

**PCA Case No. 2013-34**

**IN THE MATTER OF AN ARBITRATION PURSUANT TO THE AGREEMENT BETWEEN  
THE GOVERNMENT OF BARBADOS AND THE REPUBLIC OF VENEZUELA FOR THE  
PROMOTION AND PROTECTION OF INVESTMENTS**

**-between-**

**VENEZUELA US, S.R.L.**

**(the “Claimant”)**

**-and-**

**THE BOLIVARIAN REPUBLIC OF VENEZUELA**

**(the “Respondent”, and together with the Claimant, the “Parties”)**

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**PARTIAL AWARD  
(JURISDICTION AND LIABILITY)**

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**ARBITRAL TRIBUNAL:  
H.E. Judge Peter Tomka (Presiding Arbitrator)  
The Honourable L. Yves Fortier PC CC OQ QC  
Professor Marcelo Kohen**

**SECRETARY TO THE TRIBUNAL:  
Mr. Martin Doe Rodriguez**

**REGISTRY:  
Permanent Court of Arbitration**

**5 February 2021**

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**GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS**

<b>Anadarko</b>	Anadarko Venezuela LLC
<b>BIT</b>	Bilateral Investment Treaty, namely the Agreement between the Government of Barbados and the Republic of Venezuela for the Promotion and Protection of Investments
<b>Claimant</b>	Venezuela US, SRL
<b>Conversion Contract</b>	Contract for Conversion to a Mixed Company between Corporación Venezolana del Petróleo, S.A., Petrobras Energía Venezuela, S.A., Petrobras Energía, S.A., APC Venezuela, S.R.L., Venezuela US SRL and Corod Producción, S.A., dated 3 August 2006 (Exhibit C-2)
<b>Counter-Memorial</b>	Counter-Memorial on Jurisdiction and Liability, dated 2 February 2017
<b>CVP</b>	Corporación Venezolana de Petróleo
<b>Hearing</b>	Hearing on jurisdiction and liability held on 28 and 29 November 2017 in The Hague
<b>Hydrocarbons Law</b>	Hydrocarbons Organic Law, Decree No. 1510 (2 November 2001), Gaceta Oficial No. 37.323, dated 13 November 2001 (Exhibit C-5)
<b>ILC Articles</b>	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) II (Part Two) Yearbook of the ILC 31
<b>Instruction</b>	Instruction issued by the Minister of Energy and Petroleum, dated 12 April 2005
<b>Memorial</b>	Memorial on the Merits, dated 30 September 2014
<b>Operating Services Agreement</b>	Reactivation of Oil Fields Operating Services Agreement between Corpoven S.A. and the Consortium Compañía Naviera Perez Companc, Norcen International Ltd., Canadian Occidental Petroleum Ltd., Servicios Corod de Venezuela S.A., dated 1 November 1993 (Exhibit C-4)
<b>Parties</b>	Claimant and Respondent
<b>PCA</b>	Permanent Court of Arbitration
<b>PDVSA</b>	Petróleos de Venezuela S.A.
<b>PDVSA Petróleo</b>	PDVSA Petróleo S.A.
<b>Petrobras Argentina</b>	Petrobras Energía S.A.
<b>PetroFalcon</b>	PetroFalcon Corporation
<b>Petroritupano</b>	Petroritupano S.A.
<b>PO1</b>	Procedural Order No. 1, dated 24 January 2014
<b>PO2</b>	Procedural Order No. 2, dated 7 July 2014
<b>PO3</b>	Procedural Order No.3, dated 11 April 2017
<b>PO4</b>	Procedural Order No. 4, dated 24 October 2017

<b>Rejoinder</b>	Rejoinder Memorial on Jurisdiction and Liability, dated 13 October 2017
<b>Reply</b>	Reply Memorial on Jurisdiction and Liability, dated 16 June 2017
<b>Respondent</b>	Bolivarian Republic of Venezuela
<b>Statement of Claim</b>	Statement of Claim, dated 17 January 2014
<b>Statement of Defense</b>	Statement of Defense, dated 3 March 2014
<b>Treaty</b>	Agreement between the Government of Barbados and the Republic of Venezuela for the Promotion and Protection of Investments
<b>UNCITRAL Rules</b>	Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976
<b>VCLT</b>	Vienna Convention on the Law of Treaties, dated 23 May 1969
<b>Venezuela</b>	Bolivarian Republic of Venezuela
<b>Venezuelan Constitution</b>	Constitución de la República Bolivariana de Venezuela, Gaceta Oficial Extraordinaria No. 5.453 (24 March 2000); amended in 2009, Gaceta Oficial No. 5.908, dated 19 February 2009 (Exhibit C-40)

