 2012 24 Jan 2012	No	6.5 years+
	2011	5 Mar 2012	10 Jan 2013 10 Jan 2013	No	5.5 years+
	2012	25 Feb 2013	11 Oct 2013 17 Jun 2014	No	4.8 years+ 4.1 years+
	2013	17 Feb 2014	17 Nov 2014 28 Nov 2014	No	3.7 years+ 3.7 years+
	2014	13 Feb 2015	PORTAL DISABLED	--	2.4 years+[712]
	2016	30 Mar 2017	PORTAL DISABLED	--	0.6 years+
Refordos	2007	10 Mar 2008	16 Mar 2009	Yes (30 June 2011)	2.2 years
	2008	9 Mar 2009	9 Jun 2009	Yes (30 June 2011)	2 years
	2009	22 Mar 2010	12 Sep 2011	No	6.9 years+

	Fiscal Year	Dividend Decreed	Foreign Currency Application	Approved?	Undue delay since Application (as of 28 August 2018)[710]
	2010	28 Feb 2011	30 Aug 2013	No	4.9 years+
	2011	5 Mar 2012	11 Jan 2013	No	5.6 years+
	2012	25 Feb 2013	17 Jun 2014	No	4 years+
	2014	13 Feb 2015	PORTAL DISABLED	--	2.1 years+
	2015	28 Apr 2016	PORTAL DISABLED	--	1.1 year+
Colom-bates	2008	May 2009	26 Mar 2010	No	8.4[713]

Claimant's Reply, pp. 171, 172

IV. APPLICABLE LAW TO THE DISPUTE

200. Article 9(5) of the BIT establishes that the arbitral award shall be based on: (i) the law of the Contracting Party concerned, (ii) the provisions of the BIT and other relevant agreements between the Contracting Parties, (iii) the provisions of special agreements

relating to the investments, (iv) general principles of international law, and (v) such rules of law as may be agreed by the Parties.

201. In turn, the ICSID Convention constitutes a relevant agreement between the Parties. Article 42(1) of this instrument provides that the Tribunal shall decide a dispute:

> "[…] in accordance with such rules of law as *may be agreed by the parties*. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable." (Emphasis added)

202. The rules of law "agreed" by the Parties are primarily embodied in Article 9(5) of the BIT. In accordance with this provision, the applicable law to the present dispute shall encompass both the internal law of Venezuela as well as the provisions of the BIT. Additionally, other relevant agreements between the parties such as the ICSID Convention and general principles of international law are also to be considered by the Tribunal for the resolution of the present dispute. The Tribunal considers that there is no hierarchical order between these bodies of law that follows from the text of the provision.

203. The Respondent has indicated that "an award that upholds Claimant's claims would require [the Tribunal] to disregard the application of the law of the Republic as a Contracting Party to the Treaty," which would in turn render the award annullable under Article 52(b) of the ICSID Convention.[166] The Tribunal disagrees with this assertion. Article 9(5) provides the different bodies of laws on which the Tribunal must base its analysis. This means that both Venezuelan law and the provisions of the BIT must be part and parcel of our analysis. The inquiry is however, as indicated by Article 9(3), "whether there is a breach by the Contracting Party concerned of its obligations under *this* Agreement." The dispute resolution mechanism is set in motion pursuant to a disagreement "concerning an obligation" under the BIT regarding an investment.[167]

204. Having said this, the fact that different bodies of law must be part of our analysis does not exclude that contradictions between such bodies may exist. It does not mean either

[166] Respondent's First Post-Hearing Brief, ("**Respondent's PHB**"), 23 December 2022, ¶ 97.
[167] Treaty, Art. 9(1), **C-001**.

that compliance with domestic law necessarily translates to compliance with the obligations set forth in the BIT. Article 27 of the Vienna Convention on the Law of Treaties ("**VCLT**" or "**Vienna Convention**") recognizes this situation when indicating that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty." The Respondent's position, if accepted, would nullify this recognized rule of international law and would essentially mean that, as long as any act from a State finds a basis in its internal law, the act's consistency or not with an international obligation would be outside the Tribunal's purview. In the Tribunal's view, this approach would run contrary to the very essence of international investment arbitration.

V. OBJECTIONS TO JURISDICTION

1. Whether the Tribunal lacks jurisdiction *ratione materiae* on the basis that the Claimant did not make a protected investment under the terms of the Treaty and the ICSID Convention

A. The Respondent's Position

205. At the outset, the Respondent asserts that "the relevant facts for establishing jurisdiction must be proven" and that the Claimant has failed to discharge its burden of proof.[168] As to its objection *ratione materiae*, the Respondent alleges that the Tribunal lacks jurisdiction on the ground that the Claimant did not make a protected investment under the Treaty and the ICSID Convention. In particular, the Respondent contends that the Claimant neither performed "an activity of investment" nor "made a contribution." In Venezuela's view, the Claimant has not provided evidence of: (i) the shares acquisition, (ii) payment, and (iii) its continued status as shareholder at all relevant times.[169]

[168] Respondent's Counter-Memorial, ¶¶ 158 and 160. In general, *see* ¶¶ 158-172.
[169] Summary of Jurisdictional Objections and Request for Bifurcation ("**Request for Bifurcation**"), 27 June 2020, ¶¶ 28-30; Respondent's Counter-Memorial, ¶¶ 207-209; Respondent's Reply on Jurisdictional Objections and Counter-Claim and Rejoinder on the Merits ("**Respondent's Rejoinder**"), 7 September 2021, ¶ 315. The Respondent disputes the documents provided by the Claimant in support of the option agreement as, in its view, they cannot be deemed to be anything but mere drafts that are not signed.

206. The Respondent contends that even if indirect shareholding was proven, a passive holding is not a protected investment under the Treaty and the ICSID Convention. It submits several arguments in support of its proposition that the Claimant is a "shell company" that "never controlled, managed, supervised, or even intervened in any way in the Smurfit's Venezuelan subsidiaries activities."[170] *First,* Respondent argues that the Claimant has zero employees. *Second,* that it was never mentioned as a foreign investor in the applications before SIEX and the foreign investment applications were not submitted by the Claimant or a third person acting on its behalf, but by persons acting on behalf of Fibras Ltd. Or (PIN) B.V., as well as of Cartón or Refordos. *Third,* according to Respondent, initiation and pursuit of the arbitration is an act of Smurfit Kappa Group plc ("**SKG**") as indicated in the Group's Annual Report for 2018. *Fourth,* Respondent alleges that no financial statement of the Claimant has been produced in the arbitration and the operations that were run in Venezuela were performed under the control of the Irish company SKG. In relation to this contention, Respondent submits that the Claimant has never been listed within SKG's principal subsidiaries and had no participation in the decision to deconsolidate Smurfit's Venezuelan operations, which was made and carried out by the group's parent company.[171]

207. The Respondent submits that an interpretation under the VCLT and the analysis of several Treaty provisions support the conclusion that "an active contribution by the investor […] is a condition for protection" as opposed to a "mere passive indirect sharehold[ing]." In this regard, while the Respondent accepts that Article 1(a) of the Treaty presents a broad definition of "investment," it alleges that this provision is just "the steppingstone" of the analysis.[172] In addition, Respondent posits that "the objective

[170] Request for Bifurcation, ¶¶ 33 and 34; Respondent's Counter-Memorial, ¶¶ 212 and 213.
[171] Request for Bifurcation, ¶¶ 35-44; Respondent's Counter-Memorial, ¶¶ 214-223.
[172] Request for Bifurcation, ¶ 49. *See also* ¶¶ 47-56. In particular, the Respondent refers to the Preamble, Arts. 2, 3, 6, 7, 9(1), 10 and 14(3). The Respondent also relies on other investment decisions in support of its interpretation, such as *Standard Chartered Bank v. United Republic of Tanzania,* ICSID Case No. ARB/10/12, Award, 2 November 2012 (*"**Standard Chartered Bank v. Tanzania***"), **RL-015**; *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 ("***Quiborax v. Bolivia***"), **RL-016**; *Saba Fakes v. Republic of Turkey,* ICSID Case No. ARB/07/20, Award, 14 July 2010 ("***Saba Fakes v. Turkey***"), **RL-017**; *Caratube International Oil Company LLP v. the Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012 (*"**Caratube v. Kazakhstan***"), **RL-018**; and *Blue Bank International & Trust (Barbados) Ltd. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/12/20, Decision on Annulment,

definition of the notion of 'investment' required for the Tribunal to have jurisdiction *ratione materiae* under the ICSID Convention "embodies specific criteria corresponding to the ordinary meaning of the term 'investment',"[173] among those, a significant contribution, commitment of the investor's own resources, a real intent to develop economic activities, risk and duration.[174]

208. In its Rejoinder, the Respondent indicates that "the sole ownership of a share is insufficient to prove a contribution of money or assets" and the relevant discussion is whether the contribution made has been "substantial" or "meaningful." It also posits that Smurfit has not demonstrated that it made a contribution with the purpose of generating profits within a specified timeframe and that, if any, the investment was made by SKG.[175]

B. The Claimant's Position

209. The Claimant submits that it is a national of the Netherlands and that it made investments in Venezuela which are protected under the Treaty. In particular, the Claimant indicates that it indirectly owns 87.93% of Cartón's shares, 87.84% of Refordos's shares and 61.74% of Colombates's shares and that, through those companies, it indirectly owns substantial interests.[176] In its Rejoinder on Jurisdiction, the Claimant states that "its Treaty-protected investments include not only its shareholding interest in the Venezuelan

22 June 2020 ("***Blue Bank v. Venezuela***"), **RL-019**. In the same sense, Respondent's Counter-Memorial, ¶¶ 226-239 and Respondent's Rejoinder, ¶¶ 331-345.

[173] Request for Bifurcation, ¶ 61, referring to *Saba Fakes v. Republic of Turkey*, ¶ 110.

[174] Request for Bifurcation, ¶¶ 61-63; Respondent's Counter-Memorial, ¶¶ 240 and 241; Respondent's Rejoinder, ¶¶ 346-355.

[175] Respondent's Rejoinder, ¶¶ 356, 359, 378.

[176] Through Cartón: "100 percent of the shares of Corporación Venezolana de Papel CA; 100 percent of the shares of Corsuca; 100 percent of the shares of Reforestadora Uno Reforuno C.A.; 100 percent of the shares of Cariven Investment Limited; 99 percent of the shares of Corrugadora Latina; 8.89 percent of the shares of Forestal Orinoco CA; 5.70 percent of the shares of Colombates; and 2.29 percent of the shares of Refordos." Cartón indirectly owns "100 percent of the shares of Agropecuaria Tacamajaca; 100 percent of the shares of Corrugadora Latina SRL; 28.81 percent of the shares of Forestal Orinoco CA; and 1 percent of the shares of Corrugadora Latina." "Smurfit, through Cartón and Refordos, owns approximately 35,000 hectares of land, three paper mills, and 15 production facilities in Venezuela, among other assets." (Quotes omitted). Claimant's Memorial, ¶¶ 275 and 276. *See also* Claimant's Rejoinder on Jurisdiction, 6 December 2021 ("**Claimant's Rejoinder**"), **Annex A** indicating Smurfit Holdings B.V.'s ownership of the investment as of 31 October 2008. *See also* Claimant's Rejoinder, ¶ 46. Annex A was first attached to Claimant's Observations on the Respondent's Request for Bifurcation, 12 August 2020 ("**Claimant's Observations on Bifurcation**") and Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction and Counterclaim ("**Claimant's Reply**").

subsidiaries, but also its interest in the immovable and movable assets (such as the Venezuelan landholdings and production facilities) and claims to performance having economic value such as the VAT refund requests."[177]

210. The Claimant qualifies Respondent's objections as baseless and submits that it acquired shares in Cartón in 1987 pursuant to an option agreement and continued to hold an indirect interest when Venezuela expropriated its investments in 2018.[178] The Claimant contends that the Treaty does not require an "active contribution" for an investment to qualify for protection, maintaining that such argument has no legal basis in the Treaty or in case law.[179] In the Claimant's view, Article 1(a) of the Treaty provides for a broad definition of investment and the tribunal's jurisdiction is governed by such definition. Smurfit submits that even if an active contribution was required, it would be satisfied since it "paid over US$32 million […] to acquire its indirect shareholding [and] […] has held that investment for more than thirty years during which time its Venezuelan business

[177] Claimant's Rejoinder, ¶ 57. "The ordinary meaning of Article 1 of the Treaty therefore plainly protects Smurfit's investments which consist of assets expressly listed within the definition of investments, *ie* shares, landholdings, and VAT refund requests." *See* ¶ 59.

[178] Claimant's Observations on Bifurcation, ¶¶ 32-35; Claimant's Reply, 13 May 2021, ¶¶ 521-524. As to Respondent's objection that Claimant has presented only copies of the option agreement, the Claimant replies that: "The Option Agreement was concluded 35 years ago in 1986. The Amendment Agreement was concluded 34 years ago in 1987. Smurfit did not need to exhibit fully executed copies of either agreement to prove that it owned its investments at the relevant times, as Smurfit relied on shareholder registries and other ordinary course corporate documents to conclusively establish its ownership interests. […] When Venezuela raised the irrelevant complaint in its Request for Bifurcation that the exhibited copies of the Option Agreement and the Amendment Agreement were not signed by all parties, Smurfit produced copies that were executed by all parties. This required searching its archives – no easy feat for decades-old documents that pre-date electronic records." *See also* Claimant's Rejoinder, ¶ 51.

[179] The Claimant distinguishes the cases invoked by the Respondent as follows. As to *Standard Chartered Bank v. Tanzania*, the Claimant indicates that the case is a "heavily criticized outlier case" and that the tribunal declined jurisdiction on the basis that the claimant had in no way participated in the acquisition of the loans, whereas in the current dispute Smurfit directly participated in the acquisition of the investment by exercising its rights and paying consideration. Regarding *Quiborax v. Bolivia*, the Claimant indicates one of the claimants in that case had received only one token share in a Bolivian mining company for no consideration and the transfer had occurred to comply with Bolivian law requirements that a company have at least three shareholders, whereas Smurfit acquired the shares for valuable consideration. As to *Saba Fakes v. Turkey* and *Caratube v. Kazkhastan*, it considers the former to be inapplicable since the tribunal in that case found that the parties never had an intention to transfer rights to the shares and they were not actually transferred; and the latter to be inapplicable since the treaty at issue does not require control for an investment to qualify as such. Finally, the Claimant disqualifies *Blue Bank v. Venezuela* since it refers to a trustee's interest as an investment and in that case the tribunal found that Blue Bank did not own the trust assets, did not have any ownership interest in them and the trust assets were held separately from the equity of the trustee. *See* Claimant's Observations on Bifurcation, ¶ 42.

significantly expanded. This is clearly not a case where the investor has not 'performed an activity of investment under the Treaty'."[180]

211. The Claimant alleges that the Respondent has not explained how the number of employees or whether Smurfit is listed as principal subsidiary of its ultimate parent, is relevant in determining a contribution. Regarding management control, it indicates that whether Smurfit was mentioned in the applications submitted to the SIEX is irrelevant and ultimately only direct foreign shareholders can register with SIEX, that the fact that SKG consolidated the Venezuelan subsidiaries in its financial reporting does not affect whether the Claimant has control over the Venezuelan companies from an accounting or an international law perspective and that the decision by SKG to deconsolidate the Venezuelan subsidiaries from its consolidated financial statements could only have been taken by that Group in accordance with the applicable accounting standards and reporting responsibilities.[181]

212. The Claimant further argues that the ICSID Convention does not require a significant contribution and the drafters of Article 25 deliberately omitted a definition of the term *investment* leaving that task to instruments of consent. It posits that many tribunals have rejected the application of inherent criteria since there is no support in the ICSID Convention for such a requirement.[182] Notwithstanding this, Claimant submits that even if the additional criteria developed by some tribunals were to apply, its investment complies with such requirements as it: "(i) paid over US$32 million to acquire the indirect shareholding in the Venezuelan subsidiaries, it did so in (ii) expectation of a return (the risk element), and it held this investment for (iii) over 30 years (duration)."[183]

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[180] Claimant's Observations on Bifurcation, ¶¶ 36-44. "An 'active contribution' entails an active involvement in the acquisition of the investment and the payment of a contribution." *See* ¶ 46. In the same sense on the active contribution requirement, *see* Claimant's Reply, ¶¶ 526-532; Claimant's Rejoinder, ¶¶ 59-66.

[181] According to the Claimant, in any event, the announcement regarding the deconsolidation was made by both Smurfit and SKG. Claimant's Observations on Bifurcation, ¶¶ 45 and 46(a), (b) and (c). Also, Claimant's Reply, ¶¶ 533 and 534(a), (b) and (c). On management control, *see* Claimant's Rejoinder, ¶¶ 67-71. The Claimant indicates in this submission that the proceeding is an activity performed by Smurfit and that the media's description of Smurfit Kappa as a whole and its operations in Venezuela have no bearing on whether the Tribunal has jurisdiction.

[182] Claimant's Observations on Bifurcation, ¶ 48; Claimant's Rejoinder, ¶ 74.

[183] Claimant's Observations on Bifurcation, ¶ 49; Claimant's Reply, ¶ 537; Claimant's Rejoinder, ¶¶ 75-79.

C. The Tribunal's Analysis

213. In its Memorial, while indicating that it made investments in Venezuela, the Claimant refers to the first three subparagraphs of Article 1(a), *i.e.* "movable and immovable property […]," "rights derived from shares […]" and "title to money […] or to any performance having an economic value."[184] Although in general Claimant's main focus while developing its argument is the shares it acquired and its interests as shareholder in other companies, it also submits that it owns (through Cartón and Refordos) approximately 35,000 hectares of land, three paper mills and 15 production facilities.[185] In its Rejoinder, Claimant also notes that its investments consist of "assets expressly listed within the definition of investments, *i.e.* shares, landholdings, and VAT refund requests."[186] The Tribunal thus understands that its claim of protected investment is based on the first three subparagraphs of Article 1(a). The Respondent, while contesting the qualification of a protected investment, focuses on the shares transaction and does not contest the other types of investment mentioned by the Claimant.[187]

214. In order to properly address the matter at issue, we must first turn to the relevant provisions of the Treaty keeping in mind the general rule of interpretation set forth in Article 31 of the VCLT.[188] Our examination begins with Article 1(a) of the Treaty, which states the definition of "investments" as follows:

> "the term 'investments' *shall comprise every kind of asset* and more particularly though *not exclusively*.

[184] Claimant's Memorial, ¶ 274.
[185] Claimant's Memorial, ¶ 276.
[186] Claimant's Rejoinder, ¶ 59. "As Smurfit has explained, and Venezuela has not disputed, its Treaty-protected investments include not only its shareholding interest in the Venezuelan subsidiaries, but also its interest in the immovable and movable assets (such as the Venezuelan landholdings and production facilities) and claims to performance having economic value such as the VAT refund requests." ¶ 57. *See also* Claimant's Reply, ¶ 547, referring back in a footnote to the first subparagraphs of Art. 1(a) of the Treaty.
[187] The Tribunal notes as well that the Respondent, while arguing that the Claimant has not made a protected investment also indicates that "Claimant is not a protected investor since it has not made a protected investment." *See* Respondent's Rejoinder, p. 101, subheading C. However, considerations on whether a protected investment exists and whether a protected investor exists are two separate issues.
[188] "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." Vienna Convention on the Law of Treaties, 1155 United Nations Treaty Series 331, 23 May 1969, **CL-004**, Art. 31.1.

> i) *movable and immovable property*, as well as any other rights *in rem* in respect of every kind of asset;
>
> ii) *rights derived from shares*, bonds, and *other kinds of interests in companies* and joint ventures;
>
> iii) *title to money*, to other assets *or to any performance having an economic value*;
>
> iv) rights in the field of intellectual property, technical processes, goodwill and know-how;
>
> v) rights granted under public law, including rights to prospect, explore, extract, and win natural resources." (Emphasis added)

215. The Tribunal notes, first, that the definition of "investments" provided by the instrument is broad in nature. This follows from the wording "*every kind of asset*" as well as the fact that the Treaty presents an open list through the phrase "not exclusively." In particular, subsection (ii) identifies as investments "rights derived from *shares*" in *companies* as well as "other kinds of interests" in them. It is clear from the text of the provision that there is no specific requirement for an asset to qualify as an investment that there be an active participation by the investor, a continued status at specified times, a material business presence, a particular duration of the investment, or any particulars as to the acquisition or the operation of the asset.

216. The Respondent submits that the text of Article 1(a) is just the "steppingstone of the analysis" and refers to the Preamble and to Articles 2, 3, 6, 7, 9(1), 10, and 14(3) in support of its argument that an active contribution is required.[189] The Preamble refers to "investments *by* the nationals" of one Party "*in* the territory *of* the other"; Articles 2, 3 and 6 refer to "investments *of* nationals"; Article 7 refers to "*their investments in* the territory *of* the other Contracting Party"; Article 9 (1) refers to disputes concerning an obligation "in relation to an investment *of* the latter [a national of the other Contracting Party]," Article 10 refers to "investments, *which have been made*," and Article 14 (3) refers to "investments *made*."

[189] Request for Bifurcation, ¶¶ 48-55.

217. The references identified by the Respondent correspond in their majority to the prepositions: *by*, *in*, *of*. The Tribunal observes that these prepositions can indicate various things. For example, the preposition "*by*" can indicate among other things "proximity," "during the course of," "through the agency or instrumentality of," "born or begot of," "in conformity with" or "on behalf of."[190] The preposition "*of*" can indicate "origin or derivation," "cause, motive, or reason" as well as "belonging or a possessive relationship."[191] The preposition "*in*" can refer to "inclusion, location, or position within limits," "means, medium, or instrumentality," "limitation, qualification, or circumstance," "purpose."[192] Contrary to the Respondent's assertions, the Tribunal does not consider that the use of these prepositions points in any way to an active contribution requirement. Rather, their use in those specific provisions seems to correspond to their function in indicating origin, belonging or location.

218. The Respondent has also referred to the word "made" in Articles 10 and 14(3); however, in the Tribunal's view such usage does not point either to a particular requirement that an investment must fulfill. Rather, it points to the fact that the investment *as defined* in Article 1, *i.e.,* an *asset* (in this case *shares*), must exist or have been "produced" before the entry into force or before the termination of the agreement.[193] Nothing else can be derived from that. The Treaty incorporates a definition of investment and the Tribunal is in no position to import additional requirements, whether limiting or not, not contemplated by the Parties through the use of these words as sought by the Respondent.

219. The Respondent has also alleged that, pursuant to the ICSID Convention, there are other specific criteria that are applicable to qualify as an investment. In this regard, the Respondent refers to a "significant contribution," to the commitment by an investor of its "own resources" and to a "real intent to develop economic activities." Additionally, it points towards the elements identified as part of the ordinary definition of investment

[190] "By" in *Merriam-Webster.com* (2023). Retrieved, 25 May 2023 https://www.merriam-webster.com/dictionary/by
[191] "Of" in *Merriam-Webster.com* (2023). Retrieved, 25 May 2023 https://www.merriam-webster.com/dictionary/of
[192] "In" in *Merriam-Webster.com* (2023). Retrieved, 25 May 2023 https://www.merriam-webster.com/dictionary/in
[193] "Made" in *Merriam-Webster.com* (2023). Retrieved, 25 May 2023 https://www.merriam-webster.com/dictionary/made

by the tribunal in *Quiborax v. Bolivia*, *i.e.*, "a contribution of money or assets (that is, a commitment of resources), risk and duration."[194]

220. Article 25 of the ICSID Convention on the "Jurisdiction of the Centre" does not define "investment." As noted by the Respondent, through investment case law certain criteria have been applied from time to time. However, the Tribunal is of the view that the fact that the ICSID Convention does not incorporate a specific definition of investment gives deference to the legal instruments for the protection of investments negotiated by the parties. In this regard, such instruments are the foundation upon which the jurisdiction of the Centre rests. The Tribunal does not consider that the Treaty at issue leaves the definition of investment or the intentions of the Parties in that regard ambiguous and we see no reason to limit the scope agreed by the Parties on account of criteria that are clearly not established in the text or in the ICSID Convention.

221. In the case at hand, the acquisition of the assets was made through several instruments: (i) an option agreement between JSC/MS Holdings Inc. ("**JSC/MS**") and Smurfit International B.V. whereby the former granted the latter the option to purchase all of the capital stock owned by JSC/MS Holdings,[195] (ii) the assignment by Smurfit International B.V. to the Claimant of all of its rights and obligations,[196] (iii) the Amendment agreement between Container Corporation America ("**CCA**"), CCA Enterprises Inc. and the Claimant extending the option to purchase the capital stock,[197] (iv) the Claimant's exercise in November 1987 of the option to purchase the shares of capital stock owned by CCA Enterprises in (PIN) B.V.,[198] and (v) the deed of transfer indicating the shares "have been fully paid," the transfer of said shares to Claimant, the purchase price of USD 32,851,623 and that (PIN) B.V. is the holder of shares in several businesses

[194] Request for Bifurcation, ¶ 62; quoting *Quiborax v. Bolivia*, **RL-016**, ¶ 233.
[195] Option agreement between JSC/MS Holdings Inc. and Smurfit International B.V., 30 September 1986, **C-176 bis**. In 1986 JSC/MS Holdings Inc. merged into CCA and, as surviving company, CCA assumed the obligations undertaken by Holdings in the option agreement.
[196] Agreement between Smurfit International B.V. and Smurfit Holdings B.V., 22 December 1986, **C-177**.
[197] Amendment agreement between CCA, Smurfit Holdings B.V. and CCA Enterprises Inc, 14 September 1987, **C-178 bis**.
[198] Letter from Smurfit Holdings B.V. to CCA Enterprises Inc. and CCA, 5 November 1987, **C-319**.

operating in Venezuela including Cartón de Venezuela S.A.[199] As to Fibras Limited, in September 1987, Smurfit assigned its rights under the option agreement with respect to Fibras Limited to its wholly owned subsidiary, SI Holdings Limited ("**SI Holdings**"). SI Holdings exercised that option and CCA Enterprises' shares were transferred to SI Holdings.[200]

222. While somewhat complex due to the number of companies and instruments, the evidence presented by the Claimant shows its interest in Cartón,[201] Refordos,[202] and Colombates,[203] as well as the rest of the Venezuelan companies: Corporación Venezolana de Papel C.A.;[204] Corsuca;[205] Reforestadora Uno Reforuno C.A.;[206] Cariven Investment Limited;[207] Corrugadora Latina;[208] Forestal Orinoco C.A.;[209] Agropecuaria Tacamajaca;[210] Corrugadora Latina SRL.[211]

223. In light of the above, the Tribunal considers that the Claimant has demonstrated the existence of "*assets*," *i.e*. *shares in companies*, which in accordance with Article 1 of the Treaty qualify as *investments*. Moreover, even though the Tribunal has indicated there is no other requirement pursuant to the Treaty or to the ICSID Convention for the purposes of establishing jurisdiction, it considers that in light of the facts of the case, even if such requirements were to apply, they would be met.

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[199] Deed of Transfer between CCA Enterprises Inc. and Smurfit Holdings BV, 10 November 1987, **C-321**, Arts. 1-3. Share Purchase Agreement between CCA Enterprises Inc. and Packaging Investments Netherlands (PIN) BV, 14 September 1987, **C-316.**
[200] Assignment Agreement between Smurfit Holdings B.V. and SI Holdings Limited, 21 September 1987, **C-317**; Letter from CCA Enterprises Inc. to Reid Finance Limited, 29 September 1987, **C-318**. *See also* Claimant's Rejoinder, **Annex A**, footnotes 6, 15 and 49.
[201] In general, *see* Claimant's Rejoinder, **Annex A**, footnotes 3, 6, 15, and 16.
[202] In general, *see* Claimant's Rejoinder, **Annex A**, footnotes 48, 49 and 50.
[203] Claimant's Rejoinder, **Annex A**, footnotes 28 and 29.
[204] Claimant's Rejoinder, **Annex A**, footnote 43.
[205] Claimant's Rejoinder, **Annex A**, footnote 34.
[206] Claimant's Rejoinder, **Annex A**, footnote 39.
[207] Claimant's Rejoinder, **Annex A**, footnotes 30 and 31.
[208] Claimant's Rejoinder, **Annex A**, footnotes 36 and 37.
[209] Claimant's Rejoinder, **Annex A**, footnotes 46 and 47.
[210] Claimant's Rejoinder, **Annex A**, footnotes 32 and 33.
[211] Claimant's Rejoinder, **Annex A**, footnotes 41 and 42.

224. In this regard, the Tribunal observes from the evidence in the record that a contribution of money was paid by the Claimant to acquire the assets and that such assets have been held for a significant period of time, in particular, for many years before the termination of the Treaty. The Tribunal considers this contribution to entail a risk inherent to such commitment. The Respondent argued in this context that the contribution should be meaningful or substantial, that the Claimant has not demonstrated that it made a contribution "with the purpose of generating profits within a timeframe"[212] and that the evidence indicates "that Smurfit's intention was to make a short-term transaction and not a long-term commitment."[213] The Tribunal begs to differ. The evidence in the record supports the conclusion that a contribution was made in order to acquire assets specifically covered by Article 1(a) of the Treaty. In light of the facts of the case, such contribution could not be deemed as either not meaningful or insubstantial. That investment has been held for 30 years, which could not be considered a short-term commitment; additionally, while the intention of the Claimant at the moment it made its investment would be difficult to ascertain, it continued to hold on to its investment until the actions taken by the Venezuelan Government that have been detailed above took place, which would indicate the pursuit of profitability or the existence of profitability. Claimant's dividend claim, amounting to tens of millions of dollars, highlights that its investment was in the pursuit of profits. Indeed, it would be difficult to reconcile the fact that, if Claimant's business had not been profitable or its intention had not been to generate profits, then in all probability the present dispute would not exist or the set of facts underlying it would be different. For the reasons stated above, even if these requirements were considered for the sake of argument, the Tribunal considers they would be satisfied.

225. Regarding the other types of assets comprised in its investment, *i.e.* landholdings (land, paper mills, production facilities) and VAT refund requests, the Tribunal notes that the former would fall within the category of "immovable property" whereas the latter would

[212] Respondent's Rejoinder, ¶¶ 356, 359.
[213] Respondent's Rejoinder, ¶ 389.

fall within the category of "title to money or to any performance having an economic value."

226. As in the case of "rights derived from shares," neither of these categories provides for additional requirements, for example relating to the acquisition, the operation or the participation of the investor. Furthermore, while there are different categories for the assets under Article 1(a), it is possible for an asset to fit within more than one category. In the case at hand, the landholdings and VAT certificate refunds could be considered as well as "rights derived from shares […] and other kinds of interests in companies," in this case, in the Venezuelan companies.

227. In light of the above, the Tribunal rejects Respondent's objections that the Claimant did not make a protected investment under the Treaty.

2. Whether the Tribunal lacks jurisdiction *ratione temporis* on the basis that the Claimant did not make its alleged investment before the termination of the Treaty

A. The Respondent's Position

228. The Respondent contends that Claimant's investments were not made before the termination of the Treaty. Pursuant to Article 14, Venezuela communicated on 21 April 2008 its intention to terminate said instrument. Such termination became effective on November 1 of that same year.[214] In the Respondent's view, the Claimant has failed to establish that Smurfit Holdings B.V. made its investment when the Treaty was still in force and thus it cannot ascertain jurisdiction under the Treaty.[215]

229. The Respondent relies on Article 13 of the International Law Commission's ("**ILC**") Articles on Responsibility of States for Internationally Wrongful Acts providing that: "An act of State does not constitute a breach of an international obligation unless the state is bound by the obligation in question at the time the act occurs," as well as Article

[214] Notice of Termination of the Bolivarian Republic of Venezuela regarding the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, 21 April 2008, **C-061**.
[215] Request for Bifurcation, ¶¶ 17-19; Respondent's Counter-Memorial, ¶¶ 194-196; Respondent's Rejoinder, ¶¶ 396-398.

28 of the VCLT, which states that the provisions of a treaty do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.[216]

230. According to the Respondent, the evidence provided by the Claimant is defective and insufficient. However, even assuming that the corporate documents presented are sufficient, Respondent asserts that the evidence demonstrates that indirect ownership was established when the Treaty was no longer in force (2009-2018). In particular, it references: (i) *Packaging Finance N.V. (Curaçao)* ("**Packaging Finance**") (2014), (ii) *Smurfit Kappa Curaçao N.V.* ("**Smurfit Kappa**") (2014), (iii) *SI Holdings* (2009), *and* (iv) *other instances in the record* (2010, 2016, 2018). In consequence, the 15-year period during which the Contracting Parties agreed to extend the effects of the Treaty is not applicable.[217] As to the evidence presented by the Claimant subsequent to its Memorial, the Respondent alleges that it modified the description of the relevant facts and it is an attempt to revamp its jurisdictional case.[218]

B. The Claimant's Position

231. The Claimant argues that Respondent's objection is unfounded. According to the Claimant, its investment was originally acquired in 1987 and Claimant held the investment until Venezuela expropriated it in 2018. This includes but is not limited to Smurfit's indirect shareholding interest in Cartón (87.9%), Refordos (87.8%) and Colombates (61.7%).[219] The Claimant submits that, since the investment was made prior to 1 November 2008, pursuant to the sunset clause contained in Article 14(3) of the Treaty its investments are protected and Respondent's objection must be rejected.[220]

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[216] Respondent's Rejoinder, ¶ 393, referring to Responsibility of States for Internationally Wrongful Acts, General Assembly resolution 56/83, 12 December 2001, **RL-216**, Art. 13; and VCLT, **RL-264**, Art. 28.
[217] Request for Bifurcation, ¶¶ 20-26; Respondent's Counter-Memorial, ¶¶ 197-202; Respondent's Rejoinder, ¶¶ 396-400.
[218] Respondent's Counter-Memorial, ¶¶ 203-206.
[219] Claimant's Observations on Bifurcation, ¶¶ 53-56; Claimant's Reply, ¶¶ 507-509 and its **Annex A**.
In Reply to Respondent's arguments on the investment structure, the Claimant alleges that "the insertion of Smurfit Kappa Curaçao, a wholly owned subsidiary of Smurfit, into the corporate structure in 2014 had no effect on the indirect shareholding interest of Smurfit, which remained unchanged." *See* Claimant's Reply, ¶ 516.
[220] Claimant's Observations on Bifurcation, ¶ 57.

232. As to the ownership structure and the relevant times the investment has been held, the Claimant submits the following:

- Refordos's audited financial statements confirm Claimant's indirect ownership of Refordos's shares from 1989 until 2018.
- Fibras Limited holds a controlling stake in Refordos and SI Holdings holds a controlling stake in Fibras.
- Until 2014, 100% of SI Holding's shares were held by Packaging Finance; onwards, it was held indirectly through Smurfit Kappa (a wholly owned subsidiary of Packaging Finance).
- Packaging Finance has been a wholly owned subsidiary of Smurfit since 1985.[221]
- Cartón's direct shareholders before 1 November 2008 and until the expropriation in 2018 were Inversiones Isica C.A. ("**Isica**" or "**Isica C.A.**"), Fibras Limited (indirectly owned by Smurfit) and (PIN) B.V. (directly owned by Smurfit).
- Isica C.A.'s shareholders both before and after 1 November 2008 were (PIN) B.V. and Cartón.
- (PIN) B.V. has been a wholly owned subsidiary of the Claimant since 1987. Cartón was also indirectly owned by the Claimant both before and after 1 November 2008.
- Colombates was at all relevant times a direct subsidiary of Cartón (which until 2018 was indirectly owned by the Claimant) and Compañía Colombiana de Empaques Bates S.A. (Colombates) (Colombia), since 2000.
- Compañía Colombiana de Empaques Bates S.A. (Colombates) (Colombia) has been continuously owned by two Smurfit entities both before and after 1 November 2008: (PIH) B.V. (Claimant's direct subsidiary), and Empresa de Transporte Bosques Nacionales S.A. ("**Transbosnal**") and its predecessor, Celulosa Y Papel de Colombia S.A.
- Transbosnal (and its predecessor) have been subsidiaries of Cartón de Colombia S.A. since 1996.

[221] Claimant's Reply, ¶¶ 512 and 513.

- Since 1998, Cartón de Colombia S.A.'s majority shareholders have continuously been (PIH) B.V. and Packaging Investments Netherlands (PIN) B.V., both wholly owned subsidiaries of Claimant since 1992 and 1987, respectively.
- Colombates was also indirectly owned by the Claimant both before and after 1 November 2008.[222]

C. The Tribunal's Analysis

233. We recall that, while the Respondent terminated the Treaty in 2008, pursuant to Article 14.3 investments made before the date of termination would still be subject to the provisions of that instrument for a determined period:

> "In respect of investments made before the date of termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a *further period of fifteen years* from that date." (Emphasis added)

234. Therefore, the Tribunal must analyze whether the Claimant has demonstrated in fact that it made its investment before Respondent's termination in 2008.

235. The Claimant, Smurfit Holdings B.V., was incorporated in the Netherlands on 23 December 1983. Packaging Finance is a wholly owned subsidiary of the Claimant and has been such since 1985.[223] The Respondent argues that Packaging Finance became a shareholder in Smurfit Kappa on 11 November 2014 and in turn, the latter became a shareholder in SI Holdings on 24 December 2014.[224] On the other hand, the Claimant has brought forth evidence that establishes the following: (i) Packaging Finance was incorporated on 27 December 1984, and (ii) SI Holdings is a company incorporated in 1985 and has been wholly owned by Packaging Finance since at least 1988.[225]

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[222] Claimant's Reply, ¶ 518. Although the Claimant refers in this submission to (PIN) N.V., the Tribunal notes that Claimant's Rejoinder, **Annex A** only refers to (PIN) B.V. The Tribunal only refers to the latter, which according to the record is within the corporate chain.
[223] Packaging Finance N.V. Shareholder Register, **C-003D**, p. 1; Packaging Finance N.V. Annual Accounts for 2007, 23 October 2008, **C-003E**, p. 6.
[224] Request for Bifurcation, ¶ 24; Smurfit Kappa Curaçao N.V. Shareholder Register, **C-004C,** p. 1; SI Holdings Limited Register of Members, **C-005,** p. 81.
[225] Curaçao Commercial Register excerpt for Packaging Finance N.V., 2 August 2018, **C-003A**, p. 1; Secretary's Certificate of constitutional documents for SI Holdings Limited, 23 March 2016, **C-005**, p. 2; Audited Non-

236. The Tribunal understands that Respondent's argument not only relates to whether the Claimant's investment was made before the date of the termination of the Treaty, but also to the nature of its investment within the chain of ownership presented by the Claimant. Respondent's argument appears to relate to its allegation that the Claimant has not proven its continued status as shareholder. As mentioned above, Article 1 of the Treaty defines "investment" as:

> "[…] *every kind of asset* and more particularly though *not exclusively*:
>
> […]
>
> ii) *rights derived from shares*, bonds, and *other kinds* of *interests in companies* and joint ventures." (Emphasis added)

237. The Tribunal has indicated that this definition is broad. This conclusion is based on the language "every […] asset" as well as the language "though not exclusively." Moreover, in the case of subparagraph (ii), while there is an express mention of a common form of ownership in companies *i.e*. through the rights derived from *shares*, the use of the phrase "and other kinds of interests" seems to extend the scope of investments, just as it has been done in other Bilateral Investment Treaties ("**BITs**") with similar formulations.

238. In *Siemens v. Argentina*, while analyzing Argentina's contention that the treaty at issue required "a direct relationship" between the investor and the investment, the tribunal considered that:

> "The definition of "investment" is very broad. […] The drafters were careful to use the words "not exclusively" before listing the categories of "particularly" included investments. One of the categories consists of "shares, rights of participation in companies and other types of participation in companies." The plain meaning of this provision is that shares held by a German shareholder are protected under the Treaty. *The Treaty does not require that there be no interposed companies between the investment and the ultimate owner of the company.* Therefore, a literal reading of the Treaty does not support the

Consolidated Financial Statements of SI Holdings Limited as of 31 January 1988, 7 March 1988, **C-005B**, p. 4; Packaging Finance N.V. Annual Accounts for 2007, 23 October 2008, **C-003E**, p. 6.

> allegation that the definition of investment excludes indirect investment."[226] (Emphasis added)

239. In the same vein, Article 1 of the Treaty also defines "nationals" not only as "legal persons constituted under the law of that Contracting Party" (subparagraph (ii)), but also as "legal persons not constituted under the law of that Contracting Party but *controlled*, *directly or indirectly*, by natural persons as defined in (i) or by legal persons as defined in (ii) above" (subparagraph (iii)). The element of "control" is required in subparagraph (iii) involving legal persons *not* constituted under the law of a Contracting Party, but not in subparagraph (ii), which only requires the nationality and incorporation under the law of the Contracting Party. In the Tribunal's understanding, Respondent has not challenged the nationality of the Claimant.

240. In this regard, the Tribunal considers that the text of the Treaty does not require that there be no interposed companies between the investment and the ultimate owner. Rather, it requires an investment by a "national" or "a non-national", which in turn may be controlled directly or indirectly by a legal person satisfying the description of "national of a Contracting Party." Therefore, the connection of the investor must remain. The Tribunal considers this to be the case.

241. While Packaging Finance's investment in Smurfit Kappa and then Smurfit Kappa's investment in SI Holdings were made in 2014, SI Holdings was wholly owned by Packaging Finance since 1988. Smurfit Kappa's investments in SI Holdings made in 2014, do not prejudice the 1988 preexisting link between, Packaging Finance and SI Holdings nor the link between Packaging Finance and the Claimant. A new subsidiary (Smurfit Kappa) as intermediate between the shareholder (Packaging Finance and indirectly the Claimant) and another subsidiary (SI Holdings) does not have any effect on the indirect shareholding interest. The origin and destination of the interest is still preserved and such link in the investment chain has not been severed.

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[226] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004 (***"Siemens v. Argentina"***), **CL-102**, ¶ 137. *See also* ¶¶ 123-136.

242. As to SI Holding's investments in Fibras Limited, the Respondent contends that the former became a shareholder of the latter in 2009.[227] Claimant submits that "SI Holdings […] acquired its stake in Fibras Limited as a result of the exercise of rights under an option agreement in 1987 […] and […] it held rights to the shares from that date onwards."[228] The Tribunal notes that pursuant to the Assignment Agreement between the Claimant and SI Holdings dated 21 September 1987, Smurfit Holdings B.V. assigned to SI Holdings the option it had to acquire CCA Enterprises Inc.'s shares in Fibras Limited.[229] In the Tribunal's view, the evidence presented by the Claimant supports its allegation that those shares were held by Reid Finance Limited as nominee whereas SI Holdings was the beneficial owner of the shares and in fact a shareholder of Fibras Limited.[230] In consequence, the investment chain is preserved.

243. The Respondent points to five other instances in which it claims that the investment was made after the termination of the Treaty; those instances concern (PIN) B.V., (PIH) B.V., Transbosnal, Cartón and Fibras Limited.

244. In particular, the Respondent alleges that (PIN) B.V.'s shareholding in Isica C.A. is reflected as of 20 September 2010, that the shareholding of (PIH) B.V. and Transbosnal in Colombates is reflected as of 27 November 2018, that Cartón's shareholding in Corporación Venezolana de Papel C.A. is reflected as of 10 August 2016 and that Fibras Limited's shareholding in Refordos is reflected as of 18 May 2018.[231]

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[227] Secretary's Certificate of constitutional documents for Fibras Limited, 23 March 2016, **C-006**, p. 82.
[228] Observations on Respondent's Request for Bifurcation, footnote 151.
[229] Assignment Agreement between Smurfit Holdings B.V. and SI Holdings Limited, 21 September 1987, **C-317**; Letter from SI Holdings Limited to CCA Enterprises Inc. and CCA, 5 November 1987, **C-320.**
[230] "From 1987 until 2009, SI Holdings Limited's shares in Fibras Limited were held by Reid Finance Limited as nominee for SI Holdings Limited as beneficial holder of the shares. […] In Bermuda, shares may be held by a nominee on behalf of a beneficial owner. The beneficial owner possesses all shareholding rights over the shares (including voting rights and rights to dividends)." Claimant's Observations on Bifurcation, **Annex A**, footnote 6. Letter from CCA Enterprises Inc. to Reid Finance Limited, 29 September 1987, **C-318**; Letter from Bermudan counsel to SI Holdings Limited, 8 January 1988, **C-322**; Secretary's Certificate of constitutional documents for Fibras Limited, 23 March 2016, **C-006**, p. 082; Audited Non-Consolidated Financial Statements of SI Holdings Limited as at 31 January 1988, 7 March 1988, **C-005B**, p. 5; Fibras Limited Board of Directors Unanimous Written Resolutions, 19 June 2008, **C-006B**, p. 4.
[231] Request for Bifurcation, footnote 35; Exhibit **C-008B**; Exhibit **C-023B**; Exhibit **C-12B**; Exhibit **C-010B**.

245. Regarding (PIN) B.V.'s investment, the evidence provided shows its shareholding interest in Isica C.A. since 1991 which remained unchanged up to 2010.[232] The same is true for (PIH) B.V.'s and Transbosnal's shareholding in Colombates, which is observable since 1992 and continued to 2018.[233] With respect to Fibras Limited's shareholding in Refordos, the latter's Audited Financial Statements from 2007 to 2017 confirm indirect ownership since before the Treaty was terminated until 2018 when the investments were expropriated.[234]

246. Finally, as to Cartón's shareholding in Corporación Venezolana de Papel C.A., the evidence provided shows that, in 2004, Reforestadora Uno Reforuno C.A. was a shareholder in Corporación Venezolana de Papel C.A.[235] Those shares were transferred as a capital increase to Cartón in August 2009. In this regard, the investment held by Reforestadora Uno Reforuno C.A. prior to the termination is within the scope of the Treaty. Overall, in all the instances alleged by the Respondent, the evidence reflects the origin of the investment on a date prior to the termination of the Treaty as well as its

[232] Minutes of Special Shareholders Meeting of Inversiones Isica C.A. registered in Commercial Registry on 9 May 1992, 18 November 1991, **C-008C**, p. 1; Certification dated 9 April 2008 Packaging Investments Netherlands (PIN) B.V. Director's Certificate, 2 April 2008, **C-007E**, p. 1; Certification dated 4 November 2010 of Minutes of Special Shareholders Meeting of Inversiones Isica C.A., 20 September 2010, **C-008B**, p. 1.

[233] Certification of Shareholders of Compañía Colombiana de Empaques Bates S.A. (COLOMBATES), 8 June 1992, **C-023D**, p. 1; Certification of Shareholders of Compañía Colombiana de Empaques Bates S.A. (COLOMBATES), 27 November 2018, **C-023B**, p. 1. On 25 September 2008, Celulosa y Papel de Colombia S.A. de-merged into two companies: TRANSBOSNAL and Reforestadora Andina S.A. TRANSBOSNAL acquired Celulosa y Papel de Colombia S.A.'s shareholding interest in Compañía Colombiana de Empaques Bates S.A. (COLOMBATES), Certification dated 4 November 2008 of Demerger Plan for Celulosa y Papel de Colombia S.A., 30 May 2008, **C-022D**, p. 3 whereby TRANSBOSNAL acquired Celulosa y Papel de Colombia S.A.'s shareholding interest in Compañía Colombiana de Empaques Bates S.A. (COLOMBATES) in the demerger; Certification of Shareholders of Compañía Colombiana de Empaques Bates S.A. (COLOMBATES), 27 November 2018, **C-023B**, p. 1; Certificate of Existence and Legal Representation of Empresa de Transporte Bosques Nacionales S.A. (TRANSBOSNAL), 9 November 2018, **C-022A ter**, pp. 2 and 3; Certification dated 4 November 2008 of Minutes of Special Shareholders Meeting of Celulosa y Papel de Colombia S.A., 25 June 2008, **C-022C**, p. 1; Certification of Shareholders of Empresa de Transporte Bosques Nacionales S.A. (TRANSBOSNAL), 27 November 2018, **C-022B**, p. 1.

[234] Refordos Audited Financial Statements (2007 and 2008), 2 March 2009, **CLEX-020**, p. 5; Refordos Audited Financial Statements (2008 and 2009), 10 March 2010, **CLEX-020**, p. 5; Refordos Audited Financial Statements (2009 and 2010), 17 February 2011, **CLEX-020**, p. 5; Refordos Audited Financial Statements (2010 and 2011), 3 March 2012, **CLEX-020**, p. 5; Refordos Audited Financial Statements (2012 and 2013), 3 February 2014, **CLEX-020**, p. 5; Refordos Audited Financial Statement (2013 and 2014), 3 February 2015, **CLEX-020**, p. 5; Refordos Audited Financial Statements (2015), 8 April 2016, **CLEX-020**, p. 6; Refordos Audited Financial Statements (2016), 6 March 2017, **CLEX-020**, p. 6; Refordos Audited Financial Statements (2017), 18 May 2018, **CLEX-020**, p. 6.

[235] Shareholder Registry of Corporación Venezolana de Papel C.A., **C-012D**, pp. 1, 6, 7; Certification dated 13 October 2016 of Minutes of Special Shareholders Meeting of Corporación Venezolana de Papel (Corvenpa) C.A., 10 August 2016, **C-012B**, p. 9.

continuity. Thus, the Tribunal finds that Claimant's investments were made prior to the termination of the Treaty and dismisses Respondent's objections *ratione temporis* to its jurisdiction.

3. Whether claims as an alleged indirect shareholder as presented in this arbitration are inadmissible

A. The Respondent's Position

247. The Respondent argues that Claimant is "suing for the impairment of rights belonging to third parties, namely the Venezuelan companies," which cannot entail a breach of the Treaty *vis-à-vis* Smurfit.[236] The Respondent submits that "general international law does not protect shareholders' rights any more than municipal legal systems do" and "if a company considers that its property rights have been in some way infringed, its shareholders lack standing to seek redress at the international level just as they lack standing at the municipal level."[237]

248. The Respondent refers to *Barcelona Traction* and *Diallo* and posits that "[t]he Court's determination on the *scope* of shareholders' rights under international law is not confined to the realm of diplomatic protection. […] the specific procedural context under which the ICJ's positions were adopted is entirely irrelevant for the substantive question relating to the identification of which rights of shareholders are entitled to international protection as distinct from the rights of the company."[238]

249. It is Respondent's contention that, under international investment law and the ICSID Convention, shareholders do not have claims arising from impairment of assets of the companies in which they hold shares. In Respondent's view, the way that Claimant has formulated its claims shows that it is seeking reparation for an alleged injury to property rights of Venezuelan companies rather than for the flow-through of damage caused to

[236] Request for Bifurcation, ¶¶ 79 and 80; Respondent's Counter-Memorial, ¶¶ 245-247.
[237] Request for Bifurcation, ¶ 81; Respondent's Counter-Memorial, ¶ 248.
[238] Respondent's Counter-Memorial, ¶ 250.

whatever equity investment it may have made.[239] In its Counter-Memorial, the Respondent specifies that its objection is unrelated to the issue of quantification, but to the fact that the alleged indirect economic interest is not sufficient to confer standing to pursue claims related to property rights of other companies. It submits that the claims formulated by Smurfit do not "relate to the residual financial benefits Claimant was entitled to expect, in its capacity as indirect shareholder;" rather "the claims are founded on the estimated value of the land properties and of the claims to money belonging to the Smurfit Sellers" and "under Venezuelan law, Smurfit Holding[s] B.V. had no legal title to any bundle of rights or assets belonging to said companies." Moreover, the claims on landholdings and VAT Certificates overlap with claims that could be asserted by the Venezuelan companies themselves.[240]

B. The Claimant's Position

250. The Claimant argues that Respondent's objection is "wrong on the law" and that it has standing derived from the Treaty and the ICSID Convention to bring the claims in its capacity as investor with protected investments.[241] According to the Claimant, Smurfit's claim is "grounded in the Treaty, and in particular, its definition of 'investment', interpreted in good faith and in light of its object and purpose."[242] The Claimant maintains that "[c]laims are therefore 'not limited to the damage directly affecting [their] rights as shareholder[s]' but in fact extend to 'losses affecting the assets of [local subsidiaries]' including also any reduction in the value of those assets" and that "States often require investors to channel their investments through local subsidiaries," which under Venezuela's argument would render investment protections "meaningless."[243]

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[239] Request for Bifurcation, ¶¶ 82-84. The Respondent considers that further confirmation can be found in the fact that the Claimant proposes a book value approach to calculate the damages presumably flowing from the alleged seizure of landholdings or that it bases the damages values relating to the VAT Certificates on the VAT credit balance of the Smurfit's subsidiaries. *See* ¶ 86.
[240] Respondent's Counter-Memorial, ¶¶ 265-267, 272.
[241] Claimant's Observations on Bifurcation, ¶¶ 61 and 62; Claimant's Reply, ¶ 546; Claimant's Rejoinder, ¶ 86.
[242] Claimant's Reply, ¶ 543.
[243] Claimant's Reply, ¶ 544, quoting *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova (I)* (SCC), Arbitral Award, 22 September 2005, **RL-137**, ¶ 5.1.1; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011 ("***Paushok v. Mongolia***"), **CL-118**, ¶ 202.

251. In the Claimant's view, Venezuela's argument that Smurfit's claims are an impermissible derivative claim have been consistently rejected in other cases.[244] Furthermore, the Claimant also contends that the Treaty does not require that investments be held directly; therefore, it "has standing to bring claims for the damage caused to all of its protected investments (not only its investment in shares) resulting from Venezuela's breaches of the Treaty, in proportion to its interest in these investments."[245]

252. In its Rejoinder on Jurisdiction, the Claimant contends that even if the Treaty were interpreted so as to restrict Smurfit's ability to bring a claim only for the losses that impacted the value of its indirect equity, all of its claims would qualify since "all of Venezuela's measures caused direct losses to Smurfit," in particular: (i) Venezuela's expropriation of Smurfit's entire business reduced the value of Smurfit's shares in Cartón, Refordos and Colombates to zero, (ii) Venezuela's wrongful expropriation of Refordos' three forestry landholdings comprising 6,434 hectares (the size of 9,000 soccer fields) also caused direct economic harm to Smurfit as a shareholder since it restricted the ability of Smurfit's subsidiaries to provide raw material that could be turned into end products (packaging products), thus diminishing the value of Smurfit's shares in its Venezuelan production chain, (iii) the inability of Smurfit's subsidiaries to repatriate dividends has caused a direct loss to Smurfit's rights as a shareholder in Cartón, Refordos and Colombates, and (iv) the sums that Cartón and Refordos ought to have received by way of timely VAT refunds were cashflows that Smurfit's businesses would have otherwise had were it not for Venezuela's wrongful measures. These cashflows would have enhanced Smurfit's share value in these two companies.[246]

253. In relation to Venezuela's argument on the methodology used by Smurfit to calculate damages, the Claimant replies that such issue relates to quantum and cannot have an impact on the jurisdiction of the Tribunal. The Claimant also contends that its experts'

[244] Claimant's Reply, ¶ 541; Claimant's Rejoinder, ¶ 84.
[245] Claimant's Observations on Bifurcation, ¶¶ 63 and 64. Also, "[a]s with Smurfit's shareholding interest in its Venezuelan subsidiaries, the Treaty does not require that these investments [interest in the immovable and movable assets (such as the Venezuelan landholdings and production facilities) and claims to performance having economic value] be held directly." Claimant's Reply, ¶ 547.
[246] Claimant's Rejoinder, ¶ 87.

calculation of the value of Cartón, Refordos and Colombates aimed to capture the value of those companies and the damage Claimant sustained as shareholder on 28 August 2018. However, this analysis could not account for the effect that earlier measures had before the expropriation occurred, such as the failure to allow repatriation of dividends, to issue VAT certificates and expropriation of landholdings.[247]

C. The Tribunal's Analysis

254. The Respondent has relied on several cases to support its contention. As to *Barcelona Traction*, the Tribunal does not consider that this precedent applies to the facts of the case, in particular, since that case dealt with diplomatic protection and as was made clear in *Suez v. Argentina*:

> "Unlike the present case, *Barcelona Traction did not involve a bilateral treaty which specifically provides that shareholders are investors and as such are entitled to have recourse to international arbitration* to protect their shares from host country actions that violate the treaty."[248] (Emphasis added)

255. Similarly, neither the Treaty at issue in this proceeding "nor the ICSID Convention limit[s] the rights of shareholders to bring actions for direct, as opposed to derivative claims. This distinction, present in domestic corporate law of many countries, does not exist in any of the treaties applicable to this case."[249] The Respondent has referred as well to *Poštová banka v. The Hellenic Republic.* However, even in that case, the tribunal also recognized that investment decisions had established consistently that:

> "[…] a shareholder of a company incorporated in the host State may assert claims *based on measures taken against such company's assets that impair the*

[247] Claimant's Observations on Bifurcation, ¶ 65; Claimant's Reply, ¶¶ 551-554.
[248] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006 ("***Suez v. Argentina***"), **CL-108**, ¶ 50. In the same sense, "[…] Counsel for the Claimant are also right when affirming that this case was concerned only with the exercise of diplomatic protection in that particular triangular setting, and involved what the Court considered to be a relationship attached to municipal law, but it did not rule out the possibility of extending protection to shareholders in a corporation in different contexts." *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003 ("***CMS v. Argentina***"), **CL-099**, ¶ 43. *See also* "Those cases were concerned with diplomatic protection under customary international law and not with the protection of the rights of investors under treaties relating to the protection of investments. As specified by the Tribunal, those judgments are not 'directly relevant to the present dispute'." *CMS v. Argentina*, Decision on the Application for Annulment, 25 September 2007, **RL-075**, ¶ 69, referred in Claimant's Reply, footnote 1128.
[249] *Suez v. Argentina,* **CL-108**, ¶ 49.

> *value of the claimant's shares*. However, such claimant has no standing teo pursue claims directly over the assets of the local company, as it has no legal right to such assets."[250] (Emphasis added)

256. Regarding a similar issue pertaining to an investment of shares in a company incorporated under Mongolian law, the tribunal in *Paushok v. Mongolia* considered that:

> "It is therefore important to note that *Claimants must prove that their claims arise out of the Treaty itself* and not merely be an attempt to exercise contractual rights belonging to GEM. To argue that Claimants could not make such Treaty claims *would render it practically meaningless* in many instances; a large number of countries require foreign investors to incorporate a local company in order to engage into activities in sectors which are considered of strategic importance (mining, oil and gas, communications etc.). In such situations, *a BIT would be rendered practically without effect if it were right to argue that any action taken by a State against such local companies or their assets would be not be subject to Treaty claims by a foreign investor because its investment is merely constituted of shares in that local company*."[251] (Emphasis added)

257. In *Flemingo DutyFree v. Poland*, the tribunal considered that:

> "As other investment arbitration tribunals have decided with regard to *similarly broad definitions of the term 'investment', such definitions do not exclude indirect investments through controlling shareholding via intermediate companies*. Consequently, the indirect shareholding in BH Travel, the holder of the Lease Agreements and concessions for the duty-free shops, equally qualifies as a protected investment under the Treaty."[252] (Emphasis added)

258. Moreover, the tribunal in *Flemingo DutyFree v. Poland* expressed its view as to the different aspects of protection that investors have, whether by holding shares in a local company or indirectly through intermediate companies leading up to a local company making investments:

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[250] *Poštová banka, A.S. and ISTROKAPITAL SE v. The Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015, **RL-033**, ¶ 245. *See also* "[…] an investor whose investment consists of shares cannot claim, for example, that the assets of the company are its property and ask for compensation for interference with these assets. Such an investor can, however, claim for any loss of value of its shares resulting from an interference with the assets or contracts of the company in which it owns the shares." *ST-AD GmbH v. The Republic of Bulgaria*, UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, **RL-35**, ¶ 282.

[251] *Paushok v. Mongolia*, **CL-118**, ¶ 202.

[252] *Flemingo DutyFree Shop Private Limited v. The Republic of Poland*, UNCITRAL, Award, 12 August 2016 (*"**Flemingo DutyFree v. Poland**")*, **CL-126**, ¶ 305.

> "[…] In fact under investment treaties, investments can just as well consist of a shareholding in a local company, as of the investments made by a local company, controlled by successive intermediate companies. *The investor "steps into the shoes" of the local company and claims for damages suffered by the local company as if it had been inflicted, on a pro rata basis, on itself*. Those two different aspects of "upstream protection" of investors have clearly been identified by the International Court of Justice. Each type of investment gives rise to specific legal questions: in the case of shares, whether the value of the shareholding is affected; in case of indirect investments, whether the rights of the local company have been violated. Of course both approaches may be combined. *The actual investment may be made by a local company, but may lead to indirect investments through a series of intermediate shareholdings*."[253] (Emphasis added)

259. The Tribunal concurs with the opinions of these other tribunals in this regard. We have determined that the Claimant made an investment within the meaning of Article 1 of the Treaty. That provision contains no further requirement as to whether the "assets" must be held directly or indirectly. The Tribunal notes that, while the Respondent has asserted in its Request for Bifurcation that the Claimant is a shell company, it has not objected to Smurfit Holdings B.V.'s qualification as an investor within the meaning of Article 1 of the Treaty. However, we have already determined that the only requirement to qualify as a "national" is to be constituted under the law of that Contracting Party, and that the Treaty itself allows such qualification for a legal person not constituted under that law but controlled directly or indirectly by a legal person satisfying such a requirement. In consequence, we agree with the Claimant that it has standing under the Treaty to bring its claims.

260. The Claimant alleges that several measures enacted by Venezuela effectively nullified its investments. Such measures directly affected companies incorporated in Venezuela. However, the fact that the Claimant does not directly own the assets does not mean that the significant value of its investment made through shares and that materialized in the control over those companies (Cartón (87.9%), Refordos (87.8%) and Colombates (61.7%)) renders its case outside the jurisdiction of this Tribunal. In the words of the *Paushok v. Mongolia* tribunal, to accept Respondent's argument would render the

[253] *Flemingo DutyFree v. Poland*, **CL-126**, ¶ 310.

investment protections granted under the Treaty "*practically meaningless*." On the contrary, the question whether there was a breach of Venezuela's obligations under the Treaty and whether those measures affected Claimant's indirect shareholding must be assessed. Moreover, the Tribunal considers that even if the Treaty were interpreted as restricting Claimant's ability to bring a claim only for the losses that impacted the value of its equity, the claim would qualify since the measures of which Smurfit complains go to the core of its investment, to the corporate chain built around it.

261. In light of the above, the Tribunal rejects Respondent's objections that Smurfit's claims as an indirect shareholder, are inadmissible.

4. Whether the Tribunal lacks jurisdiction *ratione voluntatis* on the basis that consent to submit this dispute to arbitration under the ICSID Convention was not perfected before Venezuela's denunciation of the ICSID Convention

262. The arguments of the Parties, in favor and against, this objection center around "consent." In particular: (i) whether Article 72 of the ICSID Convention refers to "perfected consent" and thus, whether it required that both Parties expressed their consent before Venezuela's denunciation notice for the rights and obligations of Venezuela (under the ICSID Convention) to not be affected, and (ii) if Claimant did consent to the jurisdiction of the Centre by means of a letter sent to Venezuela before its denunciation of the ICSID Convention (the "**Letter**"). The Tribunal will summarize the Parties' position and then address: first, the arguments regarding consent under the ICSID Convention and Article 9 of the BIT; in second place, consent under Article 72; in third place, the Letter sent by the Claimant; and last, the conclusion.

A. The Respondent's Position

263. Overall, the Respondent contends that Claimant's "consent" to submit the dispute was not perfected before Venezuela denounced the ICSID Convention. Venezuela states that "[m]utual consent of both the host State and the investor is a *sine qua non* requirement for the Centre to have jurisdiction" and that, pursuant to Article 25 of the ICSID Convention, "a State must be a Contracting State of the Convention for the Centre to

have jurisdiction or for any tribunal established thereunder to have competence over a given dispute."[254] Additionally, it submits that "Article 71 of the ICSID Convention enshrines the right of any Contracting State to denounce the Convention by written notice […]."[255]

264. It is the Respondent's position that "[a]s a result of the Republic's giving notice of the denunciation of the ICSID Convention to the World Bank on January 24, 2012, 'Venezuela ceased to be a Contracting State under the ICSID Convention six months later on July 25, 2012 by virtue of Article 71' and 'ceased to have rights or obligations as a Contracting State to the ICSID Convention as of that date'."[256] Therefore, by the time that the Claimant filed its Request for Arbitration, Venezuela was no longer a party to the ICSID Convention, which is fatal to its case under Article 25 of the ICSID Convention.

265. Furthermore, it argues that, while Article 9 of the Treaty contained the Respondent's offer of arbitration, "[t]his unilateral consent (or offer to arbitrate) is not perfected until an investor gives its unilateral consent to submit a dispute to ICSID arbitration."[257] In the Respondent's view, the Letter submitted by the Claimant in 2011 "cannot be deemed to be an acceptance to submit this dispute to arbitration." The reasons provided by Venezuela are the following: (i) the Letter does not refer to a particular dispute, (ii) it does not refer to specific Treaty breaches, (iii) the Letter is sent by two different legal persons (and there is no identity between the parties),[258] (iv) the Letter does not refer in particular to the Treaty,[259] and (v) the Claimant has failed to establish that Mr. O'Riordan, who signed the Letter, had representation powers and, in any case, the Letter was sent prior to the events surrounding Claimant's claims.[260]

[254] Request for Bifurcation, ¶¶ 65 and 66; Respondent's Counter-Memorial, ¶¶ 179 and 180; Respondent's Rejoinder, ¶¶ 268 and 269.
[255] Request for Bifurcation, ¶ 67; Respondent's Counter-Memorial, ¶ 181; Respondent's Rejoinder, ¶ 270.
[256] Request for Bifurcation, ¶ 68; Respondent's Counter-Memorial, ¶ 182; Respondent's PHB, footnote 17.
[257] Request for Bifurcation, ¶ 71; Respondent's Counter-Memorial, ¶ 185.
[258] Respondent's PHB, ¶¶ 19 and 20.
[259] Request for Bifurcation, ¶¶ 72-76; Respondent's Counter-Memorial, ¶¶ 187-190; Respondent's PHB, ¶¶ 17-32.
[260] Respondent's Rejoinder, ¶ 275.