## I. THE PARTIES

1. The Claimant in these proceedings is Venezuela US, SRL (the “**Claimant**”), a company organized and existing under the laws of Barbados, with its principal place of business at 1201 Lake Robbins Drive, The Woodlands, Texas 77380, USA. The Claimant was represented in this case until 13 February 2020 by:

Mr. John P. Bowman	King & Spalding LLP
Ms. Jennifer L. Price	Price Arbitration PLLC

Since 15 February 2020, the Claimant is represented by:

Mr. Elliot Friedman	Freshfields Bruckhaus Deringer US LLP
Mr. Sam Prevatt	Freshfields Bruckhaus Deringer US LLP
Mr. Lee Rovinescu	Freshfields Bruckhaus Deringer US LLP
Ms. Madeline Snider	Freshfields Bruckhaus Deringer US LLP
Ms. Paige von Mehren	Freshfields Bruckhaus Deringer US LLP

2. The Respondent in these proceedings is the Bolivarian Republic of Venezuela (the “**Respondent**” or “**Venezuela**”, and together with the Claimant, the “**Parties**”). The Respondent was represented in this case until 30 June 2020 by:

Mr. Mark H. O’Donoghue	Curtis, Mallet-Prevost, Colt & Mosle LLP
Prof. Tullio R. Treves	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Renato R. Treves	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. Eloy Barbará de Parres	Curtis, Mallet-Prevost, Colt & Mosle LLP
Mr. George Kahale III	Curtis, Mallet-Prevost, Colt & Mosle LLP
Ms. Claudia Frutos-Peterson	Curtis, Mallet-Prevost, Colt & Mosle LLP

Since 1 July 2020, the Respondent is represented by:

Mr. Osvaldo César Guglielmino	Guglielmino & Asociados S.A.
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## II. PROCEDURAL HISTORY

### A. COMMENCEMENT OF THE ARBITRATION

3. By Notice of Arbitration dated 22 March 2013, the Claimant commenced arbitral proceedings against the Respondent under the Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules**”) pursuant to Article 8 of the Agreement between the Government of Barbados and the Republic of Venezuela for the Promotion and

Protection of Investments (the “**Treaty**” or “**BIT**”).<sup>1</sup> Article 8 of the Treaty provides, in relevant part:

**ARTICLE 8**  
**Settlement of Disputes Between one Contracting Party**  
**and Nationals or Companies of the other Contracting**  
**Party**

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

(2) As long as the Republic of Venezuela has not become a Contracting State of the Convention as mentioned in paragraph 1 of this Article, disputes as referred to in that paragraph shall be submitted to the International Centre for Settlement of Investment disputes under the Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (Additional Facility Rules). If for any reason the Additional Facility is not available the investor shall have the right to submit the dispute to arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL).

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

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

4. The Claimant, a company organized under the laws of Barbados, alleges that the Respondent, through its acts and omissions, as well as those of State-owned entities acting under its direction

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<sup>1</sup> UNTS, vol. 1984, p. 169. The Treaty was signed on 15 July 1994 and it entered into force, in accordance with its Article 12, on 31 October 1995.

and control, breached its obligations under Articles 2, 3 and 5 of the BIT with respect to the Claimant's investment in the oil and gas industry in Venezuela.

**B. CONSTITUTION OF THE TRIBUNAL**

5. In its Notice of Arbitration, the Claimant appointed The Hon. L. Yves Fortier PC CC OQ QC as the first arbitrator.
6. By letter dated 13 June 2013, the Claimant requested that the Secretary-General of the Permanent Court of Arbitration (the "PCA") designate an appointing authority pursuant to Articles 6(1) and 6(2) of the UNCITRAL Rules (2010).
7. On 16 July 2013, the Secretary-General of the PCA designated Professor Piero Bernardini as appointing authority.
8. By letter dated 17 July 2013, the Claimant requested that Professor Bernardini appoint an arbitrator on behalf of the Respondent.
9. By e-mail of 1 August 2013, the Respondent advised that it had appointed the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP to represent it in this case and that the Parties had agreed to a two-week extension of time for the Respondent to make an appointment.
10. By letter dated 5 August 2013, the Respondent appointed Mr. Gabriel Bottini as the second arbitrator.
11. By letter dated 13 November 2013, pursuant to the agreement of the Parties, H.E. Judge Peter Tomka was appointed as the Presiding Arbitrator.

**C. INITIAL PROCEDURAL STEPS**

12. By letter dated 4 December 2013, the Tribunal circulated a Draft Terms of Appointment to the Parties for their comments. By letter dated 13 December 2013, the Respondent submitted its comments on the Draft Terms of Appointment and asserted that the UNCITRAL Rules (1976) were applicable to the proceedings. By letter of the same date, the Claimant submitted its comments on the Draft Terms of Appointment and acknowledged that the original UNCITRAL Rules (1976) were applicable and would govern the arbitration in lieu of the revised UNCITRAL Rules (2010) under which it had commenced the arbitration.



13. By letter dated 18 December 2013, the Tribunal issued a final version of the Terms of Appointment, which were subsequently executed by the Parties and the Tribunal (the last signature being on 9 January 2014), and circulated a Draft Procedural Order No. 1 for the Parties' comments.
14. By letter dated 7 January 2014, the Claimant provided its comments on Draft Procedural Order No. 1 and proposed a procedural calendar for the initial phase of the arbitration. By e-mail dated 8 January 2014, the Respondent provided its comments on Draft Procedural Order No. 1. By letter dated 9 January 2014, the Tribunal acknowledged receipt of the Parties' comments on Draft Procedural Order No. 1 and invited the Claimant to comment on the Respondent's proposed modifications to the draft order. By letter dated 15 January 2014, the Claimant submitted its comments on Respondent's proposed modifications to Draft Procedural Order No. 1.
15. On 17 January 2014, the Claimant submitted its Statement of Claim (the "**Statement of Claim**").
16. On 24 January 2014, the Tribunal issued Procedural Order No. 1 ("**PO1**").
17. On 3 March 2014, the Respondent submitted its Statement of Defense (the "**Statement of Defense**"), in which it raised objections to jurisdiction and requested the bifurcation of the proceedings.

#### **D. BIFURCATION OF THE PROCEEDINGS**

18. By letter dated 7 March 2014, the Tribunal invited the Parties to make submissions on whether to bifurcate the proceedings and whether to hold an in-person procedural meeting to discuss the Respondent's request for bifurcation and the timetable for the proceedings.
19. By e-mail of 11 March 2014, the Respondent conveyed a request on behalf of both Parties that the Tribunal hold a procedural meeting in person.
20. By letter of the same date, the Respondent submitted a request for bifurcation of the proceedings asking the Tribunal to rule upon its first jurisdictional objection relating to the lack of jurisdiction *ratione voluntatis* as a preliminary matter.
21. By letter dated 12 March 2014, the Tribunal confirmed that a procedural meeting would be held in person on 19 March 2014 at the Peace Palace in The Hague, the Netherlands.

22. By letter dated 14 March 2014, the Claimant agreed to the bifurcation of the Respondent's first jurisdictional objection relating to the Tribunal's jurisdiction *ratione voluntatis* and proposed a timetable for bifurcated proceedings.
23. By e-mail of 14 March 2014, the Respondent notified the Tribunal and the Claimant of a challenge to Mr. Fortier under Articles 10 and 11 of the UNCITRAL Rules for lack of independence and impartiality and requested that the procedural meeting scheduled for 19 March 2014 be postponed.
24. By separate e-mail and letter dated 14 March 2014, the Claimant raised certain concerns regarding the disclosures made by Mr. Bottini with his statement of independence and impartiality, and opposed the Respondent's request to postpone the procedural meeting.
25. The Parties exchanged further correspondence on whether to postpone the procedural meeting including the Respondent's further e-mail of 14 March 2014, the Claimant's e-mail of 15 March 2014, the Respondent's e-mail of 16 March 2014, and the Claimant's e-mail of 16 March 2014.
26. By letter dated 16 March 2014, the Presiding Arbitrator acknowledged the Parties' agreement to bifurcate the Respondent's first jurisdictional objection and decided, subject to subsequent revision by the full Tribunal, to cancel the proposed procedural meeting and to establish a procedural calendar for the preliminary jurisdictional phase of the arbitration.