266. In its Counter-Memorial, the Respondent expressed the view that "[t]o condone Claimant's abusive attempt would be equivalent to destroying the consensual basis of international investment arbitration, and certainly of international law in general, insofar as international jurisdiction is based on the consent of State. […] A decision upholding Claimant's contention would plainly transform the landscape of international arbitration, erasing the requirement of a valid arbitration agreement for an arbitration proceeding to be valid" and that "[n]o State could be forced to continue being a party to the Convention against its will, since the Convention provides a specific denunciation mechanism, and the State has implemented such mechanism."[261]

267. In its Rejoinder, the Respondent also posits that "consent in writing" according to the ICSID Convention "would indicate a minimum of formality in accepting the host State's offer," that "Article 9 of the Treaty provides that the acceptance of the offer by the investor shall be done by means of the submission of the dispute to the ICSID" and that "the term 'consent', as used in Article 72 of the ICSID Convention, means 'perfected consent'."[262] In its Post-Hearing Brief, Respondent dismisses Claimant's argument that it consented to Venezuela's offer when submitting the Request for Arbitration in 2018 on the basis that "if consent has not been perfected before denunciation a surviving BIT provision in which ICSID has been envisaged as possible forum for arbitration, is no longer an offer to be accepted and simply constitutes a statement of a forum, which is no longer available for putative claimants."[263]

B. The Claimant's Position

268. The Claimant submits that under Article 72 of the ICSID Convention, "a State's denunciation […] does not affect any rights and obligations arising from consent to ICSID jurisdiction given prior to the denunciation. Venezuela gave its 'unconditional consent' to arbitrate disputes with Dutch investors before ICSID in the Treaty. Smurfit, in turn, consented to arbitrate disputes with Venezuela under the Treaty before ICSID in

[261] Respondent's Counter-Memorial, ¶¶ 177 and 181.
[262] Respondent's Rejoinder, ¶¶ 281, 290 and 307.
[263] Respondent's PHB, ¶ 36.

September 2011, some four months before Venezuela delivered its notice of denunciation of the ICSID Convention and some ten months before that denunciation took effect."[264]

269. As a consequence, the Claimant contends that "[o]nce both parties consented to arbitrate disputes under the Treaty before ICSID, an arbitration agreement was formed. Pursuant to Article 25(1) of the ICSID Convention, [and] once consent to ICSID arbitration is given, no party may unilaterally withdraw its consent."[265] In the Claimant's view, the Respondent's objections to the 2011 Letter lack basis since: (i) the ICSID Convention contains no limitation on the scope of consent, (ii) it does not limit consent solely to pre-existing disputes, (iii) consent can be perfected by accepting the State's standing offer to arbitrate at any time, even before a dispute has arisen, (iv) Smurfit consented "in general terms," (v) Venezuela's consent was expressly "unconditional," (vi) Smurfit's Letter consents to arbitrate disputes under the Treaty at ICSID, (vii) there is no requirement either under the Treaty or the ICSID Convention to allege specific treaty breaches, and (viii) silence by Venezuela recognized that there was nothing unusual about the right of Smurfit to consent in advance.[266]

270. In its Rejoinder, the Claimant argued that "Article 72 […] qualifies the requirement under Article 25 that the parties to the dispute be a Contracting State and a national of another Contracting State, by maintaining in effect a State's consent given prior to the notice of denunciation."[267] Furthermore, it indicated that "Article 72 provides that a State's denunciation of the ICSID Convention has no effect on the rights and obligations of the State or of the national of the State regarding the 'consent […] given by one of them' (rather than, for example, mutual consent or consent provided by both parties to the dispute). The text is clear that the consent referred to here is unilateral consent."[268]

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[264] Claimant's Observations to Bifurcation, ¶ 18; Claimant's Reply, ¶ 491.
[265] Claimant's Observations to Bifurcation, ¶ 24; Claimant's Reply, ¶ 497.
[266] Claimant's Observations to Bifurcation, ¶¶ 19-29; Claimant's Reply, ¶¶ 492-503. *See also* Claimant's reply to Respondent's arguments on the 2011 letter (timing, particular dispute, representation powers) in Claimant's Rejoinder, ¶¶ 19-45; Claimant's Post-Hearing Brief ("**Claimant's PHB**"), 23 December 2022, ¶¶ 154-156.
[267] Claimant's Rejoinder, ¶ 9.
[268] Claimant's Rejoinder, ¶ 11.

271. In this regard, it is Claimant's position that the consent in Article 9 of the Treaty given by Venezuela "is in force for investments that existed on the date at which the Treaty's termination took effect (1 November 2008) for a period of 15 years."[269] The Claimant indicated as well that "even if Article 72 of the ICSID Convention was deemed to refer to perfected consent, Smurfit's 2011 Letter satisfies that consent." In its view, Article 9 does not limit the form of the investor's consent and does not specify what form that consent must take, let alone require that consent and initiation of proceedings take place at the same time. Thus, "an investor can consent to ICSID arbitration under the Treaty at any time, and in any form, so long as it is 'in writing' (the only requirement for consent in the ICSID Convention)."[270]

272. The Claimant also raised the argument that "post-denunciation survival of the State's consent to ICSID arbitration follows from the function of Article 72" and "even under Venezuela's implausible argument that Smurfit could only consent to ICSID arbitration by instituting proceedings […] under Article 72 of the ICSID Convention and Article 9 of the Treaty, Smurfit was able to consent to ICSID arbitration by instituting proceedings in 2018."[271] In its Post-Hearing Brief, the Claimant indicated that this argument was subsidiary in the event "the Tribunal were to find that Smurfit's 2011 Letter did not perfect consent to ICSID arbitration."[272] In its Reply Post-Hearing Brief, the Claimant maintained that its interpretation "is the only one which preserves both Venezuela's right to denounce the ICSID Convention as well as the rights and obligations arising under the Treaty […]. [I]f upheld, Respondent's interpretation of Article 72 of the Convention would achieve exactly the opposite: it would allow Venezuela to effectively terminate Venezuela's offer of consent in the Treaty, a different instrument, rendering the Treaty's sunset provision ineffective."[273]

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[269] Claimant's Rejoinder, ¶ 12.
[270] Claimant's Rejoinder, ¶¶ 17-24. The Claimant also contends that neither the Treaty nor the ICSID Convention limit the timing of the investor's consent. *See* ¶¶ 28-40.
[271] Claimant's Rejoinder, ¶ 16.
[272] Claimant's PHB, ¶ 156. *See also* Claimant's Second Post-Hearing Brief ("**Claimant's Reply PHB**"), 10 February 2023, ¶¶ 86 and 87.
[273] *See also* Claimant's Reply PHB, ¶ 87. (Emphasis omitted)

C. The Tribunal's Analysis

273. Before the Tribunal begins its analysis, we recall certain facts that are central to the current dispute and that relate to the two international instruments that must be interpreted. The Treaty was signed on 22 October 1991 and entered into force on 1 November 1993.[274] On 21 April 2008, pursuant to Article 14(2), Venezuela notified its decision to terminate the Treaty,[275] which became effective on 1 November 2008. In accordance with its sunset clause (Article 14(3)), the BIT was still "effective for a further period of fifteen years," *i.e.*, until November 2023, with respect to "investments made before the date of the termination of the present Agreement."

274. Additionally, Venezuela became a member of the ICSID Convention on 1 June 1995, following its signature of the Convention on 18 August 1993 and the deposit of its instrument of ratification on 2 May 1995. On 24 January 2012, Venezuela denounced the ICSID Convention;[276] such denunciation became effective on 25 July 2012. In terms of the timeline, Venezuela terminated first the BIT and, four years later, denounced the ICSID Convention.

i. Consent to Arbitration under the ICSID Convention and the BIT

275. The Tribunal agrees that "the jurisdiction of an ICSID tribunal should be tested both against the BIT and the ICSID Convention."[277] The Tribunal also concurs that "the

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[274] Treaty, **C-001**.

[275] *See* Notice of Termination of the Bolivarian Republic of Venezuela regarding the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, 21 April 2008, **C-061**. Art. 14(2). "Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly for periods of ten years, each Contracting Party reserving the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity." Treaty, **C-001**.

[276] "Bolivarian Government Denounces ICSID Convention," Ministry of Foreign Affairs press release, 25 January 2012, **C-102**.

[277] Respondent's Second Post-Hearing Brief ("**Respondent's Reply PHB**"), 10 February 2023, ¶ 11. With regard to consent, the Tribunal observes that both parties have relied on the terms of the BIT, as well as the ICSID Convention. *See*, *e.g.*: "The parties agree that besides considering Article 25(1) of the ICSID Convention, the BIT – or any other instrument – where the offer to consent by the State should be taken into account. [*Sic*] The reason for this is simple, for an alleged acceptance to an offer to be such, it needs to be given within the terms of the offer, which in this case as both Parties is contained in Article 9 of the BIT." Respondent's PHB, ¶ 26. "[N]either the Treaty nor the ICSID Convention require the investor to allege specific treaty breaches when consenting to submit future disputes to ICSID arbitration". Claimant's Reply, ¶ 502. With regard to its "standing" to bring claims: "Smurfit's "standing" to bring its claims is derived solely from the BIT and the ICSID Convention." Claimant's Reply, ¶ 546.

conditions for resorting to ICSID arbitration are set out in two separate and wholly independent international legal instruments and both must be satisfied for the Tribunal to have jurisdiction in this case."[278] Nonetheless, the fact that two instruments are independent does not mean that there is no connection between them or that they should be treated in isolation from each other. There is no hard and fast rule to determine whether consent exists in this case and the Tribunal is cognizant of the complexities involving this inquiry. Determining whether Venezuela has consented to submit a dispute to arbitration should be a function of a holistic interpretative exercise, in accordance with the general rule of interpretation of the Vienna Convention,[279] of all relevant provisions of both instruments, namely those provisions related to jurisdiction, consent, denunciation/termination and sunset. Based on this, the Tribunal will address each of those provisions, beginning with Article 25 of the ICSID Convention, which provides as follows:

Article 25. ICSID Convention.

> "(1) The jurisdiction of the Centre shall extend to *any legal dispute* arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the *parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.*" (Emphasis added)

276. This provision sets out ICSID jurisdiction as provided in the ICSID Convention based on the *consent* of the *parties to the dispute*. The Tribunal observes, first, that the provision is drafted using mandatory language, jurisdiction "shall" extend, and it lays out the limits of that jurisdiction as to the subject matter and the parties involved, *i.e.*, to any *legal* dispute arising out of an *investment*, between a Contracting State (or constituent

[278] *Fábrica de Vidrios Los Andes, C.A. & Owens-Illinois de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/21, Award, 13 November 2017 ("***Fábrica de Vidrios v. Venezuela***"), **RL-021**, ¶ 262.
[279] Both Parties agree as to the applicability of the VCLT. "Relevant principles of public international law inform and complement the content of the Treaty, including the customary international rules on treaty interpretation as codified in the Vienna Convention on the Law of Treaties (*Vienna Convention*)." Claimant's Memorial, ¶ 179. "Pursuant to Article 31 of the Vienna Convention on the Law of Treaties (VCLT), treaty terms such as those of the Treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose." Request for Bifurcation, ¶ 47.

subdivision or agency) and a national of another Contracting State (investor). Then, Article 25 goes on to say, in respect of such a legal dispute, "which the *parties* to the dispute *consent in writing to submit* to the Centre." For the Tribunal, this provision inevitably leads to the BIT, and more particularly to Article 9, which defines the disputes that both Venezuela and the Netherlands agreed could be submitted to ICSID by its nationals (as parties to a dispute with one of those Contracting States). Disputes submitted to the ICSID do not exist in isolation, but rather are rooted in substantive legal instruments that also define and limit their reach, in this case, the BIT.[280]

277. Article 25(1) contains two sentences. Both use the word "consent." The ordinary meaning of this word is "compliance in or approval of what is done or proposed by another: acquiescence," "agreement as to action or opinion."[281] It is important to note that the text of the provision does not qualify the *type* of consent but rather refers to an action where both parties to a dispute "*consent*" or "*have given **their** consent*." There is no further indication as to when or how this consent must be given other than that it must be "in writing."[282] This wording preserves a margin of discretion for the parties. The Report of the Executive Directors on the ICSID Convention confirms this discretion when stating:

> "24. Consent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but *the Convention does not otherwise specify the time at which consent should be given*. Consent may be given, for example, in a clause included in an investment agreement, providing for the submission to the Centre

[280] While one Member of the Tribunal considers that a holistic approach is not in accordance with the VCLT, the Majority respectfully disagrees. As indicated above, the dispute not only involves the ICSID Convention, but also a Bilateral Treaty. The former is an instrument that enables the Centre to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The latter is the legal instrument from which substantive investment protections are sourced, among them, dispute settlement. Recourse to ICSID to vindicate those protections is not detached from the BIT. In other words, it is the BIT that gives rise to recourse under ICSID. Thus, although both instruments are to be interpreted in accordance with the Vienna Convention, this does not mean that they have no connection. This relationship was expressly established in the BIT by the Parties and it is an element that cannot be ignored or denied. In this regard, the Majority does not consider that a new integrated instrument is being created; rather the interpretation is to be grounded in what both instruments establish.

[281] "Consent" in *Merriam-Webster.com* (2023). Retrieved, 27 June 2023 https://www.merriam-webster.com/dictionary/consent. As a verb, it means: "to give assent or approval: agree"; "[…] concord in opinion or sentiment." In the Tribunal's view, the connotation is similar.

[282] "The Convention's only formal requirement for consent is that it must be in writing." C. Schreuer *et al*, *The ICSID Convention: A Commentary*, 2nd ed. (2009) (excerpts), **CL-056 bis**, p. 191, ¶¶ 379-381.

> of future disputes arising out of that agreement, or in a *compromis* regarding a dispute which has already arisen. *Nor does the Convention require that the consent of both parties be expressed in a single instrument*. Thus, a host State might in its investment promotion legislation offer to submit disputes arising out of certain classes of investments to the jurisdiction of the Centre, and the investor might give his consent by accepting the offer in writing." (Emphasis added)

278. The second sentence of Article 25(1) additionally provides that, once given by the parties, consent may not be *unilaterally* revoked. Whilst the first sentence mentions the word consent in the context of what the parties agree to submit, the second sentence provides that when the "parties have given their consent," "no party may withdraw ***its*** consent unilaterally." This wording indicates that the consent of each party needs to be read individually. However, when **each** party has consented, there is an unequivocal effect. Consent cannot be withdrawn by one of them. Moreover, Article 26 of the ICSID Convention defines "[c]onsent of the parties to arbitration under this Convention," which, "unless otherwise stated, [shall] be deemed consent to such arbitration to the exclusion of any other remedy." Article 9 of the BIT, in turn, provides as follows:

Article 9 of the BIT

> "1. Disputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter, *shall at the request* of the national concerned *be submitted* to the *International Centre for the Settlement of Investment Disputes, for settlement by arbitration* or conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of other States opened for signature at Washington on 18 March 1965.
>
> […]
>
> 4. Each Contracting Party hereby gives its *unconditional consent* to the *submission of disputes* as referred to in Paragraph 1 of this Article to international arbitration in accordance with the provisions of this Article." (Emphasis added)

279. Within the BIT, Article 9 is the provision that sets in motion dispute settlement for the Parties. *First,* the Tribunal notes the language contained in paragraph 1, which clearly provides that disputes "shall … be submitted" to ICSID. This language embodies an obligation and the Tribunal also observes that, unlike many other legal instruments,

Article 9 of the BIT does not provide a choice as to the forum for dispute settlement. ICSID is the *exclusive* forum agreed. This provision also addresses which disputes will be submitted, *i.e.*, "between one Contracting Party" and "a national of the other Contracting Party," concerning an "obligation" of the former in relation to "an investment" of the latter.

280. *Second,* the Tribunal observes that paragraph 4 of Article 9 is undoubtedly directed at both Contracting Parties, "**[e]ach** Contracting Party hereby gives **its unconditional** consent." The term "unconditional" means "not conditional or limited: absolute, unqualified"; "unconditioned."[283] This language is straightforward and unequivocal. The consent given by both Contracting States in this BIT is not subject to any condition or limitation. There is no other paragraph in Article 9 or in any other provision of the Treaty that modifies, qualifies or limits paragraph 4.[284] The Tribunal concurs with the *Favianca v. Venezuela* tribunal in this regard.[285]

281. Regarding the language "unconditional consent" in this provision, the Respondent alleges that it "does not refer to the characteristics of the offer to consent that is contained in Article 9(1) of the BIT, as the reference in Article 9(4) makes clear, but to the conditions upon which consent may be provided by a State either in an investment treaty or in a domestic piece of legislation."[286] Moreover, the Respondent contends that "Article 9 of the Treaty contained the Respondent's offer of arbitration to the nationals of the Netherlands concerning its rights and obligations under the Treaty in relation to an investment of the latter in the territory of the former. This unilateral consent (or offer

[283] "Unconditional" in *Merriam-Webster.com* (2023). Retrieved, 27 June 2023 https://www.merriam-webster.com/dictionary/unconditional. In turn, "unconditioned" means "not subject to conditions or limitations." "Unconditioned" in *Merriam-Webster.com* (2023). Retrieved, 3 July 2023 https://www.merriam-webster.com/dictionary/unconditioned.

[284] The Tribunal notes that the text in Spanish of this provision conveys the same meaning: "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." (Emphasis added). Published in the Gaceta Oficial No. 35,269 on 6 August 1993. Retrieved, 6 July 2023 https://www.tradex.com.ve/wp-content/uploads/2019/07/TBI-Venezuela-Reino-de-los-Pa%C3%ADses-Bajos-1993.pdf

[285] "It is manifest from the express terms of Article 9 that the Respondent's consent to ICSID arbitration is "unconditional" and there is no ambiguity attaching to that consent." *Fábrica de Vidrios v. Venezuela*, **RL-021**, ¶ 257.

[286] Respondent's PHB, ¶ 28; Respondent's Reply PHB, ¶ 12.

to arbitrate) is not perfected until an investor gives its unilateral consent to submit a dispute to ICSID arbitration."[287]

282. However, the Respondent has failed to explain how this provision could be referring to the "conditions upon which consent may be provided by a State either in an investment treaty or in a domestic piece of legislation" when, from a plain reading of the text, it is clear that (i) this is not stated by the text, and (ii) the unconditional consent the provision is referring to is "the submission of disputes as referred to in paragraph 1 … to international arbitration …," *i.e.*, to the submission [to the ICSID, for settlement by arbitration] of disputes "between one Contracting Party" [in this case, Venezuela] and "a national of the other Contracting Party" [in this case, the Claimant] concerning an obligation of [Venezuela] under this Agreement in relation to an investment of [the Claimant]. No further condition is established for the submission of disputes in paragraph 1. From the plain reading of this provision, the consent given by Venezuela to adjudicate disputes under ICSID is one without *any* conditions or limits, except for the ones referred to in paragraph 1. This consent, on its own terms is irrevocable, except by the procedure set forth in Article 14 of the BIT and subject to the Treaty's sunset clause.[288]

283. Moreover, while the Respondent has referred to "perfected consent," the Tribunal notes that such term is not used in the BIT or in the ICSID Convention. In addition, under the BIT, there is no additional specific requirement or formality "to consent to arbitration" as in other international instruments. The BIT only refers to the submission of the dispute "at the request of the national." Such submission could be considered as an acceptance of the offer made by the State in paragraph 4 of Article 9, and of course, to the arbitration of the dispute. On the other hand and as noted above, under Article 25(1) of the ICSID Convention, the requirement is to consent "in writing," at the most, when the Centre is "seized."[289] Therefore, in the absence of an express limitation in Article 25 or otherwise,

[287] Request for Bifurcation, ¶ 71.
[288] Claimant's PHB, ¶¶ 167 and 168. On Art. 25 of the ICSID Convention, *see*: "A mere offer of consent to ICSID's jurisdiction may be withdrawn at any time unless, of course, it is *irrevocable by its own terms*." (Emphasis added). C. Schreuer *et al*, *The ICSID Convention: A Commentary*, 2nd ed. (2009) (extract), **CL-210**, p. 254, ¶ 599.
[289] *See* Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, **RL-020**, ¶ 24.

the Claimant could have validly consented either before a specific dispute arose or at the time it submitted its Request for Arbitration.[290] On the side of the State, Venezuela gave its unconditional consent to the submission of disputes as described in paragraph 1 of Article 9 through the Treaty.

284. In sum, the foregoing provisions do not require consent to be perfected and do not establish any particular condition to express consent other than in writing (through Article 25 of the ICSID Convention). At the same time, the BIT defines a specific sphere to which Venezuela consented without limitation.

ii. Whether Article 72 of the ICSID Convention Requires "Perfected Consent"

285. The Tribunal turns now to the provisions related to denunciation/termination and sunset.

Article 71. ICSID Convention.

> "Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. *The denunciation shall take effect six months after receipt of such notice*." (Emphasis added)

286. Under Article 71, any Party to the ICSID Convention has the right to withdraw from it. Such denunciation will be effective six months after notification. The Tribunal agrees with the Respondent that:

> "Article 71 of the ICSID Convention enshrines the right of any Contracting State to denounce the Convention by written notice to the depositary of the Convention. According to this provision, 'the denunciation shall take effect six months after receipt of such notice'. Therefore, the possibility of denouncing the ICSID Convention is provided for in the text of the Convention itself. No State could be forced to continue being a party to the Convention against its will, since the Convention provides a specific denunciation mechanism, and the State has implemented such mechanism."[291]

[290] Art. 36 of the ICSID Convention addresses the request in writing to institute proceedings and the requirement that it contains the identity of the parties and their consent.
[291] Respondent's Counter-Memorial, ¶ 181; Respondent's Rejoinder, ¶ 270.

287. Venezuela exercised this right in 2012.[292] Notwithstanding the right to denounce under Article 71, denunciation under this provision is qualified by Article 72 which establishes:

> Article 72. ICSID Convention.
>
> "*Notice* by a Contracting State pursuant to Articles 70 or *71 shall not affect* the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State *arising out of consent to* the *jurisdiction* of the Centre given *by one of them* before such notice was received by the depositary." (Emphasis added)

288. Both Parties seem to agree that this clause is directed at a variety of potential parties on the side of the denouncing State.[293] Also, both Parties appear to agree that "the objective of Article 72 is to protect 'rights or obligations' under the Convention arising out of consent to arbitration from the consequences of the denunciation of the Convention."[294] Thus, it is clear that "the intention of [Article 73, currently Article 72] […] was to make it clear that if a State had consented to arbitration, for instance by entering into an arbitration clause with an investor, the subsequent denunciation of the Convention by that State would not relieve it from its obligation to go to arbitration if a dispute arose."[295]

289. A threshold question is whether the consent to which Article 72 refers needs to be "perfected" or not for a notice under Article 71 to not "affect" rights or obligations of the subjects mentioned therein. In the Respondent's view:

> "Article 72 only preserves after the denunciation of the ICSID Convention by a State, rights and obligations arising from perfected consent. This is so, as if consent has not been perfected before denunciation in a surviving BIT provision in which ICSID has been envisaged as possible forum for arbitration, is no longer an offer to be accepted and simply constitutes a statement of a forum, which is no longer available for putative claimants."[296]

290. According to the Respondent, if consent is not "perfected" before denunciation, then Article 72 is not triggered. The term "consent to jurisdiction" is not defined in the ICSID

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[292] "Bolivarian Government Denounces ICSID Convention," Ministry of Foreign Affairs press release, 25 January 2012, **C-102**.
[293] Claimant's PHB, ¶ 166; Respondent's PHB, ¶ 39.
[294] Respondent's Reply PHB, ¶ 18; Claimant's Rejoinder, ¶ 9.
[295] ICSID, History of the ICSID Convention, Vol. II-2 (extract) (1968), **CL-192**, p. 1009.
[296] Respondent's PHB, ¶ 36.

Convention, yet the term "perfected consent" was coined in Professor Schreuer's commentary on the ICSID Convention as follows: "[c]onsent to jurisdiction is perfected only after its acceptance by both parties."[297] The Tribunal has the upmost respect for the views of Professor Schreuer. It shares the view that he is "an eminent authority on the ICSID Convention"[298] and in very many respects agrees with his analyses of the ICSID Convention. However, in respect of reading into Article 72 a requirement of "perfected" consent as a precondition to maintaining a previously given unconditional consent to arbitration before ICSID in a BIT, following a denunciation by a State of the Convention, we respectfully disagree with him and anchor our interpretation, as we must, in the text of the ICSID and BIT provisions at issue, the relevant context, and the object and purpose of these instruments, all in accordance with the Vienna Convention.[299] A comprehensive examination of these elements, demonstrates that Article 72 does not refer to or otherwise require "perfected" consent and that Venezuela's denunciation of the Convention does "not affect the ... obligations" it assumed through its unconditional consent to ICSID jurisdiction in Article 9 of the BIT.

291. The first step in the analysis is the text of Article 72. At the outset, the provision prescribes that a notice to denounce the Convention under Article 71 (*i.e.*, the preceding Article), will not affect "rights or obligations under" the Convention of specific subjects: the denouncing State (its constituent subdivisions or agencies) or a national of that State. The provision uses mandatory language -"shall not"- and leaves no doubt that such continuing rights or obligations are those that "arise" out of consent to the jurisdiction of the Centre.[300]

[297] C. Schreuer *et al*, *The ICSID Convention: A Commentary*, 2nd ed. (2009) (extract), **CL-210**, ICSID Convention commentary, p. 1280, ¶ 6.
[298] Claimant's Observations on Bifurcation, ¶ 23; Claimant's Reply, ¶ 496.
[299] The Tribunal notes that the Commentary is not an agreed text by the signatories nor it has been agreed by ICSID Members to assign to its content a specific interpretative weight. The Respondent has also not put forward its view as to how should its content be taken into account in an interpretative exercise carried out in accordance with Arts. 31 or 32 of the Vienna Convention.
[300] "To begin to occur or to exist: to come into being or to attention", "to originate from a source." "Arise" in *Merriam-Webster.com* (2023). Retrieved, 27 June 2023 https://www.merriam-webster.com/dictionary/arising

292. As indicated above, the Tribunal understands the ordinary meaning of "consent" as "compliance in or approval."[301] Although the Convention does not define the word "consent," Article 26 provides a definition that the Tribunal believes connotes a meaning similar to the phrase "consent to jurisdiction," which is "[c]onsent of the parties to arbitration." The Tribunal observes that this definition is specific to "the parties" and it does not purport to merely define "consent."

Article 26. ICSID Convention.

> "Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed *consent to such arbitration* to the *exclusion* of any other remedy […]."[302] (Emphasis added)

293. Looking at Article 72 as a whole, the formula "arising out of consent to the jurisdiction of the Centre given *by one of them*," means that the undertaking to submit to arbitration under the ICSID to the *exclusion* of any other remedy, refers to the consent given by only *one* of the subjects contemplated in the provision, in this case, the State of Venezuela, before notice to denounce the Convention is received.[303]

294. As already indicated, the phrase "perfected consent" is not used in any part of the Convention. It is also not used either in the BIT or in the ICSID Arbitration Rules. Within the Convention itself, the Tribunal observes that there are several provisions that specifically address consent by both parties, for example, the Preamble, ("[r]ecognizing that mutual consent by the parties to submit such disputes"), Article 25 ("which the

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[301] "Consent" in *Merriam-Webster.com* (2023). Retrieved, 27 June 2023 https://www.merriam-webster.com/dictionary/consent

[302] *See also*: "[i]t may be *presumed* that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the *intention* of the parties is to have recourse to arbitration to the *exclusion* of any other remedy. This rule of interpretation is embodied in the first sentence of Article 26." Report of the Executive Directors on the Convention on Settlement of Investment Disputes between States and Nationals of Other States, **RL-020**, ¶ 32. (Emphasis added)

[303] While not endorsing it, this view has been discussed by Prof. Schreuer: "A possible alternative interpretation may be based on a literal reading of Art. 72 in the light of Art. 25(1). Art. 72 refers to 'consent ... given by one of them'. By contrast Art. 25(1) refers to consent by 'the parties to the dispute' and to 'the parties [having] given their consent'. It is clear that Art. 25(1) requires consent by both parties to the dispute to establish jurisdiction. But it may be argued that the phrase 'given by one of them' indicates that Article 72 covers a unilateral expression of consent by the host State before its acceptance by the investor. This would mean that the mere expression of consent by the host State remains unaffected by a notice under Art. 70 or 71." C. Schreuer *et al*, *The ICSID Convention: A Commentary*, 2nd ed. (2009) (extract), **CL-210**, p. 1281, ¶ 8.

parties ... consent"/ "their consent"), Article 26 ("[c]onsent of the parties"), Article 27(1) (excluding diplomatic protection in respect of a dispute "which one of its nationals and another Contracting State … have consented … to arbitration"), Article 36(2) (requiring that a request for arbitration must contain information concerning "their [*i.e.*, the parties'] consent"), Article 44 (applying the Arbitration Rules in effect on the "date on which the parties consented to arbitration"), Article 46 ("the Tribunal shall … determine any incidental or additional claims… provided that they are within the scope of the consent of the parties") and Article 48(5) ("The Centre shall not publish the award without the consent of the parties"). Thus, when trying to address consent by more than one party, the relevant provisions of the Convention employ various wordings that make clear that the consent which is the subject of those provisions is the consent of both parties.

295. By contrast, Article 72 does not refer to rights or obligations arising out of "consent of the parties" as it does in other provisions. It does not refer either to rights or obligations derived from consent "given by one of them" and "a national of another contracting State" to indicate any "matching consent." By its plain terms, denunciation of the ICSID Convention cannot "affect the . . . obligations" of the State "arising out of consent to the jurisdiction […] given by" the State. While an argument could, perhaps, be made that, where Article 72 addresses denunciation by a Contracting State, there is no need to refer to the investor, the language specifically addresses consent to jurisdiction given "by one of them." If the drafters had intended to require "perfected" consent, the provision would have used language to bring about that result. This is particularly so because the Convention has distinguished in other places where consent is given by more than one subject. The Tribunal concludes that the failure to use comparable language or to state in sum and substance that consent needed to be "perfected" is not inadvertent but rather is the result of a deliberate choice by the drafters.

296. The Preamble of the Convention is instructive to understand the function of Article 72.[304] It states as follows:

[304] Cf. *Fábrica de Vidrios v. Venezuela*, **RL-021**, ¶¶ 283-285.

> "**Bearing in mind** the possibility that from time to time *disputes may arise in connection* with such *investment* between Contracting States and nationals of other Contracting States;
>
> **Recognizing** that while such disputes would usually be subject to national legal processes, *international methods of settlement may be appropriate* in certain cases;
>
> **Attaching *particular importance*** to the *availability of facilities* for *international* conciliation or *arbitration* to which Contracting States and nationals of other Contracting States *may submit such disputes if they so desire;*
>
> ***Desiring*** to *establish such facilities* under the auspices of the International Bank for Reconstruction and Development […]." (Emphasis added)

297. If disputes arise in connection with investments (substantively regulated by another legal instrument such as the BIT), the object of establishing facilities, including a legal framework that provides predictability in the rights and obligations of each party to dispute settlement and the specific services that these procedures entail, would be undermined if an "unconditional consent to the submission of disputes" to ICSID, as the one provided under Article 9 of the BIT, were given only to later be recanted unilaterally by one of the parties.

298. The Tribunal considers that, from the ordinary meaning of its terms and its context, Article 72 provides that the rights and obligations of a State, its subdivisions, its agencies, or its nationals shall not be affected by the denunciation of the Convention when the consent was given by *one of them* (by the State or its agencies, subdivisions, or nationals) prior to denunciation. In this regard, the Tribunal agrees that "Article 72 of the ICSID Convention constitutes a special application of the principle of irrevocability, expressed in more general terms in the last sentence of Article 25(1). When the parties have given their consent, no party may withdraw its consent unilaterally. This includes an attempted withdrawal of consent by way of denunciation of the Convention."[305] In the Tribunal's

[305] C. Schreuer, "Denunciation of the ICSID Convention and Consent to Arbitration," in M. Waibel *et al*, *The Backlash against Investment Arbitration: Perceptions and Reality* (2010), **CL-212,** p. 363. While one Member of the Tribunal considers Institution Rule 2 defining "Date of Consent" as instructive for purposes of this analysis (a view shared by Prof. Schreuer), the Majority disagrees. In particular, the Majority observes that such definition recognizes that consent may be provided at different times, while ascribing a particular meaning when the parties acted at different dates for purposes of the request for arbitration. The Majority recalls that for the Centre to be properly seized, consent by both

view, while Article 25 highlights a fundamental principle of non-revocation when "each" party has given its consent, Article 72 protects the other "side of the coin," where a Contracting State wants to opt-out of the Convention despite having given its prior unconditional consent in a BIT (or otherwise).

299. The Respondent has made the argument that, "pursuant to Article 71 of the Convention, the Bolivarian Republic of Venezuela is not a party to the ICSID Convention and did not have that status at the time these proceedings were instituted by the Claimant."[306] However, although Article 25 clearly regulates jurisdiction towards Contracting States, Article 72 addresses those circumstances where a State is, or will soon be, no longer a Contracting State, but is nevertheless bound by its unconditional consent given before the decision to denounce the Convention.

300. As mentioned above, the Convention imposes no restriction on the moment when the investor must express its consent, other than the fact that it must exist when requesting arbitration. It is thus entitled to express its consent at any time up to that moment. If Article 72 were interpreted as the Respondent contends, the right guaranteed by the BIT that investors may provide their consent at any time up to the moment of submission of the request for arbitration would be fundamentally impaired. An interpretation that would make an investor "speculate" as to the moment when a Contracting State would denounce the ICSID Convention or a scenario in which, even aware of such imminent denunciation, an investor would have to rush into initiating a dispute in order to "perfect" consent and not "miss" jurisdiction, would also defy logic. Such situation would *de facto* mean that investors would, in cases where the denouncing country has signed various investment treaties, need to present their consent in each relevant jurisdiction in order to maintain their right to a forum, particularly in this case where the agreement does not provide for any alternative dispute settlement forum. In the Tribunal's view, an interpretation which disregards the fact that consent of the national of the other

parties must exist. However, this provision does not go further to stipulate "perfected consent" and more importantly, Article 72 does not refer to the date of consent for purposes of the effect of denunciation; rather it specifically refers to "consent […] given *by one of them*" [Contracting State] at a determined moment, *i.e.* before the notice of denunciation is received. (Emphasis added)

[306] Respondent's Counter-Memorial, ¶ 183.

Contracting State was not considered for terms of Article 72 would in fact "expose investors to the danger of a withdrawal of access to ICSID after making their investments in reliance on the Host State's offer of consent."[307]

301. Importantly, denouncing the ICSID Convention could potentially turn into a mechanism to avoid or circumvent substantive obligations under investment protection treaties. Such an interpretation that would effectively undermine a binding and unconditional commitment to adjudicate before ICSID would itself lead to "a manifestly absurd or unreasonable" result.

302. The negotiating history of Article 72 confirms our conclusion. The history indicates that it was designed not only to address ongoing disputes but also to establish a principle that "*agreements to arbitration cannot be broken by one of the parties*" and further that "the denouncing State could not incur any new obligations *but the existing obligations would remain in force*."[308] In particular, the Tribunal considers the following excerpts to be instructive:

> "57. Mr. Mejia-Palacio asked what would happen if a State which was a party to the Convention signed an agreement with a company and later withdrew from the Centre while no disputes were pending. If, say ten years later a dispute arose – would that dispute still be under the jurisdiction of the Centre?
>
> 58. Mr. Broches replied that *if the agreement with the company included an arbitration clause and that agreement lasted for say 20 years, that State would still be bound* to submit its disputes with that company under that agreement to the Centre.
>
> 59. Mr. Mejia-Palacio stated that in certain cases agreement had no definite duration but provided that they could be terminated by denunciation.
>
> 60. Mr. Broches remarked that *in the case of an arbitration clause which could be terminated by one of the parties*, the jurisdiction of the Centre would come to an end on *termination of the clause.*
>
> 61. Mr. Gutierrez Cano said that Article 73 in the new text was lacking a time limit beyond which the Convention would cease to apply. Unless such time limit was

[307] C. Schreuer *et al*, *The ICSID Convention: A Commentary*, 2nd ed. (2009) (excerpts), **CL-056 bis**, p. 1281, ¶ 7.
[308] ICSID, History of the ICSID Convention, Vol. II-2 (extract) (1968), **CL-192**, p. 1011. (Emphasis added)

introduced States would be bound indefinitely. He had in mind the case in which *there was no agreement between the State and the foreign investor but only a general declaration on the part of the State in favor of submission of claims to the Centre and a subsequent withdrawal from the Convention by that State before any claim had been in fact submitted to the Centre.* Would the Convention still compel the State to accept the jurisdiction of the Centre?

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

[…]

66. Mr. Woods thought it important to clarify all the implications of Article 73 before proceeding further. For his part he thought Article 73 expressed a *basic principle, i.e. that if an agreement was in force at the time the State party to that agreement denounced the Convention, obligations under that contract to have recourse to arbitration would continue after denunciation*.

67. Mr. Machado stated that the fact that sovereign States would be parties to the Convention would create additional difficulties. As long as the State was a party to the Convention it had to fulfil in good faith all its obligations under the Convention and, if a proceeding had been started, subsequent denunciation of the Convention by that State should have no retroactive effect. To say, however, that the Centre would *continue to have jurisdiction over disputes which arose after the State had ceased to be a member of the Centre would in fact compel the State to remain forever in an organization to which it did not want to belong.* He therefore suggested that the provision be amended to say that denunciation shall not affect obligations arising out of proceedings or conciliation or arbitration which had started before the Centre and before notice of denunciation had been received.

68. Mr. Woods pointed out that this proposal would *frustrate the main purpose of the Convention*.

69. Mr. Mejia-Palacio agreed *that if a State had undertaken to go before the Centre it could not unilaterally decide that its undertaking had come to an end, but both in international law and domestic law every obligation comes to an end either because it is fulfilled or because the parties have agreed to terminate it or by prescription.* Therefore, he had suggested that some ways be found for setting a time limit, as wide as

> necessary, after which an undertaking to submit to the jurisdiction of the Centre could come to an end.
>
> 70. Mr. Broches pointed out that the provision in discussion had not been questioned at any of the regional meetings or in the Legal Committee. It was a basic essential provision. *The Convention establishes the principle that agreements to arbitration cannot be broken by one of the parties.* The provision under discussion only drew the necessary consequences in case of denunciation of the Convention: *the denouncing State could not incur any new obligations but the existing obligations would remain in force.*"[309]

303. These excerpts raise four issues that we consider in turn. *First*, the Tribunal notes that the ICSID Convention was open for signature on 18 March 1965, in a context that is different from the current one.[310] The proliferation of investment protection treaties as a vehicle to provide security and predictability both for investors and for Host-States and the frequent recourse to ascertain those rights has developed largely since that time. The broad and capacious terms of Article 25 defy any intent to freeze in time the investment contract scenario that largely prevailed in 1965 and to foreclose the protection of investment scenarios that might develop thereafter from the typical scenario in play almost 60 years ago. Indeed, the history of investment arbitration since that time makes clear that the broad terms of the Convention readily accommodate the new vehicles of

[309] ICSID, History of the ICSID Convention, Vol. II-2 (extract) (1968), **CL-192**, pp. 1009-1011. (Emphasis added)

[310] "At the time the ICSID Convention was drafted in the beginning of the sixties, no BIT with an investor-State mechanism was in existence. There existed a Germany – Pakistan BIT which had been concluded as early as in 1959, but that treaty did not include an ISDS mechanism. Instead, consent to arbitration by States in relation to foreign investors was predominantly provided in the form of an arbitration clause entered into by the State itself, such as in a natural resource concession or a foreign investment agreement. At the time of the drafting of the Convention, it was also recognized that States could give consent to arbitrate future disputes by offering to submit to arbitration in a foreign investment law or by a treaty. However, up to 1968, *i.e.* after the Convention had entered into effect, BITs provided only for State-to-State dispute resolution through the establishment of "mixed" commissions or by submission of a dispute to the ICJ. […] Although a few more BITs were entered into in the beginning of the seventies, it would take a long time before the ISDS mechanism of such instruments was put into actual operation; the effectiveness of a unilateral arbitration offer contained in a treaty was first upheld in 1985 in *SPP v. Egypt*. According to Newcombe and Paradell, in the period 1970-1974, no more than 39 BITs were concluded; between 1975 and 1979, 60 BITs were concluded. The 1990's witnessed a proliferation in the number of BITs. At the end of the decade, there were almost 2,000 BITs concluded. The above overview demonstrates that the investor-State arbitration option that represents the absolutely predominant basis for investor-State arbitration in the last few decades did not exist at all at the time when the ICSID Convention was opened for ratification. This circumstance gives reason to assume that the provisions of the Convention were drafted without regard to the existence of "arbitration without privity" grounded in investment protection treaties. As a consequence, the provisions of the Convention will nowadays have to be regularly applied in a contextual framework that did not exist at the time of the Convention's creation." *Blue Bank v. Venezuela*, Award, 26 April 2017, **RL-008**, Separate Opinion of Christer Söderlund, ¶¶ 20-24.

investment protection, notably the proliferation of BITs, that have developed over the last several decades.

304. *Second*, and relatedly, while negotiators clearly contemplated "agreements" that included arbitration clauses on the one hand and "general declarations" on the part of the State on the other hand, the fact is that investment protection treaties are not necessarily limited to two categories. Investment treaties *are* binding commitments between Contracting Parties to the benefit of their respective investors.[311] Yet, the concern shown even at that time for an agreement (as visualized then) in force for several years and the sudden unilateral decision to terminate it is still relevant.

305. *Third*, as mentioned before, the ICSID Convention does not exist in isolation from the substantive agreement that allows an investment dispute to be arbitrated under its rules. By unconditionally submitting its disputes to ICSID, the BIT "built a bridge" between

[311] "Normally, doctrinal writings will assume that an analogy with the "offer-acceptance" principle found in municipal law offers a workable model for explaining how the investor's entitlement to submit disputes to international arbitration is fashioned in a BIT context. […] However, this explanation model, on closer scrutiny, represents an approximation which does not lead to the appropriate inferences in all instances. It may elicit, erroneously, a perception of the existence of an offer-acceptance relationship between the contracting State and investors of the other contracting State, to the exclusion of the basic State-to-State relationship grounded in the treaty. This, in its turn, may lead to a misapplication in the specific instance of Article 72, as it assumes that there is a unilateral consent given, which will not be perfected until such time as when a particular "investor" declares its consent, *i.e.* accepts the offer." […] "The undertaking of obligations in relation to another contracting State (in a BIT) is of an enduring nature and constitutes a binding commitment under international law for the term of the applicable treaty." […] "As concerns the effectiveness of obligations undertaken by one State in relation to another State as compared with any undertaking ultimately intended to benefit a third party, there is no difference from the point of view of its obligatory character. The binding nature of each category of undertakings (whether procedural or substantive) is the same, and both are owed by each contracting State to the other on a reciprocal basis. Seen from this perspective, it is clear that the States that are parties to investment protection treaties have undertaken to maintain their respective undertakings to observe substantive standards laid down in the relevant treaty, as well as the obligation to submit to international arbitration, on a mutual basis and for the duration of the treaty. […] even if one does not accept the mutuality basis of an investment protection treaty, but consider the "offer-acceptance" model as a proper explanatory model for the investor-State relationship, such "offer" would then – until the moment of acceptance by an investor – represent a unilateral undertaking. Such undertaking would have been undertaken for the duration of the treaty […] The conclusion that the above observations compel is that a notice of denunciation of the ICSID Convention is of no consequence for consent given by a State party in a BIT in relation to another State. Such consent (whether regarded as unilateral or mutual) will remain in effect for the duration of the BIT. In other words, the availability of ICSID arbitration will remain open not only for the six-month period, which according to Article 71 of the Convention follows on the notice of denunciation, but also until such time as the relevant BIT is terminated." *Blue Bank v. Venezuela*, Award, 26 April 2017, **RL-008**, Separate Opinion of Christer Söderlund, ¶¶ 32, 33, 38, 40-42, 45.

the framework of the ICSID Convention and its own legal framework – a bridge intended to enforce the rights and obligations under the BIT.[312]

306. *Fourth*, the Tribunal considers that there is a distinction between "*a general declaration* on the part of the State *in favor* of *submission of claims*" as referred to during negotiations and consent to submit disputes to arbitration under ICSID in an investment protection treaty.[313] Article 9 of the BIT cannot be read in any way as a "general declaration … in favor of submission of claims." It is a binding and unconditional commitment. For this reason, an examination of the terms in which a State grants its consent is necessary to determine if what the State offered is a general declaration in favor of submitting disputes or a binding commitment to submit disputes.[314]

307. Article 14 of the BIT on termination of the agreement provides the following:

Article 14 of the BIT

> "1. The Present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that the procedures constitutionally required therefor in their respective countries have been complied with, and *shall remain in force for a period of fifteen years*.
>
> 2. *Unless notice of termination* has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement *shall be extended tacitly for periods of ten years*, each Contracting Party reserving the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.

[312] With regards to the objective of the BIT: "Desiring […] to extend and intensify the economic relations between them, particularly with respect to investments […] Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment of investment is desirable." Treaty, Preamble, **C-001**, p. 1.

[313] "The situation was different. It concerned a general declaration that could only be conceived as directing itself towards an investor to submit to arbitration; such declaration would not involve any other State and did not concern an offer of arbitration which was undertaken for any specific period of time." *Blue Bank v. Venezuela*, Award, 26 April 2017, **RL-008**, Separate Opinion of Christer Söderlund, ¶ 44.

[314] As indicated above, there is no other requirement under the ICSID Convention for consent other than that it be expressed in writing. Consent can be expressed through a variety of instruments, whether contracts, BIT's, national legislation, etc. These instruments "outside" the ICSID framework are relevant and indeed necessary to address when examining whether the State has provided its consent and thus, whether Article 72 is triggered or not. Such instruments cannot be simply detached from an analysis of Article 72 in a given dispute.

> 3. In respect of *investment made before the date of termination* of the present Agreement *the foregoing Articles* thereof *shall continue to be effective* for a *further period of fifteen years from that date*." (Emphasis added)

308. Under the survival clause (Article 14(3)), the BIT "shall" remain in force until 1 November 2023, which is when the fifteen years provided for in Article 14 elapse. This is uncontested by Venezuela.[315] We have already determined that the Claimant made an investment before the date of termination of the Agreement.

309. This means in turn that Article 9, in particular paragraphs 1 and 4, continue to be applicable as to those investments until 1 November 2023. Under paragraph 4, Venezuela gave "its *unconditional* consent to the submission of disputes as referred to in Paragraph 1 […] to international arbitration …". Under paragraph 1, Venezuela and the Netherlands identified the disputes to which both States gave their unconditional consent, *i.e.*, "[d]isputes between one Contracting Party and a national of the other Contracting Party concerning an obligation of the former under this Agreement in relation to an investment of the latter." According to this paragraph, these disputes "shall at the request of the national concerned be submitted [to ICSID] for settlement." The text of the provision is not a general declaration in favor of submission of disputes. It does not state, for example, that disputes "may" or "could" be submitted when consent is provided by the Host State; there is no further step to be agreed by the investor and the Contracting Party.[316] It is mandatory as to the submission and it leaves no other choice as to the forum. Disputes within the description of paragraph 1 shall be submitted to ICSID and such provision is

[315] "Certainly, Article 14(3) establishes that 'In respect of investments made before the date of the termination of the present Agreement the foregoing Articles thereof shall continue to be effective for a further period of fifteen years from that date'." Request for Bifurcation, ¶ 18.

[316] Cf. "[A] denouncing state's consent to the jurisdiction of the [C]entre based on an investment protection treaty depends on the terminology used in the arbitration clause contained in that treaty […] Article 8 of the Bolivia-Uk BIT of May 24, 1988, on the other hand, provides that disputes "shall…be submitted to international arbitration if either party to the dispute so wishes" but adds that "[w]here the dispute is referred to international arbitration, the investor and the contracting Party concerned in the dispute may agree to refer the dispute either to [ICSID or ICC or ad hoc arbitration]," which is an indication that a further agreement is necessary before the initiation of an ICSID arbitration (with UNCITRAL arbitration being the fallback position if no agreement is reached after a period of six months from written notification of the claim). In other words, for the purposes of Article 72, it is important to ensure that *the wording of the arbitration clause in each investment protection treaty in effect constitutes a state's prior consent to the jurisdiction of the centre*. Where an *unqualified consent exists*, as opposed to an agreement to consent, the rights and obligations attached to this consent should not be affected by the denunciation of the ICSID Convention." (Emphasis added). E Gaillard, "The Denunciation of the ICSID Convention" (2007), **CL-111**, p. 3.

applicable for 15 years after termination of the BIT. This scenario is the one to which Venezuela gave its "unconditional consent."[317]

310. In this regard, the obligations of Venezuela under the ICSID Convention as a potential party to a dispute remain unaffected by denunciation as a result of the State's unconditional "consent to the jurisdiction of the Centre" given before denunciation. While the Respondent has submitted that "[t]hose 'rights or obligations' only arise when consent is perfected, […] no rights and obligations under the ICSID Convention arise from unilateral expression of consent in a BIT,"[318] the Tribunal considers that the obligations referred to in Article 72 are those that a potential Respondent State would have under the ICSID Convention if it continued to be a Contracting State when an investor has provided its consent and request for arbitration in line with the BIT and its sunset provisions.

311. What "arises" from the consent of Venezuela to submit to ICSID jurisdiction before the notice of denunciation is that its rights and obligations (and those of its nationals) under the Convention are not affected by its denunciation, *i.e.*, to *actually submit* to jurisdiction. This coupled with the survival of Venezuela's consent in the BIT and the rights of the investor under that same instrument, permit the Claimant to provide its consent when a dispute arises. So long as the BIT continues in force, including through the sunset period, the bridge built between the BIT and ICSID remains.

312. In the case at hand, pursuant to the sunset clause, the Claimant presented its Request for Arbitration on 3 December 2018,[319] thus complying with the requirement set forth in Article 9. Also, according to Article 25 of the ICSID Convention, "the parties have given their consent." The Respondent has relied on *Favianca v. Venezuela* for its contention

[317] In this sense, *see also*: "[…] even if one […] consider[s] the "offer-acceptance" model as a proper explanatory model for the investor-State relationship, such "offer" would then – until the moment of acceptance by an investor – represent a unilateral undertaking. Such undertaking would have been undertaken for the duration of the treaty, and Article 72 would not apply. To quote the words of Prof Schreuer, '[a] mere offer of consent to ICSID's jurisdiction may be withdrawn at any time, unless, of course, it is irrevocable by its own terms'." *Blue Bank v. Venezuela*, Award, 26 April 2017, **RL-008**, Separate Opinion of Christer Söderlund, ¶ 42.
[318] Respondent's Reply PHB, ¶ 18.
[319] Request for Arbitration.

that Article 72 of the ICSID Convention requires perfected consent. However, the Tribunal disagrees with that interpretation. In particular, since: *first*, the plain reading of the Treaty does not contain the word "perfected", or a comparable word or phrase, and the text refers in no way to the consent given by the national of another Contracting State as a potential party to a dispute. *Second*, although that tribunal noted that "parties to a bilateral investment treaty cannot, in that treaty, purport to amend their rights and obligations under the ICSID Convention,"[320] an interpretation adding words to Article 72 would effectively turn the consent to the jurisdiction of the Centre given by the denouncing State in another instrument as nonexistent and would in consequence, nullify such binding commitment.

313. *Third*, while the tribunal in *Favianca* asserted that the ICSID Convention did not use the word "consent" in the sense of unilateral consent, there are provisions in which the drafters distinguished the consent of one party, such as: Preamble, paragraph 7 ("without its consent"), Article 25(1) ("withdraw its consent"), Article 25(3) ("[c]onsent by a constituent subdivision or agency") and Article 26 ("as a condition of its consent").

314. In conclusion, the Tribunal considers that "consent" in Article 72 does not refer to "perfected" consent and that, Respondent's unconditional consent, given by Venezuela through Article 9 of the BIT before denouncing the ICSID Convention, shall not be affected by its notice under Article 71. Such consent is subject to extinction through the specific terms in which it was agreed under the BIT.

315. The Tribunal considers it appropriate to address certain arguments and concerns expressed by the Respondent as to the consequences of upholding jurisdiction. At the hearing, the Respondent argued "[t]his denunciation was the exercise of the Republic's fundamental sovereign right to exit the ICSID Convention […] [t]his is the right that Claimant wants you to empty of meaning because the decision that Claimant is asking you to adopt […] would literally deprive Sovereign States from their … right to exit the framework agreed in the ICSID Convention when they no longer see it fit."[321] The

[320] *Fábrica de Vidrios v. Venezuela*, **RL-021**, ¶ 258.
[321] Hearing, Tr. Day 1 (Ms. De la Colina) P174:L6-16.

Tribunal agrees that Article 71 establishes the right of any Contracting State to exit the ICSID Convention. However, while the Respondent has argued that on 25 July 2012 it ceased to have rights or obligations under the ICSID Convention, such interpretation is contrary to the text of Article 72, according to which "rights or obligations" arising out of consent shall not be affected by the notice given under Article 71. Article 71 and the right Venezuela refers to does not operate in isolation from the rest of the provisions of the Convention. Thus, while ceasing to be a Contracting State, the obligations of Venezuela remain unaffected by its unconditional consent until such consent is extinguished.

316. The Tribunal agrees with Claimant's argument that "Venezuela can always 'exit the framework'. That exit, however, is conditioned by the separate, unilateral commitment that Venezuela itself voluntarily assumed *vis-à-vis* the Netherlands to submit Treaty disputes to ICSID arbitration for a period of 15 years following the Treaty's termination (*i.e.*, until 1 November 2023), as per the Treaty's sunset clause. All Venezuela has to do is wait for the sunset period to expire."[322] Venezuela's withdrawal from the ICSID Convention has prospective effects, as reflected in the negotiating history of Article 72 and Venezuela will not incur any new obligations. But the continuing obligations to which Venezuela agreed in the BIT, notwithstanding its termination, have not been extinguished and remain in effect. The Tribunal does not agree with the Respondent that this would "turn […] the State into a prisoner of a forum it no longer decides to belong to."[323]

317. In its Post-Hearing Brief, Venezuela expressed the following view if the Tribunal were to sustain its jurisdiction:

> "As also explained by the Republic during the hearing, grave systemic consequences would further result in case the Tribunal were to uphold jurisdiction upon Claimant's 2018 Request for Arbitration. If the Tribunal were to uphold jurisdiction (as requested by Claimant) on the basis that Claimant's Request for Arbitration, submitted 6 years after the effective denunciation of the ICSID Convention by the Republic, has perfected consent allegedly offered by

[322] Claimant's PHB, ¶ 165.
[323] Expressed within the context of the 2011 Letter and the ICSID Convention. Respondent's PHB, ¶ 14.

> the Republic in Article 9(1) of the BIT, States would have no other choice to prevent being subject to the jurisdiction of the Centre once they no longer intend to, not only to denounce the ICSID Convention but also to terminate all existing BITs where ICSID arbitration was agreed as one of the possible fora. This would result in, as the Tribunal surely understands, massive systemic consequences, as the termination of BITs would be [sic] deprive investors not only of their alleged right to bring a claim before an ICSID tribunal (which they did not have if consent was not perfected before the denunciation of the Convention), but also of any and all substantial rights recognized in such treaty."[324]

318. The Tribunal disagrees with Respondent's assertion that "grave systemic consequences" would follow from such a result. The termination of the ICSID Convention was a policy choice made by Venezuela. Termination of any BIT in which the Respondent agreed to ICSID arbitration is and would continue to be its choice as well.

319. Whether or how Article 72 might affect other investment treaties signed by Venezuela would depend on the specific terms in which consent was given by Venezuela in those instruments. In addition, any investment treaty in which Venezuela agreed to other arbitration rules may also not be affected by Venezuela's policy choice to withdraw from ICSID. Thus, the Tribunal finds that the Claimant was entitled to express its consent at any moment up to the Request for Arbitration, which was submitted on 3 December 2018. According to Article 72 of the Convention, its prior consent was not necessary for the rights and obligations of Venezuela to be unaffected by the notice of denunciation. This provision, together with Venezuela's consent through Articles 9 and 14(3) of the BIT, allowed for the Claimant to validly express its consent in the Request for Arbitration.

iii. Whether the 2011 Letter constitutes "consent" of the investor under Article 25 of the ICSID Convention

320. The Tribunal notes that the Claimant had already sent a Letter to Venezuela prior to the notice of denunciation. It is regarding this Letter on which the Claimant first relied as

[324] Respondent's PHB, ¶ 15.

expressing its consent and to which the Respondent objected as not reflecting perfected consent.

321. The Tribunal will now determine whether, through this Letter and independent of our decision above premised on Article 72 of the Convention and Article 9 of the BIT, the Claimant expressed its consent to submit disputes under the ICSID Convention in accordance with Article 25 of the ICSID Convention.

322. On 29 September 2011, the Managing Director of the Claimant (who was also the Company Secretary for the SKG) signed and sent the Letter to the Minister for Foreign Affairs of Venezuela as well as the Attorney General of the Republic. The Letter stated in full:

> "Dear Mr. Minister and Mr. Attorney General:
>
> As you may know, Smurfit Kappa Group plc ("SKG") *and its wholly-owned subsidiary, Smurfit Holdings B.V. ("Smurfit")*, have been doing business in Venezuela for many years. During this time, through our two *Venezuelan subsidiaries, Cartón de Venezuela S.A. and Reforestadora Dos Refordos C.A.*, we have made *significant investments* and have created and will continue to maintain many jobs in Venezuela. We have also been and will continue to be in full compliance with all Venezuelan laws and regulations throughout the time of our investment.
>
> *Smurfit hereby consents to resolve any dispute with the government, including any dispute it may have in the future*, with respect to *any of its investments in Venezuela* before the *International Centre for Settlement of Investment Disputes* pursuant to the *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela*. Given recent events, we wish to note that any actions taken by the government of Venezuela that adversely affect any investments or assets of SKG and Smurfit would compel us to vindicate our rights under the applicable investment treaties.
>
> Respectfully submitted." (Emphasis added)

323. The Tribunal recalls that Article 25 of the ICSID Convention provides for no further requirement to consent than that it be given "in writing." This is confirmed by the Report

of the Executive Directors on the Convention.[325] There is no other requirement or limitation, nor any further guidance as to a specific step that the investor must take in order to express its consent. By the same token, the Tribunal observes that Article 9 of the BIT does not require a specific means for the investor to consent; it does not provide for a requirement of notification or any time limit. This provision only states that: "Disputes […] shall at the request of the national concerned be submitted to the [ICSID] for settlement by arbitration […]." The language used in Article 9 allows for the institution of proceedings. However, the Tribunal observes that this Article does not mandate that consent be expressed through a request for arbitration nor does it prohibit an investor from unilaterally addressing the State. In the absence of specific requirements as to the expression of consent, the Tribunal cannot add requirements that are not there.

324. The Tribunal notes that the Letter is clear as to the intentions: "Smurfit hereby *consents* to *resolve any dispute with the government*, *including any dispute* it may have *in the future*, with respect to *any of its investments* in *Venezuela*." The Respondent has submitted that "consent in writing" according to the ICSID Convention "would indicate a minimum of formality in accepting the host State's offer."[326] We agree and note that the Letter submitted by Smurfit satisfies the only formality requirement, which is that consent be expressed "in writing."[327] The Tribunal also observes that, although not expressly provided, the Letter complies with basic "formal" requirements.

325. *First*, although the Letter indicates that both SKG and Smurfit have been doing business in Venezuela for many years and it is signed by the Company Secretary of the former and Managing Director of the latter (the same person), it indicates who is expressing its consent: "Smurfit hereby consents […]." While the Respondent has argued that the Claimant has failed to establish that the person writing that Letter had representation

[325] Report of the Executive Directors on the Convention on Settlement of Investment Disputes between States and Nationals of Other States, **RL-020**, ¶ 23.
[326] Respondent's Rejoinder, ¶ 281.
[327] "[…] [T]he Convention does not stipulate the form that written consent must take […]." *Tokios Tokelés v. Ukraine*, Decision on Jurisdiction, **CL-101**, ¶ 97.

powers,[328] the Tribunal is satisfied that the evidence provided by the Claimant indicates that Mr. O'Riordan held at the time the position of Director, which according to the Claimant's Articles of Association means that he represented the company.[329]

326. *Second*, although stated in general terms, the Letter does refer to the type of investments made in Venezuela by mentioning two companies: "Cartón de Venezuela, S.A." and "Reforestadora Dos Refordos, C.A." It is uncontested that "Cartón was established in 1954. […] [and] is the market leader and largest producer of paper-based packaging in Venezuela" and that "[d]uring its more than thirty years of operations in Venezuela, Smurfit built a highly successful business and consolidated its position as the largest producer of packaging products in the country."[330] While not a requirement under the provisions at issue, the Tribunal considers that the reference to these two companies, which, to the Tribunal's understanding are noteworthy, alerted Venezuela as to the type of investments any future dispute with Smurfit would entail.

327. *Third*, the Letter specifies the institution and the agreement to which disputes will be submitted: "before the International Centre for Settlement of Investment Disputes pursuant to the Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela."

328. The Respondent has argued that "consent must be given to a particular dispute and not in an abstract manner" and that "[the Letter] was sent prior to the events surrounding claimant's claims."[331] The Tribunal fails to see in any provision of the BIT or the ICSID Convention for that matter, a requirement that consent be given as to a specific dispute or that it should be made once a dispute has arisen. Article 25 of the ICSID Convention

[328] Respondent's Rejoinder, ¶¶ 275 and 279. The Respondent has also submitted that there is no "identity" between the parties to the dispute and the parties that have consented to submit a dispute to the jurisdiction of the Centre. Respondent's PHB, ¶ 20. While the Tribunal stresses again that there is no specific requirement in this regard, the Tribunal considers that, based on the text of the 2011 Letter, there is identity between the party expressing its consent (Smurfit) and the Claimant.
[329] Dutch Civil Code, Section 2:240, 1 November 2016, **CL-219**, ¶¶ 2-3; Certification dated 23 November 2007 of the Articles of Association for Smurfit Holdings B.V., 23 September 2002, **C-002B**, Article 9(1); The Netherlands Chamber of Commerce Business Register extract for Smurfit Holdings BV, 23 October 2018, **C-002A**, p. 1; Dutch Chamber of Commerce Business Register Extract, 19 October 2021, **C-428**, pp. 1-2.
[330] Claimant's Memorial, ¶¶ 10 and 13.
[331] Respondent's Rejoinder, ¶ 275.

addresses the kinds of disputes to which the jurisdiction of the Centre will extend, *i.e.*, any legal dispute arising directly out of an investment. Similarly, Article 9 of the BIT indicates the types of disputes that may be submitted – "[d]isputes […] concerning an obligation […] in relation to an investment." Both provisions establish requirements for jurisdiction to exist and not how consent is to be expressed (other than Article 25's requirement that consent be expressed in writing).

329. The Respondent also asserts that the Letter is deficient because it does not refer to specific Treaty breaches. It is true that the Letter does not reference specific Treaty breaches. However, the only jurisdictional requirement is for consent to be "in writing." Unlike in other investment treaties, there is no specific requirement, for example, to provide a notice of intent to submit a claim indicating the provisions that have allegedly been breached and the factual basis for the claim. Such information, as concerns the ICSID Convention, is to be provided in the Request for Arbitration. There is no basis for the Tribunal to impose the requirements already addressed by Article 36 or to overlay new requirements on top of Article 25. The Respondent has referred to *Murphy v. Ecuador* to support its allegation that the reference to "the dispute" in Article 25 indicates that "pointing […] to an indeterminate, future set of conceivable disputes, would run against the ICSID Convention itself."[332] The Tribunal begs to differ. At the outset, that case related to a provision establishing different requirements under the BIT between Ecuador and the U.S.; more precisely, it concerned the determination of when a dispute arose in connection with the waiting period, not the requirements to express consent.

330. Article 25 makes clear the situation in which there will be jurisdiction of the Centre. The text of the provision does not link the moment that the dispute arises and the moment at which consent is to be provided. It simply states that the parties to a dispute (whenever that dispute arises) have to consent *for the jurisdiction* of the Centre *to extend* to that dispute. The provision makes clear that there is no specific moment "[w]hen the parties

[332] Respondent's Counter-Memorial, ¶ 187.

have given" consent.[333] Moreover, the consent provided through Article 9 by Venezuela is expressed in general terms to the submission of "disputes as referred to in Paragraph 1." In the absence of express requirements, the Tribunal concludes that a consent expressed towards "any dispute," "including any dispute it may have in the future, with respect to any of its investments in Venezuela" would not run contrary to the Convention when the types of disputes that may be submitted to the Centre are "any legal dispute[s] arising directly out of an investment." In the Tribunal's view, the consent provided by the Claimant is expressed in these terms and does not go beyond the consent provided by Venezuela under paragraph 4 of Article 9.