**E. FIRST PHASE ON JURISDICTION**

27. By letter dated 17 March 2014, following the Claimant's indication that it did not agree to the challenge and Mr. Fortier's refusal to withdraw, the Respondent submitted the challenge to Professor Bernardini for a decision pursuant to Article 12 of the UNCITRAL Rules.
28. By letter dated 19 March 2014, Mr. Bottini provided further clarifications regarding his declaration of impartiality and independence.
29. By letter dated 25 March 2014, Professor Bernardini resigned as appointing authority.
30. By letter dated 28 March 2014, the Claimant requested that the Secretary-General of the PCA designate a substitute appointing authority to decide the challenge to Mr. Fortier.
31. On 4 April 2014, the Secretary-General of the PCA designated Mr. Jernej Sekolec as appointing authority.

32. On 11 April 2014, the Respondent submitted its Memorial on the Objection to the Jurisdiction *Ratione Voluntatis* of the Tribunal.
33. On 9 May 2014, the Claimant submitted its Counter-Memorial on the Respondent's Objection to the Jurisdiction *Ratione Voluntatis* of the Tribunal.
34. On 30 May 2014, the Respondent submitted its Reply Memorial on the Objection to the Jurisdiction *Ratione Voluntatis* of the Tribunal.
35. On 2 June 2014, Mr. Sekolec issued a decision in his capacity as appointing authority rejecting the challenge to Mr. Fortier.
36. By letter dated 5 June 2014, the Tribunal scheduled a Hearing on Jurisdiction, to be held on 10 July 2014 at the Peace Palace in The Hague, the Netherlands.
37. On 20 June 2014, the Claimant submitted its Rejoinder Memorial on the Objection to the Jurisdiction *Ratione Voluntatis* of the Tribunal.
38. On 7 July 2014, the Tribunal issued Procedural Order No. 2 (“**PO2**”)
39. On 10 July 2014, the Hearing on Jurisdiction was held at the Peace Palace in The Hague, the Netherlands. The following persons were present:

**Tribunal**

H.E. Judge Peter Tomka (Presiding Arbitrator)  
The Honourable L. Yves Fortier PC CC OQ QC  
Mr. Gabriel Bottini

**Claimant**

Mr. John P. Bowman  
Ms. Jennifer L. Price  
Mr. Louis-Alexis Bret

**Respondent**

Mr. Mark H. O'Donoghue  
Prof. Tullio R. Treves  
Mr. Renato R. Treves  
Mr. Eloy Barbará de Parres  
Dr. Isaías Medina  
Mr. Valerio Salvatori

**PCA**

Mr. Martin Doe Rodríguez  
Mr. José Luis Aragón Cardiel

Ms. Giselle Herrera Kheneyzir

**Court Reporter**

Ms. Diana Burden

Ms. Susan McIntyre

40. On 30 September 2014, the Claimant submitted its Memorial on the Merits (the “**Memorial**”).
41. By letter dated 30 October 2015, the Claimant notified the Tribunal and the Respondent of a challenge to Mr. Bottini under Articles 10 and 11 of the UNCITRAL Rules for lack of independence and impartiality.
42. By letter dated 23 November 2015, following the Respondent’s indication that it did not agree to the challenge and Mr. Bottini’s refusal to withdraw, the Claimant submitted the challenge to Mr. Sekolec for a decision pursuant to Article 12 of the UNCITRAL Rules.
43. On 22 December 2015, Mr. Sekolec issued a decision in his capacity as appointing authority sustaining the challenge against Mr. Bottini.
44. By letter dated 18 January 2016, the Respondent appointed Professor Marcelo Kohen as substitute arbitrator.
45. By letter dated 25 July 2016, the PCA forwarded to the Parties the following communications at the request of Maître Fortier: (i) a communication sent by counsel to the Bolivarian Republic of Venezuela in ICSID Case No. ARB/12/21, Fabrica de Vidrios Los Andes C.A., and Owens-Illinois de Venezuela, C.A. v. The Bolivarian Republic of Venezuela, and two attachments, (ii) reply to counsel for Respondent dated 15 July 2016 from Ms. Maria Planells-Valero, and (iii) Mr. Fortier’s letter of explanations to Ms. Planells-Valero dated 22 July 2016.
46. On 26 July 2016, the Tribunal issued its Interim Award on Jurisdiction, together with a Dissenting Opinion from Prof. Marcelo G. Kohen. In its Interim Award, the Tribunal decided:
  - (1) By two votes to one, that:
    - a. The Respondent’s Objection to Jurisdiction *rationae voluntatis* is rejected;
    - b. The proceeding shall continue under a schedule to be established after consultation with the parties;
  - (2) Unanimously, that:

c. All questions of costs are reserved.<sup>2</sup>

**F. SECOND PHASE ON JURISDICTION AND LIABILITY**

47. By letter dated 2 August 2016, the Parties were invited to confer on the timetable for the proceedings on the merits, and the Claimant was invited to inform if it wanted to make a brief additional written submission to update its position since its Memorial on the Merits, prior to the submission of the Respondent's Counter-Memorial. The Parties were also invited to submit any comments they might have prior to the publication of the Interim Award and Dissent on the PCA's website.
48. By letter dated 26 August 2016, the Claimant informed the Tribunal about the Parties' disagreement on the further timetable for the proceedings, given Respondent's desire to further bifurcate liability and quantum issues. The Claimant proposed therefore a schedule to proceed.
49. By letter of the same date, the Respondent requested the Tribunal for bifurcated proceedings, as well as a minimum period for the submission of its Counter-Memorial and Rejoinder in the event that proceedings were not bifurcated.
50. On 8 September 2016, the PCA communicated the Tribunal's decision to bifurcate the proceedings so that issues of quantum would be reserved for a subsequent stage depending on the decision in this next phase on remaining issues of jurisdiction and liability. Similarly, the Parties were informed that a hearing on jurisdiction and liability would be held in the week of 27 November 2017. The Parties were invited to confirm their availability for the hearing dates and to confer on a timetable for written submissions and revert before 19 September 2016.
51. By respective communications dated 19 September 2016, the Parties informed the Tribunal that they had been unable to reach agreement on the timetable leading up to the hearing, and each put forward their own calendar.
52. On 23 September 2016, the Tribunal established a schedule for written submissions and confirmed that the hearing would be held in the week of 27 November 2017.
53. By letter dated 2 February 2017, the Respondent submitted its Counter-Memorial on Jurisdiction and Liability (the "**Counter-Memorial**").

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<sup>2</sup> Interim Award on Jurisdiction, ¶ 132.

54. On 11 April 2017, following exchanges of document production requests and objections between the Parties, the Tribunal issued Procedural Order No. 3 (“**PO3**”), ruling on the Parties’ respective document production requests.
55. On 28 April 2017, the Respondent submitted certain comments on the Tribunal’s order on document production.
56. On 5 May 2017, the Respondent submitted some additional documentation received from PDVSA and its affiliates in response to the Claimant’s document production requests.
57. By letter dated 10 May 2017, the Claimant presented its comments on the documents produced by the Respondent so far.
58. By letter dated 12 May 2017, the Respondent responded to the Claimant’s letter dated 10 May 2017 and submitted certain additional documentation received from PDVSA and its affiliates.
59. By letter dated 15 May 2017, the Claimant requested an extension of two weeks to submit its Reply Memorial.
60. By e-mail of 17 May 2017, the Respondent accepted the Claimant’s extension request provided that the deadline for the Respondent’s Rejoinder was extended as well.
61. By letter dated 18 May 2017, the Tribunal granted the extensions requested by the Parties on the Claimant’s Reply Memorial and the Respondent’s Rejoinder Memorial.
62. By letters dated 19 May 2017, 9 June 2017, and 15 June 2017, the Respondent submitted further documentation received from PDVSA and its affiliates.
63. By letter dated 16 June 2017, the Claimant submitted its Reply Memorial on Jurisdiction and Liability (the “**Reply**”).
64. By letter dated 13 October 2017, the Respondent submitted its Rejoinder Memorial on Jurisdiction and Liability (the “**Rejoinder**”).
65. On 16 October 2017, the Tribunal circulated to the Parties a draft Procedural Order No.4 regarding the organization of the hearing on remaining issues on jurisdiction and liability.