331. As a final note, the Tribunal cannot help but note that Venezuela remained silent as to the 2011 Letter. The Tribunal does not speculate as to the reasons Venezuela may have had; however, what can be said is that if, in its view such "formality" was not met, its silence ran the risk of being confused with acquiescence.

332. In consequence, the Tribunal considers that the 2011 Letter sent by the Claimant in September of 2011 before Venezuela denounced the ICSID Convention expressed its consent in writing in accordance with Article 25 of the Convention.

iv. Conclusion

333. For the reasons already expressed, the Tribunal rejects Respondent's objections that the Tribunal lacks jurisdiction *ratione voluntatis*.[334]

334. Finally, the Tribunal would like to refer to Respondent's statement made during the last day of the hearing:

> "[…] if you were to uphold jurisdiction and award compensation to Claimant, you would not only be rendering an unsubstantiated award that could have systemic consequences, but you would be exceeding your mandate, carefully

[333] "[…] the Convention does not otherwise specify the time at which consent should be given." Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, **RL-020**, ¶ 24.
[334] One Member of the Tribunal dissents, among other issues, with the Majority's decision on the interpretation of Article 72 and whether it requires perfected consent. The dissent is attached to this Award. The Majority rejects, in the strongest terms, the suggestion that this issue was "predetermined" when the case was bifurcated.

> limited in Article 9(3) of the BIT, and clearly incurring in a ground for annulment under Article 52(1)(b) of the ICSID Convention, reason for which your Decision will not stand and most likely will be set aside."[335]

335. The Tribunal cannot make a finding on this jurisdictional allegation since it has not been properly raised as a jurisdictional objection by the Respondent. The views of the Tribunal on Article 9(3) are contained in paragraphs 628 to 632 of the Award.

5. Whether the Tribunal has jurisdiction to grant moral damages

A. The Claimant's Position

336. Regarding moral damages, the Claimant submits that "in order to achieve full reparation, it is entitled to moral damages for the harm arising out of Venezuela's egregious mistreatment of Smurfit's employees." In the Claimant's view, Venezuela's mistreatment caused damage to Smurfit's reputation, severe anxiety, mental anguish and pain to Smurfit's employees and their families. Smurfit contends: *First,* that the Tribunal has jurisdiction to award moral damages since under the applicable full reparation standard, material and moral injury must be assessed, moral damages claims are not restricted to the context of diplomatic protection, and investor-State tribunals have held that claims for moral damages are admissible.[336]

337. *Second*, Smurfit has standing to bring claims for the harm caused to its employees since the claim relates to the mistreatment of its "investments," which were comprised not only of material assets but of the human resources (*i.e.*, human capital) who operated and managed those material assets to generate value. According to the Claimant, "[b]y making Smurfit's employees targets for cruel mistreatment – *just because* they were Smurfit employees – Venezuela was knowingly seeking to harm Smurfit's ability to conduct business in Venezuela. It is therefore illogical to argue, as Venezuela does, that its mistreatment of Smurfit's employees does not constitute a mistreatment of Smurfit's

[335] Hearing, Tr. Day 5, P1173:L7-16.
[336] Claimant's Rejoinder, ¶¶ 89-95.

investments which cannot be compensated."[337] *Third*, Smurfit satisfied the *Lemire* test to prove moral damages.[338]

B. The Respondent's Position

338. The Respondent contends that the Tribunal has no jurisdiction to grant moral damages and even if the Tribunal were to find that there is jurisdiction, the allegations are without merit. In particular, it alleges: *first,* that Claimant is not entitled to "full reparation," but to "just compensation" in accordance with the Treaty; *second*, investment tribunals have almost always refused to grant moral damages to corporations; *third*, the Claimant has failed to establish actual moral damage as well as causality; *fourth*, moral damages can only be granted in "exceptional circumstances"; *fifth*, important legal policy reasons call for restricting moral damages to exceptional cases; *sixth*, moral damages should not be granted to a corporation for moral injuries, if any, to its representatives; *seventh*, in the event that the Tribunal were to find a breach of the Treaty, the compensation awarded is sufficient to repair moral damages; therefore, it should not grant any additional amount of money.[339]

339. Furthermore, the Respondent submits that: there is no causal link between the measures and the moral damages allegedly suffered; there is no reliable evidence on the mistreatment of the employees; and there is no reliable evidence of negative impact on Smurfit's reputation. Finally, Respondent contends that, in the event that the Tribunal were to find that the Claimant is entitled to moral damages, there is no basis to fix the amount at the 10% figure advocated by Claimant, so that the figure should be reduced.[340] In its Rejoinder on the Merits, the Respondent also argued that there is no indication that the Contracting Parties had the intention of according jurisdiction to investment tribunals to grant moral damages.[341]

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[337] Claimant's Rejoinder, ¶ 98. *See* in general ¶¶ 97-101.
[338] Claimant's Rejoinder, ¶¶ 102-104.
[339] Respondent's Counter-Memorial, ¶¶ 442-463.
[340] Respondent's Counter-Memorial, ¶¶ 464-483. In its Rejoinder on the Merits, the Respondent indicates that Smurfit could be awarded no more than USD 85,000 as in the *Diallo* case and any compensation for moral damages should not bear interest. Respondent's Rejoinder, ¶¶ 804 and 805.
[341] Respondent's Rejoinder, ¶¶ 761-768.

C. The Tribunal's Analysis

340. The Tribunal begins by observing that the Treaty at issue does not contain a provision addressing moral damages. Article 9(3) on dispute settlement provides: "[t]he 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."[342] The text of the article refers in general to "damages" caused by the breach and allows for compensation. While this provision does not specifically refer to moral damages, it does not preclude them either.

341. The tribunal in *Dessert Line v. Yemen* indicated that: "[e]ven if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a Party may, in exceptional circumstances, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them. […] It is also generally recognized that a legal person (as opposed to a natural one) may be awarded moral damages, including loss of reputation, in specific circumstances only."[343]

342. In *OIEG v. Venezuela*, the tribunal considered that:

> "The BIT does not make any reference to the possibility that the investor may claim and obtain compensation for moral damages. Article 6 only provides that it has a right to receive "just compensation" for the expropriated assets. Nonetheless, such "just compensation" may, under certain circumstances, include compensation for physical or moral suffering caused by the Government to the investor. […] The question, then, is not whether a Tribunal may or may not grant compensation for moral damages, because it has been accepted that it has the power to do so as long as exceptional circumstances exist."[344]

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[342] Treaty, Art. 9(3), **C-001**. (Emphasis added)
[343] *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008 ("***Desert Line v. Yemen***"), **CL-047**, ¶ 289. "[T]here is nothing in the ICSID Convention, Arbitration Rules and Additional Facility which prevents an arbitral tribunal from granting moral damages." *Cementownia "Nowa Huta" S.A. v. Republic of Turkey*, ICSID Case No. ARB (AF)/06/2, Award, 17 September 2009, **RL-136**, ¶ 169.
[344] *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, 10 March 2015 ("***OIEG v. Venezuela***"), **CL-086**, ¶¶ 906, 908.

343. In particular, the tribunal in *Lemire v. Ukraine* established a test to determine the exceptional cases in which moral damages would be available for a party injured by a State.[345] In the Tribunal's view, while not the general norm, these cases indicate that consideration of moral damages may be examined by investment tribunals and, if warranted by the exceptional circumstances of the case, may be awarded.

344. The Respondent argues that "international investment tribunals need States' consent to have jurisdiction over a claim for moral damages" and "[t]he lack of prohibition to grant moral damages under the Treaty or the ICSID Convention cannot be assumed as a blank check for investors to expand the jurisdiction of investment tribunals beyond the consent of States."[346] The Tribunal disagrees with this characterization. As mentioned above, the Treaty expressly recognizes compensation for damages caused by a breach of obligations. The Parties recognized in general the existence of damages and no specific exclusion to that undefined term is provided. Additionally, the fact that investment tribunals may assess moral damages does not imply that a blank check is granted since exceptional circumstances must be present. The Respondent has also indicated that Article 6 of the Treaty excludes moral damages.[347] While compensation in the case of expropriation is specifically provided for in that provision for those specific circumstances, the text of the Treaty does not support Respondent's contention. Moreover, the fact that compensation is allowed under one article does not mean that a specific form of damages is excluded in cases where this standard for compensation is not applicable.

345. Accordingly, the Tribunal considers that it has jurisdiction to award moral damages. Whether the specific test is satisfied and, in case it is, the amount to be awarded will be addressed below.

[345] *Joseph Charles Lemire v. Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011 ("***Lemire v. Ukraine***"), **CL-073**, ¶ 333.
[346] Respondent's PHB, ¶¶ 299 and 300.
[347] Respondent's PHB, ¶¶ 299 and 306.

6. Respondent's Counter-claim

A. The Respondent's Position

346. The Respondent submits that, if the Tribunal were to find that it has jurisdiction, it should also find that it has jurisdiction over Respondent's counterclaim. Respondent's counterclaim seeks damages derived from "Claimant's abrupt and cavalier abandonment of its operations in Venezuela." In this regard, it submits that, for the counterclaim to be heard, two conditions must be met: (i) it must fall within the ambit of the scope of consent of the Parties, and (ii) it must share a close connection with the primary claim.[348] Venezuela also posits that, alternatively, if the Tribunal follows a restrictive approach, it should consider that the Treaty does not limit the scope of counterclaims.[349]

347. The Respondent indicates that Article 46 of the ICSID Convention and Rule 40(1) of the ICSID Arbitration Rules grant tribunals with the power to review counterclaims. Therefore, when the Contracting Parties to the Treaty agreed to apply said instruments, they also consented to the tribunal's jurisdiction over counterclaims. The Respondent requests compensation for Claimant's alleged violations after it purportedly abandoned its operations without notice to over 1,400 employees. In Respondent's view, the counterclaim is directly related to the subject matter since it stems from the same events from 2018 that give rise to certain of Claimant's claims.[350]

348. According to the Respondent, Venezuela was economically affected by the Claimant's departure since it was obliged to guarantee workers' rights. In this regard, it had to devote resources to contribute economically to cover salaries and debts of Smurfit. It also has been facing the business risk of the operation.[351]

B. The Claimant's Position

349. The Claimant alleges that under the Treaty and the ICSID Convention the Tribunal has no jurisdiction over Venezuela's counterclaim since it is not "within the scope of consent

[348] Respondent's Rejoinder, ¶ 819.
[349] Respondent's Rejoinder, ¶ 820.
[350] Respondent's Rejoinder, ¶¶ 822-831.
[351] Respondent's Rejoinder, ¶¶ 836-843.

of the parties" and in any event it would fail on the merits because any damage was attributable to Venezuela. In this regard, it alleges that Venezuela has not provided an explanation as to why Smurfit would abandon its business and that "[h]aving forcibly occupied Smurfit's business, Venezuela was then required –under the provisions of its own domestic law– to ensure that workers continued to receive their salaries and other benefits throughout the occupation."[352]

C. The Tribunal's Analysis

350. The Respondent has based its counterclaim on Article 46 of the ICSID Convention in conjunction with Article 9(1) of the Treaty. We begin our analysis with Article 46, which provides the following:

> "Except as the parties otherwise agree, the Tribunal *shall*, *if requested* by a party, determine any incidental or additional claims or *counterclaims* arising *directly out of the subject-matter of the dispute* provided that they are within the *scope of the consent* of the parties and are otherwise *within the jurisdiction* of the Centre." (Emphasis added)

351. According to the text of this provision, any request to determine additional claims or counterclaims must: (i) arise directly out of the subject-matter of the dispute; and (ii) be within the scope of the consent of the parties and within the jurisdiction of the Centre. As to the jurisdiction of the Centre, the Tribunal recalls that Article 25(1) of the ICSID Convention establishes that: "[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State […] and a national of another Contracting State, which the parties to the dispute *consent* in writing to submit to the Centre."[353] In this case, the Tribunal must determine first if the counterclaim submitted by the Respondent arises directly out of the subject-matter of the dispute and then, whether it is within the scope of consent.

352. In general, the Respondent's counterclaim is based on the allegation that Smurfit unilaterally and abruptly decided to abandon its operations in Venezuela on 24

[352] Claimant's Rejoinder, ¶¶ 106-116.
[353] ICSID Convention, Art. 25(1). (Emphasis added)

September 2018, and, as a consequence, Venezuela was legally obliged to guarantee the workers' rights. This circumstance had an economic impact on the Respondent. The Tribunal is of the view that these events directly originate from the subject-matter of the dispute, *i.e.*, whether Venezuela's measures on Claimant's investments breached a Treaty obligation and the facts surrounding the dispute.

353. Regarding the second element, the Tribunal begins with Article 9(4) of the Treaty on consent. According to this provision: "[e]ach Contracting Party hereby gives its *unconditional consent* to the submission of *disputes as referred to in Paragraph 1* of this Article to international arbitration in accordance with the provisions of this Article."[354] The terminology "unconditional consent" as well as the direct reference to "disputes referred to in Paragraph 1" make clear that the Contracting Parties consented to the submission of disputes as described in paragraph 1.

354. The Tribunal observes that Article 9(1) of the Treaty on dispute settlement establishes that:

> "*Disputes* between *one Contracting Party* and a *national* of the other Contracting Party *concerning an obligation* of the former under this Agreement *in relation to an investment of the latter*, shall at the request of the national concerned *be submitted* to the International Centre for Settlement of Investment Disputes, for settlement by arbitration or conciliation […]."[355]

355. The text of the article posits only one scenario, the disputes between one Contracting Party and a national of the other Contracting Party, *i.e.*, between a State and the investor of another Contracting Party concerning an "obligation of the former," *i.e.,* of the State, in relation to an "investment of the latter," *i.e.*, of the investor. Article 9(1) does not refer in any way to disputes concerning a breach by the investor of the law of the Contracting Party nor what such a breach could have entailed for the State. The Tribunal considers that Article 9(3) reinforces its conclusion. According to this provision: "[t]he 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

[354] Treaty, Art. 9(4), **C-001**. (Emphasis added)
[355] Treaty, Art. 9(1), **C-001**. (Emphasis added)

has caused *damages to the national concerned*, and, if such is the case, the amount of compensation."[356]

356. The scope of the BIT leaves no doubt on the type of disputes that both Venezuela and the Netherlands consented to submit to dispute settlement. Furthermore, if a dispute was not consented, it would not be within the jurisdiction of the Centre in terms of Article 25(1) of the ICSID Convention, nor under the purview of Article 46 of said instrument. In light of the above, the Tribunal rejects jurisdiction over Respondent's counterclaim.

VI. MERITS OF THE DISPUTE

1. Expropriation Claims

A. The Claimant's Position

357. Claimant's investments include: (i) its majority ownership of Cartón, Refordos and Colombates, and (ii) other Venezuelan subsidiaries indirectly owned, 35,000 hectares of land, three paper mills and 15 production facilities.[357] The Claimant argues that Respondent's actions "expropriated Smurfit's entire investment in Venezuela."[358] In particular it claims that the Respondent took expropriatory measures that led to the taking of Smurfit's entire business in 2018 as well as earlier measures that led to the expropriation of certain landholdings.[359]

358. As to the measures that led to the expropriation of its entire business in 2018, the Claimant alleges that "Venezuela 'forcibly took control over Smurfit's entire operation in Venezuela […] depriving [it] of the use and economic benefit of its investments'."[360] In general terms, the Claimant refers to the following events:

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[356] Treaty, Art. 9(3), **C-001**. (Emphasis added)
[357] Claimant's Memorial, ¶ 193.
[358] Claimant's Memorial, ¶ 181.
[359] Claimant's Memorial, ¶ 105. "By forcibly seizing three of Smurfit's landholdings, and then forcibly taking control over Smurfit's Venezuelan subsidiaries and facilities, Venezuela substantially deprived Smurfit of the use and economic benefit of its investment, without paying compensation, in a manner that was arbitrary, discriminatory, and not in accordance with due process." Claimant's Reply, ¶ 218.
[359] Claimant's Memorial, ¶ 193.
[360] Claimant's Memorial, ¶ 194.

- President Maduro's announcement in July 2018 that "severe measures" would be adopted to fight the "economic war" and threat to nationalize private businesses.
- SUNDDE's visits to Cartón's office in Valencia on 21 and 22 August 2018 that had the purpose to carry out an inspection, request information and that were undertaken by government officials as well as military officers and military counter-intelligence.
- SUNDDE's announcement on 21 August 2018 of the sanctions that would be imposed on Cartón, in particular, the government's occupation and adjustment of prices.
- The detention and intimidation of employees during the visits.
- The unjustified arrest and prolonged detention of two employees in harsh conditions.
- The coordinated inspections in Cartón's facilities and its subsidiaries in San Felipe, Caracas, Guacara and Acarigua.
- SUNDDE's 21 August 2018 order to occupy the business for 90 days and appoint a Management Board.
- SUNDDE's order on 18 September 2018 for the reduction of sales prices by 86%.
- The Minister of Labor's October 2018 order to indefinitely occupy Cartón and its affiliates (Refordos, Corsuca, Corrugadora Latina, Colombates and the Technical School) as well as to take managerial control through the Special Management Board.[361]

359. Smurfit contends that it was put in a situation where: (i) its offices and facilities were occupied by the government and military, (ii) its operations were placed under Venezuela's management control, production was halted and sales were ordered to be carried at below cost, and (iii) its employees were harassed and intimidated, which in consequence led to Claimant's decision to communicate to the government that "it was no longer able to carry out its operations in compliance with company policies and applicable regulations […] such that responsibility for its Venezuelan operations had passed to the Venezuelan state."[362] In Claimant's words, "Smurfit has been deprived of its right to manage and control its Venezuelan operations, to derive any economic benefit

[361] Claimant's Memorial, ¶ 194, Claimant's Reply, ¶ 219.
[362] Claimant's Memorial, ¶ 194.

from its Venezuelan business or even to dispose of its assets. Smurfit has thus been deprived of all of its fundamental rights as a shareholder […].”[363]

360. The Claimant relies on the elements developed in *Pope & Talbot* to establish the existence of an expropriation and contends that Venezuela’s conduct satisfies the test.[364]

361. With regards to the previous expropriations, the Claimant alleges that Venezuela “targeted and expropriated” three landholdings of its subsidiary Refordos, (La Productora,[365] Santo Tomás[366] and El Piñal).[367] Smurfit refers to the legal framework enacted since 2001, which was expanded in 2005 and 2010, as well as the resolutions and decrees based on that legal framework. According to the Claimant, Venezuela expropriated the landholdings by: (i) granting rights to occupiers, (ii) declaring the lands idle and of questionable title, and (iii) authorizing their “recovery” by the State.[368] The

[363] Claimant’s Memorial, ¶ 195. *See also* Communication from Smurfit Kappa Venezuela to its workers, 24 September 2018, **C-389**, whereby the Claimant communicated the situation to its workers: “[…] as a consequence of the arbitrary actions and continuous interferences referred to above to which our employees and operations have been subjected by the Government of Venezuela, Smurfit Kappa Group (SKG) was impeded, for reasons beyond its control, from continuing to exercise control over SKCV’s business in the country. For this reason, SKG and SKCV have notified the Government of the Bolivarian Republic of Venezuela that from the notification of the temporary occupation measure by SUNDDE on 28 August 2018, responsibility for the operations of the company and compliance with applicable laws and regulations had passed to the Venezuelan state. […] We deeply regret that the Venezuelan Government’s actions have led to the current situation, and we hope that sooner rather than later, the Company will be in a position to retake control over its business and its investments in Venezuela and thus continue to contribute, together with all of you, to the development of the country.”

[364] Claimant’s Memorial, ¶ 196.

[365] The Claimant contends that, while recovery proceedings were ongoing, by March 2007 they were not completed. La Productora was taken after President Chávez’ announcement on national television in a “coordinated operation to seize a total of 29 properties across the country” and “not ‘recovered’ under the Land Law.” Claimant’s Reply, ¶¶ 21, 23. *See also* Claimant’s PHB, ¶¶ 17-22.

[366] The Claimant contends that “[w]hile the idleness proceedings were pending, in May 2011, Refordos was deprived of its rights as owner of Santo Tomás when INTI actively supported hundreds of squatters who had invaded the landholding, and granted them indefinite rights to occupy the land […] INTI only determined that the property was ‘idle’ and only initiated ‘recovery’ proceedings in October 2011, five months after it had seized the Santo Tomás property and deprived Refordos of its rights as landholder. INTI ordered the recovery of Santo Tomás in January 2015. This decision had no practical effect however, since, by that date, Refordos’s property had already been seized.” Claimant’s Reply, ¶¶ 41, 42. *See also* Claimant’s PHB, ¶¶ 26-29. The Claimant contends as well that the determination that Santo Tomás was idle or of non-conforming use was arbitrary, the determination it was not privately owned was also arbitrary and the initiation of recovery proceedings was inconsistent. Claimant’s Reply, ¶¶ 61-85.

[367] The Claimant contends that recovery proceedings were pending and El Piñal was “also not ‘recovered’ through proceedings conducted pursuant to the Land Law; it was seized by INTI and the military pursuant to President Chávez’s instructions.” Claimant’s Reply, ¶ 32. “[O]n 21 October 2009, notwithstanding that recovery proceedings remained pending, INTI, together with the military, took possession of El Piñal.” *See also* ¶ 35. INTI Takeover Minutes regarding El Piñal, 21 October 2009, **C-074**, p. 2. Also, Claimant’s PHB, ¶¶ 23-25.

[368] Claimant’s Memorial, ¶ 201; Claimant’s Reply, ¶ 234.

Claimant argues that neither of the properties were expropriated as a result of recovery decisions and, while formal decisions were issued by the INTI as to El Piñal and Santo Tomás, the investment had already been indirectly expropriated. Additionally, it submits that the Land Law is an unlawful measure in breach of the Treaty.[369]

362. It is the Claimant's contention that the expropriation taken by Venezuela was unlawful. In particular since it was made: (i) without compensation, (ii) in a discriminatory fashion without respect for due process, and (iii) was not in the public interest.[370] Finally, the Claimant submits that the expropriatory measures were not a *bona fide* exercise of regulatory powers or police powers.[371]

B. The Respondent's Position

363. The Respondent contends that the 2001 Land Law was enacted to foster the development of rural lands, for the agricultural sector to grow and to ensure food security.[372] It alleges that "[t]he requirement to prove ownership dates back to 1848"[373] and that "[r]egistration

[369] Claimant's Reply, ¶¶ 237-239. "[…] the seizure of El Piñal on President Chávez's orders and the May 2011 decision allowing squatters to permanently occupy Santo Tomás. Those two measures, together with the seizure of La Productora on President Chávez's orders, are therefore the expropriatory measures." *See* ¶ 238.
[370] Claimant's Memorial, ¶¶ 203-218. The Claimant argues that Venezuela carried out violent seizures which were arbitrary, *i.e.*, not based on legal standards, taken for different reasons than those put forward, unsubstantiated, with no reasonable advance notice. It also argues that the measures discriminated against it as a foreign multinational. As a result, Smurfit claims that they could not have been in furtherance of the public interest. The Claimant alleges as well that Smurfit was "permanently deprived" of its investment since it lost "all control over them." Claimant's Reply, ¶ 235. As to the unlawfulness argument, *see also* ¶¶ 245-250.
[371] Claimant's Memorial, ¶¶ 251-258; Claimant's PHB, ¶ 31.
[372] Respondent's Counter-Memorial, ¶ 22. "Since President Chávez was elected, Venezuela adopted laws and policies to establish land reform, increase agricultural output, and ensure food security. The Venezuelan Constitution and the Land Law were the main tools for this reform." Respondent's Rejoinder, ¶ 26.
[373] Respondent's Counter-Memorial, ¶ 27. "[T]he Vacant Lands Law of 1919, required those in possession of farmland to demonstrate valid title if such land was acquired after the Vacant Lands Law of 1848 […] Like the previous law of 1919, the 1936 law required those in possession of farmlands to demonstrate chain of title dating back to 1848 if lands were acquired after the Vacant Lands Law of 1848 […] Under Venezuelan law, a person who claims to have legal title to property acquired by means of a derivative method – that is, from a previous owner- must prove that such legal title is legitimate […] The Land Law, as amended in 2010, did not introduce any new requisites as a matter of proof of ownership in Venezuelan Law. Under the Land Law, farmlands are considered to be State property unless the occupant can demonstrate its ownership through a perfect chain of title tracing back to the valid release of the land by the Venezuelan Government. […] The only way of overcoming the presumption of ownership by the Republic is to demonstrate that one has better title than that of the Republic, which can only be done by providing evidence of the legitimacy of the chain of title or predecessors in title." *See* ¶¶ 25, 26, 28-30.

of titles has been established only for the purposes of informing third parties of the said registration, but it is not a mean to acquire property over tangible immovable assets."[374]

364. With respect to the landholdings, the Respondent alleges that Smurfit's narrative as to INTI's intervention is "inaccurate" and that "[t]he Republic did not 'seize' any of the plots of land Refordos occupied, but rather initiated recovery proceedings pursuant to the Land Law."[375] According to Venezuela, "[r]ecovery proceedings under the Land Law are based on the premise that the land is state property and, therefore, the state owes no compensation to the persons from whom the land is recovered,"[376] and such proceedings do not amount to an expropriation, but a "lawful application of the extant regulations."[377]

365. The Respondent submits that "Refordos failed to properly demonstrate title to the landholdings and/or that the lands were reaching the desired level of agricultural production,"[378] and that "Refordos's operations generated severe territorial repercussions to the extent that they affected and limited access to land and food supply for local peasant communities and had a negative impact on the aquifers in the area, as well as on local wildlife and native vegetation."[379]

366. As to La Productora, the Respondent submits that "non-conforming use of the land was at the forefront of the controversy," that recovery proceedings were initiated once all legally mandated reports were rendered, and the underutilization of the land coupled with the need to secure production for peasant groups warranted the issuance of interim measures. The Respondent further contends that those measures were reversable and that INTI went to great lengths to secure that no further damage was caused to the estate.[380] Regarding Santo Tomás, the Respondent submits that soil analyses were undertaken, that

[374] "Mere registration of a 'title' to a property is in no way indicative of the validity of the underlying transaction, let alone of perfect chain of title. […] Registration does not prevail over the legal presumption of state property when ownership is contested by the Venezuelan State, as registered title only creates a rebuttable presumption of ownership in relation to third parties, but not against the State." Respondent's Counter-Memorial, ¶ 32.
[375] Respondent's Counter-Memorial, ¶¶ 13, 14.
[376] Respondent's Counter-Memorial, ¶ 35.
[377] Respondent's Counter-Memorial, ¶ 282; Respondent's Rejoinder, ¶ 433; Respondent's PHB, ¶¶ 184-204; Respondent's Reply PHB, ¶¶ 77-80.
[378] Respondent's Counter-Memorial, ¶ 52. Respondent's Rejoinder, ¶¶ 24, 41, 42, 54.
[379] Respondent's Counter-Memorial, ¶ 59.
[380] Respondent's Counter-Memorial, ¶¶ 72-74.

the study of documents submitted to claim property rights revealed the chain of title had been interrupted, that Refordos acknowledged it and was required to offer proof of perfect chain of title as a matter of Venezuelan law and that the Yaracuy ORT involvement was due to the fact that most of the peasants came from there.[381] Venezuela also indicates that Smurfit was able to carry out its forestry activities until the company decided to leave Venezuela voluntarily.[382]

367. Regarding the inspections carried out by SUNDDE in 2018, the Respondent alleges that it validly applied the Law on Fair Prices.[383] In particular, it contends that Smurfit breached labor laws, that when authorities went to the plant, the company's personnel did not allow them entrance, that the Claimant has not established the inspections were carried out other than with respect for applicable norms and that on September 2018, Smurfit arbitrarily interrupted its activities and abandoned its business, leaving its obligations towards workers and third parties unfulfilled, which the Republic had to assume.[384]

368. Additionally, the Respondent submits that States are not liable to pay compensation to a foreign investor when "in the normal exercise of their regulatory powers, they adopt *bona fide* regulations that are aimed at the general welfare, in a nondiscriminatory manner."[385] The Respondent relies on *Burlington* to indicate when a measure taken by a State is equivalent to expropriation as well as on *Venezuela Holdings* regarding the effect of those measures.[386]

369. Venezuela submits that the mandatory recovery of the landholdings does not amount to an expropriation, that none of the interferences impaired Claimant's alleged investment and that the measures adopted by SUNDDE and the Ministry of Labor were transitory

[381] Respondent's Counter-Memorial, ¶¶ 78-87.
[382] Respondent's Counter-Memorial, ¶ 15.
[383] Venezuela indicates that the Republic first set in place a system of price controls over 70 years ago and "direct economic intervention to manage the end price of consumer goods has been a common trait of Venezuelan governments, irrespective of political ideology." Respondent's Counter-Memorial, ¶ 142.
[384] Respondent's Counter-Memorial, ¶¶ 151-157. *See also* Respondent's Rejoinder, ¶¶ 163-174, 179-184, 186-188, 211-247; Respondent's PHB, ¶¶ 100-118, 120-133, 134-142; and Respondent's Reply PHB, ¶¶ 34, 35, 38-62.
[385] Respondent's Counter-Memorial, ¶ 275.
[386] Respondent's Counter-Memorial, ¶¶ 277, 278.

and motivated by the Claimant's conduct since it failed to abide by applicable labor legislation contending that Claimant withdrew "suddenly and recklessly," leaving behind a series of unfulfilled obligations.[387] As to the arrests of two of the company's employees, Venezuela submits that they were made in due respect of law.[388]

370. In addition to contending that the Claimant has not established the existence of a causal link between the measures and the supposed deprivation, Venezuela advances the argument that even if the Tribunal were to find that it deprived Smurfit of its investment, there was no expropriation insofar as the inspections and temporary measures adopted by SUNDDE are a legitimate exercise of the Republic's police powers.[389]

C. The Tribunal's Analysis

371. Article 6 of the BIT provides the standard for expropriation. In consequence, the analysis of Article 6 constitutes the first step in the Tribunal's examination.[390] Article 6 provides:

> "Neither Contracting Party *shall take any measures to expropriate or nationalise* investments of nationals of the other Contracting Party *or take measures having an effect equivalent to nationalisation or expropriation* with regard to such investments, *unless* the following *conditions are complied* with:
>
> a) the measures are taken *in the public interest and under due process of law*;
>
> b) the measures *are not discriminatory or contrary to any undertaking* which the Contracting Party taking such measures may have given;
>
> c) the measures are taken *against just compensation*. Such compensation shall represent the market value of the investments affected immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier; it shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants

[387] Respondent's Counter-Memorial, ¶¶ 282, 283, 258, 448-477.
[388] Respondent's Rejoinder, ¶¶ 248-257. According to the record, 6 other employees were arrested. Two of them in another facility.
[389] Respondent's Counter-Memorial, ¶¶ 285, 286; Respondent's Rejoinder, ¶¶ 427, 431, 478-491.
[390] "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." VCLT, **CL-004**, Art. 31.

> are nationals or in any freely convertible currency accepted by the claimants." (Emphasis added)

372. This provision sets forth the elements of a lawful expropriation within the regulatory framework established by the Treaty. *First*, the provision makes clear that expropriations and nationalizations, as well as measures having an equivalent effect, *i.e.*, indirect expropriations, are covered. Therefore, even if a measure is not considered or identified as an expropriation *per se*, it may still run afoul of the Treaty so long as it has an *equivalent effect*: "a measure which does not have all the features of a formal expropriation may be equivalent to an expropriation if it gives rise to an effective deprivation of the investment as a whole."[391]

373. *Second*, the language "unless the following conditions are complied with" indicates that such elements are cumulative. If one is not met, then there is a breach of Article 6. In particular, the text refers to three basic conditions: (i) the measures are taken in the public interest and under due process of law, (ii) are not discriminatory or contrary to any undertaking which the Contracting Party taking such measures may have given, and (iii) are taken against just compensation. Regarding the first element, the Tribunal observes that the use of the conjunctive "and" makes both the "public interest" as well as "due process" cumulative requirements. The second element uses the conjunctive "or," which in turn can indicate an alternative, another possibility.

374. Additionally, while the Contracting Parties are entitled to take measures regulating their domestic affairs, that right is not unlimited:

> "[…] while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. As rightly pointed out by the Claimants, the rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and

[391] *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd. and Mobil Venezolana de Petróleos, Inc. v Bolivarian Republic of Venezuela*, ICISD Case No. ARB/07/27, Award, 9 October 2014, **CL-084** (cited by Respondent as exhibit **RL-079**), ¶ 286. "[E]xpropriation can take place not only through a formal takeover, but also "indirectly" through measures that result in the substantial deprivation of the use and value of an investment despite the fact that formal title to it remains with the investor." (Unofficial translation). *Tza Yap Shum v. Republic of Peru*, ICSID Case No. ARB/07/6, Award, 7 July 2011, **CL-075**, ¶ 142.

> the investment protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate."[392]

375. Article 6 also confirms this conclusion when it states that measures are not to be "contrary to any undertaking which the Contracting Party taking such measures may have given." Regarding the landholdings, the Respondent has argued that its measures are a "lawful application of the extant regulations" and as to the measures adopted by SUNDDE, it has argued that they were a "legitimate exercise of [its] police powers."[393] The Tribunal understands both arguments to put forward a different defense. Thus, the Tribunal will first determine if Venezuela's actions constitute an expropriation and, in the case of SUNDDE's measures, if they can be considered a legitimate exercise of its police powers. Subsequently, the Tribunal will determine if the expropriation satisfies the elements of a lawful expropriation under the Treaty. While the nature of the measures covered by Article 6 may differ, for ease of reference the Tribunal will refer to the term "expropriation" as encompassing all such measures.

376. Tribunals have identified common elements that define both expropriations and equivalent measures. In *AES Summit Generation*, for example, the tribunal considered that: "[f]or an expropriation to occur, it is necessary for the investor to be deprived, in whole or significant part, of the property in or effective control of its investment: or for its investment to be deprived, in whole or significant part, of its value."[394] In *Santa Elena v. Costa Rica,* the tribunal considered that "[w]hat has to be identified is the extent to which the measures taken have deprived the owner of the normal control of his property […] property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property."[395] Similarly, the tribunal in *Pope & Talbot v. Canada* identified certain elements in its analysis of whether the export control regime at issue could be

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[392] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, **CL-036**, ¶ 423.
[393] Respondent's Counter-Memorial, ¶¶ 282 and 286.
[394] *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, **CL-068**, ¶ 14.3.1.
[395] *Compañía del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, 17 February 2000 ("***Santa Elena v. Costa Rica***"), **CL-154**, ¶¶ 76, 77.

deemed to cause an expropriation, such as: the control of the investment by the investor, the direction of the day-to-day operations, whether officers or employees had been detained, and whether the State took any of the business's proceeds or interfered with management.[396]

377. The Tribunal considers that, whether an expropriation occurs by way of a formal "taking" or through the application of measures that derogate fundamental rights of ownership such as the use or enjoyment of benefits, the crux of the matter lies within the effects resulting from those measures:

> "[…] the Tribunal considers that the accumulated mass of international legal materials, comprising both arbitral decisions and doctrinal writings, describe for both direct and indirect expropriation, consistently albeit in different terms, the requirement under international law for the investor to establish the *substantial, radical, severe, devastating or fundamental deprivation* of its *rights* or the *virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment*."[397] (Emphasis added)

378. It is the actual effect, rather than how the measure is labeled or the claimed intent behind it that governs the Tribunal's analysis. Indeed, as stated in *Vivendi*, "[w]hile intent will weigh in favour of showing a measure to be expropriatory, it is not a requirement, because the *effect* of the measure on the investor, not the state's intent, is the critical factor. […] a state may expropriate property where it interferes with it even though the state expressly disclaims such intention. Indeed, international tribunals, jurists and scholars have consistently appreciated that states may accomplish expropriations in ways other than by formal decree; often in ways that may seek to cloak expropriative conduct with a veneer of legitimacy."[398]

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[396] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Interim Award, 26 June 2000 ("***Pope & Talbot v. Canada***"), **CL-011**, ¶ 100.
[397] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 ("***Electrabel v. Hungary***"), **RL-081**, ¶ 6.62.
[398] *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. The Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007 ("***Vivendi v. Argentina (I)***"), **CL-043**, ¶ 7.5.20.

379. With this in mind, the Tribunal turns now to the facts of the case addressing first the measures taken against the landholdings and then the measures taken against Claimant's companies in 2018.

i. The Landholdings

380. The Parties disagree on whether the Claimant had property rights over the landholdings and, in consequence, whether there was an expropriation warranting compensation. Prior to analyzing the measure, the Tribunal will determine if the Claimant indeed held title over the properties.

381. As indicated above, the Land Law was enacted in 2001 and was amended in 2005 and 2010. Venezuela's legal framework on land in furtherance of its food security and agrarian production policies forms the basis of its measures. Therefore, the Tribunal agrees that the validity of the title should be assessed prior to the introduction of those regulations.[399]

a. Whether the Claimant Held Title Over the Landholdings

382. The Respondent contends that Smurfit was not the lawful owner and, therefore, could not have been deprived of property it did not own.[400] In general, the Respondent submits that the landholdings were recovered pursuant to the recovery proceedings provided for in the Land Law, that the requirement to prove chain of title predates the said instrument, and that mere registration of title does not create property rights.[401]

[399] "The Parties are in agreement that an investor's ownership over the allegedly affected assets must be assessed immediately before the adoption of the challenged measures. Accordingly, the Tribunal will review the validity of Vestey's title just before the introduction of the Land Law, *i.e.* as of 13 November 2001. Using a later date would render the protection granted in Article 5 of the BIT illusory. If one were to set the date of assessment of the investor's ownership any later than the date of the first contested measure, a state could adopt a law making it impossible for a private owner to prove ownership and thereby circumvent the Treaty guarantee. This cannot be the meaning of the Treaty. Therefore, the Tribunal will not consider the provisions of the Land Law in assessing Vestey's ownership over the allegedly expropriated land." *Vestey Group Ltd. V. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016 ("***Vestey v. Venezuela***"), **CL-090**, ¶¶ 253, 254. In the Tribunal's view, the amendment to the 2010 Land Law established the requirement to prove the "chain of title" on Art. 82; nonetheless, it was since the 2001 Land Law that recovery proceedings were established. Such regime suffered amendments, yet the regime itself forms the basis of Venezuela's actions towards the landholdings and thus of the Claimant's allegations of breach.
[400] Respondent's Counter-Memorial, ¶¶ 14-35; Respondent's Rejoinder, ¶¶ 7-71.
[401] Respondent's PHB, ¶¶ 185-189.

383. The Tribunal begins its analysis with Venezuela's supreme law,[402] in particular, Articles 115 and 116 that recognize the right to property.

> Article 115. Venezuelan Constitution.
>
> "*The right of property is guaranteed*. Every person has *the right to the use, enjoyment, usufruct and disposal of his or her goods*. *Ownership* shall be subject to the contributions, restrictions and obligations established by the law for the *purposes of public utility or general interest*. The *expropriation* of any type of property may *only be declared on grounds of public utility or social interest*, by means of a *final ruling and timely payment of fair compensation*."
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> Article 116. Venezuelan Constitution.
>
> "*Confiscation of property* shall not be decreed or executed except in cases permitted by this Constitution. As an *exceptional measure*, the property of natural or legal persons of Venezuelan or foreign nationality who are responsible for crimes committed against public patrimony may be subject to confiscation, by *final judgment*, as may be the property of those who illicitly enriched themselves under cover of Public Power, and property deriving from business, financial or any other activities connected with unlawful trafficking in psychotropic and narcotic substances."[403] (Emphasis added)

384. These provisions establish that the fundamental right to property will be guaranteed and clarify the circumstances in which such right can be affected, *i.e.*, by means of an expropriation or confiscation. The text is clear as to the limited circumstances in which this right will be affected, Article 115 provides that expropriation may "only" be declared on grounds of public utility or social interest, as well as through "a final ruling" and payment of compensation. The Tribunal observes that the text in Spanish uses the word "*bienes*," which refers to "patrimony, wealth, material or immaterial things"[404] as well as "*sentencia firme*," which connotes a decision which is not subject to any right of appeal, *i.e.*, "final judgement" or *res judicata*.

385. The Claimant bases its title for La Productora on a notarized document from 17 October 1996 that certifies the unconditional, absolute and irrevocable sale from Pecuaria

[402] Venezuelan Constitution, published in the Gaceta Oficial No. 5,453 on 24 March 2000, **C-033**, Art. 7.
[403] Venezuelan Constitution, published in the Gaceta Oficial No. 5,453 on 24 March 2000, **C-033**. (Unofficial Translation)
[404] "*Bienes*" in Real Academia Española: Diccionario de la lengua española, 23th ed. Retrieved, 25 July 2023 https://dle.rae.es/bien

Mosalva, C.A. to Refordos of "a property or rural estate made up of two adjacent parcels of land, separated in the middle by the Acarigua-Guanare national highway, which constitute the estate or ranch known by the name of 'LA PRODUCTORA', with the improvements, attachments and upgrades built on it."[405] Regarding El Piñal, Claimant bases its title on a notarized document from 27 August 1993 that certifies the unconditional, absolute and irrevocable sale to Refordos from Proveduría Zuliana, C.A. of "the lands, improvements, attachments, upgrades and accessories that constitute and form part of an agricultural and livestock estate known by the name of "EL PIÑAL," located in the jurisdiction of the Simon Planas Municipality in the Palavecino District of the State of Lara."[406] As to Santo Tomás, the Claimant bases its title on a notarized document from 9 August 1991 that certifies the unconditional, absolute and irrevocable sale to Refordos from Cartón de Venezuela, S.A. of "a property and the constructions existing on it (highways and civil works and sheds) that make up the estate called SANTO TOMAS … located in the Jurisdiction of the Simón Planas Municipality [sic], formerly the Zarare Municipality of the Palavecino District of the State of Lara."[407] The Respondent does not contest the existence or authenticity of these documents.

386. The Law of Public Registry and Notary provides in Article 8 that "[o]nly titles that meet the substance and form requirements established by law may be recorded in the Registry." Article 9 states that "[t]he principle of public faith in the registry protects the legitimacy and legal certainty of its records." Article 25 provides that the "mission of the registries is to guarantee the legal security of the acts and rights registered therein with respect to third parties, through the publicity of the registry." Article 27 states that "[t]he registry entries and information officially contained and issued by the registry system will have all the legal effects corresponding to public documents." Article 43 provides that "[r]egistration does not validate registered acts or business transactions that are null or annullable in accordance with the law. However, registry entries containing such acts or business transactions may only be annulled by a firm and final ruling." This last

[405] Registered Title of La Productora, 17 October 1996, **C-024B**.
[406] Registered Title of El Piñal, 27 August 1993, **C-024A**.
[407] Registered Title of Santo Tomás, 9 August 1991, **C-024Q**.

provision is consistent with the "final judgement" requirement in Articles 115 and 116 of the Venezuelan Constitution. Finally, "[t]he purpose of the Public Registry is the registration and annotation of legal acts or transactions related to ownership and other real rights that affect real estate."[408]

387. The foregoing provisions make clear that the very object of the registry is to provide security and legal certainty as to the content of its records. Such records have the effect of public documents. Article 1359 of the Civil Code indicates that "[a] public instrument has full legal authority with respect to the parties involved as well as with respect to third parties, unless one of the following is declared false: 1. the legal acts which a public official declares he has performed, if he had the authority to carry them out; 2. The legal acts which the public official declares that he has seen or heard, provided that he is authorized to record them." Also, Article 1360 states that "[a] public instrument has full legal authority with respect to the parties involved as well as with respect to third parties insofar as the truthfulness of the statements made by the parties are concerned regarding the materialization of the legal fact documented by the instrument, except in cases where simulation is proven based on the means permitted by the law."[409]

388. The Respondent has argued that a registry does not create property rights. The Tribunal agrees, but the fact that a registry does not create property rights does not mean that such registry does not constitute a means of proof or a presumption of the validity of the underlying acts:

> "[…] although registration is not an independent mode of acquisition of property, it is not disputed that it creates a *presumption* that the act underlying the registration is *valid*. In the present case, that underlying act is the contract for the transfer of property. Such contract does constitute an independent mode of acquisition of a property right, a matter that is uncontroversial. *Unless it is invalidated through the means established by law*, the registration obliges any third party, including this Tribunal, to presume that the property right has been

[408] The Law of Public Registry and Notary, published in the Gaceta Oficial No. 5,883 on 22 December 2006, **C-050**, Art. 45.
[409] Venezuelan Civil Code, published in the Gaceta Oficial No. 2,990 on 26 July 1982, **C-028**.

> validly transferred by operation of the registered property transfer agreement."[410] (Emphasis added)

389. The Tribunal concurs with *Vestey v. Venezuela* that: "[i]f the registered title were to account solely for the good faith intention of the acquirer of the property *it would not produce any legal consequences for third parties and registry entries would not need to be public*. These entries are *public* precisely because they create the *presumption of validity* of a registered legal act *vis-à-vis* the *entire public*. Therefore, any third person can and must presume that legal acts entered into the Public Registry are valid."[411]

390. In this regard, we recall that Article 43 of the Law of Public Registry and Notary provides that registry entries may only be annulled by a firm and final ruling.[412] According to the facts of the case, the entries containing the acts whereby the Claimant acquired the landholdings had not been formally challenged. Accordingly, the presumption of validity derived from the effect of a public instrument is applicable.[413]

391. The Respondent has argued that the chain of title requirement precedes the 2010 Land Law and that both the Vacant Lands Law of 1919 and 1936 required those in possession of farmlands to demonstrate chain of title dating back to 1848 if lands were acquired

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[410] *Vestey v. Venezuela*, **CL-090**, ¶ 268.

[411] *Vestey v. Venezuela*, **CL-090**, ¶ 270. The Tribunal notes that the facts of this case are similar to those in *Vestey v. Venezuela*. In that case, the tribunal examined Art. 796 of the Civil Code, which establishes the modes of property acquisition and held that "even if the registrations were not deemed to confer valid title, Vestey would hold such title on the ground of acquisitive prescription," ¶¶ 276-284 (quoting Art. 1979 of the Civil Code: "One who acquires an immovable good or a property right over an immovable good in good faith through a duly registered title not invalid for a defect in form, acquires the ownership or the property right within ten years from the date of the registration of the title"). "Property and other rights can be acquired and transferred by virtue of the law, by succession, and by contract. They can be also acquired through prescription," ¶ 258 (quoting Art. 796 of the Civil Code). *See* Civil Code of Venezuela, **R-052**, Arts. 796 and 1979.
The Tribunal considers that the Claimant could be in the same situation as *Vestey* since the registrations of La Productora, El Piñal and Santo Tomás were made on 17 October 1996, 27 August 1993 and 9 August 1991, *i.e.,* ten years had passed without a challenge to the registered title, no vindication action was taken under the Vacant Lands Law either. The Tribunal notes in the case of La Productora that the Respondent refers to Punto de Cuenta 000003 establishing interim measures on 16 October 2006 while the Claimant has referred to a document indicating interim measures were imposed on 31 October 2006. Both refer to the same extraordinary session (26-06). Regardless of the exact date that the interim measures were imposed within the context of the Land Law, up to that point (October 16 and 17) there had been no formal challenge to the title. *See* Punto de Cuenta No. 000003 regarding La Productora, 16 October 2006, **R-031**; INTI Notice regarding La Productora, 31 October 2006, **C-047**.

[412] Law of Public Registry and Notary, published in the Gaceta Oficial No. 5,883 on 22 December 2006, **C-050**, Art. 43.

[413] Civil Code of Venezuela, **R-052**, Arts. 1,359 and 1,360. The Tribunal is not aware either that the title had been invalidated for a defect in form as provided by Art. 1,979 of the Civil Code.

after the Vacant Lands Law of 1848.[414] Article 6 of the Vacant Lands Law of 1919 provides:

> "6. The land registry will be formed by Municipalities and shall detail […]
>
> § 3 Regarding the Common Lands, the registry will indicate the origin of their acquisition by the respective municipality and *with respect to the lands of private property* or of corporations or legal persons, *the date of the award title will be ascertained*, when this is after the Law of April 10, 1848, but if the possession dates from a date prior to said Law, it will suffice to state it without ascertaining the existence or circumstance of the original data, composition or adjudication titles."[415] (Emphasis added)

392. Article 6, second paragraph of the Vacant Lands Law of 1936 reflects the same provision as the Law of 1919.[416] Whilst the Respondent contends that the burden of proof regarding the chain of title lies with those asserting property ownership and that the Land Law, as amended in 2010, did not introduce any new requisites as a matter of proof of ownership, the Tribunal observes that the requirements found in the latter substantially differ. In particular, the requirement to demonstrate "a perfect sequence and chain of title for the property and other alleged rights."[417]

393. The Tribunal finds that the Claimant held title before the alleged measures took place, including the amendments of the Land Law. In addition, the Tribunal does not find in

[414] Respondent's Counter-Memorial, ¶¶ 25, 26.
[415] Land and Ejido Law 1, 27 June 1919, **R-017,** Art. 6.3. (Unofficial Translation). According to the Respondent, "the burden of proof as regards chain of title lied with those who asserted property rights over the landholdings." Respondent's Counter-Memorial, ¶ 27. It supports this assertion with a witness statement: "[t]he private title was always derived from a State's transfer and proof of private title over those lands was necessary. During the times of the agrarian reform, also private parties depended on evidence of some kind of private acquisition." First Witness Statement of Juan Carlos Loyo, ¶ 25.
[416] Land and Ejido Law 2, 3 September 1936, **R-018**, Art. 6(2). "[…] [W]ith respect to land owned by individuals or corporations or juridical persons, the date of the title of acquisition shall be ascertained, when this is subsequent to the Law of April 10, 1848; but if the respective possession dates prior to the said Law, it shall be sufficient to so state, without ascertaining the existence or the circumstances of the original titles of date, composition or adjudication." (Unofficial Translation). *See also* Art. 8.
[417] "The National Land Institute (INTI) may also recover land in cases in which ownership is attributed to private parties, when after a documentary analysis of the sufficient title requested from the party to whom ownership rights are attributed, the person is unable to show a perfect sequence and chain of title for the property and other alleged rights, from the valid granting by the Venezuelan Nation until the title of acquisition duly registered by the party who asserts ownership." (Unofficial translation). Land Law, as amended in 2010, Art. 82, **C-083**.

the text of the Vacant Lands Law a presumption of ownership by the Venezuela that can only be rebutted by "showing a better title," as the Venezuela asserts.[418]

394. While analyzing Articles 10 and 11 of the Vacant Lands Law, the tribunal in *Vestey v. Venezuela* considered that, "according to the court, the burden will be reversed if the state '*attempts to vindicate'* allegedly vacant land […] even if the 1936 Vacant Land Law were deemed to oblige Vestey to show the chain of title, *quod non*, that obligation was never [sic] been triggered by the government. […] even if the government had started a vindication action, Article 11 would have allowed Vestey to prove its ownership by claiming acquisitive prescription as a defense without the need to show chain of title."[419] In the present case, while recovery proceedings were initiated, to the Tribunal's understanding, a civil lawsuit for vindication before courts was not triggered and as already indicated, the registered title established a validity presumption that had not been challenged either.

395. Accordingly, the Tribunal finds that the Claimant held registered titles over the three landholdings prior to the seizures challenged in this arbitration. Such titles carried a presumption of the validity of its property acquisition which was not rebutted by Venezuela.

b. Whether there was an Expropriation in Accordance with Article 6

396. We now examine whether the landholdings were the subject of an expropriation or a measure equivalent to expropriation.

[418] Even if such presumption were to be read from the text of those regulations, we concur with the tribunal in *Vestey v. Venezuela,* which also analyzed Articles 10 and 11 of the Vacant Lands Law. Art. 10 of the Vacant Lands Law provides that "the Federal Executive will order that a civil lawsuit be initiated before the competent courts" if it appears that vacant land is held as private property. Art. 11 recognizes that "[i]n all cases, the possessor, even if his possession dates from a later date than said Law, can allege the prescription that favors him, and the initiation of any claim process will not be ordered when there is evidence that if the prescription exception was invoked, it would prosper." (Unofficial translation)

[419] *Vestey v. Venezuela*, **CL-090**, ¶¶ 289-291.

1) La Productora

397. The Claimant argues that, after initiating recovery proceedings, on 31 October 2006, the INTI imposed interim measures that allowed the occupation by individuals. Then, on 25 March 2007, President Chávez announced the expropriation of La Productora and the property was seized on the same day.[420] For its part, the Respondent contends that the televised speech did not have "practical effects other than accelerating the execution of already existing interim measures, taken under due process of law, and duly notified to Refordos several months before."[421]

398. The Tribunal observes that on 31 October 2006, the INTI imposed interim measures over the land that would be in force until a decision on the recovery proceedings was rendered. This status was expected to continue. The INTI's decision also contemplated the occupation of the land by individuals and the progressive allocation of the land to agricultural activity. While the measure clearly restricted Claimant's ownership rights, it did not have the effect of depriving it of the property. Almost five months later, President Chávez announced on television:

> "And this is one of the 16 estates that today the revolution is intervening simultaneously, at this very hour, in the whole country; The war against the latifundio! Revolutionary offensive. […] What is happening is a leap forward in the revolution, the recovery of land. We are going to remind those who arrived late to the program that today we are recovering 16 estates, large estates, a total of 330,000 hectares. […] I have been sending messages to those landowners who still remain in Venezuela, a revolution has come, you will not be able to stop it, let's seek understanding. […] We are going to understand each other well, if we do not understand each other we are going to apply the law, as we are applying it today. I repeat, today we are seizing Buena Vista farm […] And in *Portuguesa*, *the producer Smurfit Cartón de Venezuela*, *2,700 hectares*. But soon we are going back for thirteen more, and they'll keep showing up."[422] (Emphasis added)

399. The Respondent has argued that "La Productora was not 'seized' and certainly was not occupied as a result of President Chávez's televised speech," that "President Chávez's intervention offered what amounts to an overview of a political process which had no

[420] Claimant's Reply, ¶ 234.
[421] Respondent's PHB, ¶ 192.
[422] Transcript of Aló Presidente N 278, *Todo Chávez*, 25 March 2007, **C-195**, pp. 2, 36, 37. (Unofficial translation)

practical bearing over the ensuing recovering proceedings" and that *Smurfit* and *La Productora* were mentioned "just once" in the speech.[423] The Tribunal agrees that interim measures were imposed on 31 October 2006. Those measures were not executed for almost 5 months. They were, however, executed on the same day that President Chávez announced the intervention of the estates. The Tribunal does not opine on whether that simultaneous intervention was made "[b]y direct order of the President of the Republic" as described in the press.[424] What is clear from the legal framework enacted by Venezuela is that a whole system of planification for the land was established based on an agenda dictated by President Chávez. What is also clear from President Chávez's statements is that this framework and in general the State's apparatus was put into operation in pursuit of this political agenda, labeled as "agrarian revolution."

400. In his televised announcement, President Chávez referred to one of the estates that was intervened that same day, La Tascosa, and to a plan to be developed within three months for inspections to be made, for studies on the natural characteristics of the zone to be undertaken, and for a planification system to implement the "productive project." Whether Smurfit and La Productora were mentioned only one time is inconsequential. It is clear from the statement made that large estates were the object of President Chávez's political agenda. The words of a President whether in a speech, press conference or social media carry considerable probative weight. Words of a head of State could not be severed in pieces and its value undermined because of a certain state of mind or poll. At all times, they are representatives of a sovereign State.[425] People listen to them, and government

[423] Respondent's Rejoinder, ¶¶ 25, 27, 29, referring in footnote 38 also to Transcript of Aló Presidente N 278, *Todo Chávez*, 25 March 2007, **C-195**, p. 37. The Tribunal observes that the Respondent acknowledges that La Productora was mentioned in the televised speech and that, although the speech refers to "the producer Smurfit Cartón de Venezuela," the number of hectares coincides with the hectares owned by the Claimant regarding La Productora estate, *i.e.,* 2,732 according to Claimant's Memorial, ¶ 14.

[424] "La Productora farm taken by the State," *El Regional*, 26 March 2007, **C-053**.

[425] "Mr. Guglielmino: But the truth of the matter is that this debate–I don't want to avoid the debate by saying well, it's obvious, but in truth it is. The statements of politicians are basically related to the circumstances, his humor if he's in good humor or not, if the polls are favorable or not, there are many variables that can make someone say things that finally are not the same, that are reflected in the legal formal act by the State after going through local procedures. So, the mere fact that you asked us what evidentiary value can this statement by a human being have who is not the same person who replaces the procedure of the State reflecting the will of the State, that's not something to take into account. A president, a minister or even a person who sweeps the streets, does not replace the way in which the State expresses its will." Tr. Day 5 (Mr. Guglielmino) P1195:L18-22/P1196:L1-13.

officials act upon them. In this case, for example, the execution of the interim measures was made that very day while recovery proceedings were still ongoing. It would be implausible to conclude that there is no connection whatsoever between such speech and the decision by the State to seize those 16 estates on 25 March 2007.

401. While the interim measures were supposed to be temporary until a final decision on the recovery proceedings was issued, the measures were, *de facto*, permanent. By virtue of the State's actions on 25 March 2007, the Claimant was deprived in full of the landholding, of its use, of its benefits and any control it had over it. This outright seizure constituted an expropriation in terms of Article 6 of the BIT.

402. As to the landholdings, the Respondent has argued that the actions were a "lawful application of the extant regulations." The fact that the seizure was made within the context of a recovery proceeding contemplated in the Land Law does not *per se* justify an expropriation. Pursuant to Article 6 of the BIT, to render such action as lawful the Tribunal must assess whether the elements therein provided were satisfied. If one element is not satisfied, then such expropriation would be unlawful.

403. At the outset, the Tribunal notes that no compensation was paid for the taking of La Productora. Under the BIT, it is clear that compliance with this compensation requirement is mandatory. Non-compliance with this requirement alone suffices to constitute an expropriation that is inconsistent with Article 6.

404. In addition, to be lawful, the expropriating measures must be taken: (i) in the public interest, and (ii) under due process of law. As to the first element, the taking of La Productora was made in furtherance of Venezuela's food security and agrarian production policies. The Tribunal considers that those objectives may qualify as matters of public interest. Regarding the second element, it is not enough for the measures to be taken in the public interest; they must also comport with due process of law. In this sense, the Tribunal notes three issues that relate to the due process inquiry. *First*, there is a presumption of validity of Claimant's registered titles that was not challenged. The provisions of the Law of Public Registry and Notary, the Civil Code and the Vacant

Lands Law of 1936 were, at the least, ignored in favor of the regime implemented through the Land Law.

405. *Second*, both Parties have referred to the interim measures imposed by the INTI in October 2006. The Claimant refers to a notification indicating that on 31 October 2006 the decision to impose measures was made.[426] The Respondent does not contest that the Claimant was notified of this decision until 19 January 2007.[427] While the Tribunal understands that, in some instances, notifications may not be served swiftly, a significant delay in notifications of procedures can hamper the right of defense of the affected party.

406. *Third*, while according to the applicable law, interim measures are supposed to be temporary, those measures were, as indicated, *de facto* permanent. The Respondent has not, to this day, pointed this Tribunal to a final decision on the recovery proceeding. In the absence of such basic evidence, it is apparent that the recovery procedure was never formally concluded as provided by the relevant legal framework.

407. In addition to these reasons, the Tribunal agrees with the conclusion of the *Vestey v. Venezuela* tribunal that: "[b]y introducing and applying the Land Law to Vestey's investment and thereby derogating from the procedural guarantees of the Expropriation Law, Venezuela deprived Vestey not only of the opportunity to have the valuation of its investment reviewed by an independent authority, but of the right to be compensated altogether. The regime provided by the Land Law fails to satisfy the due process requirements of the BIT."[428]

408. Finally, according to the Report of the Senate Commission referenced by both Parties, Refordos had previously obtained authorizations for its forestry activities in La Productora.[429] The Tribunal is not aware of a decision revoking or nullifying those

[426] INTI Notice regarding La Productora, 31 October 2006, **C-047**, p. 1. The Respondent has referred to *Punto de Cuenta No. 000003,* while both documents refer to the same extraordinary session (26-06), the latter is dated 16 October 2006.
[427] The Respondent does not contest that it notified both the decision to initiate the procedure rendered on 27 September 2006 and the decision as to the interim measures on this day.
[428] *Vestey v. Venezuela*, **CL-090**, ¶ 305.
[429] Permanent Commission on the Environment and Territorial Planning of the Senate Report, 1 November 1998, **R-027**, pp. 182, 190-194.

authorizations. Notwithstanding this, the authorizations were rendered moot in light of the Land Law regime, just as the provisions enacted specifically towards expropriation and the presumption of validity towards its registered titles.

409. Accordingly, the Tribunal does not consider it necessary to take further the analysis of the other elements provided for in Article 6 of the BIT and determines that the seizure of La Productora was an expropriation carried out in breach of this provision.

2) El Piñal

410. The Claimant contends that, despite the fact that recovery proceedings were pending, on 21 October 2009 the INTI took possession of El Piñal and, while Refordos was allowed to enter the property in order to harvest wood, from that moment Refordos lost control over the property.[430] The Respondent, on the other hand, submits that the minutes of "INTI's alleged takeover" make no reference to a directive by President Chávez but to acts consistent with the interim measures previously imposed and that such measures were temporary and reversable.[431]

411. On 25 February 2009, the INTI rendered a declaration of idleness on the land of El Piñal and initiated recovery proceedings. The decision also denied the Productive Farm Certificate that Refordos had requested and imposed interim measures.[432] This decision was notified on 1 March. On 5 March 2009, President Chávez announced the intervention of El Piñal:

> "[…] the area where the company Smurfit has some Eucalyptus plantations. This [land] *we have also intervened*. Yesterday, right? […]
>
> Yesterday, *Smurfit has been intervened*. *It has been intervened* How many hectares *do we have there*? […].[433]
>
> '*We are going to* ***rationally exploit*** that wood (from eucalyptus) and *we are going to plant other things there* (…) beans, corn, sorghum, yucca, yams…' […]

[430] Claimant's Memorial, ¶ 68.
[431] Respondent's Rejoinder, ¶ 39.
[432] INTI Notice regarding El Piñal (*Notificación*), 25 February 2009, **C-066 bis**.
[433] President Chávez speech regarding El Piñal, 5 March 2009, **C-350**. (Unofficial translation)

> [The land] '*is no longer private property, but* ***property of the people***' […] 'a community is being born' on the site, one of the new social and production structures that he proposes for the incipient 'socialist Venezuela'".[434] (Emphasis added)

412. Seven months later, on 21 October 2009, the INTI took possession of El Piñal.[435] As in the case of La Productora, recovery proceedings were ongoing when President Chávez made his announcement. Despite this fact, the Tribunal observes that the statements refer to the property as "no longer private" but "of the people" and the use to which the land would be given. While the land was intervened in March, the INTI took custody seven months later. The Claimant has indicated that, "[o]n 21 October 2009, notwithstanding INTI's pending recovery proceedings, INTI took possession of El Piñal. As a result, Refordos lost (and never regained) control over the property."[436] The Tribunal considers that once full custody was acquired by the INTI, the Claimant was completely deprived of any possible control over the property. While the Claimant was allowed to harvest wood for a period of time, it was not allowed to replant trees.[437] Although the Respondent has indicated that "Refordos was allowed to enter the property and recover the improvements it had made in El Piñal,"[438] it has not contested Claimant's assertion on the replanting of trees.[439] Whether the Claimant somehow benefitted or not was a decision of the State. This outright seizure constituted an expropriation within the terms of Article 6 of the BIT.

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[434] "Chávez announces the intervention over the lands of paper company Smurfit Kappa," *ABC Internacional*, 6 March 2009, **C-202**; "Chávez orders the expropriation of the lands of Irish paper company Smurfit Kappa," *20 minutos*, 6 March 2009, **C-203**; "Venezuela takes farm from Irish paper company," *La Nación*, 7 March 2009, **C-204**.
[435] INTI Takeover Minutes regarding El Piñal, 21 October 2009, **C-074**.
[436] Claimant's Memorial, ¶ 68; "on 21 October 2009, INTI, accompanied by armed military personnel 'assumed custody of the El Piñal property, its installations and improvements'." Claimant's PHB, ¶ 24.
[437] While the Claimant indicates for example with respect to El Hierro that it was allowed to harvest some wood, but not replant trees, until August 2018, it does not refer how much time it was allowed to harvest wood from El Piñal, it only qualifies it as "limited time." *See* Claimant's Memorial, ¶ 68 and Claimant's Reply, ¶ 36.
[438] Respondent's Rejoinder, ¶¶ 40 and 442.
[439] The Tribunal notes that according to the Minutes of 21 October 2009: "It is likewise confirmed that as of this date the National Land Institute headquartered in state of Lara assumes control and custody of the El Piñal property, its installations and improvements in their entirety, by virtue of the attributes and authority granted by the Land Law, as the competent entity responsible for the enforcement of the Recovery Proceedings to which El Piñal is subject." INTI Takeover Minutes regarding El Piñal, 21 October 2009, **C-074**, pp. 1 and 2. (Unofficial translation), referred in Respondent's Rejoinder, footnote 70.

413. As to the elements set forth in Article 6 of the BIT, Venezuela paid no compensation to the Claimant for the seizure of El Piñal, which renders the expropriation unlawful. In addition, the expropriation failed to comply with the requirements of a lawful expropriation for other independent reasons. While the Tribunal considers that food security and agrarian policies may be matters of public interest, in the Tribunal's view, the seizure of El Piñal and the decision as to its ownership and use reflected in the statements made in 2009 are at odds with the recovery proceeding that was still pending.