66. By letter dated 20 October 2017, the Claimant informed the Tribunal of the results of a call held between the Parties' counsel regarding the organization of the hearing. By letter of the same date, the Respondent also informed the Tribunal of the results of the aforementioned call.
67. By letter date 23 October 2017, the PCA communicated the Tribunal's decisions regarding the organization of the hearing.
68. On 24 October 2017, the Tribunal issued Procedural Order No. 4 ("**PO4**").
69. By letter dated 12 November 2017, the Claimant requested that the Tribunal admit two additional exhibits (C-153 and C-154) into the record. By e-mails of 12 and 14 November 2017, the Respondent opposed the Claimant's request and requested the Tribunal's authorization to make reference in its opening statement to certain additional legal authorities that were not already part of the record. By e-mail of 23 November 2017, the Claimant maintained its request for the admission of the two additional exhibits. By letter dated 23 November 2017, the Tribunal granted both Parties' requests in relation to the admission of new exhibits and legal authorities.
70. On 28 and 29 November 2017, the hearing on jurisdiction and liability was held in The Hague (the "**Hearing**"). During the Hearing, the Claimant submitted four new exhibits and the Respondent submitted one further legal authority. The following persons were present at the Hearing:

**Tribunal**

H.E. Judge Peter Tomka (Presiding Arbitrator)  
The Honourable L. Yves Fortier PC CC OQ QC  
Professor Marcelo Kohen

**Claimant**

Mr. John P. Bowman	King & Spalding LLP
Ms. Michelle Raia	King & Spalding LLP
Ms. Flora Jones	King & Spalding LLP
Ms. Jennifer L. Price	Price Arbitration PLLC
Mr. Louis H. Derrota	Anadarko Petroleum Corporation
Mr. Brent C. Kaczmarek	Expert-Witness

**Respondent**

Mr. Eloy Barbará de Parres	Curtis Mallet-Prevost Colt & Mosle SC
Ms. Gabriela Álvarez Ávila	Curtis Mallet-Prevost Colt & Mosle SC
Ms. Mariana Gómez Vallin	Curtis Mallet-Prevost Colt & Mosle SC
Mr. Alejandro Schmilinsky	Curtis Mallet-Prevost Colt & Mosle SC





renewable natural resources in order to incorporate, create and innovate in technology, create jobs and foster economic growth, and to create wealth and welfare for the people.<sup>6</sup>

75. In addition, Article 303 of the new Constitution provided as follows:

For reasons of economic and political sovereignty and national strategy, the State shall retain all shares of Petróleos de Venezuela, S.A. or the organ created to manage the petroleum industry, with the exception of subsidiaries, strategic associations, business enterprises and any other venture established or subsequently established as a consequence of the development of the businesses of Petróleos de Venezuela, S.A.<sup>7</sup>

76. In July 2000, Anadarko Petroleum Corporation acquired Union Pacific Resources Group, Inc.<sup>8</sup>

77. On 13 November 2001, the Venezuelan Hydrocarbons Law was enacted (the “**Hydrocarbons Law**”).<sup>9</sup> Article 9 of the Hydrocarbons Law establishes that “all activities relating to the exploration and search of hydrocarbons reservoirs referred to in this Decree Law, the extraction of those hydrocarbons in their natural state, and the initial gathering, transportation, and storage shall be referred to as primary activities.”<sup>10</sup> According to Article 22, these so-called “primary activities” are to be performed by the State either directly or through corporations completely owned or controlled by it (i.e. mixed companies).<sup>11</sup> Additionally, Article 33 of the Hydrocarbons Law establishes that the incorporation of mixed corporations and the conditions under which they will perform oil exploitation activities require the authorization of the National Assembly of Venezuela.<sup>12</sup>

78. In 2002, Anadarko Petroleum Corporation placed the Oritupano Leona investment in its wholly-owned indirect subsidiary Venezuela US.<sup>13</sup>

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<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> Memorial, ¶ 17.

<sup>9</sup> Exhibit C-5, Hydrocarbons Organic Law, Decree No. 1510 (2 November 2001), Gaceta Oficial No.37.323 (13 November 2001) (“Hydrocarbons Law”).

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> Exhibit C-8, Registro Mercantil Cuarto de la Circunscripción Judicial del Distrito Federal y Estado Miranda (10 September 2002).