414. With respect to due process, in the case of El Piñal there was no decision rendered until 2012, *i.e.*, three years after the seizure, this decision was not notified to the Claimant until December 2016, *i.e.*, seven years after the seizure and four years after the decision had been issued. This is uncontested by the Respondent. The Respondent has failed to proffer a credible explanation for this failure to accord due process in connection with the expropriation of El Piñal.

415. Moreover, the considerations raised by the tribunal in *Vestey v. Venezuela* as to the application of the Land Law and disregard of the Expropriation Law regime are equally applicable to El Piñal. In light of the above, the Tribunal does not consider it necessary to further analyze the other elements in Article 6 of the BIT and determines that the seizure of El Piñal was an expropriation carried out in breach of this provision.

3) Santo Tomás

416. The Claimant contends that between March 2010 and 2011 Santo Tomás was invaded by groups. On 5 May 2011, a Regional Office from a different State issued a decision guaranteeing such occupations and, from that moment on, Refordos lost permanent control of Santo Tomás. Although representatives tried to access the property, they were not allowed to enter. On 19 October 2011, Santo Tomás was declared "idle," recovery proceedings were initiated, and interim measures were imposed. On 27 January 2015, the INTI initiated a formal recovery proceeding.[440] The Respondent, on the other hand, contends that no more than thirty people entered Santo Tomás in May 2011, that only

[440] Claimant's PHB, ¶¶ 27-29.

small parts of the property were affected, that the groups that entered the land acted on their own and not at the direction of the State, that Santo Tomás was recovered pursuant to the Land Law and that the document dated 5 May 2011 was not a legal document concerning a decision adopted by the INTI.[441]

417. The Tribunal begins by noting that unlike the other two landholdings, there was no public announcement of a taking. However, the record includes complaints from March 2010, November 2010, February 2011 and May 2011, protesting the occupation of the land by individuals, damage to property, tree cutting, and intentional burning.[442] The record also contains an exhibit documenting an inspection attempted to be carried out by the Prefecture of the San Simón Planas on 13 May 2011 at the request of Refordos. That document shows that there were a hundred people occupying the land who did not allow the inspectors to enter, who threatened the inspectors and who claimed that the land was the property of the revolutionary people.[443]

418. The record also contains a letter from the General Coordinator of the Regional Land Office of the State of Yaracuy guaranteeing the farmers who were occupying the area of El Palmar in Santo Tomás their tenure on the property and requesting the courts to abstain from ordering their eviction.[444] While Mr. Loyo testified that the letter is "not a legal document concerning a decision adopted by INTI"[445] and the Respondent alleges the letter had no legal effect, the Tribunal disagrees. Whether the officer signing that order was competent or not, it is the case that there was a decision by a government officer of a Regional Office. Such decision purported to safeguard the activities of the occupants of Santo Tomás that the Claimant had denounced on several occasions to different authorities of Venezuela. According to Mr. Ramírez, the entrance to the property was

[441] Respondent's Rejoinder, ¶¶ 44-48; Respondent's PHB, ¶¶ 195-198.
[442] Letter from Refordos (Mr. Arrieche) to Prefecture of the Sarare Municipality, 5 May 2011, **C-214**; Letter from Refordos (Mr. Cordobes) to Ministry of the Environment – Director of the Lara state (Ms. Arrieta), 16 May 2011, **C-215**. *See also* Palavecino and Simón Planas District Court of the State of Lara Judicial Inspection file regarding Santo Tomás, June 2011, **C-216**, pp. 53, 55.
[443] Minutes of Inspection conducted by the Prefecture of the Simón Planas Municipality at Santo Tomás, 13 May 2011, **C-090**, pp. 1-2.
[444] Guarantee of residence to Consejo Comunal El Palmar by the Yaracuy RLO, 5 May 2011, **C-356**.
[445] Hearing, Tr. D 3 (Mr. Loyo), P624:L4-5.

blocked from then on and Claimant's equipment was not recovered: "[d]espite our complaints to the authorities, we were unable to access the property from then onwards, and never managed to recover our equipment. We had to rent new equipment to replace the harvesting equipment that remained on the property."[446]

419. The Tribunal finds that the evidence shows that the Claimant lost physical control over the land after the Yaracuy decision. In fact, a Report from 2013 recounts that 147 people had occupied the land since 2011 and that Refordos was not in possession of the landholding.[447] In consequence, not only was the Claimant not in physical control of the property, but also it was deprived of access, use and enjoyment of the property. We recall that "[t]he measure is expropriatory, whether it affects the entire investment or only part of it, as long as the operation of the investment cannot generate a commercial return."[448] The evidence in the record establishes that Refordos was not able to continue operating Santo Tomás and to obtain an economic return from it. In the words of the *Santa Elena* tribunal, "[w]hat has to be identified is the extent to which the measures taken have deprived the owner of the normal control of his property […] a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property […]."[449]

420. Five months after the Yaracuy decision, the INTI issued interim measures over the land and formally began recovery proceedings. The Tribunal agrees that as of the time the INTI issued its decision in 2015, the scenario had not changed for the Claimant, the land had been declared idle since October 2011 and the resolution formalized that the land had, in fact, been recovered by the State.[450]

[446] First Witness Statement of Alberto Ramírez, ¶ 27(c).
[447] INTI Technical Report regarding Santo Tomás, 15 June 2013, **C-230**, pp. 7, 34, 35.
[448] *Burlington Resources Inc. v. The Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 ("***Burlington v. Ecuador***"), **RL-078**, ¶ 398.
[449] *Santa Elena v. Costa Rica,* **CL-154**, ¶¶ 76, 77.
[450] INTI Notice regarding Santo Tomás, 27 January 2015, **C-134**, p. 25.

421. While the Respondent has argued that the acts of which the Claimant complains were acts of individuals and not of the State, the Tribunal considers that a measure may be categorized either as an action or as an omission and it may be comprised of different components. Regardless of the fact that the invasions were made by individuals, their occupation was guaranteed first by the Yaracuy decision and then by the interim measures. Accordingly, the Tribunal concludes that at least from 19 October 2011, when the land was declared idle and interim measures were imposed, the Claimant was substantially deprived of Santo Tomás. Such measures constituted an expropriation within the terms of Article 6 of the BIT.

422. It is uncontested that Venezuela paid no compensation to the Claimant for Santo Tomás, as in the case of the other landholdings, which renders the measure unlawful. While, as noted above, the Tribunal considers that food security and agrarian production may be matters of public interest, the Tribunal observes that these objectives are greatly undermined by INTI Reports from 2013 and 2014, which recorded minimal activity in the case of the former (1.50% of the surface for corn and 0.01% for pepper) and no livestock activities or corn crops in the case of the latter.[451]

423. In this instance, there was also a presumption of validity of the registered titles and provisions under the Law of Public Registry and Notary, the Civil Code and the Vacant Lands Law of 1936 that were ignored. The Tribunal considers that the considerations expressed as to the application of the Land Law and disregard of the Expropriation Law are equally applicable in this instance. Additionally, the notification of the final decision was made almost two years after it was rendered (November 2016) while the groups occupying the land had been notified in February of 2015,[452] which reflects disparate treatment among parties and affects due process just as a decision rendered by an authority that is not competent to make it does, and consequently, it is arbitrary.

[451] INTI Technical Report regarding Santo Tomás, 15 June 2013, **C-230**, p. 33; INTI Technical Report regarding Santo Tomás, 22 May 2014, **C-237**, pp. 14-17.
[452] INTI Notice regarding Santo Tomás, 10 February 2015, **C-244**; INTI Notice regarding Santo Tomás, 27 January 2015, **C-134**, p. 29. The Respondent does not contest this fact.

424. In light of the above, the Tribunal does not consider it necessary to further analyze the other elements set forth in Article 6 of the BIT and determines that Santo Tomás was seized in breach of this provision.

4) Other Landholdings

425. The Claimant has argued that Venezuela implemented measures that affected six other landholdings. Overall, such interferences refer to the initiation of procedures against the landholdings, the issuance of interim measures approving the occupation by groups, the issuance of agrarian letters to individuals over the land as well as a failure to take action to evict them. The Tribunal understands that the Claimant is not making a claim of indirect expropriation of these landholdings. In its submissions, the Claimant has not alleged how such circumstances would independently constitute an indirect expropriation.

426. In respect of these other landholdings, the Tribunal observes that, notwithstanding the entrance by individuals onto these properties, their activities on the land, and the impossibility to evict the occupants, at least up to August 2018 when Venezuela implemented further measures, the Claimant was still able to continue its activities and harvest wood. While it was not allowed to replant trees and there was no access to some areas, there was no outright seizure unlike the other cases and the interferences by the government in these six landholdings do not rise to a "substantial deprivation" that would virtually extinguish its capacity to generate return, radically deprive it of use and enjoyment of its benefits or render its rights useless.[453]

427. In consequence, since the Tribunal has not been asked to make a finding of violation in respect of these other properties, it has no occasion to comment further on them.

[453] *Burlington v. Ecuador*, **RL-078, ¶¶** 397, 398. *Vivendi v. Argentina (I)*, **CL-043**, ¶ 7.5.24

ii. 2018 Measures on Smurfit's Business

a. Whether there was an Expropriation in Accordance with Article 6

428. The Claimant contends that the Respondent took control over its entire business in Venezuela and in consequence deprived it of the use and economic benefit of its investments. We recall that in order to determine whether an indirect expropriation has taken place, "[w]hat has to be identified is the *extent* to which the measures taken have *deprived* the owner of the *normal control* of his property […] when the effect of the measures taken by the state has been to deprive the owner of title, *possession or access* to the *benefit and economic use* of his property."[454] The investor must establish "the *substantial, radical, severe, devastating or fundamental deprivation* of its *rights* or the *virtual annihilation, effective neutralisation or factual destruction of its investment, its value or enjoyment*."[455]

429. On August 21 and 22, SUNDDE inspected Cartón's office in Valencia and in the following days, other affiliates were also subject to inspections. Since 21 August, the first day of the inspection, a temporary occupation (of 180 days that could be extended for an equal period) of Cartón was ordered through an interim measure. Two days later, SUNDDE issued a decision ratifying the interim measures previously imposed, ordering a temporary occupation for 90 days, and designating a new Management Board due to asserted infractions of the Law on Fair Prices.[456] The Respondent contends that the Claimant abandoned its operations before the expiration of the temporary occupation order and that it did not deprive the Claimant of its right to manage and control its business or to derive economic benefits from it.[457]

430. While the Respondent maintains that the Claimant has not proven "loss of control" over its business, the Tribunal notes that the Claimant was not in control from the time of the first interim measure imposing a temporary occupation, *i.e.*, the very first day of the

[454] *Santa Elena v. Costa Rica*, **CL-154**, ¶¶ 76, 77. (Emphasis added)
[455] *Electrabel v. Hungary*, **RL-081**, ¶ 6.62. (Emphasis added)
[456] SUNDDE Ruling OTB-DNEMP No. 04-2018, 23 August 2018, **C-160**, pp. 7, 8.
[457] Respondent's Rejoinder, ¶ 450. *See also* Respondent's Reply PHB, ¶¶ 56-59.

inspection on August 21. Article 70 of the Law on Fair Prices indicates that "[w]hen the temporary occupation is issued, such measure shall be materialized through an *immediate takeover*" and "the measure will ensure the *operation and use* of the establishment […] *by* the competent body or entity."[458] In other words, the Law on Fair Prices itself states that a temporary occupation results in loss of control of the business. Additionally, on August 23, SUNDDE issued another decision ratifying the interim measures and ordering the appointment of a new management board. By this decision, the Claimant was deprived of any administrative or management control over Cartón and, in consequence, of its *normal control*, *possession* and the capacity to manage the company.[459] The Tribunal further observes that this decision indicated that:

> "The Ministry of People's Power for the Social Process of Labor *shall negotiate with the workers of the company the ultimate fate of the company* so as to establish *how productive activities shall continue* and *who shall be responsible for the labor and social security rights of the workers* of the company."[460] (Emphasis added)

431. The language in Spanish reads "negociará con los trabajadores […] el *destino final* de la empresa." The Tribunal translates this as referring to the "ultimate fate" of the company. The fact that the decision, despite referring to a "temporal" occupation, mentioned a negotiation with the workers as to the "ultimate fate" of the company does not comport with Venezuela's assertion that the measure was not permanent.[461] Moreover, the Tribunal notes that, while the decision of August 23 referred to an occupation of 90 days,

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[458] Law on Fair Prices, **C-140**, Art. 70. The interim measures also ordered a price adjustment. SUNDDE Ruling OTB-DNEMP No. 04-2018, 23 August 2018, **C-160**, p. 3.

[459] At the Hearing, Mr. Ramírez indicated: "[…] from SUNDDE's decision of the 23rd of August and on, we had no control over the Company. I was not… There was no way I could give an order from Miami. We had no control from then on. […] ever since the 23rd of August when they give the order… the notice in which they take control of the Company and appoint a new administration board, they have full control of the Company. […] each area had its special situation, but you could see that they had control and that they did not want to report to us, the previous managers. They did not want to follow any orders from us because it seemed to them that this would cause them trouble." Hearing, Tr. Day 2 (Mr. Ramírez) P353:L3-7, P365:L10-14, P368:L2-7.

[460] SUNDDE Ruling OTB-DNEMP No. 04-2018, 23 August 2018, **C-160**, p. 8.

[461] "While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral." *Tippetts, Abbett, McCarthy, and Stratton v. TAMS AFFA Consulting Engineers of Iran and others*, Award (1984-Volume 6) Iran-US Claims Tribunal Report, 29 June 1984 ("***Tippetts***"), **CL-148**, ¶ 22.

the decision still ratified the interim measure imposed two days earlier, which established a longer period of occupation of 180 days, which in turn was extendable for another 180 days, *i.e.*, almost a full year. This time frame is contemplated in Article 70 of the Law on Fair Prices, which provides that a temporary occupation may last for 180 days and is extendable.

432. Based on these measures, the Tribunal considers that Venezuela has deprived the Claimant of control through the occupation, the designation of a new management board, as well as a forced adjustment of prices.[462] The forced adjustment of prices shows that the Claimant was not in control of the company's decisions nor able to determine the economic benefits derived from its production. To the Tribunal this constitutes a deprivation of its rights and the enjoyment of its investment.

433. In the Tribunal's view, the case of Smurfit's facilities cannot be viewed in isolation from the political and economic context Venezuela was undergoing nor the expropriations of its landholdings. The facts of the case reflect that the State was assuming a specific role within the country's economy as a major governing body. The government sought to implement a series of measures that would bring a profound political, economic, and legal change. The statements made by President Maduro at the end of July 2018 put into context this environment when addressing the economic changes that would be implemented from August 20:

> "[…] to set in motion a *productive economic model* and achieve economic recovery and stability there are no miracles […] there are well-coordinated efforts, a lot of work and a lot of authority. […] There are various proposals, the communist party is proposing me the *revolutionary nationalization* of part of the country's economy. And *we do not reject it, we are examining it* […] We are going to bring about an *economic change* […] By hook or by crook, with the support of the people, nothing is going to stop us, I say this clearly, I am determined and resolved that from August 20 onwards the people will be

[462] SUNDDE Ruling EIBC-DNEMP No. 123-2018, 18 September 2018, **C-165**. The decision of 23 August already established an adjustment of prices. The decision of 18 September provided an adjustment on 2,675 items. It is the Claimant's contention that the price reduction effectively forced Cartón to sell its products at a loss. Claimant's Reply, ¶ 219. "SUNDDE issued a decision in September 2018 ordering an 86% reduction of the prices of Cartón's products and ratifying its prior order to occupy the company. The prices at which Cartón, already under State control, was ordered to sell its products fell well below its production costs." First Witness Statement Alberto Ramírez, ¶ 66(a).

> respected, the law will be respected, the authority will be respected, and whoever does not respect it will face us. […] I say this with a great deal of conviction, because we have had enough of so much abuse by the oligopolies […] *New rules are coming*."[463] (Emphasis added)

434. "Nationalization of part of the country's economy" was within the measures evaluated by the government. The Tribunal does not consider that the choice of words by President Maduro was made lightly or that his choice was made out of context. Again, statements made by a country's President in any public setting carry substantial weight and are relevant for our assessment. This specific environment relates to the 2018 measures taken with respect to Smurfit's business. More importantly, the government ultimately and effectively took possession and control of Cartón de Venezuela, and afterwards, of the other companies. From the Respondent's submissions, the Tribunal understands there are three main arguments under which Venezuela claims its measures do not amount to an expropriation: (i) the Claimant voluntarily abandoned its operations, (ii) the measures were prompted by the Claimant's non-compliance with Venezuelan law, and (iii) its measures are a legitimate exercise of police powers.

435. As to the first defense, while the Respondent has argued that it was the Claimant that abandoned the operation, by the time Smurfit wrote to the government and its own employees indicating that it was "no longer able to carry out its operations in accordance with the company policies and applicable regulations" and could not "assume responsibility for business operations on Company premises,"[464] it had already been substantially deprived of fundamental rights towards Cartón de Venezuela as well as of three of its landholdings in previous years. In the Tribunal's view, even though such decision was formalized on 18 October 2018 when the Minister of Labor assumed control and issued orders for the immediate occupation of Cartón, the Claimant had, in fact, already been deprived of fundamental rights since 23 August. In the case of its affiliates

[463] "Maduro does not deny the possibility of nationalizing part of the economy," *El Carabobeño*, 28 July 2018, **C-156**; "IV PSUV Congress": Complete address of Nicolás Maduro at the National Pantheon, 28 July 2018, **C-155**, at 1:55:53. (Unofficial translation)
[464] Letters from Smurfit Holdings B.V. (Mr. O'Riordan) to the President of the Bolivarian Republic of Venezuela (Mr. Maduro), the Attorney General (Mr. Muñoz) and the ad interim *Chargé d'affaires* of the Venezuelan Embassy in the Netherlands (Mr. Díaz), 24 September 2018, **C-166**.

(Refordos, Corsuca, Corrugadora Latina, Colombates and the Technical School), it is clear to the Tribunal that expropriation was effective no later than the 18 October decision in response to Claimant's letter.[465]

436. In the Tribunal's view, the facts of the case already discussed show that, by taking control of the company's premises with the aid of military officers, arresting company's employees, and adjusting prices, Venezuela in fact dispossessed the Claimant. None of these facts support the notion that the Claimant voluntarily "abandoned" or intended to "abandon" its investment. Rather, it seems to the Tribunal that it was "pushed-out of it" and was left without any effective control before the company acknowledged it through its letter.

437. As to the other two defenses, the Tribunal notes that the Respondent's arguments seem to be based on its contention that the decision was purportedly made in accordance with Venezuelan law. In relation to the second defense, the Respondent has alleged that its measures were the result of Claimant's supposed failure to abide by the applicable labor legislation. However, the evidence shows that initiation of the inspections was explained, not as a result of alleged labor law violations, but rather to determine compliance with the Law on Fair Prices. In fact, SUNDDE announced to the general public through social media that the inspections were necessary due to an alleged destabilization of the economy, abuse of dominant position, boycott, speculation and smuggling, and were not attributable to compliance with applicable labor legislation.[466] The Tribunal notes in this regard as well that all of the tweets by SUNDDE that expressly mentioned Smurfit

[465] Resolutions Nos. 618, 619, 620, 621, 622 and 623 of the Ministry of Labor, 16 October 2018, published in the Gaceta Oficial No. 41,505 on 18 October 2018, **C-168**.

[466] SUNDDE Notice No. 022966 of Commencement of Proceedings to Determine Compliance, 21 August 2018, **C-271** (Cartón de Venezuela); SUNDDE Minutes of Inspection No. 022966, 21 August 2018, **C-280** (Cartón de Venezuela); SUNDDE Minutes of Inspection No. 022966 regarding the presumption of socioeconomic crimes, 21 August 2018, **C-158** (Cartón de Venezuela); SUNDDE Requests for Information from Cartón (Valencia, 11:09am), 21 August 2018, **C-272**; SUNDDE Requests for Information from Cartón (Carbonero, 3:34pm), 21 August 2018, **C-275**; SUNDDE Request for Information from Cartón, 27 August 2018, **C-289**; SUNDDE Notice No. 023098 of Commencement of Proceedings to Determine Compliance, 22 August 2018, **C-281** (Refordos); SUNDDE Request for Information from Refordos, 22 August 2018, **C-282**, p. 1; Minutes of Inspection of Refordos, 22 August 2018, **C-283**, pp. 1, 2; SUNDDE Notice No. 023732 of Commencement of Proceedings to Determine Compliance, 27 August 2018, **C-288** (Colombates); SUNDDE Request for Information from Corrugadora Latina, 23 August 2018, **C-285**; SUNDDE Request for Information from Colombates, 27 August 2018, **C-290**.

Kappa, but one, tagged President Maduro and many of those referred to "#EstabilidadEconómica (EconomicStability)."[467] For the Tribunal, this indicates that compliance with labor legislation was not what prompted the inspections and temporary measures. The Respondent itself has stated "[c]ertainly, SUNDDE's measures were grounded on the protection of Law of Fair Prices."[468] Plainly, SUNDDE's measures are separate from any labor conflict that may have existed.

438. The Respondent has also submitted that the Claimant's decision to stop production temporarily at the Valencia Mill (due to collective vacations) caused "market shortages [that] led to the skyrocketing of packaging products' prices" and SUNDDE had to intervene as the "foreseeable and lawful consequence."[469] The Respondent refers to the decision of 23 August which imposed the temporary occupation as evidence of that affirmation. However, that decision mentions "a presumption" that "the company's shutdown, through the collective vacation scheme, is aimed at raising the prices of goods, thus favoring a concerted price increase […] in order to affect the National Economy" rather than the shutdown effectively causing shortages and prices increase as an established fact.[470] The Tribunal is not convinced that the Valencia Mill shutdown

[467] Compiled SUNDDE tweets, **C-159**.
[468] Respondent's Rejoinder, ¶ 469.
[469] Respondent's Rejoinder, ¶¶ 168, 169.
[470] SUNDDE Ruling OTB-DNEMP No. 04-2018, 23 August 2018, **C-160**, p. 2.

effectively caused market shortages[471] nor that price increases were the direct result of Claimant's decision despite the inflation.[472]

439. In addition to this, for the Tribunal it is unclear how the conflict over the planned temporary shutdown of the Valencia Mill would have impacted other affiliates that were subject of inspections as well or how it would have prompted the occupation of Cartón as a whole. Regardless of whether such intervention was justified under the Law on Fair Prices, the Tribunal recalls that the determining factor to show if a measure is expropriatory is the effect and not intent:

> "While intent will weigh in favour of showing a measure to be expropriatory, it is not a requirement, because the *effect* of the measure on the investor, not the state's intent, is the critical factor. […] a state may expropriate property where it

[471] At the hearing, Mr. Agelviz indicated "[…] Cartón de Venezuela did not affect the national market at any point in time. And when I say 'affect the national market,' I'm referring explicitly to the case of the Valencia Mill. That mill aims at or was developed to produce a *special type of paper for folding*, to make –let's say–boxboard; ok? Before deciding the vacations measure, the company evaluated everything. The market of Cartón de Venezuela, that for rolls of boxboard, or *the volume shipped by us was equal to 3 percent of what we made*. *The remaining 97 percent is produced by five corrugating plants*, which receive paper from a specialized mill for these plants: San Felipe Mill, ok? Moreover, the Company has inventory. And when I talk about "inventory," I am talking about all the operations. So, *a plant like the Folding plant will hardly be affected by the paralyzation of a mill, such as the one in Valencia*. An example is when you perform annual maintenance. These huge operations are in a continuous process of operations, so operations are not paralyzed. Thus, it is necessary to stop possibly one month, one month-and-a-half to carry out the maintenance. When this happens, *the company stocks the necessary inventory so as not to affect supply to its customers*, which, let's say, is our aim as a business. When I read here that we wanted to stop supplying products, that is against our policy. As a general manager of two corrugating plants, my focus –let's say– my target, my strategy is directed at supplying all customers with the amount of boxes they require at the time they request, and to fulfilling those demands. That is why I say that what I read, I read it, but I completely disagree with it because the Company did not affect the supply of products to its customers. […] We sold by the ton, and this could easily be *six or seven months of inventory*. In addition to what I pointed out, that *each mill or the San Felipe and Caracas Mills could make this product, this would certainly allow us to supply these products in the market*." Hearing, Tr. Day 2 (Mr. Agelviz) P440:L2-22/P441:L1-17, P443:L12-18.
"The three mills in Venezuela were able to produce Eco Master. Folding had inventory. *Ninety seven percent of the volume delivered to the market in Venezuela was supplied* by *other plants that have nothing to do with the Valencia Mill or with Folding*. Considering these figures, it's clear to me that *Cartón de Venezuela did not suspend the delivery of materials and products to its clients at any time*. An example of that is the annual stoppages for maintenance, which every mill does and which can be carried out in a-month-and-a-half period. When you say that, *due to vacations, we stopped delivering products to our customers, the same could happen if we stopped for maintenance, and it doesn't happen. That is, it's all planned*." Hearing, Tr. Day 2 (Mr. Agelviz) P446:L18-22/P447:L1-10. (Emphasis added)

[472] "In Venezuela, as I think everyone knows, we lived or suffered from inflation, hyperinflation. Evidently, in situations such as this, unfortunately the costs –and I say "unfortunately" because we were also affected– increased. And for this reason, the prices also increased. As I said when I was answering Mrs. Richard's question, I was responsible for monitoring the evolution of the profit margin vis-à-vis the cost of the Company. And conscientiously I must say that we complied with the law because our profit margin was not higher than 30 percent. Let me give an example. The fact that there's a price increase does not mean or, put differently, it is not a reason to conclude that the profit margin would be higher than 30 percent." Hearing, Tr. Day 2 (Mr. Agelviz) P448:L4-18.

> interferes with it even though the state expressly disclaims such intention. […] states may accomplish expropriations in ways other than by formal decree; often in ways that may seek to cloak expropriative conduct with a veneer of legitimacy."[473]

440. In *Pope & Talbot v. Canada,* the tribunal when analyzing if the Export Control Regime had caused an expropriation stated:

> "[…] Using the ordinary meaning of those terms under international law, the answer must be negative. First of all, there is no allegation that the Investment has been nationalized or that the Regime is confiscatory. The Investor's (and the Investment's) Operations Controller testified at the hearing that the Investor remains *in control* of the Investment, it directs the *day-to-day operations* of the Investment and *no officers or employees of the Investment have been detained* by virtue of the Regime. Canada does not *supervise* the work of the officers or employees of the Investment, does not take any of the proceeds of company sales (apart from taxation), does not interfere with *management* or shareholders' activities, does not prevent the Investment from paying dividends to its shareholders does not interfere with the *appointment of directors or management* and does not take any other actions ousting the Investor from full ownership and control of the Investment."[474] (Emphasis added)

441. Unlike that case, in the present dispute the investor did not remain in control of the investment or the day-to-day operations, employees were arrested, access to the facility was controlled by SUNDEE and the military,[475] and the government appointed a new management board. In *Biwater v. Tanzania*, the tribunal also analyzed several cases that involved government interference, occupation and seizure, arrest of workers and usurpation of management control, all of which were considered to amount to a *de facto* expropriation that deprived the investor of the effective use, control and benefits of its investment.[476] This case presents similar features. Additionally, the Tribunal also finds

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[473] *Vivendi v. Argentina (I)*, **CL-043**, ¶ 7.5.20. "[I]t is clear that the intent plays a secondary role relative to the effects test. In *Tippetts*, the tribunal held that 'the intent of the government is less important than the effects of the measures [...].' Thus, evidence of intent may serve to confirm the outcome of the effects test, but does not replace it." *Burlington v. Ecuador*, **RL-078**, ¶ 401.

[474] *Pope & Talbot v. Canada*, **CL-011**, ¶ 100.

[475] "[I]n different areas of the company, SUNDDE and the military started giving orders that no material or anything else could leave or enter without their permission. This caused, days later, the inventory to fill up, and operations began to stop." Hearing, Tr. Day 2 (Mr. Ramírez) P363:L14-19.
"[T]wo or three officers were with me, and they were at the entrance of the Company Cartón de Venezuela." Tr. Day 3 (Mr. Arias) P727:L5-7.

[476] *Biwater Gauff (Tanzania) Ltd. V. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008 ("***Biwater v. Tanzania***"), **CL-049**, ¶¶ 503-510.

similarities with *OIEG v. Venezuela*, in which the Institute for Defense of People in Access to Goods and Services ("**INDEPABIS**" and SUNDDE's predecessor) also took possession and control of certain plants following an inspection and through a temporary occupation.[477]

442. In relation to the third defense, the Respondent has argued that the inspections and temporary measures do not amount to an expropriation since they were a legitimate exercise of its police powers.[478] However, the Respondent has not provided any legal criteria, nor has it explained what was the legitimate public policy interest pursued or how its measures were a valid exercise of police powers. Venezuela seems to base its defense in the same way it has argued that its measures are not expropriations, *i.e.*, on the fact that the Claimant breached labor laws and the Law on Fair Prices. Yet, even assuming for the sake of argument that there was a violation of these laws, the Tribunal does not see how Respondent's actions amount to a general *bona fide*, non-discriminatory measure in pursuit of a public interest, distinguishable from an expropriation and, thus, not subject to compensation. While the Respondent has provided several explanations for the actions it took and why it considers those actions do not amount to an expropriation, in the Tribunal's view, the evidence in the record does not support its contentions.

443. In consequence, the Tribunal determines that the occupation of Cartón de Venezuela on 23 August 2018, as well as the other companies on 18 October, constituted measures equivalent to expropriations in terms of Article 6 of the BIT which do not fall within the scope of the Police Powers doctrine. The Tribunal will consider now whether such measures complied with the requirements established in the BIT for a lawful expropriation.

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[477] *OIEG. v. Venezuela*, **CL-086**, ¶¶ 336-342. The Tribunal also finds certain similarities in the actions of the Venezuelan government when taking control of Frisa. *Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-03/AA473, Final Award, 26 April 2019 ("***Serafín García v. Venezuela***"), **CL-096**, ¶¶ 512-519. *See also* ¶¶ 120, 336-338.

[478] Respondent's Rejoinder, ¶¶ 478-491. *See also* Respondent's Counter-Memorial, ¶ 286 and Respondent's PHB, ¶ 141.

444. As in the case of the landholdings, it is uncontested that no compensation was provided for the taking of the Claimant's business through Cartón de Venezuela, Refordos, Corsuca, Corrugadora Latina, Colombates, the Technical School and their respective divisions or facilities. This alone is sufficient to establish a breach to Article 6 of the BIT. Notwithstanding this, the Tribunal will consider whether the measures comply with the other requirements provided.

b. Whether the Measures are Taken in the Public Interest and Under Due Process of Law

445. The Respondent argued in its submissions that the occupation of Cartón de Venezuela was due to the fact that it breached its obligations under labor laws and the Law of Fair Prices. The Respondent also maintained that Claimant's temporary, vacation-linked stoppage of production in the Valencia Mill affected workers and produced shortages in the market which in turn led to price increases. In the Tribunal's view, the objective of guaranteeing access to goods and services at fair prices which in turn allows the population to have their needs covered may be an action in pursuit of a "public interest," particularly, in a context, as was the case in Venezuela, in which a country's economy has deteriorated.[479] Nonetheless, the Tribunal concludes that Respondent's assertion that the shutdown of production in the Valencia Mill effectively caused shortages in the market and an increase in prices is not substantiated.

446. At the hearing, Mr. Agelviz confirmed that the Valencia Mill produced a specific type of boxboard that could have been produced by other mills, that 97% of the volume delivered to the market was supplied by other plants that were not dependent on the Valencia Mill and that there was approximately six or seven months inventory which would have allowed it to supply the market.[480] In terms of price, both parties have referred to a difficult economic situation at that time, which was confirmed at the Hearing as well: "[i]n Venezuela, as I think everyone knows, we lived or suffered from inflation,

[479] Decree No. 2,184 on the Declaration of the State of emergency, 14 January 2016, published in the Gaceta Oficial No. 6,214 Extraordinary on 14 January 2016, **RL-142**; and Decree No. 3,505 on the Extension for 60 days of the State of emergency, 9 July 2018, published in the Gaceta Oficial No. 41,435 on 9 July 2018, **RL-143**.
[480] Hearing, Tr. Day 2 (Mr. Agelviz) P440:L2-22/P441:L1-17, P443:L12-18, P446:L18-22/P447:L1-10.

hyperinflation. Evidently, in situations such as this, unfortunately the costs –and I say 'unfortunately' because we were also affected– increased. And for this reason, the prices also increased."[481]

447. The fact that the main basis for the occupation is not substantiated, not only directly undermines the rationale for taking the measure, but also reflects that Claimant's due process rights were not respected. In this regard, the Tribunal notes that the inspection was carried out in a manner that fell short of due process. In particular, when the government officials arrived at Claimant's offices, the SUNDDE issued the following statement: "They didn't want to open the doors for us. We were patient. Then we went in. We've made some demands because as of this moment a temporary occupation of the company begins."[482] The occupation was announced also through social media prior to the issuance of the interim measures,[483] and practically before the inspection began. The interim measures were issued on 21 August, however, the Claimant was made aware of these measures through the decision of 23 August, which was notified on 28 August.[484]

448. Respondent's witness testified that in connection with the inspection, Claimant's personnel "failed to cooperate," that the information SUNDDE sought was "scarce and incomplete," that "the company did not have (or was unwilling to disclose) the information and documents that any company would usually have available and disclose easily."[485] The Tribunal observes that on 21 August during the inspection SUNDDE made 6 requests for information. The first one at 11:09 am requiring: "1) master client list, 2) master supplier list, 3) list of personnel and [*illegible*] directory, 4) commercial registry with amendments, 5) operational capacity, 6) installed and real capacity, 7) production history range for the last 3 years, 8) price list for June, July and August 2018, 9) inventory of raw materials and end products in all states."[486] The information was to

[481] Hearing, Tr. Day 2 (Mr. Agelviz) P448:L4-9.
[482] Video interview of Government ministers and SUNDDE Superintendent outside Cartón's corporate offices, 21 August 2018, **C-441** and **C-441 bis**. Witness Statement César Agelviz, ¶¶ 26, 28, (indicating that the interview took place at around 09:30 am).
[483] SUNDDE Tweets, 21-27 August, **C-159**, pp. 13-14.
[484] SUNDDE Ruling OTB-DNEMP No. 04-2018, 23 August 2018, **C-160**, p. 8.
[485] Witness Statement Joel Arias, ¶¶ 27, 33, 34.
[486] SUNDDE Requests for Information from Carton (Valencia, 11:09am), 21 August 2018, **C-272**.

be provided "immediately." The second request came at 12:30 pm and required "1) Description of the production process, 2) manual for the SAT system; 3) letter explaining holidays granted to employees and list of employees from 13 July to 3 August included in the current collective agreement, 4) collective labor agreement, 5) letter [*illegible*] explaining the suspension of the plant's activities, 6) power of attorney and copy of the legal representative's identity document, ISIR, 7) VAT payment for the last three years and sworn declaration of [*illegible*] and/or deposit received by the national register." This information seemed to relate to the temporary, vacation shutdown of the Valencia Mill and was to be provided "immediately."[487]

449. The third request came at 12:55 pm and required "[i]mportation file containing: single customs declaration; original invoices for imported raw materials; customs broker expenses; Bolipuerto [Venezuela Port Authority] expenses; container expenses; ground transportation expenses from customs to [*illegible*] warehouses; currency authorization letter or explanatory letter [*illegible*]; list of imported raw materials; purchase orders for 2017-2018 inputs; customs clearances for the 2017-2018 period."[488] The information was to be provided "immediately." The fourth request came at 4:05 pm and required "[p]roduct catalogs; distribution centers; authorized centers; itemization of materials used by production; updated employee list with name, identity document number, title, department of the unit to which the employee is assigned, basic salary, bonuses and other benefits [*illegible*] verification from the month of April 2018; general ledger from April to the present date; calculation details with details of the calculation of the cost of production; cost structure of all products," which should be provided "immediately."[489] The fifth request came at 5:11 pm and required "[h]istory of operations with [the National Foreign Trade Centre] Cencoex, all procedures and documentation related to Cencoex; Cencoex certificate; export and import file, from 2018 onwards." The information was to be provided "immediately."[490] The sixth request came at 6:20 pm and required

[487] SUNDDE Requests for Information from Carton (Valencia, 12:30pm), 21 August 2018, **C-273**. The Tribunal notes that while the evidence refers to "SAT system," Claimant's submissions refer to SAP system.
[488] SUNDDE Requests for Information from Carton (Valencia, 12:55pm), 21 August 2018, **C-274**.
[489] SUNDDE issued additional Requests for Information: SUNDDE Requests for Information from Carton (Valencia, 4:05pm), 21 August 2018, **C-276**.
[490] SUNDDE Requests for Information from Carton (Valencia, 5:11pm), 21 August 2018, **C-277**.

"[h]istory of transactions with the Central Bank of Venezuela; sales from 2018 of imported foreign currency […]; explanation of exports plus 3/[*illegible*]" and copies of certain invoices numbers. The information was to be provided once more "immediately."

450. That same day, interim measures were issued ordering temporary occupation. Regarding the cost structures that were requested that day in the afternoon, SUNDDE Ruling No. 003/2014 provided that information could be delivered within five business days.[491] This information was said to be essential to determine if Cartón was breaching the Law of Fair Prices. It was the main input for such determination, yet the resolution rested on a presumption, not a proven fact.[492] This was confirmed at the Hearing when Mr. Arias indicated that Smurfit's products in Venezuela did not have a fixed price (above which Smurfit could have sold) and that: "we needed the cost structure to see whether their prices were reasonable and within the law. If they did not present this cost structure, I could automatically find, based on the powers given to me by the law, a presumption of the crime of speculation. And the Public Ministry will determine if there is speculation or not. I am not saying here that that they're speculating. No, I am finding the presumption and then the Public Ministry will decide."[493] There is no evidence in the record that the Respondent has ever provided such a resolution by the Public Ministry.

451. In light of all these requests, it would not be reasonable for a company to provide the type of information requested by SUNDDE "immediately." It would have needed a longer period of time in order to process and deliver that information. SUNDDE was in fact asking the company to comply with a very difficult task that was not proportionate with the time frame given: "immediately." As Mr. Lugo testified: "The government officials reiterated to me and Cipriano that they wanted the cost structure of each individual product for all of our 50,000 or so products. That information did not exist in our system in the summary manner that they wanted. We would have had to build the

[491] SUNDDE Ruling No. 003/2014, 7 February 2014, published in the Gaceta Oficial No. 40,351 on 7 February 2015, **C-234**, Art. 6.
[492] The Tribunal notes that the authority based its decision on the price analysis prepared by Mr. Franklin Nieves, SUNDDE's Director of Cost Analysis. Notwithstanding this, the Tribunal is not convinced that such analysis could have been an appropriate input as opposed to the cost structures.
[493] Hearing, Tr. Day 3 (Mr. Arias) P756:L22, P757:L7-12.

cost structures for each product from scratch, which would take several days. […] asking us to produce the cost structures for approximately 50,000 products in such a short time period was impossible."[494] SUNDDE's rigid and unbending requirement is not only contrary to due process, but is also, in nature, arbitrary.

452. In the Tribunal's opinion, the fact that Corsuca had also been subject to an inspection in July in which information on production, costs, prices, inventory etc. was requested to be produced in a reasonable and feasible time frame, not "immediately" and was accordingly provided, indicates not only that the form and substance of the inspection carried out in August of the same year were highly irregular, but also that there was willingness on the part of Claimant to cooperate with the authority's requests for information.[495] According to Mr. Agelviz:

> "It was completely different. I mean, no military, no DGCIM [the "Directorate General of Military Counterintelligence"], no minister. A SUNDDE official generally came accompanied by someone. We had good communication, they requested information. Unlike in August, they asked for information and gave us a prudent time to collect it. We submitted the information, he reviewed it and asked us questions, and he requested more information. Let's say that there was communication at all times between both parties. There was no press. Let's say that, during that inspection which lasted several weeks, everything worked totally different, unlike the August inspection."[496]

453. In that case, an inspection began on 12 July when a request for information was delivered. The following day a second request for information was delivered. The Tribunal observes that the company requested an extension of 48 hours, in addition to the 72 hours originally provided, which was granted by the authority. The Tribunal also notes that

[494] Witness Statement of Luis Fernando Lugo, ¶¶ 36, 37.
[495] Claimant's Memorial, ¶¶ 130, 131. "We were subject to one such inspection in July 2018, when SUNDDE carried out an inspection and audit at the corrugating facility and administrative offices of Carton's subsidiary Corsuca in Cagua. The inspection began on 12 July 2018. Although I was not present at Corsuca's facility at the time, I was immediately informed of the inspection and received regular updates from Corsuca's management. As part of the inspection, SUNDDE's officers made several requests for information regarding Corsuca's production, prices, costs, inventory and imports, among other information. The company was asked to provide the requested information within 72 hours. SUNDDE took no action after the inspection was completed and did not charge Corsuca with any violations of the Law on Fair Prices." First Witness Statement of Alberto Ramírez, ¶ 41.
[496] Hearing, Tr. Day 2 (Mr. Agelviz) P425:L2-14.

once the information was given, there was no other indication that the authority was dissatisfied with such information.[497] At the Hearing, Mr. Agelviz also testified that:

> "Let's see. We didn't have the cost structures that SUNDDE requested because our systems and—let's say—the model we used does not have it. We explained to them what we had, and they categorically said 'No, we want cost structures by product,' and we did not keep those cost structures by product. The same thing happened in Cagua where the inspection in July took place, and the person who was doing the inspection there did allow us to give him, within a reasonable time, the cost structures of some products he considered appropriate and selected to review individually. Cartón de Venezuela has a huge range of products, thousands of products, and each product of Cartón de Venezuela is completely different from the other one. There are not identical products. This is the reason why or one of the many reasons why we did not have an automatic system or report that could provide what SUNDDE requested. We explained this on several occasions [….] But this is something they did accept in Cagua."[498]

454. In both inspections SUNDDE requested similar information. However, the Respondent has not explained to this Tribunal why the August inspection by SUNDDE was conducted so differently from the July inspection. In particular, why the response by the authority to the company's need for additional time was different, and in general, why the environment in which the August inspection was carried out seemed of a more inquisitorial nature. In the present case, the Claimant was not given a reasonable opportunity to both compile and gather the voluminous information in order to present it to the authority as requested.

455. The Tribunal also finds that Respondent has not provided a credible explanation for using military forces and finds particularly troubling the arrest, prolonged detention, and mistreatment of the company's employees. Two of the employees that were trying to gather such information were arrested and charged in the early hours of August 23.[499] According to Mr. Agelviz testimony:

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[497] SUNDDE Request for Information from Corrugadora Suramericana C.A., 11 July 2018, **C-264**. SUNDDE Request for Information from Corrugadora Suramericana C.A., 12 July 2018, **C-266,** Corrugadora Suramericana C.A. Delivery of Information to SUNDDE, 12 July 2018, **C-267**; Corrugadora Suramericana C.A. Delivery of Information to SUNDDE and Request for Extension, 17 July 2018, **C-268**; Corrugadora Suramericana C.A. Delivery of Information to SUNDDE, 19 July 2018, **C-269**.
[498] Hearing, Tr. Day 2 (Mr. Agelviz) P465:L1-19, P466:L9-10.
[499] First Witness Statement of Alberto Ramírez, ¶¶ 43, 55, 58.

> "[…] right from the outset it didn't seem like a normal inspection to me. And when I say 'not normal,' I mean, the fact that the DGCIM— the Directorate General of Military Counter intelligence—arrived, the fact that the SEBIN arrived, and the fact that ministers, high-ranking officials from the Government and even the press arrived. These facts showed me that there was something odd going on. What's more, from the outset, everything was very aggressive. When I say 'aggressive,' I mean, I don't know how many times I was told that, if I didn't hand over the information immediately, I would be arrested. It wasn't just me, you see, but also all of my work colleagues. […] I even came to the conclusion that, sometimes, SUNDDE thought that providing information or requesting information consisted in pressing a button, you see. And no, it was not like that."[500]

456. In light of the above, the Tribunal does not consider it necessary to take further the analysis of the other elements provided for in Article 6 of the BIT and finds that Venezuela's 2018 measures on Smurfit's business constitute an expropriation that was not taken in the public interest and was not compliant with due process of law. Therefore, for these independent reasons, the Government's measures constitute a breach of this provision.

2. Fair and Equitable Treatment (FET)

A. The Claimant's Position

457. According to the Claimant, "the ordinary meaning of the Protocol makes evident that fair and equitable treatment is broader than the international minimum standard. The Protocol sets the international minimum standard as the floor."[501] In its view, the dominant position is that the international minimum standard and the autonomous standard for fair and equitable treatment ("**FET**") should be equated, and that the former has evolved such that it has "converged" with the FET standard. Therefore, irrespective of how it is labelled, the standard accords equivalent protection.[502] In this regard, the Claimant

[500] Hearing, Tr. Day 2 (Mr. Agelviz) P423:L6-19, P424:L1-5. "Most of the information had to be compiled from our systems – an exercise that was complicated by the fact that access to our SAP system had been limited for most users that day because we were in the process of converting it to the new currency denomination (which the prior day had dropped five zeros)." Witness Statement of César Agelviz, ¶ 29.
[501] Claimant's Memorial, ¶ 222; Claimant's Reply, ¶¶ 269, 271-273.
[502] Claimant's Memorial, ¶ 223; Claimant's Reply, ¶¶ 274-277.

contends that Venezuela's measures would violate even the narrowest formulation of the standards.

458. The Claimant alleges that Venezuela's targeting of its investments culminated in the taking of several of its landholdings and the violent outright seizure of its Venezuelan business in August 2018.[503] In particular, it indicates that Venezuela's measures and its conduct were:

- Arbitrary and unreasonable because they were "not based on legal standards," and that they were "taken for reasons that are different from those put forward by the decision maker." As for the inspections, the Claimant submits that they were aimed at obtaining a "pre-ordained conclusion" whereas for the landholdings it submits the procedures were not based "on legal standards […] but rather on discretion and prejudice;"
- Coercive and intended to harass the investor, when intimidating Cartón's employees by armed military officers and through arbitrary detention of employees;
- In breach of basic principles of due process and transparency. In particular, as to the seizure of Claimant's landholdings, two "in the midst of pending 'recovery' proceedings" and the other one under "irregular 'recovery' proceedings;" the preordained minutes of inspection by the SUNDDE before the evidence gathering phase had started and unsubstantiated regulatory breaches, SUNDDE's announcement on Twitter of the sanctions to be applied before the inspections had been concluded, the government's occupation of the facilities and the arbitrary detention of Cartón's employees by the military;
- Unstable and unpredictable, since the laws enacted by Venezuela "eviscerated" acquired property rights and were applied in an abusive manner, the legislation on fair pricing interfered with Smurfit under an inflationary environment and subsequently, regulatory powers were abused to seize the business without compensation;
- Disproportionate.[504]

[503] Claimant's Memorial, ¶ 244.
[504] Claimant's Memorial, ¶¶ 245-246; Claimant's Reply, ¶¶ 278-285.

459. The Claimant also raises the argument that the takings were based on discriminatory motives, that the INTI circumvented taking the properties through the Expropriation Law, that the INTI and the relevant RLOs failed to carry out the soil sampling analyses that they were required to undertake, that the INTI based its decision solely on a visual inspection of the land which is capricious and arbitrary, and that Refordos's challenges to the recovery decisions and to the May 2011 decision allowing occupation of Santo Tomás were never decided.[505]

460. With regards to SUNDDE's measures in 2018, the Claimant alleges that the occupation was based on allegations that were not substantiated, that the seizure of the business was a permanent nationalization disguised as a temporary regulatory measure, that SUNDDE's measures violated due process, that the prolonged detention of two employees was made pursuant to unsubstantiated infractions and no formal charges were pressed, that employees were harassed and intimidated by armed officers during the inspection, and that the taking was disproportionate to an alleged violation of labor laws in relation to one facility.[506]

461. In addition to the claims over the landholdings and the business, the Claimant alleges that Venezuela breached the FET standard when failing to issue VAT Certificates. In particular, the Claimant contends that Cartón and its affiliates were entitled to recover the VAT that they paid when they purchased goods and services from their suppliers from the VAT that they collected on sales to their customers. However, since many of their customers qualified as "special taxpayers," when the Smurfit Sellers sold to those special taxpayers, they could only recover the VAT directly from SENIAT.[507]

462. In this regard, the Claimant submits that from 2005 onwards, the Respondent "delayed or failed to respond to Smurfit's subsidiaries' applications for VAT Certificates […]

[505] Claimant's Reply, ¶¶ 300-301. "[T]he expropriations were preceded by statements regarding the need to fight against 'imperialism' (a reference to foreign interests) and to protect 'the Venezuelan people'." ¶ 300.
[506] Claimant's Reply, ¶¶ 289-298. The Claimant contends that the justification for seizing the business because of labor law violations or breaches to the Law on Fair Prices are both baseless. Claimant's PHB, ¶¶ 98-112.
[507] Claimant's Reply, ¶¶ 88, 89.

without any justification."[508] According to the Claimant, the tax authority had an obligation to respond within 30 business days.[509]

463. The Claimant also contends that the Treaty does not require the exercise or exhaustion of domestic remedies as a "precondition to commence arbitration" and that SENIAT "never justified the lengthy delays in issuing those VAT Certificates that it did grant" and in the other cases, it "never issued any response to (and therefore never raised any defects concerning) the Smurfit Sellers' outstanding Refund Requests."[510]

B. The Respondent's Position

464. The Respondent contends that the scope of the FET standard as defined in the Treaty is limited to the minimum standard of treatment of customary international law, which imposes a high bar for a breach. In its view, this is evident from the language of the Treaty, its Protocol, and the intention of the Parties and has been constantly re-affirmed by tribunals. According to the Respondent, if the Tribunal were to construe the FET provision contained in the Treaty as a reference to an autonomous standard, rather than to a standard tied to customary international law, it would directly contradict the clear intention of the Parties, in a manner inconsistent with the applicable rules of treaty interpretation.[511]

465. The Respondent submits that it has not treated the Claimant's alleged investment unfairly or inequitably, regardless of the standard used. In particular, it alleges that:

- The Claimant had no legitimate expectation that the regulatory framework for its alleged investment was going to remain unmodified. Economic, social, as well as a wide array of other reasons may justify changes in legislation, as long as such changes are pursued in the public interest, in

[508] Claimant's Memorial, ¶ 248; Claimant's Reply, ¶ 303.
[509] Claimant's Reply, ¶ 304.
[510] Claimant's Reply, ¶¶ 311, 316.
[511] Respondent's Counter-Memorial, ¶¶ 287-292. The Respondent also argues that "[g]iven that the ordinary meaning of the FET obligation under Article 3.1 of the Treaty is inconclusive as to the precise standard to be applied, the Respondent submits that the starting point for construing the fair and equitable standard should be the preamble to the Treaty." Respondent's Rejoinder, ¶ 496.

order to adapt to ever-changing circumstances, or otherwise necessary to satisfy urgent needs.[512]

- Regulations aimed at controlling fair prices were present in Venezuela since a time long before Claimant's alleged investment;
- The conduct of the Republic in applying those regulations in the context of the operations of Smurfit was rational, adequate and proportional.
- Venezuela acted in a transparent manner, granting all due process warranties, in furtherance of a public purpose.
- The Claimant has not established in the record of this arbitration that it resorted to the numerous remedies available to it to challenge any of the measures here questioned.[513]

466. The Respondent alleges that the Republic afforded Refordos all of its procedural rights, that Refordos was given appropriate notice of the initiation of recovery proceedings, that it was afforded the opportunity to challenge INTI's decisions both administratively and judicially, that interim measures were necessary to ensure that the objective of recovery proceedings was met and that the INTI always limited the period of application of the interim measures until the end of proceedings.[514]

467. Regarding the 2018 inspections, the Respondent argues that "it was Claimant's own determination that prompted the interruption of Smurfit's activities,"[515] that the inspections were conducted pursuant to the applicable law and were the result of Claimant's own breaches to Venezuelan law, that the detentions were legally grounded and were not arbitrary since the employees refused to provide the information requested and were responsible for violations of the law due to their positions in the company, that there is no evidence of cruel and inhuman treatment during the detentions, and that the employees who were arrested were heard, were brought before a judge and subsequently left prison.[516]

[512] Respondent's Counter-Memorial, ¶¶ 300-308.
[513] Respondent's Counter-Memorial, ¶¶ 310-312.
[514] Respondent's Rejoinder, ¶¶ 504, 512, 513, 515.
[515] The Respondent also submits that "the inspection[s] were properly motived and carried forward with puntctilious [sic] due process of law, despite Claimant's unlawful obstructive conduct" and detentions "were fully grounded by the law." Respondent's Rejoinder, ¶¶ 519, 520.
[516] Respondent's Rejoinder, ¶¶ 519-527; Respondent's PHB, ¶¶ 143-150.

468. Regarding the VAT Certificates, the Respondent alleges that the Claimant failed to provide evidence of its allegations, that it produced only four requests (one of which is a letter) allegedly filed in October and December of 2017.[517] The Respondent contends that pursuant to Article 4 of the Organic Law on Administrative Procedure, in the event that the Tax Authority remained silent on the request, the applicant must assume that the request was denied. In this sense, Respondent submits that the Claimant had "more than one legal remedy (including the *amparo tributario*) available to it and all said remedies, if granted, would have allowed the Claimant to compel SENIAT to issue a decision or to otherwise provide an update on the status of the pending request."[518]

469. In addition to this, the Respondent alleges that the Tax Administration has discretion not to grant refunds, that there is no obligation to explain or justify its decision in that regard, that foreign investors such as the Claimant do not have an accrued right to VAT refunds,[519] and that Smurfit's subsidiaries voluntarily decided to wait for a response.[520] The Respondent further alleges that it has processed many VAT refund requests (and issued many VAT certificates), that the Claimant has not demonstrated that it presented the requests in a timely manner, and that the imposition on Venezuela of the obligation to produce the documents that Claimant should have had in its possession, would entail a manifest disregard of the basic distribution of the burden of proof in an international arbitration proceeding and an abuse.[521]

[517] The Respondent also contends that "SUNDDE's inspection was foreseen by Claimant as it was the natural consequence of Claimant's prior decision to stop the production and prejudice the workers of Cartonal. Consequently, it is not credible that Smurfit does not have in its possession all of the VAT Certificates requests" and that "Claimant utilized an integrated electronic server in the functioning of the companies, a server from which moreover it blocked access from the workers right after it decided to unlawfully depart from Venezuela." Respondent's Rejoinder, ¶¶ 88, 89.
[518] Respondent's Counter-Memorial, ¶¶ 93-95, 314.
[519] Respondent's Counter-Memorial, ¶¶ 97-100.
[520] Respondent's Rejoinder, ¶ 101.
[521] Respondent's Rejoinder, ¶¶ 92, 102 113. "[…] [T]he SUNDDE's inspection of August 20018 was not neither abrupt nor not foreseen by Smurfit and considering that the Republic had no access to the data base of Smurfit Venezuela, Claimant cannot impose to the Republic an excessive and unjustified burden to prove Smurfit's case" ¶ 91.

C. The Tribunal's Analysis

470. The relevant provision to analyze the FET obligation under the Treaty is Article 3(1). This Article frames the obligation without specifying the scope of FET:

> "Each Contracting Party *shall ensure fair and equitable treatment* of the investments of nationals of the other Contracting Party […]." (Emphasis added)

471. Nonetheless, Section 2 of the Protocol to this Article provides that:

> "The Contracting Parties agree that the treatment of investments *shall be considered to be fair and equitable* as mentioned in Article 3, paragraph 1, if it *conforms to the treatment accorded to investments of their own nationals, or to investments of nationals of any third State, whichever is more favorable* to the national concerned, *as well as to the minimum standard for the treatment* of foreign nationals *under international law*." (Emphasis added)

472. According to the Protocol, treatment shall be considered as fair and equitable within the meaning of Article 3 if "it *conforms to the treatment accorded to investments of their own nationals*." The use of this sentence would indicate that treatment must not be discriminatory in a similar way as provisions on national treatment forbid that type of conduct. The next phrase "or *to investments of nationals of any third State*" reinforces the non-discriminatory nature of the treatment by incorporating what amounts to Most Favoured Nation ("**MFN**") Treatment. The Tribunal considers that the text of the provision leaves no doubt that the investor is entitled to "whichever [treatment] is *more favorable*." Finally, through the use of the wording "as well as," Section 2 includes another essential element, "*the minimum standard for the treatment* of foreign nationals *under international law*." The text makes clear that both the minimum standard of treatment under international law, as well as conduct that is not discriminatory in relation to investments of a Contracting Party's own nationals or the nationals of third States are required under the Protocol and the BIT. The tribunal in *OIEG v. Venezuela* also reached this same conclusion.[522]

[522] "[…] [T]he regulation of FET envisaged in the English version of item 2 of the Protocol shall prevail. In practical terms, this regulation implies that the FET guaranteed by the BIT -As a general rule, shall equate to the minimum customary standard; -Unless the investor is able to prove that the treatment guaranteed for the investments of nationals or third States is superior." *OIEG v. Venezuela,* **RL-086**, ¶ 480.

473. The FET standard has been widely interpreted in investment case law, creating a wide spectrum of different shades. In *Waste Management v. Mexico,* the tribunal understood a line of cases analyzed thus far under the NAFTA to suggest that: "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and *harmful* to the claimant if the conduct is *arbitrary, grossly unfair, unjust or idiosyncratic*, is *discriminatory* and exposes the claimant to *sectional or racial prejudice*, or involves a *lack of due process* leading to an *outcome which offends judicial propriety* […]."[523] In *Bayındır v. Pakistan,* the tribunal identified the different factors comprising the standard in the following terms: "[t]hese comprise the obligation to act *transparently* and grant *due process*, to refrain from taking *arbitrary or discriminatory measures*, from exercising *coercion* or from frustrating the investor's reasonable expectations with respect to the legal framework affecting the investment." Additionally, it considered that a breach of the standard "need not necessarily arise out of individual isolated acts but can result from a series of circumstances, and that it does not presuppose bad faith on the part of the State."[524]

474. Expanding somewhat more, the tribunal in *Saluka v. The Czech Republic* stated that: "it transpires from arbitral practice that, according to the 'fair and equitable treatment' standard, the host State must *never disregard* the principles of *procedural propriety* and *due process* and must grant the investor *freedom* from *coercion or harassment* by its own regulatory authorities."[525] Also, gravely disproportionate measures have been found to

[523] *Waste Management*, *Inc. v. United Mexican States (II),* ICSID Case No. ARB(AF)/00/3, Award, 30 April *2004*, **RL-091**, ¶ 98. (Emphasis added)
[524] *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **CL-059**, ¶¶ 178, 181.
[525] *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 ("***Saluka v. The Czech Republic***"), **CL-034**, ¶ 308. (Emphasis added). As to coercion *see also Desert Line v. Yemen*, **CL-047**, ¶ 179.

breach due process and in turn this standard[526] with the same result for measures not based on reason that have been considered as arbitrary.[527]

475. The Parties have debated whether the standard provided under the BIT is autonomous or not. The Tribunal does not consider it necessary to resolve that specific disagreement of the Parties because the case law makes clear that there are common elements that without doubt have been understood as necessary to meet any minimum standard of treatment, such as: due process, non-arbitrary measures, and an absence of coercion on the part of the State. In this regard, such *minimum treatment* is what an investor would expect, and be entitled to, under Article 3(1) of the Treaty in addition to the non-discriminatory treatment specifically referred therein.

i. The Landholdings

476. The Claimant has alleged that Venezuela's measures were: (i) arbitrary and unreasonable, in particular, that the procedures whereby the landholdings were recovered were not based on legal standards but rather on discretion and prejudice; (ii) in breach of basic principles of due process and transparency; (iii) unstable and unpredictable since the laws enacted by Venezuela "eviscerated" acquired property rights and were applied in an abusive manner, and (iv) the takings were based on discriminatory motives.

477. The concepts of "due process," "arbitrariness" and "discrimination" are related. In *Crystallex v. Venezuela*, the tribunal considered that "a measure is for instance arbitrary if it is not based on *legal standards* but on *excess of discretion, prejudice or personal preference*, and taken for reasons that are different from those put forward by the decision maker."[528] The tribunal in *Lemire v. Ukraine* noted that "the underlying notion of

[526] *Serafín García v. Venezuela*, **CL-096**, ¶¶ 343-347. In this case, the tribunal also considered that not exhausting local remedies did not alter the recognition of violations committed by the respondent. The tribunal quoted Prof. Schreuer in that exhaustion of local remedies: "is not a requirement of modern investment law […] it would deprive the development of investment arbitration of much of its force and effect, if, despite a clear intention of States parties not to require the pursuit of local remedies as a pre-condition to arbitration, such a requirement were reintroduced as part of the substantive cause of action." ¶ 351.
[527] *Siemens v. Argentina*, Award, 6 February 2007, **CL-040**, ¶ 319.
[528] *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, **CL-089**, ¶ 578.

arbitrariness is that *prejudice, preference or bias is substituted for the rule of law*."[529] In *AIG Capital Partners v. Kazakhstan*, the tribunal emphasized similar criteria in the following terms:

> "Expropriation of alien property is not itself contrary to international law provided certain conditions are met, and perhaps the most clearly established condition is that expropriation must *not be arbitrary* (i.e., must *not be contrary to "the due process of law"*) and must be based on the application of duly adopted laws. The requirement that expropriation should be in a *non-discriminatory manner* (i.e., as between alien and national) and *in accordance with due process* is also widely accepted, and is *relevant to the assessment whether the expropriation was or was not arbitrary* and in furtherance of the public interest."[530] (Emphasis added)

478. In the present case, the Tribunal has determined within the context of the landholdings expropriations that Venezuela's actions did not afford due process, in particular, the fact that the recovery proceedings were made without the State having challenged Claimant's registered titles, without such titles having been declared invalid for a defect in form, and that, when derogating from the procedural guarantees of the Expropriation Law, the Claimant was deprived of the opportunity to have the valuation of its investment reviewed by an independent authority and the right to receive compensation.

479. In the case of La Productora, the Tribunal found that the notification of the interim measures was made three months after the measures were instituted, that such measures were *de facto* permanent, and that no final decision on the recovery proceeding was ever rendered. In the case of El Piñal, the Tribunal considers the fact that the seizure was made pursuant to an already taken decision on the ownership and use of the landholding, when

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[529] *Lemire v. Ukraine*, Decision on Jurisdiction and Liability, 14 January 2010, **CL-063**, ¶ 263, *see also* ¶ 262. (Emphasis added). "In its ordinary meaning, 'arbitrary' means 'derived from mere opinion', 'capricious', 'unrestrained', 'despotic'. *Black's Law Dictionary* defines this term as 'fixed or done capriciously or at pleasure; without adequate determining principle', 'depending on the will alone', 'without cause based upon the law'. There is also abundant case law on the interpretation of this term to which the parties have referred. The Tribunal considers that the definition in *ELSI* is the most authoritative interpretation of international law and it is close to the ordinary meaning of the term emphasizing the willful disregard of the law." *Siemens v. Argentina*, Award, 6 February 2007, **CL-040**, ¶ 318.

[530] *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company Ltd. v. The Republic of Kazakhstan*, ICSID Case No. ARB/01/6, Award, 7 October 2003, **CL-026**, ¶ 10.5.1. "[D]ue process may be denied both substantively and procedurally." *Waguih Elie George Siag and Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, **CL-058**, ¶ 440.

no final decision of the recovery proceeding had been made, to be arbitrary and inconsistent with due process. Additionally, the Tribunal has concluded that the fact the final decision was notified to the Claimant four years after it was taken also failed to meet due process. In the case of Santo Tomás, the Tribunal found that the notification of the final decision to the Claimant almost two years after it was made when the occupying groups were notified a month after, reflected a different treatment between parties and affected due process in the same way that a decision rendered by an authority not competent affected it and was arbitrary.

480. The Tribunal also notes that the Respondent has not contested that challenges presented by Refordos before the INTI regarding several decisions were never answered.[531] In the Tribunal's view, mere silence by an authority does not *per se* entail a violation of FET and the particular circumstances of each case are important when determining whether there has been an FET violation. Nonetheless, the fact that an authority maintains an attitude of silence towards a defendant for a prolonged period without any reasonable basis or explanation is relevant to whether there has been an excess of discretion, personal preference and thus, arbitrary treatment. In this case, while there was not complete silence by the Venezuelan authorities, there were instances in which on one hand there was a lack of reasonable notification to the Claimant (even negligent in some cases) and, on the other, no response at all as to the acts being undertaken by the authorities. Such requests remained unanswered. The authorities did not provide a reasonable explanation for those failures.

481. The Claimant has indicated that the measures and the conduct of the State were unstable and unpredictable since the laws enacted "eviscerated" acquired property rights. This

[531] Refordos's administrative challenge regarding La Productora filed with INTI, 11 March 2014, **C-128** (against the interim measures imposed on October 2006); Refordos's annulment appeal regarding Santo Tomás filed with the High Agrarian Court of the State of Lara, 14 December 2016, **C-142**, p. 4 (request for a declaration of annulment before the INTI regarding the Decision issued on 5 May 2011 by the Yaracuy RLO); Refordos's annulment appeal regarding El Piñal filed with the High Agrarian Court of the Zone of Lara, 27 January 2017, **C-143** (Refordos's requests to annul INTI's decision to recover the property and to issue *cartas agrarias*.) The Tribunal notes that a letter to the Ministry of Environment also went unanswered. Letter from Refordos (Mr. Cordobes) to the Ministry of Environment – Director of the Lara State (Ms. Arrieta), 16 May 2011, **C-215**, pp. 1-9 (complaining of environmental infractions in Santo Tomás).

argument relates to the fact that Venezuela never challenged Claimant's registered titles and ignored other provisions in favor of the application of the Land Law. Fair and equitable treatment in its most basic form aims to provide security and predictability against arbitrary or discriminatory acts as well as conduct that violates legal standards and due process. The fact that Venezuela has deference to determine the objectives of its policies and regulations does not provide it a blank check to breach the FET standard nor its obligations under the BIT in general. In this regard, the Tribunal agrees that:

> "This deference, however, is not without limits. Even if such measures are taken for an important public purpose, governments are required to use due diligence in the protection of foreigners and will not be excused from liability if their action has been arbitrary or discriminatory. As Judge Higgins noted in her separate opinion in the Oil Platforms Case, '[t]he key terms 'fair and equitable treatment to nationals and companies' and 'unreasonable and discriminatory measures' are legal terms of art well known in the field of overseas investment protection."[532]

482. In light of the above, the Tribunal determines that the measures implemented by Venezuela for the taking of the landholdings breached Article 3(1) of the BIT.

ii. 2018 Measures on Smurfit's Business

483. The Tribunal turns now to the measures taken by SUNDDE in 2018, namely the inspection and subsequent order for the temporary occupation of Cartón de Venezuela. The Tribunal has indicated that there are common elements within the minimum standard of treatment, whether discussing FET as an autonomous standard under the BIT or not, such as: due process, non-arbitrary measures and an absence of coercion by the State.

484. Within the context of Article 6, the Tribunal analyzed the manner in which SUNDDE conducted the inspection, in particular the fact that on 21 August 2018 the authority made 6 requests for information. Such requests sought vast quantities and very detailed information that was to be provided "immediately." Part of that information, which referred to cost structures for Cartón's products, was said to be essential for determining

[532] *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Cases Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, **CL-078**, ¶ 247.

whether the company was exceeding a 30% profit margin in violation of the Law on Fair Prices. The Tribunal found that SUNDDE's rigid and unbending demands did not accord a proper opportunity for the Claimant to respond, which was contrary to due process. The Tribunal also considered SUNDDE's demands to be arbitrary. This situation sharply contrasts with the previous inspection of an affiliate of Cartón, Corsuca, which had taken place in July. In that case, the conduct of the authority, the response to the company's explanations for a longer period of time to gather and present the information, as well as the overall environment was very distinct.

485. In the Tribunal's view, the circumstances under which SUNDDE carried out the inspection of Cartón and SUNDDE's temporary occupation of Cartón both violated due process and were arbitrary, conduct which goes to the very core of the FET obligation.

486. The Respondent made the argument that the measures taken against Cartón were prompted by the failure of that company to comply with Venezuelan law, that such measures were temporary and that after a month, Cartón abandoned its operations, forcing the government and the workers to recover production. In 2019 President Maduro stated this on national television:

> "We picked this productive unit *up from the floor. It had been abandoned for eight years* by its former foreign owners *and suddenly*, one day a year ago in September 2018, *in order to sabotage the economy of our country, they closed the doors, froze the accounts, kicked out all the workers*, they informed me, the workers were prepared to take over. It seemed surprising to me that a multinational company would do this to its workers. They left the country and we came, the national government came, the revolution came, I sent the government there, we held a meeting with the working class, they made the plan, they went to the courts, and all of this was done in accordance with the constitution and the law […]."[533] (Emphasis added)

487. The statements made to justify taking over Smurfit's operations do not correspond with the facts of the case. The evidence establishes that Cartón de Venezuela and Claimant's investment in Venezuela in general constituted an integrated business that was in operation for at least 30 years. Until 2018, there was no suggestion that Claimant's

[533] President Maduro press conference, 22 October 2019, **C-311**, 01:37-02:29. (Unofficial translation)

business operations were not conducted in accordance with the law in all material respects. While Venezuela has argued that the Claimant abandoned its operations, in the words of President Maduro, in an attempt to "sabotage the economy," there is no basis to conclude that the substantial effort to acquire and operate a whole chain of production from growing trees as inputs all the way to the production of paper-based packaging products would be deliberately relinquished after 30 years. Moreover, as noted above, the Claimant communicated its impossibility to continue operating in accordance with its policies once Venezuela had taken control of Cartón.

488. While the Tribunal does not deny that there is a public interest in assuring fair prices for goods and services, as stated in the expropriation section, the evidentiary basis to assert that the Claimant had caused market shortages and increased prices regardless of the inflation and economic situation was not established in the record. From the statements made by President Maduro, it is evident that a series of economic measures would take place and that nationalization was being considered. In 2019, the new General Manager of Cartón appointed by the government and President Maduro made the following statements:

> [Hugo Cabezas]: "Yes, this is correct, *made* in Venezuela. *Before, everything was imported*. For approximately six months now, based on your instructions, we have been producing four million boxes per month. […] because here, Mr. President, *everything, even the plant's processes of preventive maintenance, were done using foreign personnel*, and here, the workers have demonstrated that, with their own machines, their own experience and above all their willingness to get things done and to believe in our country, here they have made the pieces, the parts which are required so that the industry can operate the way it is operating."
>
> [Nicolás Maduro]: "We can say that we have experienced in a year, a process of *recovery, reconstruction and nationalization of Cartón in the hands of the productive councils of workers, in the hands of the working class*…"[534] (Emphasis added)

489. The statements made along with the economic measures implemented confirm that there was an interest to change production within the territory, making the government the

[534] President Maduro press conference, 22 October 2019, **C-311**, 05:13-05:23, 06:28-07:04. (Unofficial translation)

primary focus of production. Ultimately, through Venezuela's measures, the State took over the integrated business that the Claimant had acquired and developed over many years, *i.e.*, its landholdings and the companies that participated in the production of paper-based packaging products. That was the combined effect of the measures.[535]

490. In addition, during the inspection process and as a result of the fact that Cartón was not able to provide the information requested by SUNDDE in the time frame demanded, two of Cartón's employees were arrested and held for two months. According to the statement given by one of them, his experience was *traumatic*. In particular, he recounts:

> "We were not taken to a government office or an official jail, but to what appeared to be a private home. […] we were never allowed to make that phone call. […] For the first few days of our time in the El Trigal house, Cipriano and I were kept in a narrow hallway. There were no chairs, beds or mattresses. We were left to sleep on the floor, next to 150kg of gunpowder that the [Directorate General of Military Counterintelligence] DGCIM had seized and were storing there. For the first few days, the DGCIM guards kept us handcuffed even as we slept. […]
>
> The same judge, who on Friday had said there was no case for our detention, oversaw the arraignment. […] Instead of ordering our release, the judge remanded the case and ordered us to be detained in the custody of the DGCIM for 45 days. […] The experience was horrible. We could only use the bathroom or shower with permission from the DGCIM officers. We continued to sleep on a mattress set up on the floor of a hallway, near explosives. DGCIM officers would mock us and threaten us daily. They said they were planning on sending us to a prison for violent offenders, Tocuyito, and told us we would likely be raped there […] For some days we were detained in a balcony that was fully enclosed, without air conditioning or even proper airflow. I remember that the heat was unbearable […] The government officials insisted that my release was out of the question. My family never paid the officials any money, but they would tell me about the extortion requests during our weekly visits. […]

[535] "Well, an applause. Well, as you can see, *Cartones de Venezuela, starting from the seed, the small tree, the grown tree, the pulp… the entire process, the raw materials, works with recycled carbon*, it's very important, please take note. This must be coordinated with the Minister of Eco-Socialism, with the community councils, Minister Blanca Eekhout. […] Then, *we have recycled cardboard pulp, combined with the natural pulp which comes from trees. And all of this in a company which is producing at 100%, which was recovered by us, by the working class, by socialism, by the revolutionary government*, in compliance with the laws, the judicial system, the constitution, *in the hands of the working class. And at this time, we are supplying 90% of the demand for cardboard in the entire domestic market, and soon we are going to start, sooner rather than later, exporting Venezuelan cardboard* to obtain the funds you need to improve technology, increase investments. Yes we can, my beloved Venezuela." (Unofficial translation). President Maduro press conference, 22 October 2019, **C-311**, 48:30-50:10. (Emphasis added)

> On 14 September, my lawyer told me that he had requested my release. Shortly after, I was released on house arrest and able to reunite with my family […] Since the prosecutors were unable to find evidence to support the charges against us, on 20 October 2018, my lawyer told Cipriano and I that he would seek our release from house arrest. While we were never fully released from house arrest, some of the restrictions on our freedom of movement were lifted."[536]

491. The Respondent, on the other hand, has stated that "Smurfit submits no reliable evidence concerning the mistreatment that they have allegedly suffered," that according to Mr. Lugo's declaration he met his family and friends and they were granted the benefit of house arrest and then recovered their freedom.[537] Venezuela also alludes to the two medical reports contained in the record. The Respondent has not presented evidence to rebut the witness' testimony. Mr. Lugo was detained by Venezuelan authorities and these authorities were in *full custody* of the witness. While Venezuela has denied that Mr. Lugo was first held in an unofficial jail,[538] it has not presented records that show to which official facility he was admitted on 23 August 2018, nor any further evidence documenting his treatment during that time.

492. While the Respondent has alluded to a medical report, the report is dated 23 August 2018 and would only reflect the detainee's medical condition on the day he was arrested and not during the time he was held prisoner. The Tribunal notes as well that while the record contains a document in which the measure of house arrest was substituted for periodic presentations every 60 days, there is no clear evidence of when he was formally and effectively free from charges. Such judicial decision imposed a "substitute precautionary measure" but continued to indicate: "constantly and permanently review their file for the purposes of finding out about the hearings set by the Court in order to participate in them

[536] Witness Statement of Luis Fernando Lugo Díaz, ¶¶ 49, 50, 51, 56, 57-60, 65, 66.
[537] Respondent's Rejoinder, ¶¶ 252-255.
[538] "Claimant does not know for sure but still manifests that 'they were arrested and taken to a secret DGCIM location –a private house in a residential neighborhood that had apparently been seized by the DGCIM'. This conjecture of Claimant concerning Messrs. Lugo and Betancourt's detention 'in an extraofficial and secret military compound' gives Claimant the ideal setting (within its plan to smear the due behavior of the Venezuelan authorities) to later describe situations of abuse that they supposedly experienced. […] Smurfit has not and could not provide any evidence whatsoever in support of such severe depictions other than Mr. Lugo's own Witness Statement. What Claimant is trying to create is a fictitious obscure atmosphere over two detentions that
were conducted in strict compliance with Venezuelan legislation. […] the idea of being detained in a secret prison, isolated from the outside world, becomes hard to accept." Respondent's Rejoinder, ¶¶ 252, 253.

on behalf of the defendants […].”[539] The Tribunal also notes that the prosecution did not present the accusatory brief against the defendants. Thus, the Tribunal is not able to examine any document or evidence which might have supported the detentions of these two employees.

493. In light of the fact that Venezuela has not provided evidence to this Tribunal as to the nature of the establishment in which Mr. Lugo was held up until the time he was transferred to a municipal jail in Guacara and on the treatment he received, this Tribunal accords full probative value to Mr. Lugo’s statement regarding the conditions in which he was held captive, as well as to the testimony of Mr. Ramírez.[540] The Tribunal concludes that the arrests were not made in accordance with legal standards.

494. In consequence, the Tribunal finds that Venezuela breached Article 3(1) of the BIT through SUNDDE’s measures on Cartón, as well as through the conduct of its authorities, particularly the DGCIM, during Mr. Lugo’s arrest.

iii. VAT

a. Preliminary Matters

1) Evidence Provided to the Tribunal

495. At the outset, the Tribunal will address Respondent’s argument regarding the lack of evidentiary support for Smurfit’s claim. The Respondent contends that “Claimant has failed completely in providing evidence of its allegations […]. It is indeed impossible for the Republic to seriously engage the Claimant’s argument in this regard, since it is based fully on speculation, with no evidentiary support whatsoever. This circumstance

[539] Opinion of the Court of First Instance with competence in economic crimes, Criminal Judicial Circuit Court in the State of Carabobo, 25 October 2018, **C-306**, p. 2.
[540] “I also learned from our attorney that Messrs Lugo and Betancourt were being detained in a hallway at the DGCI’s ‘house’ in El Trigal, and that they were sleeping on the floor. The DGCIM agents had told him that Carton should arrange to have food delivered for everyone in the house and to fix a broken toilet to make sure that they would be ‘treated well’. I instructed our team in Valencia to buy and deliver mattresses to the house for Messrs Lugo and Betancourt to sleep on, to send a plumber to fix the broken toilet and to make sure that ten meals were delivered there three times a day while they remained in detention.” First Witness Statement of Alberto Ramírez, ¶ 60.

in itself should suffice to reject promptly any claims related to VAT funds in this arbitration."[541]

496. The Tribunal will start by recalling the information contained in the record. Smurfit submitted copies of the Smurfit Sellers' internal VAT Records, which detailed month-by-month VAT balances and retentions for the entire period pertinent to the claim. Smurfit also provided copies of four refund requests[542] it had filed with SENIAT. The Claimant also produced two SENIAT Resolutions and Administrative Decisions. One, dated 26 September 2017, relates to Refordos.[543] The other one, dated 30 October 2014, concerns Cartón.[544]

2) Document Production

497. In Procedural Order No. 3, the Tribunal ordered the Respondent to produce all of the Smurfit Seller's refund requests and VAT ledgers prepared by SENIAT in respect of the Smurfit Seller's requests between January 2005 and July 2018, as well as SENIAT's VAT balance statements with respect to the Smurfit Seller's.[545]

498. In response to the Tribunal's order, on 12 April 2021, Venezuela submitted 27 Resolutions and Administrative Decisions concerning VAT reimbursements paid to Cartón, Refordos, Corrugadora Latina, and Corsuca. The remaining 8 Resolutions were disclosed on 21 April 2021 and finally the complete set of Resolutions with the sole annexes were included in Respondent's Rejoinder on the Merits.[546] The Claimant alleges that "[t]he Resolutions and Administrative Decisions follow a standard SENIAT format" and that each of these resolutions "as an integral part of the document" contains a "Sole Annex" (*Anexo Único*) "consisting of a VAT credits statement printed out from

[541] Respondent's Counter-Memorial, ¶ 93; Respondent's Rejoinder, ¶ 73.
[542] Corrugadora Suramericana C.A.'s VAT refund application, 27 October 2017, **C-145**; Letter from Refordos (Mr. Arrieche) to SENIAT, 27 October 2017, **C-146**; Cartón's VAT refund application, 17 December 2017, **C-147**; Corrugadora Latina & Cía's VAT refund application, 17 December 2017, **C-148**. The Claimant has produced only four requests (one of which consists of a letter, without the accompanying application form) allegedly filed in October and December of 2017.
[543] SENIAT Administrative Decision for Refordos, 26 September 2017, **C-379**.
[544] SENIAT Resolution regarding Cartón, 30 October 2014, **C-368**.
[545] PO3.
[546] Respondent's Rejoinder, ¶¶ 122-123.

SENIAT's database *(Estados de Cuenta de los créditos fiscales de retenciones del Impuesto al Valor Agregado acumuladas).*"[547] The Claimant further posits that "[e]very time a Resolution or Administrative Decision was issued, SENIAT would print out an up-to-date copy of this statement as a Sole Annex, allowing the taxpayer to see SENIAT's evaluation of historic VAT paid, retained and recovered to date and the outstanding balance [or cumulative balance] remaining to be reimbursed."[548] These facts have not been contested by the Respondent. The Sole Annexes basically provide a balance record of the VAT requested, granted, and owed to the respective company:[549]

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SENIAT
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MINISTERIO DEL PODER POPULAR DE ECONOMÍA, FINANZAS Y BANCA PUBLICA

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Página 6 de 8

J003129852 - REFORESTADORA DOS REFORDOS, C.A. (REFORESTADORA DOS REFORDOS, C.A.)

ANEXO ÚNICO

Período	Retenciones del Período Abonadas	Retenciones Descontadas en la Autoliquidación del Impuesto	Saldo Acumulado	Recuperación Retenciones Solicitadas (Otorgadas)	Saldo a Recuperar
07/2010	210.057,21	0	4.531.220,05	0	4.321.162,84
08/2010	523.999,34	0	5.055.219,39	0	4.321.162,84
09/2010	666.094,63	0	5.721.314,02	0	4.321.162,84
10/2010	680.896,47	0	6.402.210,49	0	4.531.220,05
11/2010	752.347,41	0	6.105.517,28	1.049.040,62	5.055.219,39
12/2010	516.057,59	0	6.621.574,87	0	5.721.314,02
01/2011	599.107,82	0	7.220.682,69	0	6.402.210,49
02/2011	568.985,02	0	7.789.667,71	0	6.105.517,28
03/2011	797.125,22	0	2.547.915,39	6.038.877,54	6.621.574,87
04/2011	810.209,46	0	3.358.124,85	0	7.220.682,69
05/2011	789.696,37	0	4.147.821,22	0	7.789.667,71
06/2011	717.535,01	0	4.865.356,23	0	2.547.915,39

SENIAT Administrative Decision for Refordos, 26 September 2017, ***C-379***

3) Records in Smurfit's Premises

499. Smurfit asserts that "[b]ecause of the precipitous nature of Venezuela's expropriation of the Smurfit Sellers," it did not possess a complete set of these documents spanning from 2005 to 2018 since it no longer has access to the premises of the Smurfit Sellers, which are under Venezuela's control.[550] The Respondent takes issue with the fact that the Claimant did not accompany the VAT reimbursement requests[551] and contends that

[547] Claimant's Reply, ¶ 102.
[548] Claimant's Reply, ¶ 107; Respondent's Rejoinder, ¶ 122.
[549] Claimant's Reply, ¶ 105; SENIAT Administrative Decision for Refordos, 26 September 2017, **C-379**.
[550] Claimant's Memorial, footnote 281.
[551] Respondent's PHB, ¶ 168; Respondent's Counter-Memorial, ¶ 420.

"Claimant utilized an integrated electronic server in the functioning of the companies, a server from which moreover it blocked access from the workers right after it decided to unlawfully depart from Venezuela." In addition, the Respondent alleges that "Claimant was never displaced or removed from the companies in the Republic, but unilaterally and freely decided to abandon them, breaching all applicable laws in that regard."[552] According to Venezuela, the Claimant could have had remote access to the VAT reimbursement requests from its integrated electronic server.[553] The Claimant denies this and refers to the "SAP accounting software held on a centralized server in Miami (to which Venezuela was given access)." However, it indicates that "[t]his does not mean that copies of VAT reimbursement requests were uploaded to the SAP system and held on servers in Miami."[554]

500. The Tribunal will address the facts and consequences derived from Smurfit's leaving Venezuela in section VII of this Award. For purposes of this claim, the Tribunal is satisfied with the sufficiency of the evidence in the record to make its findings. In all events, the existence or accuracy of the evidence has not been contested. Finally, the data contained in Smurfit's internal records is consistent with SENIAT's official documents in the record.

501. The Respondent alleges that the information contained in the Sole Annexes "is not enough to prove any breach of the Republic's obligations under the Treaty because there is no indication that Claimant submitted the VAT Refund Requests in timely manner or that the SENIAT did not respond in timely manner."[555] Venezuela further contends that the VAT requests submitted by the Claimant are "objectively defective" and as an example alleges that "they lack the indication about the destiny of the VAT credit requested."[556] According to the Claimant, "SENIAT's delays in issuing VAT Certificates

[552] Respondent's Counter-Memorial, ¶ 421; Respondent's Rejoinder, ¶¶ 87, 88.
[553] Respondent's Rejoinder, ¶ 605; Respondent's PHB, ¶ 172.
[554] Claimant's Reply PHB, ¶ 23. "This accounting system software was used to record financial information which could then be used to issue reports or prepare financial statements […] Smurfit would not have sought disclosure of the VAT reimbursement requests from Venezuela if it continued to hold them."
[555] Respondent's Rejoinder, ¶ 123.
[556] Respondent's Counter-Memorial, ¶ 428.

made it difficult (if not impossible) for taxpayers to foresee whether they would have other tax debts to offset or if it would be more convenient, by the time the VAT Certificate was issued, to assign the credit to another taxpayer. For this reason, SENIAT provided taxpayers the opportunity of indicating the use of the VAT credits immediately before SENIAT granted the refunds."[557]

502. The Tribunal cannot agree with the Respondent's position. First, any *ex post facto* rationalization or allegation of any defect or flaw of the VAT requests or any circumstances surrounding its submission is not valid. There is no contemporaneous evidence indicating that these issues were raised when the requests were submitted or at least around the time of submission. In particular when, as the Claimant contends, the Respondent had "access to the copies of those SENIAT VAT Records located on the premises of the Smurfit Sellers which it controls; and […] has access to SENIAT's own electronic database which SENIAT is statutorily obliged to maintain and provide access."[558]

4) Adverse Inferences

503. The Claimant requests the Tribunal "to draw adverse inferences and to conclude that the documents Venezuela failed to produce would have supported Claimant's claim," alleging that Venezuela refused to comply with the Tribunal's document production orders.[559]

504. The Tribunal sees no need to address this request since, as stated below, it finds there is sufficient evidence to engage with Claimant's allegation of violation.

b. Main Claim

505. The Claimant argues that since a significant number of the customers are "special taxpayers," the Smurfit Sellers "were only able to collect a limited portion of the VAT

[557] Claimant's Reply, ¶ 112.
[558] Claimant's Reply, ¶ 97; Letter from Respondent to Claimant, 21 April 2021, **C-412**, p. 14: "The SENIAT Declarations produced by Respondent under Request No. 3 were extracted from SENIAT's internal virtual database." *See also* Claimant's Reply PHB, ¶¶ 15-19.
[559] Claimant's PHB, ¶ 37.

that they paid to their suppliers." Thus, the Smurfit Sellers were obliged to pay their suppliers more VAT than they were able to recoup from their consumers, but they were entitled to recover such excess by acquiring VAT Certificates from SENIAT.[560] In particular, the Claimant argues that "SENIAT has significantly delayed the issuance of VAT Certificates or has entirely failed to issue VAT Certificates in response to numerous requests from the Smurfit Sellers, without any justification whatsoever."[561]

1) Discretion of Tax Authorities

506. The Respondent contends that "Article 43 of Decree 1436, which is specifically cited by Claimant, indicates that the Tax Administration has discretion not to grant refunds. The provision does not establish any obligation of the Tax Administration to explain or to justify its decision in this regard."[562] In the same vein, the Respondent alleges that Article 44 of the same Decree "does not impose an obligation upon the Tax Administration to give reasons for eventual adverse decisions."[563] Equally, it posits that, Article 201 of the Tax Code sets forth minimum requirements for applying for tax recovery, while Article 204 specifically indicates that the requested tax credits may be rejected.[564]

507. The Claimant argues that this assertion is "baseless" and Venezuelan law "clearly obliges SENIAT to issue a timely decision based on legal requirements (rather than discretion or personal preference) and to provide reasons for such decisions."[565] *First*, the Claimant takes issue with the applicability of Article 43 of Decree 1436. According to the Claimant, "reliance on Article 43 of Decree 1436 is inapposite because this Article applies to reimbursement requests relating to export transactions and not the types of transactions underlying the Smurfit Sellers' Refund Requests."[566] *Second*, the Claimant alleges that "even if Article 43 of Decree 1436 were applicable here, none of its 21 paragraphs affords SENIAT any degree of 'discretion', as suggested by Venezuela –

[560] Claimant's Memorial, ¶ 110.
[561] Claimant's Memorial, ¶ 111.
[562] Respondent's Counter-Memorial, ¶ 97.
[563] Respondent's Counter-Memorial, ¶ 98.
[564] Respondent's Counter-Memorial, ¶ 101.
[565] Claimant's Reply, ¶ 115; Claimant's PHB, ¶ 43.
[566] Claimant's Reply, ¶ 116. (Emphasis omitted)

even for export transactions. Much to the contrary, Article 43 of Decree 1436 specifically obliges SENIAT to render a decision on VAT Refund Requests within 30 business days of their receipt."[567]

508. Finally, the Claimant contends that "[u]nder Venezuelan law, SENIAT can only reject a Refund Request on specific *legal* grounds set out in the applicable legal framework that SENIAT must verify during its review of a Refund Request […] Articles 9 and 18(9) of the Organic Law on Administrative Procedure (applicable to all state entities, including SENIAT) also establish that decisions of the administration must be reasoned and explicitly refer to the underlying facts and their legal basis."[568]

509. The Tribunal finds it difficult to accept the notion suggested by Respondent that an Authority has unfettered discretion to grant a request from any party in isolation from other legal obligations or disregarding basic due process rights. We also find it hard to accept that despite the mandatory language in the provision to respond to a request in 30 working days, the normal standard would be to simply not answer at all.[569] In the Tribunal's view, implicit denial is a tool to which tax authorities may resort on an exceptional basis. However, a systematic failure to reply to VAT requests is an arbitrary abdication by the competent authority, particularly when there is no justification other

[567] Claimant's Reply, ¶ 116; SENIAT Ruling No. SNAT 2015/0049, 14 July 2015, published in the Gaceta Oficial No. 40,720 on 10 August 2015, **C-138**, Art. 9: "The request for recovery will be decided within no more than thirty 30 business days following the definitive date of receipt […]".
[568] Claimant's Reply, ¶ 116.
[569] *See* Decree No. 1,436 on the Value-Added Tax Law, 17 November 2014, published in the Gaceta Oficial No. 6,152 on 18 November 2014, **C-132 bis**, Art. 43. In the same sense: "Article 12. Recovery shall be requested from the Tax Collection Division Internal Tax Office in the taxpayer's domicile and only one (1) request may be submitted per month. […] The Head of the corresponding Collection Division shall make a decision on all of the credits requested within a term of no more than thirty (30) business days after the definitive date of receipt of the request. The agreed reimbursements shall be without prejudice to the verification and oversight authority of the Tax Administration. In cases involving requests that cover cumulative balances for periods prior to the effective date of this Decision, the Tax Administration shall make a decision in that regard within a term of no more than ninety (90) business days following the date of definitive receipt of the request. Paragraph One: If the Tax Administration fails to make a decision within the periods specified in this Article, it shall be understood that the tax agency has denied the request, pursuant to the provisions of Article 4 of the Organic Law of Administrative Procedure." (Unofficial Translation). SENIAT Ruling No. SNAT/2005/0056A, 27 January 2005, published in the Gaceta Oficial No. 38,188 on 17 May 2005, **C-042**. *See also* SENIAT Ruling No. SNAT/2013/0029, Art. 12 and SENIAT Ruling No. SNAT 2015/0049, Art. 9; SENIAT Ruling No. SNAT/2013/0029, 20 May 2013, published in the Gaceta Oficial No. 40,170 on 20 May 2013, **C-122** and SENIAT Ruling No. SNAT 2015/0049, 14 July 2015, published in the Gaceta Oficial No. 40,720 on 10 August 2015, **C-138**, Art. 9, which remains in force.

than its unfettered discretion and indicates a failure to comply with the most basic due process rights.

2) Local Remedies

510. The Respondent contends that "there is no evidence in the record that the Smurfit's Venezuelan subsidiaries challenged SENIAT's decisions, in spite of the multiple avenues[570] for relief available to it under Venezuelan law,"[571] and it was a "conscious decision" not to challenge those decisions.[572]

511. The Claimant replies that "[t]he Smurfit Sellers were under no obligation to pursue local remedies for SENIAT's failure to issue VAT Certificates" since (by Respondent's admission) they had the choice to: "(i) assume that the Refund Request has been denied and initiate legal actions, or (ii) wait for SENIAT's decision."[573] With respect to Respondent's allegations of a conscious decision by Smurfit not to pursue legal action, the Claimant notes that "Venezuela had threatened to retaliate against Smurfit by, for example, withholding export permits, which were vital to Smurfit's Venezuelan business, if legal proceedings were initiated."[574]

512. According to the Respondent, in order to find a violation on this issue, the Claimant would need "to prove that the Venezuelan legal system does not provide any legal remedy to pursue any eventual accrued VAT credit, or that it specifically relied upon them and its claim failed to succeed due to a violation of a rule of due process."[575] It also

[570] According to the Respondent, "SENIAT's rulings (or the lack thereof) may be challenged, *inter alia*, pursuant to Article 4 of the Law on Administrative Procedures (*Ley Orgánica de Procedimientos Administrativos*) by way of a regular administrative appeal (*recurso administrativo*), Article 207 of the Tax Code, and Article 43 of Decree 1463 by way of an ordinary tax appeal (*recurso contencioso tributario*), or Article 302 of the Tax Code by way of the *amparo tributario*." Respondent's Counter-Memorial, ¶ 104. Conversely, the Claimant contends that SENIAT's decisions (or omissions) related to tax refunds cannot be challenged by filing a regular administrative appeal (*recurso administrativo*). Claimant's Reply, footnote 224.
[571] Respondent's Counter-Memorial, ¶¶ 109, 113; Respondent's Rejoinder, ¶¶ 79, 96, 98.
[572] Respondent's PHB, ¶ 159.
[573] Claimant's Reply, ¶ 118 and footnote 227. *See* Respondent's Counter-Memorial, ¶ 110. The Respondent has indicated "it is true that Smurfit Sellers were under no obligation to pursue local remedies […] as well as Claimant were [sic] not obliged to pursue local remedies, it cannot be argued then that the Republic breaches its obligations under the Treaty." Respondent's Rejoinder, ¶¶ 107, 108.
[574] Claimant's Reply PHB, ¶ 16.
[575] Respondent's Rejoinder, ¶ 115.

takes issue with the fact "that a legal mechanism, such as the implicit denial, that is protective of taxpayers' rights could be questioned by Claimant with the only purpose to evade the consequences of its own acts."[576] On the other hand, the Claimant contends that "the Smurfit Sellers cannot be punished for legitimately choosing to await a decision from SENIAT […] Smurfit had sufficient reasons to believe that any such remedies would have been equally futile in this case and could have provoked further retaliation from the government. Venezuela's position that the only way for the Smurfit Sellers to obtain a decision from SENIAT was to pursue costly, time consuming (and likely ineffective) domestic remedies is at odds with Venezuelan law."[577]

513. At the outset the Tribunal agrees with the Claimant that "[u]nless an investor brings a claim for denial of justice, or there is a procedural pre-condition to arbitration in the relevant treaty, there is no requirement to exercise or exhaust local remedies to bring or prevail on a treaty claim."[578] The Respondent understands that the Claimant decided not to challenge the implicit denial of the VAT requests.

514. The Tribunal also notes that under Article 43, the Claimant had a choice either to wait for an answer or to challenge before the competent tribunals.

> "**Article 43.** Ordinary taxpayers who export goods or services of national production, will have *the right to recover the fiscal credits* generated by the acquisition and receipt of goods and services on the occasion of their export activity. […]
>
> The Tax Administration *shall rule on the admissibility or inadmissibility* of the submitted request within a period of *no more than thirty (30) business days* following the definitive date of receipt, if all requirements provided in the Regulations for that purpose have been met. […]
>
> In the event that the Tax Administration does not expressly pronounce regarding the request within the period of time specified in this Article, the taxpayer or

[576] Respondent's Rejoinder, ¶ 99. *See also* ¶ 104.
[577] Claimant's Reply, ¶ 119. The Claimant has also indicated that, in any event, "[t]he only judicial relief that could have been sought was an order compelling the SENIAT to process and issue the Smurfit's Refund Requests or to provide an update on the status of the pending requests (as Venezuela itself acknowledges at para 314 of its Counter-Memorial). The SENIAT *already* had a legal obligation to process these requests which it was disregarding, without any justification." Claimant's Reply, ¶ 312.
[578] Claimant's Reply, ¶ 308.

> responsible party *may opt, at any time and at their own discretion*, to await the decision or to consider that the expiration of the aforementioned term is equivalent to a denial of the request, in which case it may file the tax appeal provided by the Organic Tax Code."[579] (Emphasis added)

515. The Tribunal recalls that in *Serafín García v. Venezuela*, a case relied on by the Claimant, Venezuela argued that the investor could not bring a FET claim since it had not pursued domestic court remedies as to the failure of INDEPABIS to respond to its administrative challenges.[580] The tribunal disagreed with Venezuela:

> "For the Tribunal, the fact that Claimants did not initiate judicial actions before the Venezuelan courts – who, as expressed, had the right to obtain specific pronouncements from the administrative agencies to which they had appealed – in no way alters the recognition of the violations committed by the Respondent."[581]

516. The tribunal also referred to Professor Schreuer's view that "[t]he exhaustion of local remedies is not a requirement of modern investment arbitration."[582]

517. A similar argument was posited by Venezuela in *Valores Mundiales v. Venezuela.* In that case, Venezuela had issued an expropriation decree regarding two local subsidiaries. Venezuela was obliged to undertake and complete formal expropriation proceedings, but it failed to do so. While Venezuela had initiated the proceedings, it suspended them and they remained in that state for over ten years. Despite the suspension, Venezuela subjected the subsidiaries to government interference for ten years. In the arbitration,

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[579] Decree No. 1,436 on the Value-Added Tax Law, 17 November 2014, published in the Gaceta Oficial No. 6,152 on 18 November 2014, **C-132 bis**, Chapter VI. (Unofficial Translation)

[580] "Venezuela argued that when the administrative agency failed to respond within the requisite time frame under Venezuelan law, the investor could have assumed that its silence was equivalent to a denial of the request, and then appealed that denial before the courts. According to Venezuela, the investor's failure to do so precluded it from bringing an FET claim." Claimant's Reply, ¶ 310.

[581] *Serafín García v. Venezuela*, **CL-096**, ¶ 351, referring as well to *Helnan v. Egypt:* "it would deprive the development of investment arbitration of much of its force and effect, if, despite a clear intention of States parties not to require the pursuit of local remedies as a pre-condition to arbitration, such a requirement were reintroduced as part of the substantive cause of action," *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Annulment, 14 June 2010, **CL-165**, ¶ 47. The Claimant contends that the same reasoning applies in this case: "There is no requirement to do so [appeal] under the Treaty. Venezuela had a legal obligation to respond to the Smurfit Sellers' Refund Requests within a specific time period, and it blatantly disregarded that obligation, without justification, contrary to its obligation to accord FET/MST." *See* Claimant's Reply, footnote 632.

[582] Claimant's Reply, ¶ 310; *Serafín García v. Venezuela*, **CL-096**, ¶ 351, citing C. Schreuer, "*Calvo's Grandchildren: The Return of Local Remedies in Investment Arbitration*" (2005) Vol 4 Law and Practice of International Courts and Tribunals 1, **CL-177**, p. 16.

Venezuela argued that its conduct did not constitute a violation of FET because the claimant had not filed domestic challenges to nullify the expropriation decree or to protest the state's failure to complete the judicial expropriation proceedings. The tribunal observed the following:

> "[…] the Treaty does not impose an obligation to investors to exhaust domestic remedies before resorting to an international tribunal to settle their disputes with the State. […]
>
> While it is true that the Venezuelan legal system provides resources to make up for the Administration's lack of activity, Claimants are not bound to initiate an expropriation process against them, especially when this responsibility falls on the State according to its own legislation. The State cannot suspend an expropriation process, apply some of the effects of the decree that initiated the expropriation process, delay the negotiations and simultaneously argue that it was up to the Claimants to promote through legal actions the expropriation process in order to force Venezuela to comply with the obligations that it was unaware of."[583]

518. In that case, the tribunal determined that Venezuela breached its FET obligation by keeping the suspension in place for ten years without making decisive progress all the while applying the effects of the Decree, and noted that the claimants were kept in a "situation of uncertainty."[584]

519. In an isolated instance, we may agree with Venezuela that the Claimant has to bear the "consequences of its own acts." However, in a case such as this one, where there are so many instances of failure to reply (no answer at all), no explanation of the reasons for not granting the VAT request or if the requirements had not been met, SENIAT's systematic failure to reply to Claimant's VAT requests reflects a failure to comply with due process, lack of transparency, and an arbitrary act by the competent authority.

[583] *Valores Mundiales, S.L. and Consorcio Andino S.L. v. Bolivarian of Venezuela*, ICSID Case No. ARB/13/11, Award, 25 July 2017 ("***Valores Mundiales v. Venezuela***"), **CL-093**, ¶¶ 576, 579.
[584] *Valores Mundiales v. Venezuela*, **CL-093**, ¶¶ 582, 583.

3) Whether Venezuela's failure to issue VAT Certificates Constitutes a Breach of FET

520. The Claimant contends that from 2005 onwards, Venezuela arbitrarily delayed or failed to respond to Smurfit's subsidiaries' applications for VAT Certificates to which they were entitled, without any justification[585] and that Venezuela's failure was inconsistent with its legal standards, and in particular, its obligations under Article 43 of the Decree 1436 on the Organic Tax Code Law (the "**VAT Law**"). According to the Claimant, under that provision, the SENIAT (Venezuela's tax authority) was obliged to reply to these requests within 30 business days.[586] The Claimant also submits that SENIAT's conduct was inconsistent with its previous practice of issuing VAT Certificates to Smurfit's subsidiaries and no justification was provided for this change in approach.[587]

521. The Claimant relies on *Occidental* and *Valores Mundiales*. In its view, in this case, as in *Occidental*, "Venezuela had assured Smurfit by way of its own laws and regulations that the refund of VAT was available. Yet, Venezuela simply ignored Smurfit's subsidiaries' requests and failed to issue the VAT Certificates due in accordance with the law, without justification. As the tribunal in *Valores Mundiales* has held, a failure to respond to administrative applications without justification constitutes arbitrary conduct."[588]

522. In relation to VAT, the tribunal in *Anglo American v. Venezuela* considered that "[t]he apathy of MLDN which waited until February 2015 to lodge an appeal against SENIAT's silence limits its legitimacy to complain about a violation of fair and equitable treatment as a consequence of the Administration's delay."[589] The Respondent relies on that case and alleges that "it is commonplace for taxpayers to resort to one of these options in order to have their claims heard. For instance, in *Coca-Cola Servicios de Venezuela*, the plaintiff filed an *amparo tributario* alleging a delay by SENIAT in the decision of its

[585] Claimant's Memorial, ¶ 248.
[586] Claimant's Memorial, ¶ 249.
[587] Claimant's Memorial, ¶ 250.
[588] Claimant's Memorial, ¶ 252.
[589] *Anglo American PLC v. Bolivarian of Venezuela,* ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019 ("***Anglo American v. Venezuela***"), **RL-0101**, ¶ 464. Seventh Supreme Court with competence on Contentious Tax Matters, Judicial District of Caracas, Decision No. 1356, File No. AP41-U-2005-000489, 30 September 2011, **R-037**.

request for recovery of tax credits. Venezuela's Second Superior Court of Tax Litigation of the Judicial District of the Metropolitan Area of Caracas (*Tribunal Superior Segundo de lo Contencioso Tributario de la Circunscripción Judicial del Área Metropolitana de Caracas*) decided in May of 2009 on the *amparo tributario* filed by the company and ordered SENIAT to issue a response within 5 days. The Supreme Court of Justice upheld the decision."[590]

523. The Tribunal considers that while certain elements of *Anglo American* are similar to the present case, there are significant differences. In that case, the Claimant had refused to deduct the VAT credits in its returns. While the VAT Law did not contemplate that requirement, the VAT Return form changed the administrative practice by providing in the form for the taxpayer to deduct the VAT credits in its return. The tribunal considered that it was not the change in practice that created problems but the "official's lack of transparency that prevented the Claimant from knowing the reason for the rejection of its VAT Requests until 2012." According to the evidence, the claimant had been informed first verbally and then in writing through "*Actas de Requerimiento*." This is the first substantial difference: the claimant was informed of the reason for the rejection of the requests. The second substantial difference was that "once Claimant was informed of the deduction requirement and was offered the opportunity to regularize the status of its claims in respect of previous tax periods it chose not to do so." In the present case no such opportunity was offered. While in this case the Respondent has alleged that the Claimant has not proved it presented the requests in a timely manner,[591] there is no evidence in the record that any defect in those requests would have been signaled to the Claimant by the authority. Moreover, the conscious decision not to regularize the status differs from the decision not to force some response by the authority when there was a clear systematic failure to do so. In the *Anglo American* case, the tribunal indicated that "the investor does have to make sure that the attitude of an isolated official is representative of the State's position." In the present case, and as mentioned above, there

[590] Respondent's Counter-Memorial, ¶ 315.
[591] "Claimant has the burden of proof not only to prove that the Republic did not process some VAT Refund Requests but also the [sic] to demonstrate that it presented those Requests in a timely manner (without any delay on its part)." Respondent's Rejoinder, ¶ 82.

was no isolated incident, but a systematic failure to respond by the tax authorities. The tribunal considered that "it is not the lack of transparency of the Venezuelan Administration or the lack of predictability of the Venezuelan legal framework that prevented the Claimant from obtaining the VAT CERTS but its obstinacy in considering the deduction requirement to be improper and its refusal to comply with it."[592] In this case, unlike in *Anglo American,* there has not been a refusal by the Claimant to comply with a requirement referenced by the authority; rather it was the failure to provide any response, any justification in a continuous manner that the Claimant complains about.

524. In the Tribunal's view, the fact that local remedies were available under the domestic law of Venezuela does not preclude an FET claim under the Treaty. There is no requirement under the BIT to exhaust local remedies as the Respondent acknowledges. Therefore, the fact that the Claimant did not pursue local remedies in order to try "to force" a decision does not erase the fact that Venezuela systematically failed to respond to the VAT requests submitted by the Claimant in contravention of due process and thereby rendered the use of implicit silence an arbitrary exercise.

525. In conclusion, the Tribunal finds that by systematically failing to respond to VAT requests, Venezuela breached Article 3(1) of the Treaty.

3. Arbitrary or Discriminatory Measures

A. The Claimant's Position

526. The Claimant alleges that in addition to FET, Article 3(1) prohibits the impairment, by arbitrary or discriminatory measures, of the operation, management, maintenance, use, enjoyment and/or disposal by investors of their investments. Thus, any arbitrary measure that impairs a protected investment not only constitutes a breach of the FET standard but also violates this self-standing prohibition. In Claimant's view, Venezuela's measures

[592] *Anglo American v. Venezuela,* **RL-101**, ¶¶ 459-465.

also give rise to the separate but related breach of the standard prohibiting arbitrary and discriminatory treatment contained in Article 3(1) of the Treaty.[593]

527. According to the Claimant, Venezuela's measures not only were arbitrary but also based on discriminatory motives. In the case of the landholdings, it argues that the takings were preceded by declarations regarding the "need to fight against 'imperialism'" and as to the 2018 measures it submits that "President Maduro lauded the 'nationalization of Cartón in the hands […] of the workers […]'." The Claimant also indicates that the determination of the arbitrariness of a measure cannot be a self-judging exercise and the prohibition against arbitrariness is a limit to any deference that may be due to the host State.[594] Regarding the VAT requests, it alleges that failing to respond to the requests without justification was "flagrant, egregious, manifestly inconsistent and arbitrary conduct – a textbook example of internationally wrongful conduct in breach of the FET standard and the prohibition against "arbitrary or discriminatory measures" in Article 3(1) of the Treaty."[595]

B. The Respondent's Position

528. The Respondent contends that in order for the Tribunal to make a finding of arbitrariness Venezuela's alleged conduct (or omissions) must be found to have been pursued with the intention to ignore due process and proper procedure. The Respondent maintains, however, that the challenged measures were neither arbitrary nor discriminatory, but rather were measures undertaken for a public purpose, with respect for due process, carried out in a non-discriminatory manner and transparently.

529. With regards to the Land Law, the Respondent submits that the measures under such Law were pursued due to exceptional circumstances of social interest and public utility, specifically, to help safeguard the availability of food for the citizens of Venezuela. In this regard, it considers that "a State is 'entitled to a measure of deference' in defining the public interest." The Respondent also alleges that Smurfit was not the only subject

[593] Claimant's Memorial, ¶¶ 254-256; Claimant's Reply, ¶¶ 318-320.
[594] Claimant's Reply, ¶¶ 320, 321, 324, 325.
[595] Claimant's PHB, ¶ 54.

of the challenged measures and, thus, cannot prove that the alleged interference was carried out on a discriminatory basis and, in any case, that different circumstances may explain different treatment. Venezuela argues that the aim, the method and the effect of the State's measures must be analyzed, and in this case, it is evident that "there exists a reasonable relationship between the burden placed on the foreign investor by the challenged measures –pursued in the public interest–, and the aim sought to be realized by those same State measures –none other than, *inter alia*, the availability of food for the citizens of a sovereign State and the protection of the essential rights of workers and consumers–."[596]

530. Finally, the Respondent submits that the Claimant has failed to articulate how the challenged measures contravene the standard in Article 3(1), that the inspections were not linked to President Maduro's speech, that it was the Claimant that stopped production and decided to prejudice the workers' rights, and that Claimant has not explained how the inspections amount to a different treatment in comparison to different cases.[597] Regarding the VAT requests, the Respondent argues that the Claimant "cannot state that the conduct of the Administration could not be limited or censored (and, thus, controlled) if it cannot demonstrate that the Republic prevented it from making an appeal against the conduct of the Tax Administration" and that "the Claimant voluntarily chose not to duly challenge those decisions."[598]

C. The Tribunal's Analysis

531. Article 3(1) of the BIT establishes both the obligation to accord fair and equitable treatment as well as the obligation not to adversely affect the investments by means of arbitrary or discriminatory measures in the following terms:

> "Each Contracting Party shall ensure fair and equitable treatment of the investments of nationals of the other Contracting Party and *shall not impair*, by *arbitrary or discriminatory measures*, the *operation, management*,

[596] Respondent's Counter-Memorial, ¶¶ 317-333.
[597] Respondent's Rejoinder, ¶¶ 535, 536.
[598] Respondent's Counter-Memorial, ¶ 320. "Claimant has not established that any of the challenged measures was adopted unevenly to every other applicant." ¶ 321; "Venezuela did not fail to process VAT Refund Requests and even less without justification." Respondent's Rejoinder, ¶ 538.

> *maintenance, use, enjoyment* or *disposal* thereof by those nationals." (Emphasis added)

532. The Tribunal agrees with the conclusions in *CMS v. Argentina* in that "[t]he standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment."

i. The Landholdings

533. In light of our findings in the preceding sections, the Tribunal considers that Venezuela did impair the operation, management, maintenance, use, enjoyment and disposal of the landholdings.

534. Accordingly, Venezuela breached Article 3(1) of the BIT when impairing the operation, management, maintenance, use, enjoyment and disposal of the landholdings through arbitrary measures.

ii. 2018 Measures on Smurfit's Business

535. Regarding the taking of Cartón de Venezuela, the Tribunal has determined that those measures constituted expropriations within the terms of Article 6 of the BIT. It has also determined that the inspection, information demands, and temporary occupation were arbitrary, lacked evidentiary support for its basic justification and constituted a rigid and unbending requirement that was impossible to comply with in the time frame provided. Through these measures, Venezuela not only impaired the operation, management, maintenance, use, enjoyment and disposal of Cartón de Venezuela, it went even further so as to remove any possibility for the Claimant to act in relation to its company. In light of this, the Tribunal determines that Venezuela breached Article 3(1) of the BIT when impairing the operation, management, maintenance, use, enjoyment and disposal of its business through arbitrary measures.

iii. VAT Certificates

536. The Claimant contends that Respondent's arbitrary measures breaching the FET standard "also give rise to the separate but related breach of the standard prohibiting arbitrary and discriminatory treatment contained in Article 3(1) of the Treaty."[599] Venezuela contends that the challenged measures were neither arbitrary nor discriminatory and that the measures were "undertaken for a public purpose, with respect for due process, in a non-discriminatory manner, and transparently."[600] Regarding the VAT transfers, it alleges that the Claimant cannot state that the conduct of the Administration could not be limited or censored (and, thus, controlled) if it cannot demonstrate that Venezuela prevented it from making an appeal against the conduct of the Tax Administration. The Respondent relies on *Anglo American.* Also, it submits that the Claimant has not established that "any of the challenged measures was adopted unevenly to every other applicant" nor that "the affected investor [was] intentionally targeted by the States' measures."[601]

537. Article 3(1) of the Treaty not only contains the obligation to ensure FET to investments, but also not to "impair" through arbitrary or discriminatory measures the operation, management, maintenance, use, enjoyment, or disposal of the investments. The Tribunal has determined that Venezuela failed to provide any response and any justification to the Claimant regarding its VAT Requests, more precisely, that it systematically failed to respond to Claimant's VAT Requests in contravention of due process and rendering the use of implicit silence an arbitrary exercise. Regardless of whether such requests would have been approved or not, Claimant's possibility to deduct the VAT paid when buying goods or services was effectively nullified by Venezuela's conduct. This conduct had the effect of impairing the use, enjoyment, and disposal of part of Claimant's investment through the VAT Certificates.

[599] Claimant's Memorial, ¶ 256.
[600] Respondent's Counter-Memorial, ¶ 318.
[601] Respondent's Counter-Memorial, ¶¶ 320-322.

538. In light of the above, the Tribunal finds that by systematically failing to answer Claimant's VAT Certificate Requests, Venezuela impaired the use, enjoyment, and disposal of part of Claimant's investment and thus breached Article 3(1) of the BIT.

4. Full Protection and Security (FPS)

A. The Claimant's Position

539. The Claimant submits that Article 3(2) of the Treaty imposes an obligation of "vigilance and due diligence and is restricted to *physical security*."[602] It argues that Venezuela breached this obligation when SUNDDE carried out a disproportionately violent inspection and seized its business, with military officers who threatened employees, engaged in a campaign of harassment and intimidation, and detained several employees. The government took control of Smurfit's business, appointing new management and usurping the functions of the management appointed by Smurfit.[603]

540. As to the landholdings, the Claimant contends that Venezuela failed to take any steps to prevent the repeated invasions, to evict the occupants, or to stop the theft and damage that ensued, but rather actively encouraged and supported those invasions and other actions.[604] In its reply, the Claimant argues that the Full Protection and Security ("**FPS**") standard imposes an obligation "both in relation to conduct by State organs as well as in relation to private acts" and that "[m]aking the state's judicial system available does not provide *physical* protection, but rather *legal* protection." Accordingly, the Claimant submits that Venezuela's assertion that the relevant enquiry is whether its judicial system was available and its Courts were independent and impartial contradicts its own assertion that the standard is concerned with physical protection.[605]

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[602] "Smurfit only seeks redress for Venezuela's failure to physically protect its investments." Claimant's Reply, ¶ 330. The Respondent also indicates that "the Republic's obligation to provide full protection and security under Article 3(2) of the Treaty does not encompass legal protection and security" […] "the breadth of the standard is limited to protection against the impairment of the physical integrity of the investment and against interference by use of force." Respondent's Counter-Memorial, ¶¶ 360, 361.
[603] Claimant's Memorial, ¶ 260.
[604] Claimant's Memorial, ¶ 261.
[605] Claimant's Reply, ¶¶ 335-337.

541. In the Claimant's view, Venezuela did not act diligently in providing physical protection to Claimant's investments. Regarding the landholdings, Smurfit argues that it is not necessary to prove that the harm was actively caused by Venezuela. Rather, to be liable under this standard, it is sufficient to show that Venezuela was not diligent in providing physical protection to Smurfit's investments. The Claimant indicates that Venezuela not only failed to remove the occupants but that its government agencies encouraged, supported and protected them, authorizing the occupation of landholdings and ultimately seizing the land to redistribute it.[606]

542. Regarding SUNDDE's actions, the Claimant contends that Venezuela does not deny causing physical harm to its employees during the inspection, six of whom were arrested with two of them for a prolonged period of time in deplorable conditions, which amounts to a failure to physically protect an investment. It further indicates that the obligation to physically protect investments is not limited to preventing physical damage to the facilities, but also extends to the physical integrity of the investment and to providing a safe and secure environment. In the Claimant's view, Venezuela failed to comply with this obligation both during the inspection as well as during the occupation of its business since: (i) government officials, armed soldiers and other military personnel forcibly entered and took control over the premises, intimidating and harassing employees, detaining them in their offices and arresting them, (ii) the production of Smurfit's subsidiaries was halted (since the start of the inspection the subsidiaries' production was suspended and has mostly remained suspended since), and (iii) Smurfit's facilities were looted while others caught fire.[607]

B. The Respondent's Position

543. The Respondent contends that it took all the measures that were reasonable to protect the Claimant's investment. It submits that the standard is not one of strict liability and that its operation is residual, *i.e.*, it only applies to the protection of the investor's property

[606] Claimant's Reply, ¶¶ 341-343. "None of those interventions resulted in any Venezuelan authorities deploying the police or other authorities to evict the violent squatters." ¶ 344.
[607] Claimant's Reply, ¶¶ 346-350.

from acts attributed to third parties, and not to acts emanating from the host State itself.[608] According to Venezuela, it has a wide margin of discretion in deciding how to discharge its obligation to guarantee the physical integrity of the investments and if the measures it ultimately adopted were reasonable, the FPS obligation has been satisfied.[609]

544. Regarding SUNDDE's inspections, the Respondent alleges that they were in line with its obligations, no physical harm was caused to the investment, and the FPS standard is not appropriate to assess acts perpetrated by State organs. The Respondent invokes the argument that its actions to take control of the business were made after the Claimant willfully abandoned its investments and that if the Claimant had thought that SUNDDE's actions were illegal it could have sought relief from the Venezuelan courts. To the extent that it did not do so, it can only seek a remedy under the Treaty if it shows that such relief was unavailable or was otherwise illusory.[610]

545. As to the landholdings, the Respondent contends that the application of the Land Law was in line with its obligations. According to the Respondent, it did not "prompt, plan, nor direct the alleged invasions of Refordos's properties." It submits that it took steps to prevent the repeated invasion of Refordos's properties by properly investigating Refordos's complaints and ordering protective measures, that it never encroached upon Refordos's right to take legal action to repossess its property and fend off squatters, that it afforded the Claimant legal and administrative remedies to contest measures affecting

[608] Respondent's Counter-Memorial, ¶¶ 335-338. (On the operation of the standard being residual, referring to *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, **RL-037,** ¶ 522. *See also* Respondent's Rejoinder, ¶ 540. The Respondent has also argued that even if the Tribunal determined that the FPS standard also concerns acts of the State, this would only occur in "exceptional circumstances." Respondent's PHB, ¶¶ 153, 206.
[609] Respondent's Counter-Memorial, ¶ 339. Respondent's Rejoinder, ¶ 542.
[610] Respondent's Counter-Memorial, ¶¶ 343-353. "Claimant's own decisions triggered all the Republic's measures that now it is claiming in this arbitration. Claimant did not deny that it provoked a conflict with the workers before the SUNDDE's inspection." "[The Claimant] voluntarily decided to abandon its operations in Venezuela. It was the one who decided to do [sic] not protect its own businesses and the Republic had no choice but to protect Claimant's former workers." Respondent's Rejoinder, ¶¶ 548, 550; Respondent's PHB, ¶ 154.

its alleged investment and that the FPS standard does not provide an absolute guarantee against any infringement of the investor's rights.[611]

C. The Tribunal's Analysis

546. We begin our analysis with Article 3(2) of the Treaty which provides as follows:

> "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* or to *investments of nationals of any third State*, whichever is *more favourable* to the national concerned." (Emphasis added)

547. This provision is phrased in a similar way to the FET obligation under paragraph 1, incorporating a non-discrimination obligation both in terms of national treatment as well as in terms of MFN. Both Parties agree that the standard is concerned only with *physical* security. The Tribunal considers that the express wording of the article, unlike in other BITs, limits such obligation to this sphere. Some tribunals have considered the obligation applies with respect to third parties and others have considered the obligation extends to acts perpetrated by the State in certain circumstances.[612]

548. Overall, the FPS obligation has been interpreted as combining "an obligation of result and an obligation of means." "In the most basic formulation, the purpose of the FPS standard is to protect the physical integrity of an investment against interference by use of force."[613] Such obligation has been understood as requiring "vigilance and […]

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[611] Respondent's Counter-Memorial, ¶¶ 353-360. "[I]nasmuch as the Republic complied with its obligation to maintain enforcement mechanisms in place it thereby could not conceivably face any liability under the FPS standard." *See* ¶ 364. The Republic asserts that the legal remedies provided by the Venezuelan legislation are a suitable mean to protect Claimant's investment from the alleged physical damages suffered over the landholdings. Respondent's Rejoinder, ¶ 547; Respondent's PHB, ¶ 207.

[612] "The perpetrator of such interference is irrelevant it could be the State itself, (including agencies, groups, entities or other organs whose actions can be attributed to the State), or any other third party. FPS thus entails a two-fold obligation for the host State: – A negative obligation to refrain from directly harming the investment by acts of violence attributable to the State, plus – A positive obligation to prevent that third parties cause physical damage to such investment." *Cengiz Inşaat Sanayi ve Ticaret AŞ v. The State of Libya*, ICC Case No. 21537/ZF/AYZ, Final Award, 7 November 2018 ("***Cengiz v. Libya***"), **CL-186**, ¶ 403; *Biwater v. Tanzania*, **CL-049**, ¶ 730.

[613] *Cengiz v. Libya*, **CL-186,** ¶¶ 403, 404. "The 'full protection and security' standard applies essentially when the foreign investment has been affected by civil strife and physical violence. In the *AMT* arbitration, it was held that the host State 'must show that it has taken all measures of precaution to protect the investments of [the investor] in its territory.' […] The standard does not imply strict liability of the host State however. The *Tecmed* tribunal held that 'the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that

care,"[614] of "due diligence," "reasonable" or "precautionary" measures,[615] but not to impose "strict liability":[616]

> "Reasonableness must be measured taking into consideration the State's means and resources and the general situation of the country. This obligation of vigilance does not grant an insurance against damage or a warranty that the property shall never be occupied or disturbed -it simply requires that the State apply reasonable means to protect foreign property."[617]

549. In the Tribunal's view, the fact that it is not a strict liability obligation but one of due diligence, of reasonable measures, indicates that there is a high threshold that must be met. Not every impairment, not every disturbance to the property will rise to the level of an FPS breach. One of the most representative cases, *Asian Agricultural Products v. Sri Lanka* dealt, for example, with a situation in which terrorist activities took place in Sri Lanka and the events of the case centered around the destruction and killing of several employees of Serendib farm by special task forces. In *Wena v. Egypt*, while the facts did not approach that level of magnitude, hotels were seized and vandalized, much of the fixtures and furniture were removed and auctioned, and the operating license was revoked although eventually returned. *Cengiz v. Libya* involved looting and physical harm by the Libyan army and militias. It is against this standard that the Tribunal will measure the facts of this case.

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grants it'. The host State is, however, obliged to exercise due diligence. […] Accordingly, the standard obliges the host State to adopt all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners. The practice of arbitral tribunals seems to indicate, however, that the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force." *Saluka v. The Czech Republic*, **CL-034**, ¶¶ 483, 484.

[614] *American Manufacturing & Trading Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award and Separate Opinion, 21 February 1997, **CL-009**, ¶ 6.06.

[615] *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015 ("***Bernhard v. Zimbabwe***"), **CL-088**, ¶ 596; *OIEG v. Venezuela*, **CL-086**, ¶ 580; *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, **CL-006**, ¶ 85.

[616] *Bernhard v. Zimbabwe*, **CL-088**, ¶ 596.

[617] *Cengiz v. Libya*, **CL-186**, ¶ 406.

i. The Landholdings

550. The Claimant contends that Venezuela breached this standard by encouraging the invasions to the landholdings as well as by failing to prevent them (and the damages to the property) or to evict the occupiers.

551. At the outset, the Tribunal makes two observations: *first*, the legal framework in which the expropriations made by the Respondent were based, effectively fostered and secured the occupation by these individuals; *second*, it is uncontested that the landholdings were seized and the groups that occupied sections of the land were not evicted by the State. The Tribunal understands this was the intent of Venezuela's measures since they were based on the premise that the landholdings were not property of the Claimant but of the State, and it could therefore grant rights to any group or individual for agricultural activity in accordance with the Land Law.

552. Aside from these observations which outline the core of this dispute, the Tribunal recalls that the FPS obligation pursuant to Article 3(2) of the BIT aims to protect "the physical integrity of an investment against interference by use of force." As put in *Cengiz v. Libya*, on one hand, the State has an obligation to refrain from directly harming the investment and on the other, it has a positive obligation to prevent third parties from causing physical damage. It is clear for the Tribunal that this is not a case in which the State, by use of force, directly harmed the landholdings, but rather of the State's obligation to prevent damage by third parties, *i.e.*, the groups of peasants that occupied the lands pursuant to the State encouraging and allowing such situation for the reasons already described.

553. As to La Productora and El Piñal, the Tribunal does not consider the record supports a finding of physical damage that would breach this standard.[618] With regard to Santo

[618] In its Memorial, the Claimant referred in general to "Smurfit's landholdings." In its Reply, it specified how it considered Venezuela breached the standard as to La Productora, El Piñal and Santo Tomás, while it refers in a footnote that the requests for the inspections were made by Refordos to document damage to other landholdings (La Joya, El Hierro, Garachico) and to the fact that authorizations to occupy the land were issued regarding seven landholdings, the Tribunal understands the main claim to be regarding La Productora, El Piñal and Santo Tomás. Regardless of this, it also considers that while documents to other landholdings show certain damage to the property, the considerations expressed in the case of Santo Tomás as to the magnitude of damage to cause a breach to the FPS standard apply as well. *See* Minutes of Judicial Inspection of La Joya, High Agrarian Court of the State of Portuguesa and of the

Tomás, the Tribunal considers there is evidence pointing to the fact that the landholdings were subjected to certain damage by the groups. The Claimant has referred to: (i) an inspection requested by Refordos to Santo Tomás which details "a number of fallen trees that impeded vehicle traffic to one part of the property,"[619] (ii) a letter to the Sarare Prefecture including two photographs to show burning in an area of Santo Tomás,[620] and (iii) certain complaints from November 2010 and May 2011.[621] Regarding the letter to the Sarare Prefecture, the photographs are in black and white which impedes a clear appreciation of burning, the range of the area burnt or whether it was made pursuant to agricultural activities that were to be performed (corn crops). As to the complaints, while the photographs are also in black and white, it is possible to appreciate with better clarity tree cutting, a gate that was knocked down and burning in some areas. In addition to this, the decision on the request for an environmental protective measure granted in 2017 confirms damage to the property when indicating:

> "[…] from the aforementioned judicial inspection and technical report, it can be inferred that: The affectation (felling and burning) of several plots of the species pine, melina and eucalyptus [sic] The felling and burning observed during the inspection, corresponds to the pine species, carried out selectively in an extension of approximately one kilometer (1 km) from the entrance of the farm; tree felling leaving stumps with averages of 50 to 1 meters high […] as well as trees burned in their stems observed in several hectares within the estate. The felling and burning of 80% of the surface of plots 2ª and 2G of the plantation,

Municipality of Juan Vicente Campo Elías of the State of Trujillo, 2 May 2012, **C-108**, pp. 2, 3, 8-45 and Judicial Inspection Report regarding Garachico, 11 October 2010, **C-211**, pp. 24, 40-51. The Tribunal also notes that the Claimant did not raise with regard to FPS its allegation towards the injury suffered by a worker of Refordos at Los Garzones.

[619] Minutes of Inspection conducted by the Prefecture of the Simón Planas Municipality at Santo Tomás, 13 May 2011, **C-090**, p. 1.

[620] Letter from Refordos (Mr. Arrieche) to Prefecture of the Sarare Municipality (Mr. Díaz), 5 May 2011, **C-214**, pp. 2-3.

[621] Letter from Refordos (Mr. Cordobes) to Ministry of the Environment – Director of the Lara State (Ms. Arrieta), 16 May 2011, **C-215**, pp. 3-9, 17, 22, 29-32, 43, 49, 50-53. A court document detailing a judicial inspection indicates "in the adjacent sector, the destruction and burning of plant species is easily visible, whose residues have been dispersed throughout the property" … "we have been kicked out with machetes, hatchets, spears, and insulting words directed at the personnel." Palavecino and Simón Planas District Court of the State of Lara Judicial Inspection file regarding Santo Tomás, June 2011, **C-216**, pp. 53, 55. *See also* INTI Technical Report regarding Santo Tomás, 15 June 2013, **C-230**, pp. 34, 44; INTI Technical Report regarding Santo Tomás, 22 May 2014, **C-237**, p. 11.

> whose original surface is approximately 4.17 hectares, and the burning of natural vegetation and the stumps resulting from the use of the plantations […]."[622]

554. While the Respondent has not provided concrete evidence that would lead this Tribunal to believe that it effectively implemented reasonable measures to avoid unnecessary damage to the environmental area or to support the fact that the damage that has been corroborated was necessary for the agricultural activities that were to be undertaken, the Tribunal is not convinced either that the damage caused to certain areas of Santo Tomás points to a level of destruction, of irreparable damage that would render Venezuela liable under this provision.

555. Although the decision refers to the extension of 1km and a surface of 4.17 hectares, the Tribunal recalls that the extension of Santo Tomás is of 2,197 ha. While the Tribunal does not overlook or excuse the instances of environmental damage to certain areas of Santo Tomás, or the fact that confrontations with the individuals occupying the land may have had violent overtones, it also considers that overall, the record does not establish that the invasions by the peasants were undertaken with a degree of violence that would have resulted for example in the irreparable damage to the property or human losses, or that the damage inflicted on certain areas of the land was of such a grave magnitude, which would rise to a level of an FPS breach.