79. From 2002 to 2014, Rafael Ramírez acted as Minister of Energy and Petroleum and President of PDVSA.<sup>14</sup> As described on the PDVSA Website, by 2014, he was “the oldest member of the Executive Cabinet [. . .] With 12 years of service to the Bolivarian Revolution.”<sup>15</sup>
80. January 2003 was marked by the Government of Venezuela as the beginning of a true oil nationalization strategy.<sup>16</sup> It was announced to have started with the recovery of PDVSA and to call “for the reaffirmation of the nation’s property rights over its subterranean deposits of hydrocarbons, as well as the recovery of control of oil activities within its frontiers.”<sup>17</sup>
81. In 2003, Corporación Venezolana de Petróleo (“CVP”)<sup>18</sup> was “reactivated” in order, *inter alia*, to participate in mixed companies as a PDVSA affiliate.<sup>19</sup>
82. On 12 April 2005, the new Minister of Energy and Petroleum issued an “Instruction” formally declaring the Operating Services Agreement illegal (the “**Instruction**”). It ordered the “migration” of those agreements to the new form of mixed companies required under the Hydrocarbons Law.<sup>20</sup>
83. On 29 September 2005, PDVSA Petróleo S.A. (“**PDVSA Petróleo**”, an affiliate of PDVSA), Petrobras Energía Venezuela S.A. (formerly called Perez Companc de Venezuela S.A.), Corod Producción S.A., and APC Venezuela S.R.L. (formerly known as Norcen Energy Resources Venezuela S.A. as registered on 20 December 1994), entered into a Transitory Agreement following issuance of the Instruction “to negotiate in good faith the terms and conditions for the aforementioned conversion of the Operating Agreement into a *empresa mixta* structure in which

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<sup>14</sup> Exhibit C-43, Excerpt from PDVSA website, Biography of Rafael Ramírez.

<sup>15</sup> *Ibid.*

<sup>16</sup> Exhibit C-15, Excerpt from PDVSA website, “Plena soberanía, Auténtica nacionalización,” available at [www.pdvsacom](http://www.pdvsacom).

<sup>17</sup> *Ibid.*

<sup>18</sup> By means of Presidential Decree No. 1127 dated 2 September 1975, the ownership of the shares of the commercial company CVP was assigned to PDVSA. See Exhibit C-46.

<sup>19</sup> Exhibit C-12, Excerpt from PDVSA website, “Negocios y filiales: la CVP y las Empresas Mixtas,” available at [www.pdvsacom](http://www.pdvsacom).

<sup>20</sup> Exhibit C-19, Instruction Letter from Minister of Energy to Board of Directors of PDVSA and CVP regarding Operating Service and migration to mixed companies (12 April 2005).

the State, PPSA or any of its affiliates shall have an interest equal to 51% in the capital stock, and the CONTRACTOR shall have the remaining capital stock.”<sup>21</sup>

84. On 3 February 2006, the Claimant, then a company named Venezuela US LLC and constituted under the laws of Delaware, was officially continued as Venezuela US SRL under the laws of Barbados, in order to hold shares in a Venezuelan subsidiary.<sup>22</sup>
85. On 31 March 2006, PDVSA Petróleo, CVP, Petrobras Energía Venezuela S.A., Corod Producción S.A., and APC Venezuela S.R.L, entered into a Memorandum of Understanding regarding the negotiation of the migration process of the Operating Services Agreement into a mixed company.<sup>23</sup>
86. On 18 April 2006, the Law for the Regularization of Private Participation in the Primary Activities set out in Decree No. 1510 was enacted.<sup>24</sup> Article 4 of that law provides as follows:

As a result of the termination of Operating Agreements, the Republic, either by itself or through its wholly-owned companies, shall resume the development of the oil activities carried out by private parties, in view of their public use and social interest and in order to ensure their continuance, notwithstanding the fact that mixed companies may be incorporated to that effect subject to the National Assembly’s approval upon the issuance of a favourable report by the National Executive through the Ministry of Energy and Oil and the Permanent Committee on Energy and Mines of the National Assembly.<sup>25</sup>

87. A report of the Ministry of Energy and Petroleum to the National Assembly of Venezuela further described the operation of mixed companies as follows:

The Contract for Hydrocarbon Delivery shall fully maintain the monopoly in this matter which is held, according to LOH (Hydrocarbons Law), by the companies 100% owned by the State. The Mixed Companies shall deliver their total production of hydrocarbons

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<sup>21</sup> Exhibit C-20, Transitory Agreement between Petrobras Energía Venezuela S.A., ACP Venezuela S.R.L., Corod Producción S.A., and PDVSA Petróleo S.A. (29 September 2005).