556. In consequence, the Tribunal dismisses the claim that the Respondent breached the FPS obligation under Article 3(2) of the BIT.

ii. 2018 Measures on Smurfit's Business

557. As indicated above, the standard for this obligation is high; therefore, not every disturbance to the property will rise to the level of an FPS breach, which is not a strict liability provision. Additionally, "it specifically refers to *physical* security and protection." The Tribunal recalls that emblematic cases concerned the destruction of

[622] Decision of the First Instance Agrarian Court of the State of Lara regarding Santo Tomás, 15 March 2017, **C-252**, p. 11. (Unofficial translation)

assets, killing of individuals, seizure and vandalization, looting and physical harm by armed forces.

558. The Claimant has argued that the obligation under this standard extends to protecting the physical integrity of the investment and to providing a safe and secure environment.[623] At the outset, while the record indicates that on 21 August security forces were present,[624] the Tribunal considers there is no evidence that authorities, whether military or police force, caused physical damage to the facilities or the assets of Cartón. While the Respondent contends that security forces remained at the entrance,[625] Claimant's witnesses place them inside the premises accompanying SUNDDE officers at certain points.[626]

559. Regardless of this discrepancy, the evidence presented does not point to the destruction of the facility, assets, vandalization or in general to the use of force during the inspection and from the moment the temporary occupation was decreed up until the time the Claimant wrote to the government informing it that they could no longer be responsible for the operations. In the same sense, while government officials climbed over the fence at the gate to the property and entered the facility, the Claimant has not discharged its burden to proof that such action amounts to an interference by use of force.[627]

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[623] Claimant's Reply, ¶ 347.
[624] Photograph of SUNDDE inspection meeting at Cartón's corporate office in Valencia, 21 August 2018, **C-387**; Video of government officers forcing their way into Cartón's offices, 21 August 2018, **C-279**.
[625] Respondent's PHB, ¶ 148. "I remember that two or three officers were with me, and they were at the entrance of the Company Cartón de Venezuela. They were there simply safeguarding the integrity of those of us who were at the company's premises." Hearing, Tr. Day 3 (Mr. Arias) P727:L5-9.
[626] "The SUNDDE officials, however, were not satisfied with this. They wanted the information immediately. They would roam the halls, entering my employees' offices, accompanied by SEBIN officers carrying long rifles, demanding that they hand over documents immediately, often screaming at them and threatening them with arrest if they did not immediately comply." "More senior officials from SUNDDE began to arrive throughout the day, as did military counter-intelligence officers from the Directorate General of Military Counter-intelligence (DGCIM) who were bearing arms." "[T]he SUNDDE official returned with two uniformed men from the DGCIM who were carrying handguns. The DGCIM officers took away our cell phones. One of the DGCIM officers then told us that we needed to go to a meeting room to review some documents relating to the inspection for one or two hours, and that we would be released after that. […] We were even told that we could not go to the bathroom without an armed DGCIM guard accompanying us." Witness Statement Luis Fernando Lugo, ¶¶ 28, 38, 43, 44. *See also* Witness Statement César Agelviz, ¶¶ 34, 38. "Throughout the inspection, SUNDDE agents used harassment and intimidation tactics and strategically deployed armed personnel to exert psychological pressure on us. They would come into our offices, flanked by SEBIN and DGCIM officers flaunting their weapons, yelling and constantly threatening us with jail," ¶ 41.
[627] Video of government officers forcing their way into Cartón's offices, 21 August 2018, **C-279**.

560. According to the statements presented by the Claimant, during the inspection there was a tense environment and government officials were aggressive, threatened, harassed, and intimidated the employees pressuring them to obtain the information with armed security personnel (whether the Bolivarian National Intelligence Service "**SEBIN**" or DGCIM) accompanying them. While the Tribunal does not excuse the manner in which the authorities entered the facility and conducted the inspection, the authorities' conduct did not reach the threshold necessary to establish a breach by Venezuela of its obligation to refrain from *physically harming the investment*.

561. The text of Article 3(2) refers to the treatment that must be accorded with respect to "investments." While the employees of a company may form part of the investment, it is not clear from Mr. Lugo's statement that there was physical damage caused to him or other employees by the authorities during the inspection or his detention by DGCIM which could rise to the level of an FPS breach. Mr. Lugo states that he was left to sleep on the floor next to gun powder (until his colleagues at Cartón sent mattresses), handcuffed (for the first days), could not use the bathroom or shower without permission, was mocked and threatened, and kept in a fully enclosed balcony without proper airflow.[628] Although this conduct reflects degrading treatment to any detainee, which the Tribunal cannot condone, it does not amount to an FPS breach.

562. As to Claimant's allegation that during the occupation "Smurfit's facilities were looted while others caught fire," in the Tribunal's view these circumstances alone do not amount to an FPS breach. The Claimant refers to a press article of 2020 that indicates there was a fire in one of the company's mills and there were important losses in raw material, but it makes no further mention as to the effects of the fire on the mill or on the business, how the fire was produced or the measures taken in response to the fire.[629] As already indicated, not every impairment, damage or obstruction to an investment will rise to the

[628] Witness Statement Luis Fernando Lugo, ¶¶ 51-59.
[629] "Fire destroys raw material in Cartones de Venezuela, previously Smurfit Kappa," *El Carabobeño*, 13 April 2020, **C-399**. The Tribunal does not find in the record evidence of looting that may support Claimant's allegations. While the Claimant also refers to other press articles on unjustified layoffs, the halt of production and benefits owed to employees, in the Tribunal's view such evidence does not support its claims on FPS.

level of an FPS violation. The FPS obligation is not intended to provide an absolute protection guarantee.

563. In consequence, the Tribunal dismisses the claim that the Respondent breached the FPS obligation under Article 3(2) of the BIT.

5. Obligation to Guarantee the Transfer of Payments

A. The Claimant's Position

564. The Claimant contends that the Respondent breached Article 5 of the Treaty by "preventing the repatriation of dividends in relation to [its] investments in Venezuela […] without undue restriction or delay."[630] The Claimant submits that, even though Smurfit's subsidiaries complied with the requirements to obtain foreign currency to remit dividends, the Foreign Exchange Authority "either egregiously delayed or, more often, entirely failed to process the applications made by Smurfit's subsidiaries to obtain US dollars to transfer dividends."[631] In particular, the Claimant states that "[f]rom 2008 onwards, Smurfit's subsidiaries Cartón and Refordos have been prevented or delayed in their efforts to remit dividends to their foreign shareholders." Specifically, it alleges that:

i. The approval of Refordos's foreign currency applications for the 2007 and 2008 financial years took over two years.[632]
ii. The Foreign Exchange Authority entirely failed to approve Cartón's applications to remit dividends for the 2007-2014 and 2016 financial years.
iii. The Foreign Exchange Authority entirely failed to approve Refordos's applications for the 2009-2012 and 2014-2015 financial years.
iv. From 2014 onwards, the portal to submit foreign currency applications was not functional and was routinely disabled by the Foreign Exchange

[630] Claimant's Memorial, ¶ 265. According to the Claimant, "[a]lthough the Treaty does not expressly specify what constitutes 'undue delay', another treaty concluded by Venezuela clarifies that the ordinary meaning to ascribe to the term is that no more than 30 days should elapse between the investor's application and the transfer of funds." ¶ 264.
[631] Claimant's Memorial, ¶ 266.
[632] The Claimant argues that the delay resulted in "a significant reduction of the foreign currency value of the dividends. This is because the Foreign Exchange Authority authorized the conversion of the dividends into foreign currency at the official exchange rate imposed by the government in January 2010 – a rate 50 percent lower than the exchange rate in force when Refordos applied for foreign currency." Claimant's Memorial, ¶ 115.

> Authority, making it impossible for Cartón and Refordos to even apply to repatriate dividends in foreign currency for the 2014-2017 fiscal years.[633]

565. According to the Claimant, the Foreign Exchange Authority never provided an explanation for its failure to respond. The result of this was that Cartón was unable to remit dividends to its shareholders from 2007 onwards and Refordos from 2009 onwards.[634]

566. Additionally, the Claimant alleges that Venezuela has not pointed to a specific deficiency in the applications, that this arbitration proceeding is not the appropriate moment to raise for the first time observations on the applications' formal requirements and, in any event, the authority should have long before notified the subsidiaries of any deficiency. The Claimant states that the subsidiaries were doing "all that they could to advance their attempts to remit dividends abroad […] the last step in the process was the filing of a Foreign Currency Application with the Foreign Exchange Authority, which could only be done through its online portal." In relation to the online portal, the Claimant maintains that employees of the subsidiaries visited the offices of the Foreign Exchange Authority on several occasions to seek a solution to the disabled portal and sent letters to the Technological department and the International Investments department reporting the situation and the failure to process the applications, which is unjustified under Venezuelan law.[635]

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[633] Claimant's Memorial, ¶ 114.

[634] Claimant's Memorial, ¶¶ 116, 118. "[O]ut of 21 Foreign Currency Applications filed by Smurfit's Venezuelan subsidiaries between 2009 and 2014, the Foreign Exchange Authority *only responded to two applications.*" Claimant's Reply, ¶ 128.

[635] Claimant's Reply, ¶¶ 132, 134, 135. In Claimant's view, Venezuela does not have a *carte blanche* to ignore the applications, the Foreign Exchange Authority cannot determine unilaterally that foreign currency is unavailable and in any case it should have issued it as soon as it became available. In this sense, it contends that it is not credible for Venezuela to argue that there was no available currency for almost a decade, and that the authority was required to issue a decision and state the reasons. Finally, it contends that there is no provision requiring the subsidiaries to pursue legal actions. ¶¶ 136-144.

567. Finally, the Claimant maintains that "Smurfit's subsidiaries could not have accessed 'alternative' exchange markets or alternative exchange rates *for dividend repatriation purposes*."[636]

B. The Respondent's Position

568. The Respondent submits that it has guaranteed access to foreign currency at all times. As to the legal standard, it maintains that the Treaty does not confer an "absolute right" to repatriate profits nor provides for immediate transfers, that the Claimant reduced the wording of Article 5, that there was no "undue restriction" since there were legal and economic reasons to restrict access to foreign currency in one specific exchange rate market while the rest remained available and that the Claimant has not explained why the Venezuela-Portugal BIT could be used to interpret Article 5 under this Treaty.[637]

569. In addition to this, the Respondent contends that Venezuela was free to pay the amount of foreign currency requested, to pay a lesser amount, or to refuse the payment altogether. It alleges that payment was subject to the availability of foreign currency, that during the period in question Venezuela faced a scarcity of US dollars, and that the Claimant had accessed foreign currency throughout the entire period.[638]

570. The Respondent posits that if the Currency Administration Commission ("**CADIVI**") did not authorize the repatriation of dividends it could have been due to Claimant's lack of compliance with the legal requirements and that postponing the decision did not imply a rejection, but rather that CADIVI was looking for ways to pay foreign currency as requested. According to the Respondent, the authority is not obliged to provide an express answer to every request it receives, if there is no response in the corresponding

[636] Claimant's PHB, ¶ 80.
[637] Respondent's Rejoinder, ¶¶ 553, 556-564.
[638] Respondent's Rejoinder, ¶¶ 127-130. The Respondent indicates that "the Central Bank of Venezuela's reserves constantly decreased from 2009 to 2018. This simply fact, excuse the Republic to argue that even when it had available foreign currency, it had to administrate it efficiently to protect the production of the companies operating in Venezuela, including Smurfit Venezuela, and to pursue the stability of the economy" and that "[b]y avoiding extra devaluations (due to the foreign exchanges restrictions), the Republic also protected Smurfit Venezuela from the negative effects of the US dollar scarcity. Hence, it is absolutely uncomprehensive that after receiving all those positive economic effects, Claimant also expected to receive US dollars at the preferential rate to transfer them outside the country." ¶¶ 138, 139.

timeframe the request will be deemed tacitly rejected, and the Claimant did not resort to the legal remedies provided.[639] Venezuela also maintains that the Claimant did not demonstrate that it had a right to repatriate dividends at a preferential rate and that Smurfit had different foreign currency markets available to repatriate dividends at any time.[640]

571. Regarding the online portal, Venezuela posits that the evidence provided by the Claimant does not satisfy the minimum threshold of seriousness, that periodic maintenance of government portals is common and that Claimant's financial statements prove that it had access to foreign currency.[641]

572. Finally, the Respondent argues that States have the power to restrict access to foreign currency and to execute their foreign currency policy at their convenience.[642]

C. The Tribunal's Analysis

i. Legal Standard

573. Before turning to the legal standard in accordance with the Vienna Convention, we agree with the statement made by the *Rusoro v. Venezuela* tribunal with regards to what is our task in this case:

> "After 2010 the Bolivarian Republic has chosen to impose a stringent exchange control mechanism, in which residents in Venezuela must acquire foreign currency via an administrative authorization, must sell a high percentage of foreign currency earned to the BCV, and in which the Official Exchange rate is established by fiat of the BCV. Each of these choices is a policy decision, which the Bolivarian Republic is empowered to adopt exercising its monetary sovereignty, and which is compatible with the guarantees offered to protected investors in the BIT. Art. VIII simply requires that if a protected investor requests foreign currency in relation to its investment or returns, the application must be

[639] Respondent's Rejoinder, ¶¶ 131-133.
[640] Respondent's Rejoinder, ¶ 137.
[641] Respondent's Rejoinder, ¶ 143.
[642] Respondent's Rejoinder, ¶ 141.

> approved without delay, the funds delivered in convertible currency and at the Official Exchange Rate prevailing at the date of transfer."[643]

574. The Treaty establishes protections related to the free movement and conversion of investment-related payments (known as "free transfer"). Article 5 provides, in its relevant part:

> "The Contracting Parties *shall guarantee* that payments relating to an investment may be transferred. The transfers shall be made in a freely convertible currency, *without undue restriction or delay.* Such transfers include in particular though not exclusively:
>
> (a) profits, interests, dividends and other current income." (Emphasis added)

575. The term "guarantee" ordinarily means: "a promise that something *will be* done or *will* happen", "a *formal agreement* to *take responsibility* for something."[644] The language "*shall* guarantee" states unequivocally the obligation of the State to provide for or to take responsibility to allow investors to transfer funds related to an investment. The transfers must be made in a freely convertible currency.

576. The obligation to "guarantee" the transfer of funds is also qualified, in that it shall be made "without *undue restriction* or *delay*." The Treaty does not define these terms. Ordinarily, "undue" means "to a level that is *more than* is *necessary*, *acceptable*, or *reasonable*."[645] In turn, the word "restriction" means "an official limit on something"[646] and "delay" "to make something happen at a later time than originally planned or expected; to cause someone or something to be slow or late; to not act quickly or immediately."[647] In the Tribunal's view, the language used in Article 5 indicates that the

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[643] *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, **CL-092**, ¶ 578.

[644] "Guarantee" in *dictionary.cambridge.org* (2023). Retrieved 31 August 2023 https://dictionary.cambridge.org/us/dictionary/english/guarantee. (Emphasis added)

[645] "Undue" in *dictionary.cambridge.org* (2023). Retrieved 31 August 2023, https://dictionary.cambridge.org/us/dictionary/english/undue. (Emphasis added)

[646] "Restriction." in *dictionary.cambridge.org* (2023). Retrieved 31 August 2023 https://dictionary.cambridge.org/us/dictionary/english/restriction

[647] "Delay" in *dictionary.cambridge.org* (2023). Retrieved 31 August 2023 https://dictionary.cambridge.org/us/dictionary/english/delay

transfer shall be guaranteed unless there is a necessary or reasonable ground to limit or delay such transfer.[648]

577. With respect to "undue delay," the Claimant contends that based on the same wording contained in a bilateral agreement between Portugal and Venezuela, the term means "that no more than 30 days should elapse"[649] and "[s]imilar terms used in the same context in two treaties signed by Venezuela must have similar meanings."[650] Venezuela disagrees and submits that the "Claimant does not explain why or how the Venezuela-Portugal BIT could be used as interpretation mechanism of the Venezuela-Netherlands BIT"[651] and that there is no basis to argue that this term "should be equated to the specific consent given by the Republic in other Treaty […] If the Contracting Parties of the Treaty desired to define undue delay as one month or any other specific period of time, they would have done so."[652]

578. The Tribunal agrees with the Respondent that one term agreed by one Party in one treaty cannot be simply transposed to another treaty, even if the same term is used. Moreover, the Claimant has not provided another contextual basis in the BIT which would support this interpretation. Thus, to the Tribunal, the term "undue delay" under this BIT must be determined on a case-by-case basis, taking into account the particular circumstances surrounding the postponement of the transfer of payments. Nonetheless, the term agreed in the Venezuela-Portugal BIT can serve as a point of reference in looking at whether a particular time period complies with Article 5, since what is also true is that a similar term cannot have substantially different meanings between instruments of the same

[648] "This can be seen, first, from the very wording of the article, because it only guarantees the conversion and transfer of funds 'with no restriction or undue delay.' On the other hand, it allows the State to create restrictions or delays for *justified cause*." *OIEG v. Venezuela*, **RL-086**, ¶ 624. (Emphasis added)
[649] Claimant's Memorial, ¶ 264. Cf. "The Treaty does not define an 'undue' restriction or delay, nor does it establish a mandatory timeframe between the investor's application and the transfer of funds. This approach is different from that taken by the Republic in respect to other BITs, wherein the Republic has agreed upon a specific time period for the free transfer of funds to take place." Respondent's Counter-Memorial, ¶ 369.
[650] Claimant's Reply PHB, ¶ 36.
[651] Respondent's Rejoinder, ¶ 563. "[T]here is no valid reason to apply the established period of a month under the Venezuela-Portugal BIT, as it would manifestly exceed the powers of the Tribunal." ¶ 564.
[652] Respondent's PHB, ¶ 214. "Precisely pursuant to the VCLT, the different language adopted by the contracting parties to different treaties should be given effect, and the Contracting Parties to the Netherlands-Venezuela BIT did not limit the terms 'undue delay' to any specific period of time," Respondent's Reply PHB, ¶ 83.

nature. This is even more the case when the term was agreed by one of the Parties and there is no other textual or contextual element in the BIT which would support an entirely different interpretation. Finally, the Tribunal notes that, besides disagreeing with Claimant's interpretation, the Respondent has not offered an alternative interpretation of this term under the Vienna Convention.

579. In consequence, Article 5 of the BIT imposes an obligation on each Party to provide for the transfer of funds, unless there is a necessary or reasonable ground to limit or delay such transfer.

ii. Whether Venezuela Breached Article 5 of the Treaty

580. The Tribunal will now apply this interpretation to the facts at hand. The Claimant contends that "Venezuela violated Article 5 of the Treaty by preventing the repatriation of dividends in relation to Claimant's investments in Venezuela, in freely convertible currency, without undue restriction or delay."[653] The Claimant clarifies that it is not arguing "that Venezuela breached the Treaty because it was unable to *immediately* transfer dividends without restriction, but rather that the undue restrictions and delays resulting from Venezuela's failure to apply its foreign exchange framework breached the Treaty. Indeed, Smurfit accepts that the foreign exchange framework adopted by Venezuela set out requirements and restrictions which resulted in delays. Applications to convert and repatriate dividends *were* subject to several requirements, the fulfillment of which could take several months. Smurfit has taken the conservative position that Venezuela should have authorized the conversion of its dividends without undue delay *once it applied to transfer them, i.e.,* after spending months fulfilling the necessary requirements to make that application."[654]

581. The Tribunal notes first that, with respect to two applications, there was a delay of two years in their processing and response.[655] With respect to the rest of the applications,

[653] Claimant's Memorial, ¶ 265.
[654] Claimant's Reply PHB, ¶ 31.
[655] Refordos's Foreign Currency Application No. 10498616, 16 March 2009, **C-069**; Refordos's Foreign Currency Application No. 11107347, 9 June 2009, **C-070**; CADIVI Online Status: Application No. 10498616, 30 June 2011 **C-092**; CADIVI's Online status: Application No. 11107347, 30 June 2011, **C-093**.

there was no response up to the moment the business was seized in 2018. Nor is there any evidence in the record that, subsequent to the 2018 seizure of Claimant's business, the amounts claimed were approved and returned in some way. The delays incurred by Venezuelan authorities oscillates between more than 3 and 9 years. The Respondent in turn states that these are "mere delays in the processing of applications for the repatriation of dividends […] not serious enough to constitute an illicit act under international law."[656] We disagree. Under any reasonable interpretation of the term, when an authority does not issue a response for two or more years, such a delay is "undue."

a. Whether there is a Necessary or Reasonable Basis which Would Justify such Delay or Restriction

582. The Respondent contends that the "Claimant has not provided any evidence that supports its fulfillment of the requirements imposed by the regulations to authorize the acquisition and liquidation of foreign currency for dividend repatriation"[657] and that "due to the high volume of requests, it was not unusual for delays in the answers to occur."[658] The Claimant disputes this and argues that Venezuela has failed to point to "any specific deficiencies" in such applications[659] and that "even if it were true that the Foreign Currency Applications failed to comply with any particular formal requirement (which

[656] Respondent's Counter-Memorial, ¶ 385.
[657] Respondent's Counter-Memorial, ¶ 388.
[658] Respondent's Counter-Memorial, ¶ 138.
[659] Claimant's Reply, ¶ 126. "In fact, as it can be seen in each of the Foreign Currency Applications submitted with the Memorial, the exchange agent (an authorized bank) certifies that it has reviewed all the supporting documents for the application. *See eg*, Cartón's Foreign Currency Application No14259983, 14 July 2011, **C-94**, p 1, '*Declaración Jurada*', between boxes 54 and 55. The same can be seen in the following applications: Cartón's Foreign Currency Application No 10327008, 19 February 2009, **C-63**, p 1; Cartón's Foreign Currency Application No 10327408, 19 February 2009, **C-64**, p 2; Refordos's Foreign Currency Application No 10498616, 16 March 2009, **C-69**, p 2; Refordos's Foreign Currency Application No 11107347, 9 June 2009, **C-70**, p 2; Cartón's Foreign Currency Application No 11500606, 27 July 2009, **C-71**, p 1; Cartón's Foreign Currency Application No 14207763, 21 June 2011, **C-91**, p 1; Refordos's Foreign Currency Application No 14416321, 12 September 2011, **C-95**, p 1; Cartón's Foreign Currency Application No 14770622, 24 January 2012, **C-100**, p 2; Cartón's Foreign Currency Application No 14770710, 24 January 2012, **C-101**, p 2; Refordos's Foreign Currency Application No 17225618, 30 August 2013, **C-123**, p 1; Cartón's Foreign Currency Application No 15788896, 10 January 2013, **C-112**, p 1; Cartón's Foreign Currency Application No 15789051, 10 January 2013, **C-113**, p 1; Refordos's Foreign Currency Application No 15792941, 11 January 2013, **C-114**, p 1; Refordos's Foreign Currency Application No 18150248, 17 June 2014, **C-130**, p 1; Cartón's Foreign Currency Application No 18964494, 28 November 2014, **C-133**, p 1; Cartón's Foreign Currency Application No 18935481, 17 November 2014, **C-131**, p 1." Claimant's Reply, footnote 253.

they did not), the Foreign Exchange Authority should have notified Smurfit's Venezuelan subsidiaries so that they could amend them."[660]

583. The Tribunal concurs with the Claimant. There is no contemporaneous evidence in the record by which the Respondent demonstrates or even suggests that the applications contained any flaws or errors. Thus, Respondent's justification cannot be accepted.

b. Restriction

584. The Respondent alleges that the "Authorization for the Acquisition of Foreign Currency (AAD) related to the transfer of dividends, among others, was subject to the availability of currency established by the Venezuela Central Bank and the guidelines issued by the Federal Government."[661] According to the Respondent "the granting of an AAD did not create a right in favour of the applicant nor an obligation for CADIVI to grant the Authorization of the Liquidation of Foreign Currency (ALD). On the contrary, no applicant was entitled to obtain an ALD merely because the applicant had been granted an AAD. The fact that an AAD is granted in no way implies a commitment to subsequently grant an ALD."[662]

585. In this regard, the Respondent contends that the delay on the applications for transferring funds "could be due" to the availability of foreign currency: "[i]f the decision on ALDs was not granted immediately, it could be due to the lack of availability of foreign currency. Thus, postponing the decision did not imply a rejection. Rather, it meant that CADIVI keeps looking for ways to pay foreign currency as requested, instead of proceeding to immediately reject the applications. Acting in good faith, the Commission awaited clearance to authorize the payment of foreign currency when availability thereof and the national priorities so permitted."[663]

586. Thus, the Respondent alleges that from a legal and economic perspective the restriction is justified. In legal terms, it argues that the "Claimant had no right to repatriate dividends

[660] Claimant's Reply, ¶ 132.
[661] Respondent's Counter Memorial, ¶ 127.
[662] Respondent's Counter Memorial, ¶ 128.
[663] Respondent's Counter Memorial, ¶ 134; Respondent's Rejoinder, ¶ 132.

at the preferential rate and the CADIVI/CENCOEX regulations also confirm that Claimant could not expect to receive all the foreign currency requested because it was subjected to the availability of foreign currency in accordance with the exchange policy of Venezuela."[664] The Respondent elaborates that "CADIVI Ruling No. 56 specifically indicates in its article 11 that the authorizations for the purchase of foreign currency (AAD) […] are subject to the availability of foreign currency established by the Central Bank of Venezuela and to the guidelines dictated by the Executive."[665] In this regard, it posits that "[i]n order to determine the availability of foreign currency, the Central Bank of Venezuela should take into consideration the monetary, credit and foreign exchange conditions related to the stability of the local currency and the orderly development of the economy, as well as the levels of international reserves."[666]

587. Moreover, from the economic side, the Respondent further alleges that "the restrictions to grant foreign currency at the CADIVI/CENCOEX rate are supported by vast evidence that shows the scarcity of USD in Venezuela, and the legitimate administration of the foreign currency at the CADIVI/CENCOEX rate."[667] Venezuela also alleges that "in the context of US dollar scarcity, if the government had not implemented that policy to administer the foreign currency, Smurfit Venezuela would have import [sic] raw materials or equipment at a higher price in bolivars, the Venezuelan economy would have faced a more critical recession and their sales would have been lower than they were between 2008 and 2017. Hence, there is no doubt that any eventual delay in the authorization to access to foreign currency at the preferential rate would have been duly supported."[668] Finally, the Respondent claims that "[t]here is no need to explain that the Central Bank of Venezuela's reserves constantly decreased from 2009 to 2018. This simple fact, excuse [sic] the Republic to argue that even when it had available foreign currency, it had to administrate it efficiently to protect the production of the companies

[664] Respondent's Rejoinder, ¶ 559. *See also*, ¶ 136.
[665] Respondent's Counter-Memorial, ¶ 373. CADIVI Ruling No. 56, 18 August 2004, published in the Gaceta Oficial No. 38,006 on 23 August 2004, **C-038**, Art. 11.
[666] Respondent's Counter-Memorial, ¶ 132, quoting Art. 7 of Foreign Exchange Agreement No. 1, part two.
[667] Respondent's Rejoinder, ¶ 560.
[668] Respondent's PHB, ¶ 235. *See also* ¶ 237.

operating in Venezuela, including Smurfit Venezuela, and to pursue the stability of the economy."[669]

588. The Claimant takes issue with this justification and alleges that "Venezuela cannot credibly argue that for almost an entire decade (from 2009 to 2017), the Foreign Exchange Authority did not have any available currency, without providing a shred of evidence. In fact, the Foreign Exchange Authority itself has published statistics which confirm that foreign currency was, in fact, available and issued during the relevant period, including for the repatriation of dividends."[670]

589. Moreover, regarding Article 11 of the CADIVI Ruling No. 56, it argues that this provision "cannot be interpreted as a *carte blanche* for the Foreign Exchange Authority to ignore the Foreign Currency Applications at will. Precisely, because of the exceptional character of Article 11 of CADIVI Ruling No 56, it is subject to strict requirements and requires a clear motivation. The Foreign Exchange Authority cannot unilaterally determine that foreign currency is unavailable; this determination can only be made by the Venezuelan Central Bank after having considered a number of factors, which include 'monetary, credit and foreign exchange conditions', and the 'levels of international reserves'. Venezuela has furnished no evidence that such a determination was made by the Central Bank during the relevant period (*ie*, between 2009 and 2017)."[671]

590. The Claimant adds that "Venezuela does not explain its failure to present any internal documents showing compliance with Article 11 of CADIVI Ruling No 56 and Article 7 of Foreign Exchange Agreement No 1.126 […] No witness from the Foreign Exchange Authority or Central Bank has been put forward by Venezuela."[672] With respect to

[669] Respondent's Rejoinder, ¶ 138. "In a context of USD scarcity, access to such USD at the preferential rate could lawfully and reasonably be administered to prioritize the matters of first need of the population and protect the reserves of the country, as laid out in the applicable CADIVI/CENCOEX, Central Bank and the Executive regulations and guidelines." *See* Respondent's Reply PHB, ¶ 95.
[670] Claimant's Reply, ¶ 139.
[671] Claimant's Reply, ¶ 138; Claimant's PHB, ¶ 71; Claimant's Reply PHB, ¶ 49. "Venezuela's position would mean that its internal legal system is directly at odds with the Treaty, which establishes that Venezuela 'shall guarantee that payments relating to an investment may be transferred'. It is trite that Venezuela cannot evade its treaty obligations by invoking its domestic law." Claimant's Reply, ¶ 137.
[672] Claimant's Reply PHB, ¶ 52.

Article 7, it also maintains that: "Venezuela has failed to present a single report from the Central Bank demonstrating compliance with this provision."[673]

591. Finally, the Claimant contends that even if "there was a temporary impediment that prevented the Foreign Exchange Authority from processing and approving Foreign Currency Applications, the Foreign Exchange Authority should have –at the very least– notified Smurfit's Venezuelan subsidiaries. Contrary to Venezuela's contentions, no provision of Venezuelan law relieved the Foreign Exchange Authority from its obligation to provide a timely and reasoned response."[674]

592. As noted, the question before this Tribunal is whether the lack of availability of currency would justify the delay or restriction to process the requests to transfer Claimant's dividends. The Tribunal agrees that, as a general proposition, issues related to the availability of currency may be a valid justification for restricting or delaying a request to transfer funds.[675] However, there is no evidence which would support such contention by the Respondent in this case. The competent authority never informed the Claimant that this was the reason for restricting or delaying the processing of its applications. Furthermore, there is no contemporaneous study or document from the Central Bank or any competent authority which demonstrates compliance with the applicable legislation and in particular the requirement set out in Article 7 of Foreign Exchange Agreement No. 1. In light of this, the Tribunal is unable to even assess whether this justification for restricting or delaying the transfer of funds could qualify as reasonable or necessary and thus, rejects Respondent justification.

[673] Claimant's Reply PHB, ¶ 50. Art. 7 of Foreign Exchange Agreement No. 1 provides that: "The Venezuelan Central Bank […] will approve the availability of foreign currency […] and will inform the National Executive and [CADIVI]. This availability will be adjusted and/or reviewed by the Venezuelan Central Bank as required due to foreign currency reserve and cash flow conditions in the Issuing Entity, which will be reported to [CADIVI]. For the purpose of determining availability of foreign currency, the Venezuelan Central Bank will take into consideration the monetary, credit and foreign exchange conditions related to the stability of the currency and the orderly development of the economy, as well as levels of international reserves." Foreign Exchange Agreement No. 1, **R-046**, Art. 7. *See also* Claimant's PHB, ¶ 73.
[674] Claimant's Reply, ¶ 140. *See also* ¶ 141 and Claimant's PHB, ¶ 72.
[675] Respondent's Counter-Memorial, ¶ 372.

c. Preferential Exchange Rate

593. Before addressing Respondent's allegation regarding the fact that the Claimant could have, and in fact had, access to foreign currency, the Respondent contends that Article 5 does not provide for a specific exchange rate at which the transfer of dividends should be guaranteed.[676] Thus, according to the Respondent "as long as the transfers may be made in a 'freely convertible currency' the State will not be in breach of the guarantee accorded by Article 5 of the Treaty."[677]

594. In this regard, the Tribunal agrees with the Respondent that the BIT does not provide a specific exchange rate or relevant date applicable to the transfer of funds.[678] In this case, the arguments regarding which specific exchange rate applies to these transfers of funds will be examined as part of the damages section.

d. Access to Foreign Currency

595. According to the Respondent, the "Claimant had access to foreign currency at all relevant times. Indeed, there is reliable evidence that Smurfit Venezuela was granted dozens of millions of dollars at the preferential exchange rate CADIVI/CENCOEX, including but not limited to the repatriation of dividends."[679] In this regard, the Respondent alleges that "[i]nstead of assuming that risk, Claimant could access to foreign currency at the other available legal foreign exchange markets in Venezuela."[680]

596. Venezuela further contends that the "Claimant has also failed to demonstrate that it was not its own decision to access to foreign currency at the preferential exchange rate instead of getting those USD through the alternative exchange markets, when there is uncontested evidence that it has operated on them."[681] In this regard, the Respondent claims that "Smurfit had available different foreign currency markets available to

[676] Respondent's Rejoinder, ¶ 559.
[677] Respondent's Counter-Memorial, ¶ 376.
[678] As opposed to, for example the BIT between Venezuela and France and the BIT between Venezuela and the United Kingdom. Respondent's Counter-Memorial, ¶ 375. *See also* ¶ 645 *OIEG v. Venezuela*, **RL-086**, ¶¶ 625-626.
[679] Respondent's Reply PHB, ¶ 87; Respondent's PHB, ¶ 231.
[680] Respondent's Rejoinder, ¶ 559.
[681] Respondent's PHB, ¶ 236.

repatriate its dividends at any time. Apart from that, it intends to portray that it did not receive any US dollar at the preferential rate, when there is vast evidence that prove that Smurfit Venezuela obtain [sic] authorization to receive millions of dollars."[682]

597. With respect to the parallel market for exchanging dividends prior to when such market was illegal from May 2010, the Claimant responds that "in the years prior to 2010, Smurfit's subsidiaries chose to apply to the Foreign Exchange Authority for conversion at the CADIVI rate (as they had previously done, successfully). The existence of a parallel exchange market did not absolve the Foreign Exchange Authority of its duty to respond in a timely manner to applications to repatriate dividends made under the CADIVI mechanism, either granting the applications or duly justifying its refusal or any delay to grant the application. The Foreign Exchange Authority's failure to respond in a timely manner meant, moreover, that Smurfit's subsidiaries were not presented with clear options – i.e., to await conversion at the CADIVI rate, or to withdraw their application and seek conversion on the parallel market (while still legally accessible)."[683]

598. The Claimant further observes that the evidence by which Venezuela attempts to support its contention consists of "financial statements […] [which] refer to foreign currency applications relating to importing raw materials, equipment and spares[684] – not applications for dividend repatriations – for which Smurfit's subsidiaries had not yet received foreign currency. These financial statements do not indicate that Smurfit's subsidiaries had access to foreign currency for the purposes of repatriating dividends."[685]

[682] Respondent's Rejoinder, ¶ 137; Respondent's Counter-Memorial, ¶ 431.
[683] Claimant's Reply PHB, ¶ 47.
[684] "Venezuela specifically disputes two financial statement entries from 2015 and 2016 where Smurfit's subsidiaries allegedly had access to foreign currency at the CENCOEX rate in the amounts of US$12,521,559 and US$12,717,783, respectively. […] these financial statement entries clearly state that Smurfit's subsidiaries requested this foreign currency for the 'purchase of primary materials, equipment and spare parts', and further, that as of the close of each respective year, Smurfit's subsidiaries had not yet actually received such foreign currency, as it was still 'pending liquidation'. […] option 3 on the portal related to currency requests for international investments or technology, royalties, patents, etc was disabled. Consequently, Venezuela's argument that such entries '*prove*' that Smurfit had access to foreign currency for the repatriation of dividends after 2015 is demonstrably false." Claimant's PHB, footnote 219. *See* Smurfit's subsidiaries Consolidated Financial Statements, 2015, **CLEX-013**, p. 50 and Consolidated Financial Statements for Smurfit's subsidiaries for 2016, **CLEX-013**, p. 55.
[685] Claimant's PHB, ¶ 83. *See also* Claimant's Reply PHB, ¶¶ 40, 45.

599. Finally, the Claimant contends that "there was only ever one legally applicable mechanism and rate during the relevant period from 2009 to 2018. Insofar as Venezuela did not authorize at all or in a timely manner, or blocked access to, this conversion mechanism and rate, then Venezuela breached its guarantee of free convertibility in Article 5 of the Treaty."[686]

600. At the outset, the Tribunal has trouble accepting the proposition that access to a parallel market would excuse complying with the obligation imposed on the Respondent of guaranteeing the transfer of funds.[687] In the same vein, the Tribunal also has difficulty accepting that the fact that in some instances the Claimant did have access to foreign currency, would cure the lack of response on the other requests for foreign currency to transfer dividends. The Respondent has failed to explain how the possibility to resort to a non-official market or to have access in some instances to foreign currency, would excuse or justify not complying with the clear obligation under Article 5 to guarantee the transfer of funds. For these reasons, The Tribunal rejects Respondent's justification.

e. Challenge Through Local Remedies

601. The Respondent also contends that the Claimant had legal remedies available to challenge the lack of response by the competent authorities, yet it voluntarily chose not to use them.[688] According to the Respondent, a claimant "may always resort to the remedies available to any user in order to challenge a decision of CADIVI/CENCOEX's."[689] In its view, "the postponement of the decision (rather than its immediate rejection) could be considered unfavorable or detrimental to any applicant, said applicant could always consider it tacitly rejected pursuant to Article 4 of the

[686] Claimant's Reply PHB, ¶ 46.
[687] We note the difference from the *OIEG v. Venezuela* case, where the Claimant filed the request for foreign currency and having not received a response, went to the parallel market. As the tribunal in that case stated: "By opting for the parallel market, the companies tacitly waived the option of obtaining the foreign currency through CADIVI." *OIEG v. Venezuela*, **RL-086**, ¶¶ 628-636.
[688] Respondent's Reply PHB, ¶ 86.
[689] Respondent's Counter-Memorial, ¶ 141.

Organic Law on Administrative Proceedings and initiate the administrative or judicial proceedings he deemed appropriate."[690]

602. The Claimant contends that silence does not mean that it waived its right and, in fact, "[i]t is up to the applicant to accept the silence of the administration as a rejection, but the silence itself is not equal to a tacit denial by the administration."[691] Furthermore, it posits that there "is no provision of Venezuelan law [that] requires Smurfit's Venezuelan subsidiaries to pursue legal action, nor does Venezuela provide that the failure to pursue legal action results in a waiver of rights."[692] Finally, the Claimant alleges that "the Treaty contains no requirement for a claimant to exhaust local remedies and numerous international tribunals have held that 'the exhaustion of local remedies is not a requirement of modern international law'."[693]

603. The Tribunal starts by noting that this argument would not apply to the two cases where the Respondent did in fact respond to the application for transfer of funds. In those cases, we found that there was a breach of Article 5 because there was an undue delay in the transfer. With respect to the 20 applications to which there was no response, the Tribunal observes that there is no requirement in the BIT to exhaust legal remedies before bringing a claim. Furthermore, the applicable provision establishes that, when faced with an implicit denial from the authority, the Claimant had the option to challenge or wait for a response. Given that the Claimant had no obligation to challenge, the fact that the authority failed to respond and there was no necessary or reasonable justification for the delay, constitutes an obstacle to the transfer of funds and in consequence a failure to guarantee the transfer of funds.

604. In addition, as in the case of our VAT analysis, an implicit denial is not the rule but an exception. Even under the provision quoted by both Parties, the implicit denial does not

[690] Respondent's Counter-Memorial, ¶¶ 137, 139; Respondent's Rejoinder, ¶ 133.
[691] Claimant's Reply, footnote 281. Organic Law on Administrative Procedure published in the Gaceta Oficial No. 2,818, 1 July 1981, **C-175**, Art. 4: "[If] the public administration does not resolve a matter or appeal within the corresponding time limits, it shall be deemed to have resolved it negatively and the interested party may attempt the next immediate appeal, unless expressly provided otherwise." (Unofficial Translation)
[692] Claimant's Reply, ¶ 142.
[693] Claimant's PHB, ¶ 49.

relieve authorities from their responsibilities for that omission or delay. Furthermore, that provision also specifies that the recurring denial would be considered "repeated negligence" and the official involved could be subject to sanctions.[694] This confirms that the implicit denial is an exception to the obligation for authorities to respond to the applications submitted and, as such, the fact that such silence or implicit denial was not challenged could not serve as a valid justification or restriction for not complying with the BIT obligation. Furthermore, as in the VAT case, this is not a single instance of implicit denial or silence but rather a case which involves a systematic refusal over many years to respond to Claimant's multiple applications, which resulted in a failure to guarantee the transfer of funds in breach of Article 5.

f. Online Portal

605. According to the Claimant, the fact that the Respondent prevented "Smurfit's subsidiaries to even submit a Foreign Currency Application constitutes an undue restriction to the transfer of funds, in breach of Article 5 of the Treaty."[695] In this regard, it argues that "the online portal for submitting applications relating to foreign investments, including requests for the remittance of dividends, was not functional and was constantly disabled by the Foreign Exchange Authority."[696] The Claimant contends that "the portal was inoperative and even provided evidence of the error message that appeared on the Foreign Exchange Authority's website in 2015 […] stating "Attention esteemed user! Our technological platform is under maintenance. We apologize for the possible inconvenience"). Subsequently, the CENCOEX website was active but the portal through which to submit a Foreign Currency Application in relation to an

[694] "In cases in which an agency of the public administration does not resolve a matter or appeal within the corresponding time limits, it shall be deemed to have resolved it negatively and the interested party may attempt the next immediate appeal, unless expressly provided otherwise. This provision does not relieve the administrative bodies, nor their officers, of the responsibilities attributable to them for the omission or delay. Repeated negligence on the part of those responsible for the matters or appeals that result in these being considered negatively resolved as provided in this Article, shall result in a written warning for the purposes of the provisions of the Administrative Career Law, without prejudice to the sanctions provided in Article 100 of this Law." Organic Law on Administrative Procedure published in the Gaceta Oficial No. 2,818, 1 July 1981, **C-175**, Art. 4. (Unofficial Translation)
[695] Claimant's Reply, ¶ 372.
[696] Claimant's Reply, ¶ 133.

international investment (which was "option 3" on its website), was inactive."[697] The Claimant submitted evidence of the fact that the portal had been disabled and that Cartón raised the issue with the competent authorities.[698]

606. The Respondent takes issue with the evidence submitted, arguing that the cases cited "do not satisfy the minimum threshold of seriousness to support Claimant's case as: (i) this evidence are [sic] very specific to imagine that it was the generality, (ii) periodic maintenance of government portals are common and normal, and (iii) because the financial statements provided by Claimant show that it had access to foreign currency through the CADIVI/CENCOEX mechanism. It is unreasonable to argue that the online portal was available for some exchange transactions and closed for others."[699]

607. To the Tribunal the fact that the Claimant was not able to apply for foreign currency through the official online portal since 2014 in and of itself constitutes a failure to guarantee the transfer of funds under Article 5. As to the Respondent's arguments, the Tribunal considers that it has failed to rebut Claimant's case in this regard for the following reasons. *First*, Venezuela does not contest the veracity of the letters sent by the Claimant or the press report stating that access to the Foreign Exchange Authority's website was restricted since the system was under maintenance.[700] *Second*, the Respondent did not respond to such letters to clarify or deny the allegations contained therein. *Third*, it has not provided any evidence that the portals were under periodic maintenance. *Fourth*, aside from qualifying Claimant's argument as unreasonable, the Respondent has failed to produce any evidence to support its contention that the portal was indeed available.

[697] Claimant's Reply, ¶ 370.
[698] Claimant's Reply, ¶ 133. *See* Letter from Cartón (Mr. Valdivielso) to CENCOEX, 22 February 2017, **C-251**; Letter from Cartón (Mr. Valdivielso) to CENCOEX, 6 March 2018, **C-150**. *See also* Claimant's Reply, ¶ 135.
[699] Respondent's Rejoinder, ¶ 143. *See also* ¶ 571.
[700] "Cencoex portal is under maintenance," *El Estímulo*, 2 January 2015, **C-240**.

g. Conclusion

608. For the reasons stated in the preceding sections, the Tribunal finds that Venezuela breached its obligation under Article 5 of the Treaty by not guaranteeing the transfer of dividends without undue restriction or delay.

VII. DAMAGES

609. The Claimant alleges that it is entitled to full reparation for the damage caused to its investments by Venezuela's measures. In particular: (i) damages calculated on a historic basis for the taking of landholdings, the failure to timely issue VAT certificates and restrictions and delays affecting repatriation of dividends, (ii) damages derived from Venezuela's unlawful expropriation of Smurfit's business in 2018, and (iii) moral damages for the treatment of Smurfit and its employees during and after the expropriation.[701]

1. Standard of Compensation

A. The Claimant's Position

610. The Claimant alleges that the appropriate standard for reparation is "full compensation." In its view, the only standard expressly established in the Treaty is for a lawful expropriation. As there is no express standard for the breach of FET of the investment as well as for an unlawful expropriation, customary international law is applicable. The Claimant relies on *Chorzów Factory* as well as the ILC Articles[702] and submits that "[d]amages to Smurfit must thus be sufficient to 'wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'."[703]

[701] Claimant's Memorial, ¶ 287.
[702] Claimant's Memorial, ¶¶ 288, 289. "The Treaty establishes no express compensation standard for Venezuela's Treaty breaches described in Section III above, either for its unlawful expropriation of Smurfit's investments, or its breaches of other standards of treatment." Claimant's Reply, ¶ 374.
[703] Claimant's Reply, ¶ 374.

611. The Claimant indicates that Venezuela's position is contrary to the text of the Treaty and arbitral jurisprudence.[704] Additionally, the Claimant submits that if different unlawful measures give rise to losses separate from those that flow from the unlawful expropriation, compensation must be awarded. In this case, it argues that the earlier expropriation of the landholdings in breach of Article 6, the failure to issue VAT certificates in breach of Article 3 and the failure to guarantee the transfer of dividends in breach of Article 5, all of which took place before the expropriation of Smurfit's business in 2018 would not be compensated through the assessment of losses from that expropriation.[705]

B. The Respondent's Position

612. In the Respondent's view, in case the Tribunal finds a breach of Article 6 of the Treaty or to other provisions of the Treaty, the Tribunal must apply the compensation standard provided for in Article 6(c). According to the Respondent, such standard is appropriate since "as *lex specialis* it trumps customary international law" and the BIT does not differentiate between lawful or unlawful expropriations, which would have been specified had the Parties intended to do so.[706] Regarding non-expropriation claims, Venezuela submits that the maximum compensation for such claims should be the same as for any expropriatory claim, *i.e.*, just compensation and the fair market value of the investment.[707] In connection to this, it contends that the Claimant is not entitled to additional compensation as the losses are subsumed by the compensation for expropriation.[708]

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[704] Claimant's Reply, ¶¶ 376-380.
[705] Claimant's Reply, ¶¶ 381-383.
[706] Respondent's Counter-Memorial, ¶¶ 395-397. The Respondent contends that "the weight of authority supports the application of the BIT compensation standard to both *'lawful'* and *'unlawful'* expropriations." *See* ¶ 399 and footnote 384. *See also* Respondent's Rejoinder, ¶¶ 582-585.
[707] Respondent's Counter-Memorial, ¶¶ 400-402.
[708] Respondent's Counter-Memorial, ¶¶ 403, 404. The Respondent relies on *Total S.A. v. Argentina* in which the tribunal stated "damages under a finding of expropriation would not be different from those to be determined in the quantum phase under the finding of breach of the fair and equitable standard." *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010, **RL-126**, ¶ 342.

613. With regards to the relevance of the standard of compensation to the assessment of moral damages and pre-award interests, the Respondent argues that even if the customary international law standard included moral damages, it does not change the result as the Tribunal lacks jurisdiction to grant moral damages and certain tribunals have not granted compensation for moral damages. As to the interest rate, it reaffirms its position that "interest may only be awarded from the date of the eventual award on the merits" and "several tribunals have no awarded pre-rate interest even when applying the full reparation principle."[709]

C. The Tribunal's Analysis

614. Article 6(c) of the Treaty provides for a standard of compensation in cases of expropriation:

> "[…] Such compensation shall represent the *market value of the investments affected* immediately before the measures were taken or the impending measures became public knowledge, whichever is the earlier; it shall include interest at a normal commercial rate until the date of payment and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants." (Emphasis added)

615. The provision does not specify whether the compensation measure stated in Article 6(c) applies only to lawful expropriations and the Tribunal does not consider it necessary, for purposes of its award, to decide whether the Article 6(c) standard applies only to lawful expropriations or to both lawful and unlawful expropriations. The Tribunal has determined that Venezuela's measures in respect of both the landholdings and Smurfit's business breached Article 6 and therefore Respondent must compensate for such breach. In this sense, the Tribunal concurs with the conclusion stated by the tribunal in *Rurelec v. Bolivia*, that:

> "The BIT makes no distinction between the compensation to be provided in respect of an unlawful expropriation as opposed to a lawful one, and *the Tribunal does not find any reason to believe that the illegality of the expropriation renders*

[709] Respondent's Rejoinder, ¶¶ 590, 591.

> *what the BIT deems to be 'just and effective compensation' suddenly inadequate*."[710] (Emphasis added)

616. The Claimant contends that the customary international law standard of full reparation is applicable to this case. On the other hand, the Respondent argues that the standard provided under Article 6 of the Treaty should also apply in the event that the Tribunal finds a breach of non-expropriation claims. The Tribunal has considered the arguments presented by both Parties. In the present case, the Tribunal has determined that Venezuela breached its obligations under Article 3(1), Article 5 and Article 6 of the BIT.

617. Article 9(3) of the Treaty states that the award "shall be limited to determining […] whether such breach of obligations has caused damages to the national concerned, and, if such is the case, the *amount of compensation*." The Tribunal observes that while the Treaty contemplates compensation for a breach of obligations, without any particular distinction, there is no other standard of compensation contemplated than the one provided under Article 6.

618. The Claimant has referred to Articles 31 and 36 of the ILC which establish that:

> Article 31
>
> "(1) The responsible State is under an obligation to make *full reparation* for the injury caused by the internationally wrongful act.
>
> Article 36
>
> (1) The State responsible for an internationally wrongful act is under an obligation to *compensate* for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> (2) The *compensation shall cover* any *financially assessable damage* including loss of profits insofar as it is established." (Emphasis added)

619. Commentary 22 to the latter provision indicates that "[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is *generally assessed on the basis of the "fair market value"* of the property lost." In

[710] *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, PCA Case No. 2011-17, Award, 31 January 2014, **CL-124**, ¶ 613.

the Tribunal's view, both the Treaty standard and the customary international standard converge in the assessment of the "market value" of the investment. While there may be circumstances where the assessment of damages and the determination of the standard of compensation is central to the disposition of the case, the Tribunal considers that is not the case here. In this sense, although the Claimant has argued in favor of the full reparation standard, it has also stated that "[u]ltimately, however, the standard of compensation to be [sic] applied in this case does not affect the manner in which Claimant assesses the value of its expropriated assets, as Claimant does not seek to apply a valuation date that differs from the date at which the expropriations occurred or became known."[711]

620. Consequently, the Tribunal will calculate the damages based on the Fair Market Value of Claimant's investment. The Claimant has argued that the determination of the standard is relevant for the assessment of moral damages and pre-award interest, the Tribunal is not convinced that this is the case and will address the claims on moral damages and pre-award interest in the respective sections.

2. Causation and Contributory Fault

A. The Respondent's Position

621. The Respondent contends that the Claimant has failed to prove a causal link between the measures and the damage allegedly suffered. The Respondent submits that the Claimant bears the burden of proving the quantum and states that "compensation must be calculated on the basis of actual elements and not be the result of speculative considerations." In its view, "investors can neither attribute to the States the negative consequences of their own acts nor expect the States to act as insurers against the business risks inherent in any commercial enterprise."[712] In relation to this, it argues that the Claimant intentionally applies a lower standard and that "[t]he causation standard

[711] Claimant's Reply, ¶ 380.
[712] Respondent's Counter-Memorial, ¶¶ 407-411.

cannot be reduced to the obligation to merely demonstrate that the only requisite it [sic] that the link may not be too remote."[713]

622. Additionally, the Respondent also alleges that if compensation were to be awarded, it should be reduced by 75% due to Claimant's contributory fault in causing the alleged injury. The Respondent submits that Smurfit caused the damages for which it seeks compensation. In particular, Respondent maintains that: (i) Claimant contributed to the initiation of the recovery proceedings when it stopped access to the peasants, adversely affected the environment and showed lack of sensitivity towards peasants,[714] (ii) that the actions by the Ministry of Labor and SUNDDE were triggered by Claimant's refusal to abide by the applicable laws, and (iii) that the expropriation of its business was actually a "sudden, voluntary, and cruel abandonment of [its] operations."[715] As to the VAT Certificates, Respondent submits that Claimant contributed to any damage it suffered by not invoking the legal remedies provided by Venezuelan law. Regarding dividends, Respondent posits that the Claimant did not rely on the legal remedies provided and chose not to repatriate dividends through the other foreign exchange markets available.[716] Finally, the Respondent contends that pursuant to Article 9(3) of the Treaty, the Claimant must prove that Venezuela's breach caused direct damages to it. In this sense, Respondent points to a lack of evidence, in particular, to the fact that Claimant's experts did not examine Smurfit Holdings B.V.'s financial statements or tracked the dividends flow.[717]

B. The Claimant's Position

623. The Claimant argues that, according to Article 31 of the ILC Articles, "causation is a 'sufficient causal link which is not too remote,' such that 'injury should be in

[713] Respondent's Rejoinder, ¶ 594.
[714] Respondent's Rejoinder, ¶ 810.
[715] Respondent's Counter-Memorial, ¶¶ 553-560. The Respondent relies on *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, **RL-157**, ¶ 678; *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. AA 227, Award, 18 July 2014, **RL-158**, ¶ 1632; and *MTD Equity Sdn. Bhd. And MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, **RL-159**, ¶ 178. *See also* Respondent's Rejoinder, ¶¶ 813-815.
[716] Respondent's Rejoinder, ¶¶ 811, 812.
[717] Respondent's PHB, ¶¶ 245-258.

consequence of the wrongful act'." In its view, it only needs to show that "the treaty breach was 'the proximate cause of the harm', *i.e.,* that the losses were the objectively foreseeable outcome of Venezuela's measures." The Claimant submits that the causal link between Venezuela's measures and the damages is straightforward and that proving damages is not "an exercise in certainty, as such," but in "sufficient certainty." According to the Claimant, it satisfied the standard for proving damages through its expert's reports.[718]

624. Regarding Respondent's arguments on contributory fault, the Claimant indicates that the threshold is high and not every contribution will trigger a finding of contributory negligence. In particular, it refers to the commentary to ILC Article 39 as well as *Occidental v. Ecuador*. The Claimant posits that, "[i]n the rare instances where tribunals have reduced the amount of damages on the grounds of contributory fault, the investor has typically committed serious wrongdoing." However, if "the investor engages in common business practices and the respondent's measures are the primary cause of the investor's injury, damages should not be reduced."[719]

C. The Tribunal's Analysis

625. Causation implies a sufficient direct link between the measures and the breach. While the Treaty does not define this term it does indicate in essence that the breach of obligations must cause, *i.e.*, must provoke or result in, damages to the investor when stating that: "whether such breach of obligations *has caused* damages to the national concerned." The Tribunal notes that the Commentary to Article 31 of the ILC similarly indicates that the notion of a sufficient causal link, one that is not "too remote," means that injury should be *in consequence* of the wrongful act.

626. The Tribunal has determined that Venezuela breached its obligations under Articles 3(1), 5 and 6 of the Treaty. While the Respondent has argued that the Claimant has not proven

[718] Claimant's Reply, ¶¶ 385-387, referring to *Gemplus, S.A., SLP S.A., Gemplus Industrial S.A. de C.V., v. The United Mexican States*, ICSID Case No ARB(AF)/04/3, Award, 16 June 2010, **CL-066**, ¶ 13.91 and International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001), *with Commentaries*, **CL-015**, Art. 36, Commentary 27, among others.
[719] Claimant's Reply, ¶¶ 471-474.

a causal link between the measures and the damage suffered, the Tribunal considers that the evidence in the record does not support Respondent's contention. In particular, the Tribunal has found that the measures taken against the landholdings and the business resulted in the loss of property and ultimately of the business. In addition, the failure to issue VAT certificates and to guarantee repatriation of dividends also resulted in the loss of an essential part of Claimant's investment. Those effects are not isolated from the measures taken by Venezuela but rather a direct consequence of the measures.

627. The Respondent has argued that even if compensation is awarded, it should be reduced by 75% due to Claimant's contributory fault. In light of both the facts of the case and the evidence contained in the record, the Tribunal considers that Respondent's request must be dismissed. In particular, contrary to Respondent's assertions and as elaborated in previous sections, the record does not support that: (i) access to the peasants or environment affectation were the reasons the recovery proceedings were initiated against the Claimant's landholdings, (ii) that SUNDDE's inspections and measures were the result of Claimant's non-compliance with Venezuelan law, (iii) that the expropriation of the business was a response to Claimant's abandonment of operations, and (iv) that pursuing legal remedies was a pre-condition that justified Venezuela's failure to both issue the VAT certificates and allow repatriation of dividends.

628. Regarding Respondent's Article 9(3) argument[720], the Tribunal first observes that this issue was only raised in its PHB, in reaction to questions regarding quantum during the hearing.[721] At the outset, the Tribunal notes that the Respondent did not provide an interpretation under the VCLT or any precedent which would support its interpretation. Article 9(3) is a provision that delimitates the boundaries of an award, in particular, to find: (i) whether there has been a breach, (ii) if *that breach* has caused *damage,* and (iii) the compensation. Accordingly, the question is whether a *breach* has caused damages "to the national" concerned. This is the causal link that must exist. The BIT contains no

[720] One arbitrator has a different interpretation as to the scope of this provision. See paragraphs 117-195 of Dissenting Opinion.
[721] Hearing, Tr. Day 4, P880:L12-16; P881:L11-18; P882:L10-12; P885:L6-13; P893:L1-22; P894:L1-17; P895:L4-22; P896:L1-22; P897:L1-16; P954:L8-11; P955:L9-19; P957:L11-22; P958:L1-15; P975:L3-9, 12-22; P976:L1-2.

other reference as to damages.[722] Thus, this provision states that in order to compensate, damages have to accrue to the national, but the fact that damages are *caused* to the investor (the Party entitled to set in motion the mechanism and claim a compensation) is not the same as saying that damages have to be *calculated in relation to* the investor. There is a relationship between damages and compensation rooted in this provision. Compensation follows a finding of damages. This intrinsic relationship is confirmed by Article 6(c) on "just compensation", which serves as context according to the VCLT. This is the only provision in the BIT which addresses, in essence, the calculation of damages, and it does it through compensation for the investments "affected". According to Article 6(c), compensation represents the market value of the investment immediately *before the measures,* this is because such value is what is *affected by the breach.* Ultimately, this provision reflects the same three elements that form the core of an award according to Article 9(3): a breach, an affectation or damage and compensation.

629. It is essential to recall that the protection accorded to the BIT is for "investments", that is the central element around which the obligation revolves, and every substantive obligation makes that clear.[723] In this sense, any breach of obligations is, first and foremost, a breach towards the *investment.* On the other hand, compensation will be the result of a positive finding of damages. What are we compensating for? For the breach of obligations *with respect to the investment,* because as a consequence of that breach there is an affectation *on the investment.* If there is no affectation, no damage, then there is no obligation to compensate.

630. It is important to note as well that, although ultimately any damage to the investment will be a damage to the owner of the investment, the damages and in consequence, the compensation, is calculated on the basis of the investment, not of the investor or the

[722] Note that Article 7 refers to "losses in respect of their investments" when establishing the obligation of no less favorable treatment regarding restitution, indemnification and compensation due to war or other armed conflicts.
[723] Article 2: ("protection in its territory *of investments*"); Article 3: ("fair and equitable treatment *of the investments"* […] "*accord to* such *investments* full physical security and protection"); Article 4: ("accord […] with respect to their investments […] treatment no less favourable"); Article 5: ("payments relating to an investment"); Article 6: ("Neither Contracting Party shall take any measures to expropriate or nationalize investments"); Article 7: ("who suffer losses in respect of their investments […] shall be accorded […] treatment […] no less favourable"); Article 8: ("If the investments […] are insured").

economic indicators of the investor. That is why Article 6(c) incorporates a specific parameter on the calculation *of the value of the investment* affected and not on the investor's situation.[724]

631. The fact that Article 9(3) indicates that damages have to be caused "to the national", cannot be read to translate an obligation to the tribunal or the parties to track all the way up the investment chain money or specific banking operations. This would represent a problem in terms of locating within the chain specifically how the damage is reflected and in cases such as the VAT refund, which was not received, such task could be futile. Any interpretation in that sense would add particularities on damages calculation that are not in the text. The BIT does not address how that damage "will reach" the investor but it addresses how that damage materializes in the investment through the compensation.

632. Thus, the Tribunal rejects the interpretation that there was an obligation under Article 9(3) to look at Smurfit Holdings B.V.'s financial statements or track the dividends flow.

633. Accordingly, the Tribunal dismisses Respondent's claims on causation and contributory fault.

3. Damages Calculation

A. The Landholdings

634. The Claimant submits that for historic losses that occurred prior to the taking of the business in 2018, compensation must capture: (i) the cash value in freely convertible currency of the forestry properties that were taken, (ii) the cash value in freely convertible currency of sums not collected or lost as a result of Venezuela's measures at the time these became due, and (iii) all necessary adjustments to account for the time value of money in the period between the date sums became due and the date of the award.[725]

[724] While at the hearing it was mentioned that the "core question we have to address is the value to whom, not what the value is […] but the value to whom", [Hearing, Tr. Day 4, P961:L14-17], it is telling that Article 6 c) refers to the value of the investment affected.
[725] Claimant's Memorial, ¶ 293.

635. The Claimant indicates that Refordos lost ownership and control of three landholdings consisting of 18 percent of its acreage holdings or 6,434 hectares of land, *i.e.,* La Productora, El Piñal and Santo Tomás. The Claimant submits it lost access to wood and wood pulp that was produced in these properties and used as input for the production of boxboard, containerboard and paper products, that it had to alter its forestry management plans, substitute its input, purchase lower quality wood and harvest early from its available landholdings. However, the damages for the interferences with its landholdings are assessed "solely on the basis of the value of the three properties expropriated."[726] The total damages for the 6,434 hectares amount to USD 7 million in nominal terms. Claimant's expert brought forward the value calculating a total value of USD 28.0 million for the taking of landholdings as of 28 August 2018.[727]

i. The Claimant's Position

636. The Claimant calculates the value of the landholdings based on the book value of the properties, which it converts into current US dollars.[728] To calculate the book value of the properties, Compass Lexecon used a three-step methodology. *First*, it converted the book value from its financial statements from Bolivars to USD at the prevailing official exchange rate at the end of the fiscal year of each of the seizures (2007, 2009, 2011). *Second*, it divided the value by the total amount of hectares of the property to get the value in USD per hectare. *Third*, it applied that figure per hectare from each annual financial statement to the three properties using the book value contemporaneous to the date of each of the three seizures.[729]

637. Claimant's expert brought forward the value using a series of annual Weighted Average Costs of Capital ("**WACCs**") for Refordos to 28 August 2018 that were all derived using the Capital Asset Pricing Model (risk-free rate, the industry risk and country risk). Based on this methodology, Compass Lexecon calculated a total value of USD 28.0 million for

[726] Claimant's Memorial, ¶¶ 304, 305.
[727] Claimant's Memorial, ¶ 308.
[728] Claimant's Memorial, ¶ 297. "In the Claimant's view, since there is no information available on financial transactions related to the properties or comparable properties, a market-based approach is not viable." ¶ 306.
[729] Claimant's Memorial, ¶ 307.

the taking of landholdings as of 28 August 2018. As an alternative to adjusting using a WACC, it also calculated the adjusted value based on the cost of borrowing funds, computed using a yearly rate for the pre-tax cost of debt for Refordos, which gives a total of USD 21.8 million.[730] The Claimant submits that the methods proposed by the Respondent's expert to calculate the value of the landholdings, *i.e.*, the €500,000 point of reference on El Piñal and the Discounted-cash flow ("**DCF**") valuation of Refordos, are flawed. As to the first one, it indicates that the source of the Reuters article is uncertain whereas Refordos's financial statements are a reliable and reasonably certain source, that the values were recorded following standardized accounting rules and were verified by independent auditors. Regarding the second alternative, it contends that it does not reflect the value at the time of the takings since it is based on a value seven to eleven years after the taking at a time when the economic crisis was at its peak.[731]

ii. The Respondent's Position

638. The Respondent contends that "the asset-based method is the most appropriate to value landholdings in practice" and is more reliable to determine the Fair Market Value. In its view, the Claimant's value is skewed as the financial statements have been prepared at discretion and external information is required to reach an objective and accurate value.[732] The Respondent relies on a 2009 Reuters press release that refers to El Piñal being valued at around €500,000 with information allegedly provided by Smurfit and considers that the value of the other landholdings can also be estimated.[733] The Respondent's expert adjusted for inflation and considered the variation over time. It also proposed as an alternative the per-hectare value resulting from the DCF valuation of Refordos adjusted for inflation.[734] The Respondent considers this valuation works as a

[730] Claimant's Memorial, ¶ 308.
[731] Claimant's Reply, ¶¶ 401, 402.
[732] Respondent's Counter-Memorial, ¶¶ 485-487, 489.
[733] Cambero, Fabián Andrés, "ACTUALIZA3-Venezuela interviene finca papelera irlandesa Smurfit paper mill," *Reuters*, 6 March 2009, **R-042**. Respondent's Counter-Memorial, ¶ 491. According to Respondent's expert, the Reuter's article has a virtue that the book valuation lacks, which is that it has a date closer to the time of the alleged taking. Respondent's Rejoinder, ¶ 664.
[734] Respondent's Counter-Memorial, ¶¶ 492, 493.

"sanity check" and alleges that, once adjustments are made, the valuation is in line with the Reuters article.[735]

iii. The Tribunal's Analysis

639. The Tribunal agrees that a backward-looking approach such as estimations based on book values would not be the most appropriate method to calculate the Fair Market Value of the landholdings. In particular, it is unclear to the Tribunal how those values were calculated, the dates on which they were calculated and thus if they would adequately be representative. In this sense, it is also unclear for the Tribunal how those values would not represent sunk costs as pointed out by the Respondent's expert.[736]

640. On the other hand, the Respondent has relied on a Reuters press article as its first option to calculate the value of the landholdings, which indicates: "Smurfit confirmed on Friday the seizure of their farm [El Piñal], worth approximately €500,000, and said his executives were in discussions with local authorities on the matter."[737] It seems that the source of the article is the Claimant.[738] Moreover, the second alternative grounded on Refordos's DCF valuation put forward by the Respondent provides a "sanity check" and "is in line"[739] with the values mentioned in that article. Thus, the Tribunal agrees with Respondent's approach.

641. In light of the fact that Refordos's DCF valuation alternative is based on calculations provided by the Claimant, the Tribunal will calculate the damages based on this

[735] Second Expert Report of EconLogic, ¶ 100.
[736] "[…] the reason why market value, as opposed to book value, is the prefered [sic] valuation method in the business community, is that book values mostly represent sunk costs. A cost is sunk when it has already been incurred and cannot –by definition– be reversed, thereby becoming decision making. For this reason, if we rely on book value to estimate how much an asset is worth, it is equivalent to falling into the sunk cost behavior characterized by it being conditioned by past investments of time, effort or money. In other words, relying on historic costs as reflected in the books is analogous to arguing that an asset can always be sold in the market for the same price we paid for it." First Expert Report of EconLogic, ¶ 81.
[737] "Venezuela interviene finca papelera irlandesa Smurfit," *Reuters*, March 6, 2009, **EL-025**.
[738] "Smurfit confirmed on Friday the takeover of his property, worth approximately €500,000, and said its executives were in discussions with local authorities on the subject." (Unofficial translation). Reuters. "Venezuela interviene finca papelera irlandesa Smurfit," *Reuters*, 6 March 2009, **EL-025**, p. 1.
[739] Second Expert Report of EconLogic, ¶ 100.

alternative, *i.e.*, on the per hectare value derived from the DCF valuation of Refordos for 2018.

642. Thus, the Tribunal finds that the amount of damages is USD 1.9 million,[740] and updated to the date of valuation (based on the Claimant cost of debt), *i.e.*, 28 August 2018, it is USD 3.07 million.[741]

B. Foreign Exchange Rates

643. The Parties disagree on the foreign exchange rate applied to calculate historic damages on two periods of time: (i) the CADIVI rate applied from June 2010 to February 2013, and (ii) the Complementary System for the Administration of Foreign Currency ("**SICAD I**") rate applied from March 2014 to December 2014. Regarding a third period (September 2017 to February 2018), the Parties disagree on how to update the Complementary Floating Exchange Rate System for Non-Essential Imports ("**DICOM**") rate. Since historic damages comprise not only the landholdings, the relevance of the foreign exchange rate for the calculation of damages has been discussed in relation to more than one historical damage.[742] In order to avoid repetition, the issue will be addressed in this section.

[740] Updated EL-009 CLEX-006 Forestry Valuation Model, reviewed by EconLogic, **EL-082**. Tab. EL Valuation Summary.
[741] Updated EL-009 CLEX-006 Forestry Valuation Model, reviewed by EconLogic, Exhibit **EL-082**. Tab. EL Update Factor.
[742] In particular, the Respondent has argued: "the Parties' Expert valuators disagree on the foreign exchange rate applied to calculate the historic damages on three periods of time […] Due to the exchange rates applied by Compass Lexecon throughout its valuation, referred by them as the 'official exchange rate', the calculations of Claimant's damages were incorrectly overestimated. […] Smurfit and its Expert valuators confuse the claim for repatriation of dividends with the correct exchange rate applicable to *each of the alleged historical damages*. In other words, one thing is one specific claim (repatriation of dividends) where the Tribunal will assess whether the Republic has breached or not its obligations under the Treaty, and other different thing is how to convert each of the historical damages amounts from Bolivars to USD to perform a valuation of those alleged damages where valuators should applied an economic approach". Respondent's Rejoinder, ¶¶ 631, 636, 639. (Emphasis added). "[T]he FX rate used by CL reflects an inappropriate characterization of the but-for world, in the sense that this rate would not be actually available to exchange Bolivars into US dollars. Needless to say, this correction is only relevant as long as the book value is used (contrary to our suggestion) as the valuation method for the property assets allegedly seized." EconLogic, Second Expert Report, ¶ 101.

i. The Claimant's Position

644. The Claimant alleges that Compass Lexecon applied the correct foreign exchange rates (CADIVI, SICAD I and DICOM). In its view, the use of the CADIVI rate (first period) is correct since the legislation indicates its applicability to monetary conversions for payments and commitments related to international investments including repatriation of dividends while the Respondent's alternative (System for Transactions with Securities in Foreign Currency ("**SITME**")) was created as a substitute for the CADIVI rate for imports and the securities market. According to the Claimant's experts another reason is that during the period from June 2010 to February 2013, Smurfit's subsidiaries submitted Foreign Currency Applications to repatriate dividends to CADIVI, pursuant to the CADIVI regime that provided the application of that rate.[743] Claimant's experts also submit that the SICAD I rate (second period) was created in 2013 as a complementary foreign exchange mechanism to the existing CADIVI mechanism and it applied to transactions typically conducted through that regime including payments related to international investments whereas the Alternative Foreign Currency Exchange System ("**SICAD II**") was created as a temporary mechanism between March 2014 and February 2015 for exports and other foreign exchange transactions not covered by SICAD I. The Claimant argues that since the relevant Venezuelan Central Bank regulation states that the SICAD I rate is applicable for international investments and dividend repatriation, the Respondent's approach is flawed and the rate it advocates for is inapplicable.[744]

645. As to the manner in which the exchange rate should be calculated in the period Venezuela suspended the sale of US dollars on the DICOM mechanism[745] (third period, between September 2017 and February 2018), the Claimant's expert alleges that because of that suspension it applied a gradual increase between the rate prior to the suspension and the

[743] Claimant's Reply, ¶¶ 390-392.
[744] Claimant's Reply, ¶¶ 393, 394.
[745] "The DICOM mechanism, *ie* the Complementary Floating Exchange Rate System for Non-Essential Imports (*Sistema de Divisas de Tipo de Cambio Complementario Flotante de Mercado*) – operated in the form of daily auctions of foreign currency and was designed to fluctuate according to market supply and demand. The suspension of DICOM trading between September 2017 and February 2018 affects the calculation of damages relating to VAT credits, dividends and certain inputs in the DCF valuation of Smurfit's Venezuelan business." Claimant's Reply, ¶ 395; First Expert Report of Compass Lexecon, ¶ 60, Notes to Table 9.

new one in February 2018. In its view, the approach followed by the Respondent's expert whereby the reopening DICOM rate, which was 669% higher than the rate from September 2017 immediately prior to the suspension, was retroactively applied would seriously underestimate the US dollar value of Bolivars prior to February 2018 since inflation occurred over the course of this time period and not all at once on Day 1 of the suspension.[746] In its second expert report, Claimant's experts modified the approach to calculate the exchange rate during that period based on the pace of domestic inflation instead of using a linear extrapolation between the starting and ending dates of the suspension period. It submits that this approach accounts for the impact of domestic inflation on currency depreciation and more reasonably approximates the evolution of the foreign exchange rate at that period on the basis that devaluation is correlated to inflation and does not happen all at once.[747]

ii. The Respondent's Position

646. The Respondent first submitted that Compass Lexecon used a low foreign exchange rate and that a higher one would be more accurate.[748] In reply, it alleged that the Claimant had used an incorrect rate in two periods (CADIVI from June 2010 to February 2013 and SICAD I from March 2014 to December 2014) and failed to correctly update another one (DICOM from September 2017 to February 2018), that the Claimant confuses the claim on repatriation of dividends with the correct exchange rate and that during the three intermediate periods there was a systemic scarcity of US dollars which is something that cannot be ignored.[749] Respondent contends that the SITME rate (for the first period) is the proper rate to value compensation, that it has not been demonstrated that it was not available for any willing buyer in Venezuela and that the SICAD II mechanism (for the second period) was not exclusive to export transactions. Regarding the DICOM rate (third period), according to its expert, the direct correlation between the evolution of the exchange rate and the pace of domestic inflation "is valid under the assumption of a fully

[746] Claimant's Reply, ¶ 396.
[747] Claimant's Reply, ¶ 397.
[748] Respondent's Counter-Memorial, ¶ 493.
[749] Respondent's Rejoinder, ¶¶ 631-634.

functional free floating exchange rate mechanism, which was pretty far from being the case in Venezuela."[750] In the Respondent's view, the proper exchange rate during suspension is the reopening rate of 5 February 2018.[751]

iii. The Tribunal's Analysis

647. The Parties disagree as to the foreign exchange rate applied to convert Bolivars to US dollars with respect to three periods of time. As to the first period (June 2010-February 2013), while the Claimant advocates for the CADIVI rate, the Respondent advocates for a higher rate (SITME) as in its view it is "more grounded in economic reality."[752] The Tribunal observes that, in accordance with Venezuela's regime, the rate proposed by the Respondent was applicable to imports[753] whereas the CADIVI rate specifically applied to international investments, particularly repatriation of initial capital of the international investment, amounts necessary for the maintenance, expansion, development and completion of the international investment as well as remittance of profits, income, interest and dividends from the international investment.[754] This was also corroborated at the Hearing:

> "Q. *So, you're aware that the SITME rate, for example, was limited only to imports? You're aware of that?* A. (Mr. Sabbioni) *Yeah, I'm aware of that, but again, that's not –our point is, regardless of whether it was- which one was the legal rate to be used for the repatriation of dividends, we say, yeah, that might be the case*, […] Now, in order to reflect the economic reality of Venezuela, the Colombates report says, we are using this particular rate."[755] (Emphasis added)

648. The Tribunal disagrees that a foreign exchange rate that was not legally available to the Claimant is appropriate for the purpose of calculating the historical damages incurred by

[750] Respondent's Rejoinder, ¶¶ 631-654. *See also* Second Expert Report of EconLogic, ¶ 91.
[751] Respondent's Rejoinder, ¶ 655.
[752] Second Expert Report of EconLogic, ¶ 102.
[753] Resolución No. 11-11-03, published in the Gaceta Oficial No. 39.849, 24 January 2012, **CLEX-062**, Art. 6.
[754] Providencia No. 056, published in the Gaceta Oficial No. 38,006, 23 August 2004, **CLEX-060**, Art. 2. *See also* Convenio Cambiario No. 14, 8 February 2013, **CLEX-061**, Art. 3. Cartón and Refordos applied to transfer dividends under the CADIVI regime in that period. See Minutes of Board of Directors Meeting of Cartón, 28 February 2011, **C-085**; Minutes of Board of Directors Meeting of Cartón, 5 March 2012, **C-104**; and Minutes of Board of Directors Meeting of Cartón, 25 February 2013, **C-117**; Minutes of Board of Directors Meeting of Refordos, 28 February 2011, **C-086**; Minutes of Board of Directors Meeting of Refordos, 5 March 2012, **C-105**; and Minutes of Board of Directors Meeting of Refordos, 25 February 2013, **C-118**.
[755] Hearing, Tr. Day 4 (EconLogic) P1020:L6-13, L17-19.

Venezuela's measures. Accordingly, the Tribunal will apply the CADIVI rate to the first period.

649. Regarding the second period (March 2014-December 2014), the Respondent proposes the use of the SICAD II rate instead of the SICAD I rate used by Claimant's experts. According to the Claimant, the SICAD I rate was created as a complementary foreign exchange mechanism to the existing CADIVI mechanism, whereas the SICAD II rate was created as a temporary mechanism for exports and other transactions not covered by SICAD I. In this regard, it alleges that Respondent's approach is "flawed."[756] The Tribunal notes that the foundation for the applicability of this rate is similar to the one discussed for the first period, *i.e.*, according to Venezuelan regulations the SICAD I rate was applicable to international investments[757] whereas the SICAD II rate applied to private natural or legal persons engaged in the export of goods and services.[758]

650. It is Claimant's contention that "the official exchange rates used by Compass Lexecon were the only legally accessible rates for the purpose of dividend repatriation" and therefore, "Smurfit's subsidiaries could not have accessed 'alternative' exchange markets or alternative exchange rates for dividend repatriation purposes."[759] This was confirmed at the Hearing, where Respondent's expert indicated that:

> "So, the second period that you apparently disagree with Compass Lexecon on is March 2014 to December '14 when you say that the rate known as SICAD II could have been accessed by Smurfit Venezuela. *As I understand it now, you're saying that it wasn't normatively available, but you think economically as an economist, then it ought to have been available?* A. (Mr. Sabbioni) *Exactly*. The same answer applies in this case. *I'm not saying that factually it could have been accessed or not.* That's not what I'm saying. We are trying to assess value. As an economist, we think that in order to say what's the value of this cash flow that was lost, was the dollar value. *We understand that from a legal perspective, what Claimant's experts have proposed may be the right way to do it because it's*

[756] Claimant's Reply, ¶¶ 393, 394.
[757] Convenio Cambiario No. 25, published in the Gaceta Oficial No. 6,122, 23 January 2014, **CLEX- 069**, Art. 1.
[758] Convenio Cambiario No. 27, published in the Gaceta Oficial No. 40,368, 10 March 2014, **CLEX-070**, Art. 3.
[759] Claimant's PHB, ¶¶ 79, 80.

> *normative. We're saying that the norm cannot abstract from the economic reality surrounding that particular moment of time*."[760] (Emphasis added)

651. While the Respondent has referred to Smurfit's subsidiaries' financial statements indicating the use of SITME and SICAD II for other purposes,[761] to SKG's 2013 annual report, as well as to the case of two companies that transitioned their bookkeeping figures to the SICAD II rate, the Tribunal is not convinced that this shows that the SICAD II rate was effectively applicable to Smurfit Venezuela's repatriation of dividends or available to an extent that would make the Tribunal disregard the legally available rate during that period. Accordingly, the Tribunal will apply the SICAD I rate during the second period.

652. As to the third period (September 2017-February 2018), the Claimant initially presented a linear extrapolation between the last rate before the suspension and the reopening rate. In its second expert report, it calculated the extrapolation following the domestic inflation. On the other hand, the Respondent proposes to use the reopening rate of February 2018 for the entirety of the five-month period when the DICOM operations were suspended.

653. It is uncontested that during 2016 and 2017 a significant devaluation of the Bolivar took place. The consequences of a devaluation and the changes that an economy facing such situation endure may be sudden and abrupt. The depreciation of currency, the loss of purchase power, the inflation can change in different magnitudes from one day to the next. In the Tribunal's view, such situations do not normally occur at a constant pace. As indicated by the Respondent's expert, as of 31 August 2017 "the DICOM rate was at 3,250 Bolivars per US dollar." On 1 September, the DICOM system was suspended. In February 2018, it reopened at a rate of 25,000 Bolivars per US dollar.[762] The Tribunal agrees with Respondent's expert that:

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[760] Hearing, Tr. Day 4 (EconLogic) P1018:L8-22/P1019:L1-4.
[761] On access to other mechanisms see: Hearing, Tr. Day 2 (Mr. Ramírez) P393:L17-P396:L14. *See also* on the ability to repatriate dividends: "[W]e didn't have dollars at the time, and there was no way to lawfully change these bolivars to dollars in Venezuela due to the foreign-exchange controls in place […] For a long time, Cartón de Venezuela did not receive the payment, or the dollars to pay dividends … not only dividends but other liabilities in foreign currency." Hearing, Tr. Day 2 (Mr. Agelviz) P426:L14-18, 22/P427:L1-3.
[762] First Expert Report of EconLogic, ¶¶ 62, 63.

> "When assessing the possible exchange rate for any month between September and December 2017, any rational investor or analyst would have taken into account at least the obvious overvaluation of the Bolivar at the [Foreign Exchange Rate] FX rate when the DICOM market closed.
>
> If companies were to follow CL's approach to determine the FX rate during this period under a free exchange rate flotation as the one assumed by CL, they would have at least assumed a jump of the official FX rate at the beginning of this period in order to close the prevailing difference between the official and the parallel market FX rates. The correlation between domestic inflation and currency depreciation to which CL refers to is valid under the assumption of a fully functional free floating exchange rate mechanism. However, this was far from being the case in Venezuela."[763]

654. In this regard, the application of the last foreign exchange rate before the suspension, even if updated as the Claimant suggests does not seem in line with the situation that was happening in Venezuela. As pointed out by the Respondent, "common sense [would] indicate […] that Venezuela had to suspend the DICOM mechanism due to the impossibility to maintain that rate."[764] The Tribunal agrees with Respondent's expert in that "the correlation between domestic inflation and currency depreciation to which CL refers to is valid under the assumption of a fully functional free floating exchange rate mechanism," which was not the case.

655. In light of the above, the Tribunal considers that the proper exchange rate for the suspension would be the one available on the reopening day.

C. Actualization Rate

i. The Claimant's Position

656. For its damages valuation, the Claimant used as the valuation date 28 August 2018, which is the date Venezuela expropriated Smurfit's business. The losses suffered prior to that date (landholdings, VAT and dividends) are in Claimant's words "historical damages." According to the Claimant, "[i]n the absence of such Measures, not only would Claimant have been able to realize value during the historical period, but also the

[763] Second Expert Report of EconLogic, ¶¶ 90, 91.
[764] Respondent's Rejoinder, ¶ 654.

but-for standing of Smurfit Venezuela as of August 28, 2018 would have been different than what it was."[765]

657. The Claimant actualized the historical damages from the date of the losses to August 2018 using the WACC.[766] Its expert also provided an alternative based on Cartón's and Refordos' cost of debt. In its view, the cost of debt for the SKG is "stripped of the risk inherent in operating a business in Venezuela" and historical damages are not less risky than future cash flows.[767]

ii. The Respondent's Position

658. The Respondent contends that, from a financial perspective, the actualization rate has to be lower than the WACC and the amount should be updated at Claimant's cost of debt of the entire SKG.[768] In its view, the WACC is inappropriate because the Claimant is not Smurfit Venezuela, but an affiliate of SKG, with Smurfit Venezuela being a very small portion of SKG' business; it is irrelevant that Smurfit Venezuela may have obtained returns higher than the WACC in the past, the actualization rate corresponds to a past period of time, while the WACC looks into an uncertain future, and the risk free rate should be used for any actualization purposes.[769]

iii. The Tribunal's Analysis

659. The issue of the actualization rate is discussed in relation to each historical damage; therefore, in order to avoid repetition, the Tribunal will address the matter in this section.

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[765] First Expert Report of Compass Lexecon, ¶ 30.
[766] "To value nominal damages from the three historical claims, we apply a 'discrete damage' approach, based on the difference between the cash that Claimant would have been able to collect from Smurfit Venezuela in the absence of the alleged breaches (a *but-for* scenario) and the *actual* cash collected as observed. We also separate historical losses between Smurfit Venezuela's different operating entities (*i.e.,* SKCV, Colombates, and Refordos). Since the cash deprived from Claimant in the historical claims are calculated as nominal damages accruing at different moments in time between 2005 and 2017, we also update historical losses to the August 28, 2018 at a rate that reflects Smurfit Venezuela's cost of funding. […] To value damages from the expropriation of all of Smurfit Venezuela's operations, we estimate the value of Claimant's investments as these would have been as of August 28, 2018, absent the expropriation. To compute the value as of August 28, 2018 we use an 'ex-ante' approach, that is, we forecast market conditions and other relevant parameters (such as inflation and exchange rates) at their foreseeable values as of the date of valuation." First Expert Report of Compass Lexecon, ¶ 30.
[767] Claimant's Reply, ¶¶ 423-425.
[768] Respondent's Counter-Memorial, ¶ 493; Respondent's Rejoinder, ¶ 667.
[769] Respondent's PHB, ¶ 268.

The Tribunal agrees that the actualization of historic losses must reflect the opportunity cost of funds that would have been required to resort to other sources of funding.[770] The Claimant has proposed the use of its WACC. Alternatively, it has proposed: (i) the actualization based on SKCV's and Refordos' cost of debt, and (ii) the actualization based on Claimant's cost of debt plus an additional 2.9% premium to account for higher borrowing costs in Latin American investments. On the other hand, the Respondent has proposed to use the cost of debt of the worldwide Smurfit Group.

660. The Tribunal agrees that the use of WACC as an actualization rate would not be optimal in this case since the WACC looks into an uncertain future. It also considers problematic the fact that Claimant's approach allows for the application of two interest rates to first update to 28 August 2018, and then after that date. In this regard, the Tribunal agrees with Respondent's expert that:

> "[…] the update rate utilized to move a damage amount forward in time cannot be the same as the rate utilized to discount uncertain and risky future cash flows generated by Smurfit Venezuela. Instead, the appropriate rate to update damages, from the date in which each one occurred and up to the date of the Award, is a rate stripped from the risk of Smurfit Venezuela."[771]

661. While the Tribunal understands there are situations that specifically affected part of its investment, such as Cartón de Venezuela, at the end of the day, it is the damage caused to Smurfit that the Tribunal must assess. The Tribunal recalls that the Claimant in this arbitration is Smurfit Holdings, B.V., not Smurfit Venezuela, whatever damage, whatever lack of funds ultimately pertains to it.

662. In this sense, the Tribunal agrees that the Claimant's opportunity cost should be "in line with the return on investments that the Claimant fails to make because it did not have compensation" and that this would require examining how the Claimant would have invested the cash received in a timely manner from Smurfit Venezuela.[772] The Claimant

[770] Second Expert Report of EconLogic, ¶ 59; Claimant's PHB, ¶ 88.
[771] First Expert Report of EconLogic, ¶ 36.
[772] Second Expert Report of EconLogic, ¶ 48.

has not presented evidence demonstrating that the funds obtained would be reinvested in Venezuela that would justify taking into account the risk as proposed by the Claimant.

663. Rather, it is this Tribunal's view that the cost of debt of the SKG represents the minimum cost that the Claimant in this arbitration would have had to pay for other investments after receiving dividends from Smurfit Venezuela, that would be the minimum return expected.[773]

664. In addition to this, it is also unclear for the Tribunal why an actualization rate as the one proposed by the Claimant should be applied to events that crystallized long before Claimant's decision to initiate this dispute.[774] The Claimant has failed to explain why should the same rate be applicable to assess damages from a violation and for the passage of time, for a totally unrelated event for purposes of assessing damages, between those expropriations and the expropriation of Smurfit's entire business in 2018 which ultimately led the Claimant to file the case.

665. For the reasons stated, the Tribunal determines to use the cost of debt for the SKG as actualization rate for the value of the landholdings.

D. VAT Certificates

i. 30/60 days

a. The Claimant's Position

666. Claimant's expert calculated the losses caused to the Smurfit Sellers for the failure to issue VAT Certificates and in a few instances the delay in issuing VAT Certificates by determining the VAT Certificates that should have been received, including when they should have been received, and comparing this but-for scenario with what actually occurred.[775] The Claimant relied on the VAT credit balance in Smurfit's internal accounting records from 2005 to 2018. Adjusting these figures to reflect Smurfit's equity stake in Cartón and Refordos results in nominal damages of USD 101.8 million

[773] Second Expert Report of EconLogic, ¶¶ 33-62.
[774] Hearing, Tr. Day 4 (President Ramírez - Compass Lexecon) P921:L12-P924:L1-6, L10-22; P925:L1-18.
[775] Claimant's Memorial, ¶ 313.

(USD 89.8 million owed to Cartón and USD 12.0 million to Refordos.)[776] Finally, Claimant's expert brought forward the value of damages based on an annual WACC for Cartón and Refordos using the Capital Asset Pricing Model.[777]

667. As to the method to calculate damages, the Claimant submits that while there is a general rule that SENIAT must process tax refund requests within 60 days, SENIAT Ruling 2005/0056 sets a specific rule requiring response within 30 business days.[778]

668. Claimant's expert assumed that "the requests for foreign currency should have been granted within 30 days of Smurfit Venezuela's currency conversion applications to CADIVI at the prevailing official exchange rate. This date, therefore, represents the but-for date in which Venezuela should have approved Smurfit Venezuela's currency conversion requests, absent the measures enacted by Venezuela."[779] According to the Claimant, the 2015 SENIAT ruling, which remains in force, clearly states "that VAT applications' approval should occur '*no more than thirty (30) business days following the definitive date of receipt*'."[780] Furthermore, the Claimant contends that Article 210 of the same Organic Tax Code quoted by the Respondent "makes clear that these general rules on time limits are displaced where more specific rules apply and, in the case of VAT, specific regulations compel the SENIAT to respond within 30 business days."[781]

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[776] Claimant's Memorial, ¶¶ 314-316.
[777] Compass Lexecon calculated total damages of USD 238.8 million cumulatively, or USD 212.1 million for Cartón and USD 26.8 million for Refordos as of 28 August 2018. As an alternative, it adjusted the value based on the cost of borrowing funds, computed using a yearly rate for the pre-tax cost of debt for Cartón and Refordos, resulting in USD 188.2 million for Cartón and USD 22.8 million for Refordos as of 28 August 2018. Claimant's Memorial, ¶ 317.
The Claimant contends that Smurfit's VAT Records were available for examination and analyzed by EconLogic. In this regard, it alleges that they are corroborated by the VAT declarations for the years 2015-2018 taken from SENIAT's website, the two complete Administrative Decision Resolutions with the Sole Annex, the 27 Resolutions and Administrative decisions disclosed by Venezuela and the Audited Financial Statements of the Smurfit Sellers. It also submits, due to the precipitous nature of Venezuela's expropriation, that it lost access to its VAT Refund Requests which remained on its premises under the government's control, that Venezuela has withheld SENIAT's documents, which is the easiest way to verify Smurfit's information, that there is no evidence that the Smurfit Sellers contributed to SENIAT's delays, and that Venezuela does not point to any legitimate discrepancy between the financial statements and Smurfit's VAT Records. Claimant's Reply, ¶¶ 405-412.
[778] Claimant's Reply, ¶¶ 412, 413.
[779] First Expert Report of Compass Lexecon, ¶ 52.
[780] Second Expert Report of Compass Lexecon, ¶ 64. *See* SENIAT Ruling No. SNAT/2005/0056, 27 January 2005, published in the Gaceta Oficial No. 38,136 on 28 February 2005, **C-040**, Art. 10.
[781] Claimant's PHB, ¶ 58. "Q. […] in […] paragraph, 123, you say: "We disagree with Compass Lexecon for a number of reasons: First, Compass Lexecon arbitrarily decides to ignore that Article 10 of the 2005 SENIAT ruling reads as follows […] 'In the event of a failure to pronounce on the part of the tax administration within the terms established

Finally, the Claimant made an adjustment to its calculations given that the 30 days must be based on business and not calendar days.[782]

b. The Respondent's Position

669. The Respondent contends that Claimant's methodology for damages needs to be adjusted to reflect Smurfit Venezuela's economic reality and that, after considering all the adjustments and corrections proposed by its expert, any eventual compensation for VAT credits could not be larger than USD 60.8 million.[783]

670. The Respondent takes issue with the application of the 30-day rule and argues that "SENIAT […] had 60 days (not 30) to respond to the VAT credit submission. As clearly noted in Articles 207 and 216 of Decree No. 1434 on the Organic Tax Code Law […], that was the amount of time available for the tax authorities before responding to the request from the taxpayer."[784] Thus, "the Constitution prevails over all other legal norms and these must be adjusted to it, not being able to be contradictory to each other. In the same way, according to the doctrine of Administrative Law and Constitutional Law, the law has a higher rank than the regulation. For this reason, the Decree 1434 with the force of law that [Respondent] relied upon prevails over the resolutions from SENIAT issued to regulate itself, even when it defines more restrictive rules on its obligations and

in this Article, it will be understood that the tax body has resolved negatively as established in Article 4 of the Organic Law of Administrative Procedures.' […] You translated that; is that correct? A. (Mr. Sabbioni) Yeah, the translation is ours. […] Q. There is nothing here in this Article that you translated about the term established for SENIAT to respond being 60 days, is there? A. (Mr. Sabbioni) No, it's not there. […] Q. So, this is the portion you left out of your translation, correct? A. (Mr. Sabbioni) Apparently." Hearing, Tr. Day 4 (EconLogic) P1042:L9-22/P0143:L1, 10-14, P1046:L1-4.
See also Decree No. 1,434 on the Organic Tax Code Law, 17 November 2014, published in the Gaceta Oficial No. 6,152 on 18 November 2014, **C-132 bis**, Art. 210, p. 28; SENIAT Ruling No. SNAT/2005/0056, **C-040**, Art. 10: "The Head of the corresponding Collection Division shall make a decision on all of the credits requested within a term of no more than thirty (30) business days after the definitive date of receipt of the request"; SENIAT Ruling No. SNAT/2005/0056A, 27 January 2005, published in the Gaceta Oficial No. 38,188 on 17 May 2005, **C-042**, Art. 12; SENIAT Ruling No. SNAT/2013/0029, 20 May 2013, published in the Gaceta Oficial No. 40,170 on 20 May 2013, **C-122**, Arts. 10, 12; SENIAT Ruling No. SNAT 2015/0049, 14 July 2015, published in the Gaceta Oficial No. 40,720 on 10 August 2015, **C-138**, Art. 9.

[782] Second Expert Report of Compass Lexecon, ¶ 65.

[783] Respondent's Rejoinder, ¶ 692. *See also* Respondent's PHB, ¶ 271 and Respondent's Reply PHB, ¶¶ 103-106.

[784] First Expert Report of EconLogic, ¶ 109.

operation, as a lower norm as a resolution cannot prevail over a higher one such as a law."[785]

c. The Tribunal's Analysis

671. At the outset, the Tribunal refers to sections VII.3.B and VII.3.C above in which the issues on foreign exchange rate and actualization rate have been addressed. Regarding the first contentious issue between the Parties, *i.e.*, the date on which SENIAT should have approved VAT requests, it is clear to the Tribunal that, in this case, the specific provision indicating a period of 30 business days prevails over the general tax provision. In addition, the Respondent has not pointed to any specific provision or instance in which it has departed from this specific rule. Thus, the Tribunal sees no reason to depart from it.

ii. 8.5 percent Discount to Convert VAT Credits into Tax

a. The Respondent's Position

672. According to the Respondent, the Claimant "assumes that an approved VAT credit denominated in Bolivars is as liquid as (and therefore equivalent to) cash in Bolivars."[786] Thus it contends that "an overall 8.5% discount to the VAT credits is required before Smurfit Venezuela can obtain the Bolivar-denominated cash that could be further transferred to Claimant, after being converted to US dollars."[787] In addition, the Respondent takes issue with Claimant's experts assertion that "VAT credits could be '*reimbursed directly*'." According to Venezuela, "if the VAT amount owed by Venezuela could be reimbursed directly, no company (including Smurfit Venezuela) would accept a discount in the sale of the VAT credit in the secondary market."[788]

673. The Respondent also contends that the reason Smurfit Venezuela decided to exchange VAT credits into cash was not because of the accumulation of VAT credits, "but to make cash in Bolivars actually readily available to deal with inflation. Hence, absent the

[785] Second Expert Report of EconLogic, ¶ 126.
[786] First Expert Report of EconLogic, ¶ 110.
[787] First Expert Report of EconLogic, ¶ 113.
[788] First Expert Report of EconLogic, ¶ 115.

alleged delay or failure on issuing VAT credit certificates, *ceteris paribus*, does not modify the need to resort to the secondary market to convert VAT credits into cash nor the cost of such instant transformation."[789] In response to the allegation that VAT Certificates could "have been used to transfer VAT Credit to other sister companies to avoid the 8.5% discount," Respondent's expert disagreed with that proposition "because that hypothesis was based on different assumptions that were not corroborated by any experts and would imply speculation. Furthermore, the proposition that the VAT Certificates would be sold at an 8.5% discount derived precisely from the assumptions made by Compass Lexecon. Thus, the alleged unreimbursed VAT credit would have been sold at the secondary market in exchange for Bolivars."[790] In addition, it submits that "if Compass Lexecon would have seriously considered the possibility of transfers to some affiliates, they would have modeled that scenario, assessing among other things the actual availability of cash of the sister companies, the owed taxes by each company and the VAT Credit in excess. They did not."[791]

b. The Claimant's Position

674. The Claimant alleges that "EconLogic again confuses the but-for and actual scenarios." According to the Claimant "[h]ad the Venezuelan government issued VAT credit certificates promptly, which we understand was the case before 2005, Smurfit Venezuela would not have accumulated unreimbursed VAT credits. Furthermore, if the Venezuelan government had issued VAT credits promptly, Smurfit Venezuela would not have needed to sell unreimbursed VAT credits at a discount in an illiquid secondary market. More generally, in the absence of the alleged breach, Smurfit Venezuela would have not had incentives to trade VAT credits at a discount because VAT credits could have been exchanged for cash from Venezuela or used to pay taxes, both at face value."[792]

675. Additionally, the Claimant alleges that the Respondent "failed completely to account for the possibility that Smurfit's subsidiaries could have off-set the VAT Certificates against

[789] Respondent's Rejoinder, ¶ 689. *See also* Second Expert Report of EconLogic, ¶¶ 130, 131.
[790] Respondent's Reply PHB, ¶ 104.
[791] Respondent's Reply PHB, ¶ 105.
[792] Second Expert Report of Compass Lexecon, ¶ 67.

tax liabilities – though the record shows that Smurfit's subsidiaries followed this practice when the VAT Certificates were received and EconLogic admitted that this was the most efficient use of the VAT Certificates."[793] Finally, it argues that the Respondent "wrongly assumed that *all* VAT Certificates would have been received in bulk at once, rather than piecemeal on a regular basis as would have happened in the 'but for' scenario in which the SENIAT would have processed all reimbursement requests on a timely basis. In such a 'but for' scenario, Smurfit's subsidiaries, in receipt of regular reimbursements, would have had the flexibility to decide what was the most economically efficient use for the VAT Certificates."[794]

c. The Tribunal's Analysis

676. The Respondent contends that "an overall 8.5% discount to the VAT credits is required before Smurfit Venezuela can obtain the Bolivar-denominated cash that could be further transferred to Claimant, after being converted to US dollars."[795] Claimant's expert indicates that "[h]ad the Venezuelan government issued VAT credit certificates promptly […] Smurfit Venezuela would not have accumulated unreimbursed VAT credits," that "if the Venezuelan government had issued VAT credits promptly, Smurfit Venezuela would not have needed to sell unreimbursed VAT credits at a discount in an illiquid secondary market," and that "in the absence of the alleged breach, [it] would have not had incentives to trade VAT credits at a discount because VAT credits could have been exchanged for cash from Venezuela or used to pay taxes, both at face value."[796] At the outset, the Tribunal has difficulty accepting that, in the *but-for* world, all VAT credits will be exchanged for cash. The Respondent has failed to demonstrate the extrapolation of the example posed by the Claimant in which it traded VAT credits for cash in the *but-for* world. The *but-for* scenario which the Tribunal needs to assume is that in which the

[793] Claimant's PHB, ¶ 56. "Q. And Smurfit could have used [the VAT Certificates] to pay other taxes owed or transferred the certificates to its subsidiaries so that they could pay taxes owed; correct? A. (Mr. Sabbioni) Yeah […] or sold in the secondary market, yeah, many alternatives. Q. And that would be an economically efficient thing to do, would it not? A. (Mr. Sabbioni) In this context of inflation and devaluation, yes, you want to use tax in the most efficient way." Hearing, Tr. Day 4 (EconLogic) P1050:L15-22/P1051:L1-3. *See also*, Hearing, Tr. Day 4 (Compass Lexecon) P846:L21-P848:L10.
[794] Claimant's PHB, ¶ 56.
[795] First Expert Report of EconLogic, ¶ 113.
[796] Second Expert Report of Compass Lexecon, ¶ 67.

VAT reimbursement would have been regularly processed over time in accordance with the law and that the VAT Certificates would not have been received all at once. In this circumstance, it would be difficult to speculate in a *but-for* world scenario how the VAT credits would have been used.

677. In light of this, the Tribunal does not agree with the proposed discount.

iii. Cash in Bolivars is not cash in US dollars

a. The Claimant's Position

678. The Claimant contends that it treated "these but-for VAT credits owed to Smurfit Venezuela as equivalent to cash available to the shareholders, and thus value to shareholders, as if Venezuela had deprived Smurfit Venezuela of this value at the time of the but-for VAT reimbursement, not at any time after that. Companies do not hold excess cash because it is costly. Companies will either use or invest extra cash (when the expected return is higher than the cost of capital) or return it to shareholders. The VAT credit certificates would have represented excess cash to Smurfit Venezuela."[797] In addition to this, the Claimant maintains that "there is value beyond converting the VAT credits to cash to issue a dividend to shareholders. VAT credits can be used as VAT payments due to the state and credited against income taxes and other Venezuelan taxes. By receiving special tax reimbursement certificates, Smurfit Venezuela could have lowered tax payments, thus increasing cash flows."[798]

679. In other words, the Claimant contends that "by depriving the company of converting its VAT credits to cash, Smurfit Venezuela (and Claimant) were also deprived of any opportunity to manage their cash holdings to shield them from the impact of currency devaluation or to generate additional returns."[799] Finally, it asserts that "[t]here was no reason for Smurfit's subsidiaries to have waited to convert any surplus income resulting from timely payment of VAT Certificates (in the 'but for' scenario). Taxes were declared

[797] Second Expert Report of Compass Lexecon, ¶ 69.
[798] Second Expert Report of Compass Lexecon, ¶ 70.
[799] Second Expert Report of Compass Lexecon, ¶ 71.

monthly in Venezuela and, as EconLogic admitted on cross examination – it made sense for Smurfit's subsidiaries to use refunds in the most economically efficient way possible and, in a hyperinflationary environment, this meant converting as soon as was possible. The Treaty guaranteed not only the right to convert dividends 'without undue restriction or delay' but also 'other current income'."[800]

b. The Respondent's Position

680. According to the Respondent "once Smurfit Venezuela had cash in Bolivars through the sale of the VAT credits, a dividend could have been declared, thereby initiating the procedure that would eventually culminate in the approval to purchase FX for the remittance of dividends to shareholders abroad. Since CL did not take this period of time into account, its consideration is warranted."[801] In this regard, the Respondent posits that "if the cash obtained from the VAT certificates is equivalent to US dollars in the hands of the shareholders, we have to question why [Claimant] did not adopt the same approach in the dividend damages calculation."[802] In addition, it submits that since the core of this claim is "the deprivation of funds to the Claimant in freely convertible currency, the only relevant destiny for the excess cash out of the three mentioned by [Claimant] ("*use*," "*invest*" or "*return to shareholders*") is the last one."[803] Thus, "[o]nce Smurfit Venezuela had cash in Bolivars through the sale of the VAT credits, is [sic] still required to declare dividend and to go through the procedure that would eventually culminate in the approval to purchase foreign currency for the remittance of dividends to shareholders abroad. Even more, Compass Lexecon acknowledges it when they say that they treat the VAT credits as 'equivalent to cash available to the shareholders'."[804]

c. The Tribunal's Analysis

681. The Tribunal sees no reason why the Claimant should have included the period of time to declare dividends in the but-for scenario, since such situation is uncertain and, as

[800] Claimant's PHB, ¶ 57.
[801] First Expert Report of EconLogic, ¶ 117.
[802] Second Expert Report of EconLogic, ¶ 134.
[803] Second Expert Report of EconLogic, ¶ 135.
[804] Respondent's Rejoinder, ¶ 691.

conceded by Respondent's expert at the hearing, "you want to use tax in the most efficient way."[805] In the Tribunal's view, there is no evidence which supports assigning a specific purpose or establishing a specific path or destination to the funds received as a result of a timely payment of VAT certificates. Therefore, we do not find it necessary to include Respondent's proposed adjustment for purposes of our calculation.

682. Thus, the Tribunal finds that the amount of damages is USD 100.2 million,[806] and updated to the date of valuation (based on the SKG's cost of debt), *i.e.*, 28 August 2018, is USD 125.6 million.[807]

E. Transfer of Dividends

i. Puerto Rico/Costa Rica

a. The Claimant's Position

683. In its calculation of damages, Claimant's expert "adjusted available funds for cash activities that would not have taken place in the but-for scenario. Specifically, [the Claimant] refers to Smurfit Venezuela's cash transfers (in Bolivars) to affiliated companies Smurfit Puerto Rico and Smurfit Costa Rica, that are not part of Claimant's investment in Smurfit Venezuela. In this regard, [the Claimant] asserts that 'in the but-for scenario, these inter-company loan transfers would not have existed'."[808]

684. According to the Claimant "[t]he only reason why Smurfit Venezuela transferred cash to Smurfit Puerto Rico and Smurfit Costa Rica accounts in Venezuela was to safeguard the funds from Venezuelan political risk. Furthermore, had the dividend authorizations been granted on time, Smurfit Venezuela would have been able to transfer the funds overseas in US dollars (also to protect them from inflation and devaluation erosion) rather than short-term lending to affiliates. In the absence of timely access to dividend repatriation, the safeguarding practice adopted in the actual scenario would not have been necessary. Therefore, the cash transferred to sister companies would have been available to Smurfit

[805] Hearing, Tr. Day 4 (EconLogic) P1051:L2-3; *See* in general Hearing, Tr. Day 4 (EconLogic) P1050:L9-P1055:L1.
[806] Updated CLEX VAT Model, **CLEX-005 bis**.
[807] Updated EL-008 CLEX-005 VAT Model, reviewed by EconLogic, **EL-062**.
[808] First Expert Report of EconLogic, ¶ 91. (Emphasis omitted)

Venezuela to pay dividends."[809] The Claimant also reiterates that "[t]his was a mitigation strategy, implemented in the context of Venezuela's breaches of the Treaty."[810] In the Claimant's view, "in the but for scenario, absent Venezuela's restrictions to convert and transfer dividends, there would have been no need to make those transfers for any purpose. That's why in our but for scenario we don't consider that that cash would have been transferred," "[a]s a consequence, we think the Tribunal should not be making any adjustment on this because that cash was always under the discretion of Cartón de Venezuela and, absent the restrictions of foreign exchange conversion, would have been used to pay out the dividends."[811]

685. The Claimant also contends that "[t]he sister companies had no practical use for the Bolivars. They had no operations in Venezuela and were unable to convert Bolivars to Dollars because they were not registered with the Foreign Exchange Authority (as they had no operations in Venezuela)."[812] In this regard, it posits that "[s]ums held in Venezuelan accounts in hard-to-convert Bolivars could not simply be off-set to settle accounts payable to Smurfit's Puerto Rican and Costa Rican affiliates. More importantly, 'accounts payable' to Fibras Puerto Rico or Smurfit Costa Rica were orders of magnitude lower than the sums in Bolivars actually transferred to these entities."[813] To the Claimant,

[809] Second Expert Report of Compass Lexecon, ¶ 76.
[810] Claimant's PHB, ¶ 86 (a) and footnote 226. "As it relates to the cash that Cartón had in Venezuelan bank accounts in sister companies […] we asked the question: Well, what was the purpose of those cash transfers in bolivars? And as stated in the Costa Rica balance sheets, we learned that this was mostly and primarily for safeguarding Cartón de Venezuela cash from the risk of confiscation in Venezuela, and that was really the main purpose." Hearing, Tr. Day 4 (Compass Lexecon) P843:L19-20, P844:L2-8. *See also* Hearing, Tr. Day 2 (Mr. Agelviz) P425:L17-P426:L18.
[811] Claimant's PHB; footnote 227, referring to Hearing, Tr. Day 4 (Compass Lexecon) P844:L9-14 and P846:L3-8. *See also* footnote 234, referring "Q. […] Now, you're not seriously suggesting that if CADIVI had at any moment between 2009 and, say, 2015, picked up the telephone or sent an email saying to Smurfit Venezuela, 'The dollars are here, come and get them,' Smurfit Venezuela would have said, 'No, that's okay, we're protecting our bolivars from devaluation by leaving them in a Venezuelan account of one of our affiliates.' That can't be a serious suggestion, can it? A. (Mr. Sabbioni) Of course it cannot be a serious suggestion, yeah, so–okay […]." Hearing, Tr. Day 4 (EconLogic) P1113:L17-22/P1114:L1-5.
[812] Claimant's PHB, ¶ 86(b).
[813] Claimant's PHB, ¶ 86(d) and footnote 233 referring to: "Q. […] This is– and I'm just reading for the record this is CLEX 13, Smurfit Venezuela Financial Statements for 2013, and please could you turn to Page 33. […] Okay. Do you see Number 15 at the top of the page, 'Saldos y Transacciones con Accionistas y Compañías Relacionadas'? Do you see that? A. (Mr. Sabbioni) Um hmm. Q. Which we should understand to be 'balances and transactions with shareholders and related companies', correct? A. (Mr. Sabbioni) Yes. Q. Okay. Now, if we look at the –down towards the bottom, do you see where it says 'Cuentas por pagar,' which is 'accounts payable'; correct? A. (Mr. Sabbioni) Yes. Q. And we see the second one there is 'Fibras Internacionales de Puerto Rico', correct? A. Yes. Q. And that's the Puerto Rican affiliate that we had been talking about, correct? A. (Mr. Sabbioni) Yes. Q. And if we move over to the

"[i]t is absurd to suggest that because of a small debt to another Venezuelan subsidiary, Cartón would not have been free to access, and use for dividend repatriation, a sum of Bolivars held in accounts it controlled on behalf of another sister company that were more than 67 times the sum owed to Corrugadora Latina & Cía."[814]

b. The Respondent's Position

686. According to the Respondent, "[t]his is an unsupported adjustment." In its view, "these intercompany loans were the result of a management decision exclusively related to Smurfit Venezuela's best knowledge about its own business, its relation with raw materials' providers (Smurfit Puerto Rico and Smurfit Costa Rica among others), and liquidity required for normal operation, including dividends distribution."[815] In this regard, the Respondent adds that "Smurfit Venezuela did not make any statement in its FS which could be used to sustain that any of these accounting entries would not have existed in the but-for scenario without the alleged Measures."[816]

687. The Respondent further alleges that "the Smurfit Costa Rica financial statement shows that the short-term intercompany loans cash were registered as part of the ordinary transactions between companies of the group, for commercial and economic purposes.

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numbers, we see that, for 2013, the sums payable to Fibras is 75 –I think we're talking about millions– 75 millions of bolivars here, right? A. (Mr. Sabbioni) Um hmm, yes. Q. And 2012, it's 104,835,213 bolivars, correct? A. (Mr. Sabbioni) Yes. Q. Okay. Now, if we move to the top, we see 'Cuentas por cobrar,' which means 'accounts receivable', correct? A. (Mr. Sabbioni) Yes. Q. So, this shows us what Smurfit Kappa Venezuela has as a receivable from, owed from, Fibras Internacionales de Puerto Rico, correct? A. (Mr. Sabbioni) Yes. Q. And if we look at the number at the top here for 2013, we see the number is 994,718,280. A. (Mr. Sabbioni) Yes. Q. And then 437,161,129 for 2012. A. (Mr. Sabbioni) Yes. Q. You see that? A. (Mr. Sabbioni) I see that. Q. The difference between the –what is owed and what is owed to Puerto Rico and what is owed by Puerto Rico to Smurfit Kappa Venezuela is different by orders of magnitude, correct? A. (Mr. Sabbioni) Yes." Hearing, Tr. Day 4 (EconLogic) P1117:L5-8, P1118:L2-P1120:L3. *See also* Smurfit Venezuela Consolidated Financial Statements, 2013, **CLEX-013**, p. 33. The Claimant indicates that the same discrepancy between the *cuentas a cobrar* - Accounts Receivable ("**AR**") from *Fibras Internacionales de Puerto Rico* ("**Fibras PR**") and *cuentas a pagar* - Accounts Payable ("**AP**"***)*** to Fibras PR can be seen in all other relevant years, for example: (i) 2011 (AR = B$230,528,140; AP = B$116,397,791). Smurfit Venezuela Consolidated Financial Statements, 2011, **CLEX-013**, p. 30; (ii) 2012 (AR = B$437,161,129; AP = B$104,835,213). Smurfit Venezuela Consolidated Financial Statements, 2012, **CLEX-013**, pp. 31-32; and (iii) 2014 (AR = B$806,961,546; AP = B$60,472,312). Smurfit Venezuela Consolidated Financial Statements, 2014, **CLEX-013**, pp. 31-32. In this sense, see Claimant's Reply PHB, ¶ 58.

[814] Claimant's Reply PHB, ¶ 59.

[815] First Expert Report of EconLogic, ¶ 92.

[816] First Expert Report of EconLogic, ¶ 93. "CL also failed to explain that it adjusted available funds for short term account receivables, not only receivables from short term intercompany loans and dividends payments," ¶ 94. *See also* Respondent's Rejoinder, ¶¶ 675, 676; Respondent's Reply PHB, ¶ 109.

In other words, it seems that the intercompany loans intended to cancel purchases and sales between the companies of the group to reduce the impact of inflation and devaluation in their transactions."[817] It also alleges that "Smurfit's subsidiaries had full control over the Venezuelan bank accounts of their sister companies. As Mr. Agelviz confirmed at the Hearing, Cartón's employees were authorized to withdraw money from the Venezuelan accounts of its Puerto Rican and Costa Rican affiliates. In fact, money was withdrawn on an 'on demand' basis at Cartón's request. Both the financial statements of Smurfit Kappa Costa Rica,[818] and communications from Cartón's executives to the Venezuelan banks giving instructions relating to the accounts held there by Fibras Internacionales de Puerto Rico, show that Cartón's managers and employees had full control over the money deposited in the bank accounts of Smurfit's Puerto Rican and Costa Rican subsidiaries";[819] "[h]ence, it is uncontested that those deposit [sic] of bolivars made by Smurfit Venezuela in accounts belonging to sister companies had a business purpose and would still exist in the *but-for* world, as it pursues to mitigate the effects of inflation and devaluation."[820]

c. The Tribunal's Analysis

688. There is no disagreement between the Parties on the methodology to calculate dividend repatriation. The divergences pertain to the foreign exchange rate in three periods and the actualization rate, already addressed above. The other contentious issue refers to whether the Claimant would have delayed repatriation of dividends due to cash availability.

689. Although the Claimant has stated there were funds available it could withdraw on demand, that the transfers to its affiliates were made as a safeguard measure from political risk and those operations would not have existed in the but-for scenario, the

[817] Respondent's Rejoinder, ¶ 677. *See also* Respondent's Reply PHB, ¶ 108.
[818] Hearing, Tr. Day 2 (Mr. Agelviz) P428:L16-P429:L7: "We had full control of those accounts. And when I say 'full control,' I mean, the employees of Cartón de Venezuela were the people who had authorized signatures in order to withdraw money from those accounts. Moreover, money was withdrawn weekly, or it was sent according to Cartón de Venezuela's needs. And that's why I say that we considered or consider this to be more like a funds transfer than accounts receivable."
[819] Claimant's PHB, ¶ 86(c).
[820] Respondent's Reply PHB, ¶ 110.

Tribunal considers there is no concrete evidence as to the purpose or rationale for the loans to those companies. The Tribunal could not speculate on this. It would be even more difficult to hypothesize what would have been a but-for scenario if the dividends had been timely distributed and the Tribunal cannot derive from the evidence presented that those operations would not have existed. Given this uncertainty, the Tribunal cannot accept the inclusion of these loans in the damages calculation.

ii. Colombates

a. The Claimant's Position

690. The Claimant includes in its damages quantification dividends for Colombates for which it assumed "the dividend declared in May 2009 would have been paid during that calendar year, which results in USD 1.9 million and damages of USD 1.2 million based on Claimant's 61.74% ownership interest in Colombates."[821]

b. The Respondent's Position

691. The Respondent takes issue with this figure, arguing that there is "no evidence about Colombates' financial information […] introduced into the record, making any compensation uncertain and speculative."[822] In its second report, Claimant's expert introduced Colombates' 2009 financial statement and argued that this company "had sufficient cash to cover the declared dividend payment of Bs 4,361,766 during 2009."[823] The Respondent submitted that "[i]f we were to consider the average delay between the dividend declaration date and the but-for dividend authorization date experienced by SKCV and Refordos, which is available from [Claimant's] own valuation model —but inexplicably decided to avoid using— the delay to be considered would be 359 days. In

[821] First Expert Report of Compass Lexecon, ¶ 57. *See also* Second Expert Report of Compass Lexecon, ¶ 145(b), where the Claimant's expert updated the value of Colombates' 2009 dividend to Bs 4,361,766 based 2009 financial statement presented. 2009 Colombates Financial Statement, **CLEX-080**, p. 17, According to Claimant's expert, "[t]his update has a stand-alone impact of increasing damages from unrepatriated dividends by USD 228,292, or 0.06% […] In our First Report, we assume that Colombates' dividends would get authorization on May 31, 2009, in the but-for scenario. We update this authorization date to reflect a 329-day delay, consistent with the average delay between the dividend declaration date and but-for dividend authorization date experienced by SKCV. This update has a stand-alone impact of decreasing damages on the unrepatriated dividends claim by USD 2.1 million, or a 0.5% reduction."
[822] Respondent's Counter-Memorial, ¶ 433.
[823] Second Expert Report of Compass Lexecon, ¶ 78.

other words, the authorization would have taken place almost one complete year after the original Dividend Declaration Date used by [Claimant] in its original calculation. However, [Claimant] has not presented any additional support regarding the company having sufficient cash balances to make the dividend payment at the corrected authorization date in May 2010."[824]

c. The Tribunal's Analysis

692. While at the hearing, Claimant's expert indicated "[n]ow, as it relates to the cash, just a quick comment on the cash in Colombates. EconLogic argues that we have not provided evidence that there were sufficient bolivars to make this dividend distribution. We say that's not right. We had the 2009 Financial Statements just four months before the date of dividend repatriation. There were more than six times the cash in bolivars ready for that distribution, so that should be easy to resolve."[825] The Tribunal agrees with the Respondent that the Claimant has not demonstrated Colombates would have had enough resources to pay 2009 dividends in 2010 when the authorization would have taken place.[826] In the absence of evidence pointing in that direction, the Tribunal cannot take into account that inclusion for the purpose of damages calculation.

693. Thus, the Tribunal finds that the amount of damages is USD 164.1 million,[827] and updated to the date of valuation (based on the SKG's cost of debt), *i.e.*, 28 August 2018, is USD 218.6 million.[828]

[824] Second Expert Report EconLogic, ¶ 114; Respondent's PHB, ¶ 272; Respondent's Reply PHB, ¶ 107.
[825] Hearing, Tr. Day 4 (Compass Lexecon) P843:L14-18. *See also*, Second Expert Report of Compass Lexecon, ¶ 78; **CLEX-080**, p. 17.
[826] "However, CL has not presented any additional support regarding the company having sufficient cash balances to make the dividend payment at the corrected authorization date in May 2010;" EconLogic, Second Expert Report, ¶ 114. At the Hearing, Respondent's expert stated: "Now, it's important to note that in the case of Colombates, some Financial Statement was eventually provided, but that was for the cash that was available before the dividend was supposed to happen. We don't see in the record the confirmation of the cash being available at the end of the year. And that's important because it's consistent with the approach followed for the other companies, for Cartón and Refordos." Hearing, Tr. Day 4 (EconLogic) P997:L14-22.
[827] Damages for SKCV: USD 138 million. Damages for Refordos: USD 26.1 million. Updated EL-007 CLEX-004 Dividends Model, reviewed by EconLogic, **EL-060**. Updated CLEX Dividends Model. **CLEX-54**
[828] Damages for SKCV: USD 183.9 million. Damages for Refordos: USD 34.7 million. Updated EL-007 CLEX-004 Dividends Model, reviewed by EconLogic, **EL-060**.

F. Smurfit's Business

694. Claimant's expert assessed the value of Smurfit's Venezuelan business on 28 August 2018 through an income approach, applying the DCF method. The Claimant indicates that, since the business had no financial debt at that time, the enterprise value of Cartón, Refordos and Colombates is equal to their equity value.[829] The Claimant's expert prepared separate valuations for Cartón, Colombates and Refordos to reflect Claimant's equity ownership share in each company but the approach was similar, starting with a projection of cash flows and then discounting those to the valuation date with a WACC for each company.[830] Claimant's forecast covers two periods encompassing 15 years after the expropriation. The first period is 2018-2023. The second period is 2024-2033. "The distinction between these two periods has to do with the expectation about how the Venezuelan economy would perform in the years following the expropriation, because CL assumes the performance of Smurfit Venezuela closely follows that of the Venezuelan economy."[831]

695. Overall, Compass Lexecon concluded that the value of Claimant's equity would amount to USD 166.9 million on 28 August 2018. In order to verify its analysis, Compass Lexecon also conducted an assessment using two alternative market-based valuation methodologies: (i) market multiples and (ii) transaction multiples.[832]

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[829] Claimant's Memorial, ¶ 330. "[A]n income approach using the DCF model is the most appropriate method for valuing Claimant's expropriated Venezuelan business because it was a well-established enterprise with a history of profitability […] The DCF method has been widely endorsed and applied by international arbitral tribunals to determine the appropriate compensation for expropriation," ¶¶ 332-333.

[830] Claimant's Memorial, ¶ 335. For the DCF analysis, Compass Lexecon forecast future production by reference to past production, capacity and expected demand. It projected that the Caracas and Valencia mills would have resumed production in 2019 and then forecast domestic demand for paper packaging products, considering the amount of paper input needed from the mill divisions as well. Compass Lexecon also projected that Refordos's forestry division would maintain its operations at constant levels. Regarding operation costs, after assessing projected sales volumes, the experts projected future operating costs by reviewing the historic divisional operating costs for the three companies from 2000 to 2017 (raw material costs, other variable operating costs and fixed operating costs). The actual 2017 cost was used to forecast future operating costs and the figures were adjusted by inflation. *See* ¶¶ 336-341.

[831] First Expert Report of EconLogic, ¶ 130.

[832] For the first one, it calculated the enterprise value to EBITDA multiples based on a sample of companies operating in the paper mill industry, compared the multiples implicit in the DCF values for Cartón (and Colombates) and Refordos with the median and average multiples obtained from the sample, examined the multiples of 34 publicly traded companies within the same industry, excluding overvalued and undervalued companies, and adjusted the value to reflect a controlling stake in the companies. According to Claimant's expert, a comparison of the DCF multiples for

i. Country Risk Premium

a. The Claimant's Position

696. To discount projected free cash flows, Compass Lexecon applied specific WACCs of 17.06 percent for Cartón and Colombates and 18.60 percent for Refordos, which were calculated based on a Capital Asset Pricing Model and adjusted for the country risk to which the investments were exposed (the main components of the WACC being the risk-free rate, industry risk and country risk). The country risk was measured by the incremental return owed to investors in a country exposed to a greater amount of risk than an average stable economy, resulting in a 12.3 percent factor as of mid-2018 based on Damodaran's long-term approach.[833] The Claimant contends that the country risk premium in the WACC represents the risk to Smurfit's subsidiaries of operating in Venezuela as opposed to a more stable jurisdiction. According to the Claimant, Respondent's approach to calculate the country risk premium based on the default spread associated with the credit rating for its sovereign debt is incorrect since: (i) the use of a multiplier is only recommended for short-term investments and not for long-term investments, and (ii) it is inappropriate to apply to a private business a risk factor associated with an investment in the sovereign debt of a country in default.[834]

b. The Respondent's Position

697. The Respondent contends that the Claimant made several mistakes in the computation of the WACC. Regarding the market risk period, it submits that, since July 2018 is closer to the valuation date, it is more appropriate to use a 5.37% factor than the 5.08% factor,

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Cartón and Refordos with the control adjusted median multiples traded in other jurisdictions shows that its implied DCF multiples are lower than the market valuation, which confirms that the DCF approach appropriately accounts for the severity of the Venezuelan economic crisis. For the second one, Compass Lexecon calculated based on a recent arms-length transaction between Cartón de Colombia and SKG. According to Compass Lexecon, a comparison of the implicit EV/EBITDA multiple from the DCF model against the Cartón de Colombia multiple shows that the multiple implicit in the DCF model is much lower than the multiple from Cartón de Colombia's transaction, which is attributable to the economic crisis and confirms its DCF model. Claimant's Memorial, ¶¶ 349-356.

[833] Claimant's Memorial, ¶¶ 347-348. The risk-free rate was calculated based on a 12-month average return on a 10-year US treasury bond and estimated at 2.62 percent. For the industry risk, the general market risk was derived from the US stock market and assessed at 5.08 percent, which was then multiplied by the industry-specific risk, resulting in 1.05 (Refordos) and 1.07 (Cartón and Colombates).

[834] Claimant's Reply, ¶¶ 429-431; Second Expert Report of Compass Lexecon, ¶¶ 108-111, footnotes, 135, 136. *See also* Claimant's PHB, ¶¶ 135-138.

based on information from January 2018, initially proposed by Claimant's experts. As to the country risk premium, it alleges that the Claimant only kept the pure default risk spread, based on the agencies' credit rating, without multiplying it by the relative volatility factor and that Prof. Damodaran's actual calculation of the country risk premium for Venezuela as published in July 2018, at 21.99%, is a rate more justified than the 12.30% suggested.[835] Respondent's expert explains that "the issue is not the term of the investment, but how the inherent risk of the investment affects each projected cash flow, and whether the measure of volatility will or will not tend to dilute over time," and that Claimant's justification for "not taking into account the 'C' credit rating of Venezuela from March 2018 is inexplicable."[836]

c. The Tribunal's Analysis

698. The Tribunal notes that both Parties have referred and relied on Prof. Damodaran's published estimates. While the Claimant has relied on information published in early 2018, the Respondent has presented a country risk premium based on information published in July 2018.[837] The Tribunal considers that whether the source of the information is authoritative has not been contested by the Parties, rather the Claimant indicates that the information presented by the Respondent is "unusable" since it assumes a default spread based on a rating of C from Moody's.

699. In the Tribunal's view, the risk from a credit rating C, which is "highly speculative" and "*likely in, or very near default*" does not imply a significant variation from a credit rating C "typically *in default*." The former according to its definition has "*some* prospect of recovery," the latter, "*little* prospect."[838] In this sense, the Tribunal does not consider that Venezuela's downgrade to a C credit would reflect an exponentially different situation in terms of the risk borne at that time with respect to a Ca credit rating. It is unclear to the Tribunal why Prof. Damodaran's estimates of country risk premium of July 2018

[835] Respondent's Counter-Memorial, ¶ 528; First Expert Report of EconLogic, ¶¶ 205-210. *See also* Respondent's Rejoinder, ¶¶ 713-715 and Second Expert Report of EconLogic, ¶¶ 204-214.
[836] Second Expert Report of EconLogic, ¶¶ 206, 207.
[837] Damodaran (2018) "Country Risk: Determinants, Measures and Implications – The 2018 Edition," updated on July 23, 2018, p. 114, **EL-042**.
[838] Moody's. Rating Scale and Definition. Moody's Asia Pacific Desktop Reference, **CLEX-086**. (Emphasis added)

would become inadequate with respect to estimates based on its approach considering a C credit. In addition, the 21.99% figure seems to be reasonable considering other alternative methodologies put forward by the Respondent[839] and not contested by the Claimant.

700. Accordingly, the Tribunal considers that the Respondent's estimate based on the latest available information is more appropriate for a country risk premium.

ii. Debt Equity Ratio

a. The Claimant's Position

701. The Claimant submits that "it is standard to assume a debt to equity ratio based on the optimal capital structure of a comparable set of companies."[840] According to its experts, Respondent's approach derogates from standard economic principles since "in the context of a fair market value analysis, a potential buyer would be able to leverage the company's value regardless of the existing debt-equity ratios of the target asset."[841]

b. The Respondent's Position

702. The Respondent disagrees with Claimant's approach. According to Respondent's expert, "the analyst is implicitly assuming the company being valued could actually achieve such optimal capital structure." In this sense, it posits that "the lack of long-term financial debt in this case signals that Smurfit Venezuela either does not have access to the financial markets for long-term debt borrowing, or that it does at a very high interest rate or […] that long-term borrowing of money in the financial market was not a preferred strategy for its management and the group as a whole when evaluating for the company," and "the capital market has been very thin in Venezuela compared with other emerging and developed markets." In its view, it is "incorrect to assume the same D/E ratio than the

[839] Second Expert Report of EconLogic, Table 7.
[840] Claimant's Reply, ¶ 432. *See* First Expert Report of Compass Lexecon, ¶ 169; Second Expert Report of Compass Lexecon, ¶ 114.
[841] Claimant's Reply, ¶ 434. *See* Second Expert Report of Compass Lexecon, ¶¶ 116-117; Claimant's PHB, ¶¶ 139, 140.

set of comparable companies" and "the WACC of Smurfit Venezuela shows 100% financing through equity."[842]

c. The Tribunal's Analysis

703. The Claimant has argued that it is "standard to assume a debt to equity ratio based on the optimal capital structure of a comparable set of companies."[843] The Respondent disagrees with this approach and considers that "because Smurfit Venezuela did not finance their operations through long-term debt, it could not be included in the WACC formula. Thus, EconLogic assumed a 100% equity financing ratio."[844] The Tribunal agrees that "it is irrelevant that another ratio would return a more convenient result if there is no evidence at all to show that it was attainable in the context of Smurfit Venezuela."[845] As Respondent's expert expressed at the hearing:

> "We are not talking about the sources of funding of the prospective buyer. That's not the right exercise. We need to consider, for the purposes of the valuation of Smurfit Venezuela, how Smurfit Venezuela funds their operations, and for many years in the past, they haven't been able to issue long-term debt, and that's related to the economic situation of Venezuela. […] in the context of crisis, Smurfit Venezuela wasn't able to issue long-term debt. And when the prospective buyer is considering the situation, the possibility of buying this company, is taking into account many variables, and is looking to the future. And is asking the following question: Is it possible for Smurfit Venezuela to have a mix of equity and debt such that–so that is more efficient because you know when you have debt, you have the tax savings that is implicit in the WACC calculation."[846]

704. The Tribunal agrees that the evidence in the record indicates that it would be extremely difficult to introduce long term debt into Smurfit Venezuela, and such situation has not occurred. The Tribunal believes that Claimant's contention that "it is reasonable to assume that a hypothetical willing buyer could finance at least some part of Smurfit

[842] First Expert Report of EconLogic, ¶¶ 211-214; Second Expert Report of EconLogic, ¶ 222. *See also* ¶¶ 216-225.
[843] Claimant's Reply, ¶ 432; First Expert Report of Compass Lexecon, ¶ 169.
[844] Respondent's Rejoinder, footnote 975; First Expert Report of EconLogic, ¶¶ 211-214.
[845] Second Expert Report of EconLogic, ¶ 220.
[846] Hearing, Tr. Day 4 (EconLogic) P1091:L3-10, P1093:L12-21.

Venezuela's purchase through loans sourced inside or outside Venezuela"[847] lacks support.

705. The Tribunal also considers that the Claimant has not shown that it would be appropriate to assume the same debt-to-equity ratio as in the set of comparable companies or that assuming a debt-to-equity ratio is standard in the type of economic context that prevailed in Venezuela at the time of the expropriation even if, in theory, companies are typically financed by a combination of debt and equity.

706. In light of the above, the Tribunal finds it more appropriate that the WACC of Smurfit Venezuela should be based on 100% equity financing.

iii. Sales and Length of Recovery Period

a. 2018-2023

1) The Claimant's Position

707. Claimant's expert forecasted that the Venezuelan economy and local sales would begin to recover by 2024. In its second report, Claimant's expert explains that Respondent's forecasts are not appropriate because once Venezuela's Gross Domestic Product ("**GDP**") begins to recover, Smurfit's Venezuelan subsidiaries' sales would begin to recover as well, as the abnormal drop would have begun to reverse. Additionally, the Claimant explains that, in response to the reduction in local sales, the subsidiaries began to channel production to the export market and could have continued to do so. In this regard, Compass Lexecon considers actual data about past production levels to forecast future sales more accurately.[848]

[847] Second Expert Report of Compass Lexecon, ¶ 118.
[848] Claimant's Reply, ¶¶ 434-436. "By ignoring historical production, EconLogic fails to benchmark the level of output and domestic sales that Smurfit Venezuela achieved before the crisis […] This rebound is not 'magical' as EconLogic sarcastically labeled it, but a logical anticipation that Smurfit Venezuela would recover part of the demand lost during the exceptional 2015-2017 years. […] EconLogic's flawed methodology implies that SKCV's sales volumes of folding carton boxes would never recover to pre-crisis levels at any point during the recovery period. It also means (wrongly) that sales would remain well below even the lowest sales volume achieved in any year between 1987 and 2015. […] Demand should rebound from its abnormal low once the recession is over." Second Expert Report of Compass Lexecon, ¶¶ 121, 123, 125.

708. As to the length of recovery, Compass Lexecon examined 11 countries suffering from economic crises of a similar magnitude as Venezuela's and estimated a recovery timeline of 20 years, from 2013 until 2023, similar to Zimbabwe. According to the Claimant, the crisis experienced by Tajikistan or Ukraine is not similar since it was related to the collapse of the Soviet Union and disruption to the countries' economic structure; however, the crisis in Venezuela was similar to the Zimbabwean crisis of 1998, "when Zimbabwe entered a hyperinflationary environment leading the government to enact strict price controls and exchange rate controls intended to manage inflation."[849]

2) The Respondent's Position

709. The Respondent disagrees with the Claimant's sales volume forecast. According to Respondent's expert, "the transition from the 2018-2023 subperiod to the 2024-2033 subperiod is so abrupt that it becomes difficult to support it from an economic standpoint,"[850] and before August 2018, the International Monetary Fund ("**IMF**") released more information that could have been used for the forecast. As to the recovery period between 2024-2033, the Respondent contends that Claimant's projections are unjustified "considering the unprecedented scale of the economic and humanitarian crisis […] and given the almost complete dismantling of the hydrocarbon and mining industry on which Venezuela's economy has been historically dependent."[851]

710. Respondent's expert also concludes that: "the Venezuelan economy takes six more years to reach the 2013 pre-crisis level than what CL forecasted. That is, the pre-crisis level is restored in 2039 instead of 2033" and "[o]nce all available information regarding the

[849] Second Expert Report of Compass Lexecon, ¶¶ 131-134.
[850] First Expert Report of EconLogic, ¶ 132. "CL forecasted corrugated sales volumes growing at a rate that is 13 times larger than the GDP growth […] In our First Expert Report we showed that Smurfit Venezuela had never achieved such incredible growth rates in any single year. As illustrated in Table 8 in our First Expert Report, the record growth rates obtained by the company in its entire history were dramatically lower than those proposed by CL for 2024. […] we do not ignore Smurfit Venezuela's historic sales, as CL argues. […] we take into account those historic figures as context, but believe that the crisis faced by Venezuela and the company is so severe that whatever happened in the eighties and nineties does not constitute very useful information", Second Expert Report of EconLogic, ¶¶ 145, 149, 150.
[851] Respondent's Counter-Memorial, ¶¶ 514-517; Respondent's Rejoinder, ¶¶ 698-702. "[T]he year in which Smurfit Venezuela achieves such outstanding growth rates cannot depend on the number of years included within IMF growth forecasts." Second Expert Report of EconLogic, ¶ 158. *See also* ¶¶ 160-165 on the IMF forecast period 2018-2023.

severeness of the systemic crisis faced by Venezuela […] is taken into account, it is more accurate to expect a recovery path for Venezuela closer to Tajikistan's recovery timeframe (with a recovery taking 26 years) or even Ukraine's recovery timeframe […]."[852] Finally, it contends that the projections of sales are overestimated and assuming constant production throughout the year is inaccurate.[853]

3) The Tribunal's Analysis

(i.) Production/Sales

711. Overall, the Parties disagree on the sales forecast as well as on the recovery period for Venezuela. As to the first issue, while the Claimant emphasizes the "abnormal" drop in local demand between 2015-2017, the Respondent emphasizes the "magical" growth for 2024.[854] A related issue is the IMF's GDP forecast used by both Parties.

712. While historical data on corrugated boxes sales may indicate the behavior of local demand of these products in Venezuela at a certain point in time and certainly the recovery of demand lost due to the economic situation can be achieved, the Tribunal is not convinced that there would be a significant increase in sales volume for the year 2024. Such an increase presupposes significant growth rates that, as put by Respondent's expert, do not seem to be "grounded in past or future economic reality of the business in Venezuela."[855] Claimant's contention is that once Venezuela's GDP begins to recover, so will the sales. However, the Tribunal cannot deduce that such increase would reach almost pre-crisis levels as a natural consequence of the GDP recovery in the magnitude proposed by the Claimant. In light of this, the Tribunal considers that the approach taken by the Respondent is more reasonable.

[852] "Tajikistan faced a hyperinflationary environment wherein the government enacted price controls and a de facto exchange rate pegged to the US dollar which was intended to manage inflation, with the presence of a de facto pegging of prices to the main exchange rate, and a high level of dollarization and remittance flows." First Expert Report of EconLogic, ¶ 162. *See also* Respondent's Rejoinder, ¶ 703.
[853] Respondent's Counter-Memorial, ¶ 518. On Respondent's proposed corrections *see also* Second Expert Report of EconLogic, ¶ 175.
[854] Second Expert Report of Compass Lexecon, ¶¶ 119-124; Second Expert Report of EconLogic, ¶¶ 145-159.
[855] Second Expert Report of EconLogic, ¶ 149.

(ii.)2018-2023 GDP

713. Regarding the GDP forecast, the document cited by the Respondent is more recent than the one provided by the Claimant. On the other hand, the Claimant has referred to a full forecast report whereas the Respondent to an article containing information on Venezuela's economic situation. The Tribunal is of the opinion that the variation provided in both sources is minor. While Respondent refers to an 18% decline in 2018 and 5% in 2019, the Claimant refers to 15% and 6% declines respectively and the difference of time between both publications is not significant either, while Respondent's article is from July 2018, Claimant's report is from April 2018. Thus, the Tribunal will rely on the most recent publication.

(iii.) 2024-2033 Recovery path

714. As to this issue, the Tribunal considers that Zimbabwe's crisis provides an accurate benchmark in terms of hyperinflation and controls implemented, which is not influenced by an additional determinant factor such as the dismantling of the Soviet Union (like Tajikistan and Ukraine). In addition, the Tribunal notes that the article presented by Respondent to update the GDP from 2018 also compares Venezuela's situation to Zimbabwe's. Thus, the Tribunal considers that Zimbabwe's crisis constitutes a more precise reference.

(iv.) Annualization Factor

715. The Respondent takes issue with the "annualization factor" used by the Claimant for 2018. "This is the factor employed by CL to account for the fact that production data for 2018 only covers the January-July period. Then, in order to estimate what production would have looked like for the entire 2018, which is the starting point for the forecasts underlying the valuation, a factor equal to 1.71 is used by CL, under the implicit assumption that production is constant throughout the year."[856] The Respondent

[856] First Expert Report of EconLogic, ¶ 164.

contends that this factor does not take into account "seasonality" and that "assuming constant production throughout the year is inaccurate."[857]

716. The Claimant does not contest the calculation of Respondent's experts, but rather alleges that it did not find "any significant difference in the alternative implementation suggested by EconLogic."[858] Thus, without a clear argument of why Respondent's calculation should be disregarded, the Tribunal will use this calculation for the determination of damages.

iv. Target Price Margins

a. The Claimant's Position

717. Regarding prices, Claimant's expert examined historical price margins over variable costs to forecast future prices and price margins. Target price margins for 2018 (for each division) were applied to projected variable operating costs to predict prices going forward that would produce the future free cash flows. Projected prices for sales to the international market were taken from price growth forecasts by the Fastmarkets; RISI North American Paper Packaging Forecast ("**RISI**"). To verify the price margin projections, Compass Lexecon examined the Earnings Before Interest, Taxes, Depreciation and Amortization ("**EBITDA**") margins, which were consistent in proportional terms.[859] According to the Claimant, Respondent's proposal to take an average of the historical price margins observed from 2015 to 2017 results in a similar target margin as the one obtained by Compass Lexecon, except for Refordos. The Claimant submits that "using the historical average price margin for Refordos is not appropriate as it ignores the fact that Refordos was not operating as a stand-alone venture, but rather as part of a vertically integrated business (as it sold all of the wood it produced to Cartón). When assessing the fair market value of Refordos, a willing buyer would do

[857] First Expert Report of EconLogic, ¶ 165.
[858] Second Expert Report of Compass Lexecon, footnote 168.
[859] Claimant's Memorial, ¶¶ 342-344.

so on the basis of Refordos as a stand-alone, self-sustaining business, and would accordingly assume higher target price margins."[860]

b. The Respondent's Position

718. The Respondent initially submitted that under a more appropriate approach, taking into account the value of the foreign exchange rate when the DICOM market reopened as Compass Lexecon did in the dividends damages calculations, the margin still remains at 45% but with lower unit costs and prices in 2017.[861] Additionally, Respondent's expert indicates that a potential alternative was to assume that margins would equal the average of the 2015-2017 period and in that case some margins would have been larger and some would have been lower than what was assumed by the Claimant, with the exception of Refordos. In its view, for that business, assuming Smurfit Venezuela experienced the 31.6% average margin in the 2015-2017 period would imply a substantial reduction with respect to the 45% margin assumed by the Claimant. Respondent's expert maintains that instead of adopting ad-hoc target margins, the Claimant should have computed the average margins experienced in the 2015-2017 period and used those margins to estimate prices in 2018 and thereafter.[862]

c. The Tribunal's Analysis

719. The Claimant has submitted that Refordos has operated as a fully integrated division of SKCV, that the latter is Refordos's only buyer and that interest-free cash loans were granted to Refordos to meet its working capital needs.[863] While the Claimant has

[860] Second Expert Report of Compass Lexecon, ¶¶ 135-137. "EconLogic's proposed target price margin at 32% does not provide Refordos with a sufficient margin to cover total expenses and imply a negative company value. By applying the average margin from 2015 to 2017, at 32%, Refordos' fair market value would result in an equity value to the Claimant equal to USD -1.3 million. The price margin proposed by EconLogic cannot be reasonable as the company would not be viable and would cease to exist." "SKVC is Refordos' forestry division only buyer, as Refordos sells all its wood to SKCV. SKCV also provided Refordos support to meet its working capital needs." ¶¶ 136, 137.
[861] Respondent's Counter-Memorial, ¶ 522.
[862] Respondent's Counter-Memorial, ¶ 523 and First Expert Report of EconLogic, ¶¶ 186-188. "EconLogic asserts that assuming Refordos as a stand-alone business is unrealistic […] EconLogic explains that 'in the *but-for* world Refordos would still be a fully integrated division of SKCV and not a stand-alone venture' and it is not unusual in vertically integrated businesses to accept losses in certain business divisions in order to obtain additional gains on others." Respondent's Rejoinder, ¶¶ 707, 708.
[863] Second Expert Report of Compass Lexecon, ¶ 137.

indicated that a willing buyer would value Refordos as a stand-alone, self-sustaining business and increase the target price margin, the Tribunal is not convinced this would be the case. In this regard, the Tribunal agrees with the Respondent that "[a] willing buyer would consider the value of the business as a whole, recognizing that Refordos is not a self-sustaining business and that, as history shows, it cannot provide with a higher target margin. […] if Refordos historically operated as an integrated division, using historical margins is the obvious choice from the valuation perspective of a willing buyer of the business as a whole."[864]

720. Therefore, the Tribunal considers that a target margin of 32% would be appropriate for Refordos as proposed by the Respondent.

v. Working Capital

a. The Claimant's Position

721. Claimant's expert forecast working capital requirements. In its forecast, Compass Lexecon assumed all accounts receivable and payable for Cartón, Refordos and Colombates would be paid within 30 days. According to the Claimant, the assumption made by the Respondent, whereby it calculates a period greater than 30 days, fails to consider that Smurfit's Venezuelan subsidiaries' historical working capital balances were "severely affected by Venezuela's measures […] due to the outstanding VAT credit balances and due to the excess cash balances resulting from the inability to repatriate dividends." In addition to this, it does not recognize that the subsidiaries were shortening the payment terms and limiting their credit in response to the prevailing inflation and devaluation. For these reasons, the 30-day timeline more accurately reflects the circumstances in the *but-for* scenario.[865]

[864] Second Expert Report of EconLogic, ¶ 185.
[865] Claimant's Reply, ¶¶ 442; Second Expert Report of Compass Lexecon, ¶¶ 138-144. *See also* Claimant's PHB, ¶¶ 128-133; Claimant's Reply PHB, ¶ 78.

b. The Respondent's Position

722. The Respondent contends that the assumptions made by Claimant's expert do not correspond with Smurfit Venezuela's financial statements which show that its current assets and liabilities are much larger.[866] Respondent's expert posits that if the Claimant had considered this information in the financial statements, "damages from expropriation to Claimant would have been lower" because "Smurfit Venezuela would have lower cash flows" than those projected.[867] Additionally, the Respondent also maintains that "inflation and devaluation were already present in the actual world. Hence, it is hard to imagine that a willing buyer would assess the payment and collection terms without considering that they were in an environment of sustained inflation and devaluation."[868]

c. The Tribunal's Analysis

723. The Tribunal does not find enough evidence to disregard the historical values proposed by the Respondent. There is no contemporaneous evidence that the challenged measures in fact "heavily tainted" the historical working capital balances. In addition and taking into consideration Smurfit Venezuela's conduct under similar circumstances, the Tribunal agrees with the Respondent that it is not credible that "a willing buyer would assess Smurfit Venezuela's value under the assumption that payment and collection terms could deviate from what they were in an environment of sustained inflation and devaluation."[869] Thus, the Tribunal finds that historical values are more appropriate for the determination of damages.

[866] Respondent's Counter-Memorial, ¶ 525.
[867] Respondent's Counter-Memorial, ¶¶ 525-527; First Expert Report of EconLogic, ¶¶ 195, 196.
[868] Respondent's Rejoinder, ¶ 711.
[869] Second Expert Report of EconLogic, ¶ 190.

vi. Relative Benchmarks

a. The Claimant's Position

724. To support its DCF valuation, Compass Lexecon put forward two alternative market-based valuation methodologies: the market multiples method and the transaction multiples method.

725. The Claimant submits that this exercise provides reassurance that its DCF valuation establishes a conservative value for the expropriated subsidiaries. Regarding the first method,[870] the Claimant alleges that the suggestion by Respondent's expert to use the 2018 EBITDA is not suitable since EV/EBITDA ratios are normally calculated based on data from the last fiscal year. In this sense, it submits that the 2017 EBITDA is more appropriate since in a hypothetical transaction a willing buyer would have most likely used data from a full fiscal year and the comparable industry sample multiples are also based on historical EBITDA.[871] As to the sample selection,[872] the Claimant acknowledges that SKG is not directly comparable to Smurfit Venezuela because of its size and global operations but it is included in the sample since it has not been filtered by size. The Claimant submits that excluding SKG from the sample does not alter the analysis conclusions and there is no particular size effect on the multiple.[873] The Claimant also posits that a sample of two companies would not be representative and

[870] "This benchmarking exercise involves computing enterprise value to EBITDA (EV/EBITDA) multiples for a sample of companies or transactions and comparing the median multiple to the multiple implicit in the DCF valuation, which, as per our First Report was 2.56x213 and in our updated valuation is 2.54x." Second Expert Report of Compass Lexecon, ¶ 156.
[871] Claimant's Reply, ¶¶ 445-447; Second Expert Report of Compass Lexecon, ¶¶ 159-162. "In the First Report, we computed EBITDA for January-August 2017 and annualized it to estimate the EBITDA for the fiscal year 2017 at USD 70.6 million. We now calculate the 2017 EBITDA by looking at monthly data (in Bolivars) for all 12 months and using average monthly exchange rates to convert to US Dollars using the DICOM rates for January-August 2017. For the September-December of that year, while Venezuela suspended the DICOM exchange, we use an extrapolation based on the assumption that the depreciation rate would have followed the same pace of domestic inflation. The resulting 2017 EBITDA for SKCV and Colombates is USD 61.1 million. The implied EV/EBITDA multiple for SKCV and Colombates in the DCF valuation is 2.54x based on the combined enterprise value of USD 155.3 million and combined EBITDA of USD 61.1 million." Second Expert Report of Compass Lexecon, ¶ 161.
[872] "[…] we look at the multiples from all publicly traded companies operating within the industry code SIC 2631 Paperboard Mills. Both SKCV and Colombates operate as paper packaging manufacturers under this code classification. We arrive at a final sample of 32 comparable firms after excluding companies with negative EBITDA, companies that lack the relevant data, or companies with EV/EBITDA multiples above 25.0x." Second Expert Report of Compass Lexecon, ¶ 164.
[873] Second Expert Report of Compass Lexecon, ¶¶ 164-166.

there might be a structural difference between the classification of Organisation for Economic Cooperation and Development ("**OECD**") and non-OECD countries that can be used as an approximation.[874] The Claimant also argues in favor of the application of a control premium stating that since "the market prices used to compute the enterprise value reflect the company's value to a non-controlling shareholder, publicly-traded multiples require an adjustment, known as a control premium, to reflect the value to a controlling shareholder […]."[875] Finally, the Claimant indicates that it is not presenting an assessment of damages based on the steady-state process, rather the benchmarking is a sanity check to the DCF valuation.[876]

726. Regarding the transaction multiples method, it submits that Respondent's application of Cartón de Colombia's market capitalization is not suitable since it is the transaction (and the transaction price) that reflects the true value of the asset.[877]

b. <u>The Respondent's Position</u>

727. The Respondent contends that the analysis conducted by Claimant's expert is unreliable since there is no logical reason to think that the EBITDA could be that much larger in 2017 with respect to 2016 given that production and the EBITDA margin decreased that year,[878] the sample of comparable companies chosen by Compass Lexecon was not analyzed in detail,[879] there is no support for including a control premium to the market

[874] Second Expert Report of Compass Lexecon, ¶¶ 167 and 170.
[875] Second Expert Report of Compass Lexecon, ¶ 168.
[876] "If we remove the short-term effects of the Venezuelan economic crisis from the DCF valuation, the DCF model should produce a valuation result that is closer to the market multiple valuations from paper packaging companies from other jurisdictions. […] we call this alternative valuation test the "steady-state DCF value […] while conducting a steady-state valuation, it is inappropriate to consider an EBITDA value that belongs to the 'crisis period'. This use of a trailing 12-month period for the EBITDA will therefore overstate the multiple. In this exercise, we calculate the multiple based on the estimated EBITDA for the first forecasted year. The resulting EV/EBITDA multiple for the steady-state setting of SKCV and Colombates, once we correct the terminal valuation clerical error, is 12.74x." Second Expert Report of Compass Lexecon, ¶¶ 174-176.
[877] Claimant's Reply, ¶ 448; Second Expert Report of Compass Lexecon, ¶¶ 177-180.
[878] "Basically, CL argues a willing buyer would have considered a full fiscal year rather than the last 12 trailing months (TTMs). That is very questionable, as the standard practice actually is to use the more complete and reliable information available. […] In a crisis situation like that as of mid 2018 in Venezuela, CL's reasoning implies arguing that a willing buyer would ignore the performance of the company in the period January-July of 2018. That does not make economic sense." EconLogic, Second Expert Report, ¶ 235.
[879] "[I]n order to make inferences, the sample must include comparable companies, which was not the case here. For example, we noted that the sample included only two companies from Latin America. Further, we also showed that if

based multiples of the companies in the sample selected by Compass Lexecon, the multiple derived from Cartón de Colombia confirms that no control premium can be applied without first making sure that it applies to the particular case being analyzed, and the Claimant relied on one single questionable transaction which resulted in a value assigned by a buyer who already controlled the target company.[880] The Respondent also alleges that Compass Lexecon's updated 2,54x multiple has the same overestimation problem as its DCF analysis, and that Claimant's expert has not proven that the companies selected for the sample are comparable with Smurfit Venezuela.[881]

728. Regarding the transaction, the Respondent contends that "the multiple should have been based on the market capitalization before the transaction" and that "[…] if CL's logic in the median sample analysis was applied to the Carton de Colombia's case, without examining the specific situation, CL would blindly increase the value of Carton de Colombia by including a 30.6% premium, to a value which already included a 47.4% premium paid by a shareholder who already controlled the company."[882]

c. The Tribunal's Analysis

729. The Claimant contends that both alternatives presented "could serve as reasonable checks"[883] or as a useful "benchmarking exercise."[884] However, the Claimant makes clear that it "ultimately rel[ies]" on, and that the "more accurate" method for valuing its investments is, the DCF method.[885] Moreover, the Claimant posits that it did "not provide

we exclude from the sample the firms which are very dissimilar to Smurfit Venezuela in terms of size (as measured by net income or EBITDA), those two latinamerican [sic] firms also have to be discarded, leaving us with no comparable firms. […] The comparability of the companies in the sample is of essence, and cannot be sacrificed because the analyst insists on constructing a sample. Curious enough, CL argues that a sample of n=2 cannot be used to infer any conclusions, but at the same time CL draws inferences based on a sample of n=1 when analyzing the Carton de Colombia transaction." Second Expert Report of EconLogic, ¶¶ 237, 240.

[880] Respondent's Counter-Memorial, ¶¶ 532-538; Respondent's Rejoinder, ¶ 720. Second Expert Report of EconLogic, ¶¶ 228-267. "CL has not explained or provided any support for the inclusion of a control premium. CL assumed without any explanation the existence of prospective hypothetical buyers who would be willing to pay a control premium." Second Expert Report of EconLogic, ¶ 248.

[881] *See* Respondent's Rejoinder, ¶¶ 721-728.

[882] Second Expert Report of EconLogic, ¶ 267.

[883] First Expert Report of Compass Lexecon, ¶ 118.

[884] Second Expert Report of Compass Lexecon, ¶ 157.

[885] Second Expert Report of Compass Lexecon, ¶ 157.

an assessment of value using the market valuation method."[886] The Tribunal finds difficulty in assigning any probative value to those alternatives in light of the limited evidence and arguments put forward and the fact that the Respondent has contested various aspects of the methodologies in which both alternatives were grounded.

730. The Tribunal finds that the overall damages for the Smurfit Business as of 28 August 2018 is USD 47.3 million.[887]

G. Moral Damages

i. The Claimant's Position

731. The Claimant contends that it is entitled to an award of moral damages for "Venezuela's egregious mistreatment of its employees." Specifically, it submits that Smurfit's employees were subjected to "verbal abuse, physical threats, degradation, humiliation, conversion of property, extortion, and prolonged detention without charge under deplorable conditions," which in turn "caused mental anguish and pain and suffering to the employees and their family members" and "damaged Smurfit's reputation."[888] The Claimant bases its claim on Article 31 of the Articles on Responsibility of States for Internationally Wrongful Acts and relies on *Desert Line v. Yemen* and *Lemire v. Ukraine*.[889]

732. The Claimant contends that it has satisfied the test established by the tribunal in *Lemire v. Ukraine* to determine whether the circumstances necessary to award moral damages in an investment treaty dispute exist since two Cartón employees were subjected to mistreatment and were illegally detained, and these actions caused the employees and their families physical and mental suffering. The Claimant also argues that the company was publicly denigrated through social media, which damaged SKG's reputation and

[886] Second Expert Report of Compass Lexecon, ¶ 157.
[887] Updated CLEX-053 DCF CLEX Model, reviewed by EconLogic, **EL-075**; **CLEX-053bis**.
[888] Claimant's Memorial, ¶ 364. *See also* Claimant's Reply, ¶ 458.
[889] Claimant's Memorial, ¶¶ 365-367. *See also* Claimant's PHB, ¶ 147.

prestige as a business, and that the gravity of the physical duress and mental suffering inflicted exceeds that inflicted in other cases where moral damages were awarded.[890]

733. As to the quantum of the moral damages, Claimant argues that the Tribunal has discretion to determine such relief, and in order to calibrate those damages, it is necessary to assess the gravity of the harm inflicted by the state's egregious misconduct. In this case, the mental anguish, pain, suffering, loss of personal liberty, length of the illegal detention as well as the fact that the employees cannot return to their home country. The Claimant requests 10 percent of the sum eventually awarded.[891]

ii. The Respondent's Position

734. The Respondent contends that investment tribunals have mostly refused to grant moral damages to corporations, that the Claimant has failed to provide sufficient evidence of actual moral damages and the causality required, and that in the cases where such damages have been awarded, tribunals have found they can be granted only in "exceptional circumstances."[892] In the Respondent's view, even if the Tribunal found "that the brief detention of Mr. Lugo and Mr. Betancourt amount to a breach of the Republic's obligation under the applicable BIT […] it is not enough to fulfil this high and extraordinary test."[893]

735. According to the Respondent, the detentions were not illegal but grounded in law, there is no reliable evidence on the employees' health deterioration, stress, anxiety, mental suffering, humiliation, loss of reputation, and in any event the cause and effect would not be grave or substantial. Additionally, it submits that "moral damages should not be granted to a corporation for moral injuries […] to its representatives, unless it can 'substantiate its own loss in the investment'," and that the Tribunal should not grant

[890] Claimant's Memorial, ¶¶ 370-375; Claimant's Reply, ¶ 462; Claimant's PHB, ¶¶ 149-152.
[891] Claimant's Memorial, ¶¶ 377-380.
[892] Respondent's Counter-Memorial, ¶¶ 446-449. *See also* Respondent's Rejoinder, ¶¶ 783-795.
[893] Respondent's Counter-Memorial, ¶ 450.

additional money for moral damages since the compensation awarded for an eventual finding of treaty breach is "sufficient satisfaction."[894]

736. Finally, the Respondent alleges that the Claimant failed to prove a causal link between the measures and the alleged moral damages.[895]

iii. The Tribunal's Analysis

737. The Tribunal has determined that it has jurisdiction to award moral damages and will now consider whether the circumstances to award moral damages are present in this case. In *Desert Line v. Yemen*, the tribunal considered that, "[e]ven if investment treaties primarily aim at protecting property and economic values, they do not exclude, as such, that a party may, in exceptional circumstances, ask for compensation for moral damages. It is generally accepted in most legal systems that moral damages may also be recovered besides pure economic damages. There are indeed no reasons to exclude them."[896] The tribunal referred to the *Lusitania* cases, which recognized that non-material damages may be "very real" and that the fact those damages were difficult to measure constitutes no reason to not be compensated. In this regard, the tribunal affirmed that a legal person could be awarded moral damages in specific circumstances.[897]

738. Both Parties have referred to *Lemire v. Ukraine*, in that case, the tribunal stated that moral damages can be awarded in "exceptional circumstances":

> "[…] as a general rule, moral damages are not available to a party injured by the wrongful acts of a State, but that moral damages can be awarded in *exceptional cases*, provided that
>
> -the State's actions imply physical threat, *illegal detention* or other analogous situations in which the *ill-treatment contravenes the norms according to which civilized nations are expected to act*;

[894] Respondent's Counter-Memorial, ¶¶ 453-463. *See also* Respondent's Rejoinder, ¶¶ 770-777; Respondent's PHB, ¶¶ 303-305, Respondent's Reply PHB, ¶¶ 122, 123.
[895] Respondent's Counter-Memorial, ¶¶ 464-476. *See also* Respondent's Rejoinder, ¶¶ 778-782.
[896] *Desert Line v. Yemen*, **CL-047**, 289.
[897] *Desert Line v. Yemen*, **CL-047**, 289.

> -the State's actions cause a *deterioration* of health, *stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation*, credit and social position; and
>
> -both *cause and effect* are *grave or substantial*."[898] (Emphasis added)

739. The elements are cumulative. The Tribunal agrees that awarding moral damages should be made in "exceptional circumstances," whether for a natural or legal person. It is a high standard. In the case at hand, the Claimant alleges that it satisfies the test set out in *Lemire*. As to the first limb of the test, the Claimant contends that Venezuela subjected Messrs. Lugo and Betancourt to approximately two months of illegal detention, part of that time in a secret prison. It contends that they were subjected to ill-treatment, intimidation, harassment, public humiliation, attempted extortion and physical duress, among other situations.

740. Although the Claimant has referred to two employees that were detained, only one of them has provided a witness declaration. The Tribunal will refer to this employee when necessary. From the facts of the case, it is clear that Mr. Lugo was arrested in the context of Cartón's inspection and as a result of the failure to immediately provide the voluminous documentation requested by the authority. The inspection was carried out not only by SUNDDE but also by military officers and DGCIM officers.[899] The arrest

[898] *Lemire v. Ukraine*, Award, 28 March 2011, **CL-073**, ¶ 333.

[899] "The security apparatus includes […] the Directorate General of Military Counterintelligence (DGCIM). […] Intelligence services (SEBIN and DGCIM) have been responsible for arbitrary detentions, ill-treatment and torture of political opponents and their relatives. […] According to the NGO "Foro Penal Venezolano", at least 15,045 persons were detained for political motives between January 2014 and May 2019. […] By 31 May 2019, 793 persons remained arbitrarily deprived of their liberty, 1,437 persons had been released unconditionally, and 8,598 had been conditionally released and were still facing lengthy criminal proceedings. The rest had been released without having been brought before a judge. Some of them left Venezuela for fear of being arrested again. OHCHR considers that the Government has used arbitrary detentions as one of the principal means to intimidate and repress the political opposition and any real or perceived expression of dissent since at least 2014. OHCHR was able to collect detailed information on 135 people (23 women and 112 men) arbitrarily deprived of their liberty between 2014 and 2019. Of them 23 were arrested in 2018 and 8 in 2019. Some of these cases constituted enforced disappearances until the authorities revealed the whereabouts of the individuals days or weeks after their arrests. In most cases, people were detained for exercising their fundamental rights, particularly freedom of opinion, expression, association and peaceful assembly. The detentions often had no legal basis. OHCHR also identified serious and repeated violations of the right to a fair trial in each of these cases. None of the victims interviewed who had been released have received remedies for the violations suffered as a result of their arbitrary detention. In most cases, women and men were subjected to one or more forms of torture or cruel, inhuman or degrading treatment or punishment, including electric shocks, suffocation with plastic bags, water boarding, beatings, sexual violence, water and food deprivation, stress positions and exposure to extreme temperatures. Security forces and intelligence services, particularly SEBIN and DGCIM, routinely resort

was made on 22 August 2018, the day after the inspection began. On 19 September of that year, the measure was substituted for house arrest and on 25 October the measure of house arrest was substituted for periodic presentations every 60 days since the prosecutor failed to formally press charges.[900] This has not been refuted by the Respondent. What the Tribunal can conclude from the record is that ultimately there was no legal basis for the arrest of this employee, who was eventually set free.[901] The same conclusion could be drawn as to the second employee.

741. Notwithstanding Respondent's contention that his detention was "brief," Mr. Lugo was under arrest for almost a month. The Tribunal recalls that, in the absence of evidence as to the official establishment in which he was held, the Tribunal accorded full probative value to Mr. Lugo's statement regarding the conditions in which he remained under arrest, as well as to the testimony of Mr. Ramírez.

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to such practices to extract information and confessions, intimidate, and punish the detainees." "Human rights situation in the Bolivarian Republic of Venezuela," Office of the United Nations High Commissioner for Human Rights, 5 July 2019, **C-309**, pp. 7, 9. "[…] [T]he Mission has reasonable grounds to believe that DGCIM officials engaged in a pattern of human rights violations and crimes against military dissidents, including arbitrary detentions, short term enforced disappearances and torture and cruel, inhuman and degrading treatment, including rape and other acts of sexual violence. These violations and crimes occurred during the period under review, increasing from 2017 to present. […] DGCIM is a highly centralized institution that responds directly to the President. All intelligence information gathered from around the country is sent to DGCIM headquarters in Caracas. […] Prior to taking them to DGCIM Boleita, DGCIM officials brought detainees to unofficial facilities throughout the country, where they were held for several days and during which time their whereabouts were not disclosed. […] The violations and crimes, continuous in nature and occurring against a high number of detainees, have been denounced by the victims and their families, as well as by Venezuelan organizations and international institutions. Nevertheless, DGCIM continued to be provided with the financial and material resources to continue to carry out acts that have resulted in unlawful conduct by DGCIM officials at the time of writing. […] DGCIM officials who have been identified as direct perpetrators of crimes and subjected to international sanctions for that reason, have not been removed or been subjected to internal disciplinary sanctions, according to information gathered by the Mission. […] In fact, several high-ranking DGCIM directors identified as having been involved in the direct perpetration of crimes have been promoted to higher military ranks." Human Rights Council, "Detailed findings of the independent international factfinding mission on the Bolivarian Republic of Venezuela," Forty-fifth Session, 15 September 2020, **C-400**, ¶¶ 1996, 1998, 2000-2003. *See also* "Annual Report 2019: Chapter IV.B Venezuela," Inter-American Commission on Human Rights, **C-391**, ¶¶ 59 and 139.

[900] Criminal Court file No. GP01-P-2018, 24 August 2018, **C-286** and Opinion of the Court of First Instance with competence in economic crimes, Criminal Judicial Circuit Court in the State of Carabobo, 25 October 2018, **C-306**.

[901] "[…] [F]rom reviewing the court records*, it is evident that the Public Minister did not conclude the preparatory phase with the presentation of an accusatory brief against the defendants, and until the present date, has not presented the corresponding final record*. Once this period has passed *without the prosecutor formally pressing charges*, the person under arrest will be released by means of the decision of the examining judge, who can impose a substitute precautionary measure." (Unofficial translation) (Emphasis added). Opinion of the Court of First Instance with competence in economic crimes, Criminal Judicial Circuit Court in the State of Carabobo, 25 October 2018, **C-306**.

742. The Tribunal does not take lightly the arrest, without an apparent legal basis and with the aid of military officers, of Claimant's executive. More worrying is the fact that for a certain period of time he was held in an unofficial site. The Respondent has not presented evidence to contradict Mr. Lugo's statement in this regard.

743. The Tribunal also notes that during Mr. Lugo's cross examination, the Respondent did not attempt, nor considered it relevant, to challenge any of the facts described in the witness statement submitted to this Tribunal.[902]

744. In this case, while the Respondent justified the detention as being within the authority's competence, the Tribunal has considered that the inspection and the measures on Cartón breached Venezuela's obligations under the FET standard. As to the detentions, the Tribunal specifically found that the primary reason for the detention (an alleged violation of the Law on Fair Prices) was made without the authority having analyzed the information necessary to determine whether the profit margin had been exceeded. The amount of information requested and the time provided by the authority to collect the information were not reasonable. This defective basis is what kept Mr. Lugo, and the second employee (Mr. Betancourt), incarcerated for almost a month, part of it outside the official establishments of the formal justice system.[903] In the Tribunal's view, this illegal detention, is not in line with "*the norms according to which civilized nations are expected to act*."[904]

745. Regarding the second requirement, the Claimant alleged first that: "Mr Lugo suffered degradation and psychological injury from the appalling conditions of confinement where he was harassed, humiliated and threatened under physical duress by the DGCIM," and second: "the public degradation of the company through Venezuelan news outlets and social media damaged the reputation and prestige of Smurfit Kappa

[902] Hearing, Tr. Day 2 (Respondent) P537:L21-22, P538:L1-4, P538:L:19-P539:L6.
[903] Respondent recognizes: "It is true that the judge did not hear Messrs. Lugo and Betancourt on Friday 24 August 2018, but on Monday 27 August 2018. Despite of that their lawyers had available remedies […]" and "Considering that the prosecutor had not collected sufficient evidence to proceed with the formal indictment at that moment, the judge properly revoked the detention […]." Respondent's Rejoinder, ¶¶ 787, 789.
[904] *Lemire v. Ukraine*, Award, 28 March 2011, **CL-073**, ¶ 333.

Group."[905] On the other hand, the Respondent takes issue with the fact that the Claimant only relies on the testimony of Mr. Lugo and that there is no reliable evidence of "Messrs Lugo's and Betancourt's deterioration of health, stress, anxiety, other mental suffering such as humiliation, shame and degradation, or loss of reputation, credit and social position." The Respondent qualifies the case as "speculative."[906]

746. The fact that Claimant's employees were illegally detained is not lost on the Tribunal. Even if, despite the lack of evidence that led to the release, the Tribunal considered that there was a legal basis for the detention, the Respondent has not provided a plausible justification for the initial detention by DGCIM officers in an unofficial establishment. Such detention, outside the formal justice system cannot be qualified as other than "illegal."

747. Mr. Lugo has qualified his experience as "traumatic" and testified as follows:

> "[…] the DGCIM guards kept us handcuffed even as we slept. It was incredibly degrading, painful and unsafe. […] I was *deeply concerned* that I *might be detained indefinitely without charge* as well. […] When we met the judge, she said to the Prosecutor: "What is this? Do not bring these people here. This is part of an intimidation process. There is no reason to detain them. There is nothing here." That day, I spent nine hours at the court waiting for my arraignment, unable even to use the bathroom. Ultimately, the arraignment hearing was not held that day. It was rescheduled for the following Monday. […]
>
> We were made to wait in the same courthouse room infested with roaches for at least an hour together with other men detained for violent crimes. *I did not feel safe around the other men who were discussing the violent crimes they had committed.* […]
>
> We returned to the DGCIM base and Cipriano and I were held there for two more weeks. *The experience was horrible*. We could only use the bathroom or shower with permission from the DGCIM officers. We continued to sleep on a mattress set up on the floor of a hallway, near explosives. DGCIM officers would *mock us and threaten us daily*. They said they were planning on sending us to a prison for violent offenders, Tocuyito, and told us we would likely be raped there. Tocuyito is an extremely violent jail in Valencia that is not under the control of the government, but rather controlled by the prisoners, and it is considered extremely dangerous. *Just the thought of being sent to Tocuyito terrified me —*

[905] Claimant's Reply, ¶ 462.
[906] Respondent's Counter-Memorial, ¶ 455 and Respondent's Rejoinder, ¶ 792.

> *it could be a death sentence*. For some days we were detained in a balcony that was fully enclosed, without air conditioning or even proper airflow. I remember that the heat was unbearable (around that time of year, the average daytime temperature is 30°C and 80% humidity). We were only able to stand early in the mornings. From midday until late in the night, *the heat was unbearable*, and lying on the floor was the only tolerable position. One day while we were imprisoned in the balcony, some DCGIM officers arrived with a superior who I overheard was a general. The DGCIM officers took the general to the balcony so he could see the prisoners. I remember one of the DGCIM officers saying that we were "emblematic prisoners." I was terrified when I heard that expression because, as I understood, this was akin to being a political prisoner in Venezuela. […] *I was constantly worried that the DGCIM officers would make good on their threats and transfer me to Tocuyito*. […] It was a relief when the car pulled up to a municipal jail in Guacara, a city approximately 20 kilometers from Valencia. Cipriano and I were incarcerated together in a room with a bunk bed and only one meter of space to walk. *I still had no idea when, or if, I would be released*. […] At that point, *I no longer felt safe in Venezuela. I feared for my life and for my family's safety*. Therefore, I decided to move to Colombia to live with my wife and son permanently."[907]

748. For its part, the Respondent has put forward its view as to what every person that has been subjected to an illegal detention should expect as an explanation:

> "[…] For us, the world of police detention and criminal indictment is… a nightmare when the food is bad for us, right? […] But, suddenly, one day, by chance, you found yourself being investigated for a crime, and you started feeling what these people live maybe not every day, but they know […] So, one day you found yourself living scenes of… that another class of people live, not us. What you lived would not make them—believe me—sue for $80 million dollars. They know this is the life of people who are arrested for being accused of crimes, at least, in South America. In Mexico, in Central America and in South America, they know this is like this, and they won't grumble, they won't feel terrified, they won't feel anguish, the won't… in other words, they won't feel anything special, because those things happen, they happen to them. Well, not to us. Not to us. So, what happens? You, like us, the people to whom those things don't happen, felt distress, got scared, you felt horror. I don't know all the words you used. You got scared, your wife cried, your mother cried. You certainly lived a traumatic situation for your class condition, certainly because of how your life is, like mine. Now, this subjective issue makes your damages expert request 80 million dollars. […] Now, the intensity of the suffering only because you belong to that world where these experience [sic] don't happen; well, bad luck. What do you want me to do? […] Are you surprised by the fact that a prison guard is sadistic? I mean… […] MR. GUGLIELMINO: No, no, honestly. We're talking

[907] Witness Statement of Luis Fernando Lugo, ¶¶ 19, 51-54, 56, 58, 59, 62, 64, 67.

> about something very important in this case, which is the… the format, the whole web of mistreatment with which they want to surround this case. Are you surprised? Is anyone in this room surprised by the fact that there are tragic… sadistic prison guards? […] MR. GUGLIELMINO: I'm not questioning anything. I'm not questioning. What I am saying is that, when a human being is put in prison, it is highly probable that he finds himself with a prison guard who does… who enjoys scaring people. Nothing, that's what I'm saying. But Mr. Lugo presents it as something terrifying, dramatic."[908]

749. While the Respondent has made clear that, in its view, Mr. Lugo's statement is not enough to prove anxiety or mental suffering, the Tribunal disagrees. The Tribunal is not in a position to doubt the statement presented by Mr. Lugo. In the Tribunal's view, being deprived of a fundamental right such as freedom, even more, outside normal legal procedures, and the uncertainty that that entails can certainly produce anguish, anxiety and mental suffering to any human being. The Respondent has referred to a medical report dated 23 August 2018, the day Mr. Lugo was arrested. As indicated above, such report may attest on his health at that point in time, but not during or after the arrest. The Tribunal understands that the Respondent has not presented any other medical report or log prior to the employee's release nor a report on his psychological condition at that time; therefore, at least as to Mr. Lugo, the Tribunal considers its detention produced stress, anxiety and mental suffering.

750. In *Lemire v. Ukraine*, the tribunal stated: "[t]he Arbitral Tribunal accepts that inspections by a regulator, if improperly used as tools of intimidation against regulated entities, constitute egregious behaviour and an abuse of power, which can cause extreme stress and anxiety to the supervised and result in an entitlement to be compensated for the moral damage inflicted."[909] In that case, the tribunal did not find indications that the National Council tried to intimidate through the inspections. In the case at hand, the inspections of Cartón, which included armed military personnel, went as far as to materialize an illegal detention of employees. There is nothing in the record or the testimony of Mr. Lugo, which contests or raises doubts that Mr. Lugo did not suffer constant worry, deep

[908] Hearing, Tr. Day 2 (Respondent) P534:L13-15, 22/P535:L1-3, P536:L1-20, P537:L14-17/P538:L6-8, 10-16/P539:L5-11.
[909] *Lemire v. Ukraine*, Award, 28 March 2011, **CL-073**, ¶ 341.

concern, fear for his life and his family's safety, uncertainty about his future. Thus, the Tribunal is of the view that both cause and effect are grave enough to award moral damages.[910]

751. The Tribunal cannot agree that the experience suffered by Mr. Lugo can be simply qualified as something that occurred by "chance," "bad luck," that it is "the life of people who are arrested for being accused of crimes, at least, in South America" or on the fact that there can be instances were minimum requirements of due process of law can be disregarded. Thus, the Tribunal rejects in the strongest terms the notion that life experiences like the one faced by Mr. Lugo should be normalized or considered as part of the landscape in any part of Latin America.

752. The Claimant requests 10% of the sum awarded for moral damages. In the Tribunal's view, the Claimant has not provided a full explanation or a methodology in which the 10% figure is grounded. In light of the circumstances of the case, the Tribunal awards moral damages in the amount of $1 Bolivar.

4. Interest

A. The Claimant's Position

753. Claimant's expert calculated a "normal commercial rate" of interest applicable to a commercial borrower in Venezuela.[911] The rate was calculated based on the sum of the three components: (i) a risk free rate based on annual averages, (ii) normalized Venezuela country risk (at 4%), and (iii) an industry risk premium (at 1%).[912]

754. In Claimant's view, such a rate has to be "related to a rate that is relevant and linked to the jurisdiction of the investment and not anywhere else." The Claimant maintains that Respondent's suggestion of equating the rate to Smurfit Group's cost of debt is not

[910] Regarding the reputation that Smurfit may have lost, the Claimant has referred to certain tweets issued by SUNDDE publicly informing of sanctions to Smurfit for abuse of dominance. Although the Tribunal has already determined the breaches that Venezuela incurred as to SUNDDE's inspection and the measures imposed, it considers there is not enough evidence of the loss of reputation of the SKG alleged by the Claimant or of the gravity of the effects.
[911] "[A] rate 'which is not affected by the extraordinary financial and economic crisis in Venezuela'." Claimant's PHB, ¶ 144.
[912] Claimant's PHB, ¶ 144.

"representative of the opportunity cost of capital that both Parties' experts have recognized should be the principle underpinning both the actualization of historical damages and pre-award interest."[913]

755. With regards to pre-award interest and Article 6(c) of the Treaty, it submits that until the date of payment, any damages are effectively being withheld by the host country where the Claimant is exposed to risk. The Claimant further alleges that it is appropriate to apply different rates for actualizing historical losses and for pre-award interest going forward from 28 August 2018 and that interest should be compounded annually in order to achieve full reparation. Claimant's expert calculates that pre-award interest in respect of historical damages and expropriation damages accruing from 28 August 2018 until 30 September 2022 amounts to USD 238 million.[914]

B. The Respondent's Position

756. Contrary to Claimant's contention and considering that the Treaty is silent about this issue, the Respondent maintains that interest must not be compounded since such interest is not accepted under Venezuelan law.[915] Respondent contends that several tribunals relied upon the national laws to reject the application of compound interest and that even if the Tribunal applied the full reparation principle, it does not *per se* demand the application of compound interest and the Claimant did not explain or prove that it incurred compound interest as damages.[916]

757. The Respondent also alleges that Compass Lexecon's reasoning to suggest the application of the compound interest is based on the assumption that there is no

[913] Claimant's PHB, ¶ 145.
[914] Claimant's PHB, ¶¶ 145, 146. To express question by the Tribunal, the Claimant submits that the signatories of the Treaty envisaged that the "normal commercial rate" of Article 6(c) would apply to lawful expropriations and that "neither the standard of 'just compensation' nor the interest rate applicable to lawful expropriation can have been intended to apply to the computation of discrete historical damages which involve a period of time when the investor still had control of its Venezuelan business and was thus exposed, in a more direct way, to the risks affecting that business in Venezuela." In Claimant's view, the Treaty allows the application of two interest rates: "[t]he update factor applied to the actualization of historical damages must therefore be understood to be interest *as damages*, necessary to achieve full reparation. Conversely, interest at a normal commercial rate going forward from 28 August 2018 should be viewed as interest *on* damages." Claimant's PHB, ¶ 200.
[915] Respondent's Rejoinder, ¶ 754.
[916] Respondent's Rejoinder, ¶¶ 755, 756.

macroeconomic volatility observed in Venezuela as of 2018.[917] In its Post-Hearing Brief, the Respondent reiterates its position that the Claimant is applying two different interest rates, which is inconsistent (neither economically consistent nor required by the Treaty). In addition to this, it submits that interests do not have a punitive function under international law.[918]

C. The Tribunal's Analysis

758. The actualization rate has already been addressed and the Tribunal has also expressed that Claimant's calculation applying two interest rates to update the historical damages is problematic. The Treaty does not differentiate between the pre-award rate and the actualization rate. This was acknowledged by Claimant's expert at the hearing:

> "So, can you please show us where the Treaty, as you say, and I quote, "provides for an explicit reference on the interest rate, introducing a different differentiation between the Pre-Award Rate and the Actualization Rate"? A. (Dr. Abdala) Okay. Well, as I mentioned, *there is no direct language in this*, but here it's referring to the "commercial rate that should apply until the date of the payment," right? But it's talking about an expropriation claim, so this is basically the Date of Valuation of the expropriation until the date of the payment, assuming the date of valuation and expropriation would be the Date of Valuation of the Claim. […] Q. The problem is that you premise –and I think I was trying to be fair by starting with your own words– you premised your calculation on Interest in your Reports by basing it on a, in your words, "explicit distinction" that this Article supposedly includes. It's just simply not there. There you want to– A. (Dr. Abdala) *No, I agree the Article doesn't… doesn't include any language that separates the periods, that we agree with*."[919] (Emphasis added)

759. Thus, the Tribunal is not in a position in which it can draw a distinction between rates without a textual basis on the Treaty. Contrary to Claimant's position on the applicability of an actualization rate and a pre-award interest rate, the Tribunal considers that, in accordance with a plain reading of the text, there is only one interest rate applicable to update the damages from the moment the violation crystallized and forward in time until

[917] Respondent's Rejoinder, ¶ 757.
[918] Respondent's Reply PHB, ¶¶ 120, 121.
[919] Hearing, Tr. Day 4 (Compass Lexecon) P948:L2-15 and P949:L3-12.

payment of the award, based on SKG's cost of debt. This is consistent with Article 6(c), which mandates "interest at a normal commercial rate until the date of payment."

760. The Treaty is also silent as to whether interest should be simple or compounded. The Claimant has advocated for compounded interest while the Respondent has argued that compounded interests are not accepted under Venezuelan law.

761. This case refers to events that date back to 2007, *i.e.*, 16 years. The Tribunal has already expressed its concern of a potential misuse of the system that rewards potential claimant's passivity in relation to interests.[920] While such circumstances could in other scenarios be taken into account, the Tribunal does not consider it should bear weight on its decision on interest in this case.

762. In this regard, although the Respondent has relied on investment cases to make its argument, such as *Autopista Concesionada de Venezuela v. Venezuela*, the Tribunal observes that it has not put forward to this Tribunal the specific legal basis as to why compounded interests would be not accepted or unapplicable under Venezuelan law. The Tribunal cannot take a step further and elaborate on such a legal basis, its interpretation or the arguments not made by Venezuela.

763. In consequence, the Tribunal considers that the interests should be compounded.

5. Taxes

764. The Claimant requests that the award is net of all Venezuelan taxes since any taxation on Respondent's part would result in the Claimant being taxed twice, which in turn, would subvert the purpose of the award. In addition to this, the Claimant "seeks an indemnity from Venezuela in respect of any adverse consequences that may result from the imposition of a double taxation liability by the Venezuelan tax authorities if the declaration in the Tribunal's Award recognizing that the Award is net of Venezuelan

[920] Hearing, Tr. Day 4 (Compass Lexecon) P922:L2-5.

taxes is not accepted as the equivalent of evidence of payment."[921] The Respondent has not presented any argument on this issue.

A. The Tribunal's Analysis

765. In its damages calculation, Claimant's expert accounted for all the taxes that Venezuela would have applied *but-for* the measures.[922] The Respondent has not presented its position on this issue or contested this. The Tribunal finds that the amounts awarded are net of taxes.

VIII. COSTS

1. Claimant's Costs Submissions

766. The Claimant requests that the Tribunal order Venezuela to bear Claimant's costs in their entirety, plus interest from the date at which such costs were incurred until the date of payment.[923] The Claimant bases this request on the Respondent's conduct in this proceeding, which in its view has been improper. In particular, it alleges that such conduct has increased its costs in the arbitration through: (i) the refusal to contribute towards ICSID's advanced costs, and (ii) procedural misconduct by refusing to produce responsive documents in its possession; withholding key pages from documents; deliberately submitting information and a witness statement with its last pleading, forcing the Claimant to seek an additional opportunity to respond; and by presenting illegible and incomplete copies.[924]

767. The Claimant states that it has incurred a total of USD 18,970,398.12, comprised of: (i) USD 1,425,000 for the Tribunal's and ICSID's fees, (ii) USD 14,307,306.32 for legal representation, (iii) USD 3,151,030.69 for experts and consultants, and (iv) USD 87,061.11 for travel and other expenses.

[921] Claimant's Memorial, ¶¶ 381, 382. Claimant's Reply, ¶ 470.
[922] First Expert Report of Compass Lexecon, ¶ 10; Second Expert Report of Compass Lexecon, ¶ 13.
[923] Claimant's Cost Submission, 25 June 2024, ¶ 1.
[924] Claimant's Cost Submission, 25 June 2024, ¶ 5.

2. Respondent's Costs Submissions

768. The Respondent requests that the Claimant bears the full costs of the arbitration. According to the Respondent, the Claimant has forced Venezuela to incur in high costs to its detriment on the basis of a case that is manifestly without jurisdiction. The Respondent alleges that the claim submitted is frivolous, manufactured by the Claimant to pursue an inflated compensation. The Respondent indicates that the Claimant has mischaracterized the events, not pursued available remedies, benefited from operating in Venezuela and remained silent about the dispute until a convenient time.[925] In addition to this, the Respondent submits that throughout the procedure, there has been procedural misconduct on the part of the Claimant which has resulted in an escalation of costs. In particular, it submits that the Claimant has made burdensome requests seeking information it already had in its possession, failed to produce documents, forced Venezuela to make repeated applications, incorporated a document which prevented Venezuela from submitting responsive documents and did not prevail in the arbitration. Finally, it alleges that not making payments in advance of costs is a right of a respondent under Rule 14(3)(d) of the ICSID Administrative and Financial Regulations.[926]

769. The Respondent states that it has incurred a total of USD 3,156,239.50, comprised of: (i) USD 2,942,839.50 for legal fees and expenses, and (ii) USD 213,400.00 for experts' fees.

3. The Tribunal's Decision on Costs

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

> "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

[925] Respondent's Submission on Costs, 25 June 2024, ¶¶ 3-5, 12.
[926] Respondent's Submission on Costs, 25 June 2024, ¶¶ 6-10.

771. As recognized by the Parties and other tribunals, the Tribunal has broad discretion to determine how costs should be allocated. Some tribunals have applied the principle that "costs follow the event", while others have determined that each party bears its own costs.[927] Investment tribunals have also considered the nature of the dispute and particular circumstances to determine the allocation of costs, which as rightly pointed by the Parties, have included conduct within the procedure.[928]

772. In their submissions, both Parties have recognized the principle that "costs follow the event" and asked for the losing Party to bear all costs. The Claimant has largely prevailed both on jurisdiction and on the merits of this case. Therefore, this case is not a case without merit or a frivolous claim. In this case, the Tribunal sees no reason to depart from this rule.[929]

773. Notwithstanding the above, the Tribunal recalls that Arbitration Rule 28(2) refers to a "statement of costs reasonably incurred" and the broad discretion for tribunals with regards to costs is precisely to "assess" the expenses. Other tribunals have also referred to the reasonability of costs when examining their allocation[930] and considered whether there has been a significant disproportion between the costs of the parties.[931]

774. In the present case, despite the fact that the Claimant prevailed in the arbitration, the Tribunal does not consider that Claimant's costs amounting to USD 18,970,398.12 are reasonable. This is a figure six times higher of what the Respondent incurred in. As recognized by other tribunals, a disputing party is free to organize its representation as

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[927] *See Burlington Resources, Inc v Republic of Ecuador*, (ICSID Case No ARB/08/5) Decision on Reconsideration and Award, 7 February 2017, **CL-0183**, ¶¶ 619, 620.
[928] *See e.g. Phoenix Action Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award, **RL-0010**, ¶ 151.
[929] "A general principle commonly followed in international arbitration is that a successful party under an award should recover its legal costs." *Hydro SRL v Albania,* ICSID Case No. ARB/15/28, Award, 24 April 2019, **RL-229**, ¶ 908.
[930] *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, **RL-235**, ¶ 1009. *See also*: "The Tribunal favors the approach taken by the Parties – which is implicit in their requests for cost orders – that as a general principle the successful party should be paid its *reasonable legal costs* by the unsuccessful party." (Emphasis added). *Blue Bank International & Trust v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB 12/20, Award, 26 April 2017, **RL-008**, ¶¶ 208.
[931] *Philip Morris Brand Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Award, **RL-090**, ¶ 588; *Transban Investments Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/24, Award, 22 November 2017, **RL-062**, ¶¶ 186, 189.

most convenient to it, but this is no reason for the other party (defeated in the procedure) to bear the consequences of its decisions.[932] In exercise of its discretion, the Tribunal determines that a reasonable amount for Claimant's costs is the same amount that Respondent incurred in, *i.e.*, USD 3,156,239.50. These costs shall be reimbursed by the Respondent to the Claimant.

775. On a final note, the Tribunal also takes into account for the cost allocation that, in order to vindicate its rights, the Claimant not only brought forward this dispute but had to bear with all the arbitration costs due to Respondent's refusal to make the advance payments requested for the procedure. While the Respondent has referred to Rule 14(3)(d) of the ICSID Administrative and Financial Regulations, such rule, which foresees the possibility of default, also provides that: "each party shall pay one half of each advance or supplemental charge, without prejudice to the final decision on the payment of the cost of an arbitration proceeding to be made by the Tribunal pursuant to Article 61(2) of the Convention". In this sense, the Tribunal agrees with the statement that "a tribunal has the authority to mend a situation of default in the final allocation of costs by awarding costs to the party that financed the proceeding".[933]

776. In light of the above, the Tribunal determines that the Respondent is to bear all the costs of the arbitration, which amount to USD 1,379,151.77,[934] plus the amount that the Tribunal has determined to be reasonable for Claimant's costs. In consequence, the Respondent shall pay the Claimant USD 4,535,391.27.

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[932] *Enrique Heemsen y Jorge Heemsen v. Bolivarian Republic of Venezuela*, PCA Case No. 2017-18, Award on Jurisdiction, 29 October 2019, **RL-269**, ¶ 451.
[933] *Valle Verde Sociedad Financiera SL v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/18, Decision on Provisional Measures, 25 January 2016, ¶ 84. The tribunal in that case also stated that it "reserve[d] its right to rely on defaulted advance payments when considering its final allocation of costs". *See also* ¶ 85. The Tribunal notes that the Decision on Bifurcation for this case was submitted as **RL-068**.
[934] The costs of arbitration include the fees and expenses of the Tribunal (USD 865,927.44), ICSID administrative fees (USD 262,000) and direct expenses (USD 251,224.33). ICSID will reimburse the remaining balance of the advances to Claimant.

IX. AWARD

777. For the reasons stated in the Award, the Tribunal decides as follows:[935]

Objections to Jurisdiction

i. Respondent's objections to jurisdiction *ratione materiae*, *ratione temporis*, indirect shareholding and *ratione voluntatis* are dismissed.

ii. The Tribunal has jurisdiction to award moral damages.

iii. The Tribunal rejects jurisdiction over Respondent's counterclaim.

Merits of the Dispute

i. The seizure of La Productora, El Piñal and Santo Tomás landholdings were expropriations carried out in breach of Article 6 of the Treaty.

ii. Venezuela's 2018 measures on Smurfit's business constitute an expropriation carried out in breach of Article 6 of the Treaty.

iii. The measures implemented by Venezuela for the taking of the landholdings breached Article 3(1) of the Treaty.

iv. Venezuela breached Article 3(1) of the Treaty through SUNDDE's 2018 measures on Cartón, as well as through the conduct of its authorities, particularly the DGCIM, during Mr. Lugo's arrest.

v. Venezuela breached Article 3(1) of the Treaty by systematically failing to respond to the VAT requests.

vi. Venezuela breached Article 3(1) of the Treaty when impairing the operation, management, maintenance, use, enjoyment and disposal of the landholdings through arbitrary measures.

vii. Venezuela breached Article 3(1) of the Treaty when impairing the operation, management, maintenance, use, enjoyment and disposal of Cartón de Venezuela through arbitrary measures.

[935] One Member of the Tribunal has dissented in full from the Award. The dissenting opinion is attached to this Award.

viii. Venezuela breached Article 3(1) of the Treaty when impairing the use, enjoyment, and disposal of part of Claimant's investment by systematically failing to answer Claimant's VAT Certificate Requests.

ix. The Tribunal dismisses the claim that the Respondent breached the FPS obligation under Article 3(2) of the Treaty as to the landholdings.

x. The Tribunal dismisses the claim that the Respondent breached the FPS obligation under Article 3(2) of the Treaty in relation to the measures taken in 2018 against Smurfit's business.

xi. Venezuela breached Article 5 of the Treaty by not guaranteeing the transfer of dividends without undue restriction or delay.

xii. As a result of Respondent's breaches. Venezuela shall pay to the Claimant damages, as of 28 August 2018, amounting to USD 394.57 million and $1 Bolivar. [936]

- Landholdings value: USD 3.07 million.
- VAT Certificates: USD 125.6 million.
- Dividends: USD 218.6 million.
- Smurfit's Business: USD 47.3 million.
- Moral Damages: $ 1 Bolivar.

xiii. In addition, Venezuela shall pay to the Claimant interest on the damages amounts stated in subparagraph (xii) at the interest rate based on SKG's cost of debt. Such interest shall be compounded and shall run from 28 August 2018 until the date of the Award. The amount as of 31 May 2024 is: USD 468.7 million[937] and $ 1 Bolivar.

xiv. The Respondent shall also pay Claimant's costs amounting to USD 4,535,391.27.[938]

xv. The Respondent shall pay compounded interests on the total damages awarded in subparagraph (xiii) and (xiv) based on SKG's cost of debt from 31 May 2024 until the date of payment.

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[936] Regarding moral damages, the Tribunal also reaches its decision by Majority with one Arbitrator considering the amount should be higher. The dissenting opinion (at ¶ 190 and footnote 120) and concurring statement are attached to the Award.

[937] **Exhibit EL-81 bis**_Updated EL-10 CLEX-07 Pre-Award Interest Calculation – Updated May 2024.

[938] One Member of the Tribunal considers that the Claimant should be awarded its full costs. The dissenting opinion (at ¶ 116) and concurring statement are attached to this Award.

Mr. Howard Mann
Arbitrator
Subject to the attached dissenting opinion

Date: 23 Aug 2024

Mr. Elliot Polebaum
Arbitrator
Subject to the attached concurring statement

Date:

Prof. Ricardo Ramírez Hernández
President of the Tribunal

Date:

Mr. Howard Mann
Arbitrator
Subject to the attached dissenting opinion

Date:

Mr. Elliot Polebaum
Arbitrator
Subject to the attached concurring statement

Date: 23 August 2024

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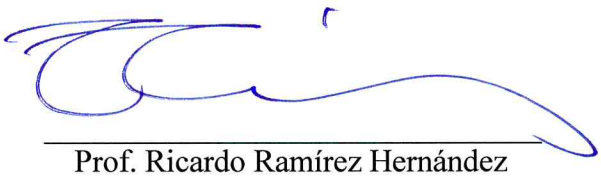

Prof. Ricardo Ramírez Hernández
President of the Tribunal

Date: 23 August 2024