<sup>22</sup> Exhibit C-6, Certificate of Organization and Certificate of Continuance of Venezuela US SRL (3 February 2006).

<sup>23</sup> Exhibit C-48, Memorandum de Entendimiento Proceso de Conversión a Empresa Mixta entre PDVSA Petróleo S.A., Corporación Venezolana de Petróleo, S.A., Petrobras Energía Venezuela, S.A., APC Venezuela, S.R.L., y Corod Producción, S.A. (31 March 2006).

<sup>24</sup> Exhibit C-21, Ley de Regularización de la Participación Privada en las Actividades Primarias Previstas en el Decreto No. 1.1510 con fuerza de Ley Orgánica de Hidrocarburos, Gaceta Oficial No. 38.419 (18 April 2006).

<sup>25</sup> *Ibid.*

to PDVSA, and PDVSA shall sell the production to the customers it deems convenient.  
The Mixed Companies shall receive payment for the value of the hydrocarbons delivered in dollars, at market prices.<sup>26</sup>

88. On 5 May 2006, the National Assembly of Venezuela approved the incorporation of the mixed company Petroritupano S.A. (“**Petroritupano**”), between CVP, Petrobras Energía Venezuela, S.A, APC Venezuela, S.R.L., and Corod Producción, S.A., or their respective affiliates, with an initial shareholding of 60%, 18%, 18%, and 4%, respectively.<sup>27</sup>
89. On 20 June 2006, the Ministry of Energy and Petroleum authorized the constitution of Petroritupano.<sup>28</sup>
90. On 22 June 2006, the President of the Republic approved the constitution of Petroritupano.<sup>29</sup>
91. On 3 August 2006, CVP, Petrobras Energía Venezuela, S.A, Petrobras Energía S.A. (“**Petrobras Argentina**”), APC Venezuela, S.R.L., the Claimant (as direct owner of APC’s shares), and Corod Producción, S.A., entered into a Contract for Conversion to a Mixed Company (the “**Conversion Contract**”).<sup>30</sup> As established in Article 1.3, “[t]he initial stock ownership in the Mixed Company shall be as follows: CVP: 60.000 Class A shares, representing a 60% interest [ . . . ]. Petrobras Argentina: 18.000 Class B shares, representing an 18% interest [ . . . ]. Venezuela-US: 18.000 Class B shares, representing an 18% interest [ . . . ] Corod: 4.000 Class B shares, representing a 4% interest.”<sup>31</sup> Article 1.5 of the Conversion Contract provides as follows:

The Shareholders’ Meeting of the Mixed Company may from time to time request from shareholders, in accordance with the Business Plan referred to in Article 1.7, those additional capital contributions or loans (under market conditions) it deems as necessary

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<sup>26</sup> Exhibit C-51, Plena Soberanía Petrolera: Los Convenios Operativos Informe Dirigido a la Asamblea Nacional por medio de la Comisión Permanente de Energía y Minas, sobre la Política de Migración de los Convenios Operativos a Empresas Mixtas (March 2006), ¶ 6.3.

<sup>27</sup> Exhibit C-2A, Conversion Contract Annex A, Acuerdo de la Asamblea Nacional, Gaceta Oficial No. 38.430 (5 May 2006).

<sup>28</sup> Exhibit C-2B, Conversion Contract Annex B, Resolución del Ministerio de Energía y Petróleo, Gaceta Oficial No. 38.462 (20 June 2006).

<sup>29</sup> Exhibit C-2C, Conversion Contract Annex C, Decreto de Creación, Decreto No. 4.588, Gaceta Oficial No. 38.464 (22 June 2006).

<sup>30</sup> Exhibit C-2, Contract for Conversion to a Mixed Company between Corporación Venezolana del Petróleo, S.A., Petrobras Energía Venezuela, S.A., Petrobras Energía, S.A., APC Venezuela, S.R.L., Venezuela US SRL and Corod Producción, S.A. (3 August 2006) (“Conversion Contract”).

<sup>31</sup> *Ibid.*

to perform its corporate purpose. [ . . . ] In case the Shareholders' Meeting would authorize so, the Mixed Company will seek to obtain funding for its working capital and investment projects on terms and conditions deemed appropriate by its Shareholders' Meeting, which shall be in agreement with financial market standards and consistent with this Contract, the Business Plan referred to in Article 1.7, policies and procedures of the Mixed Company referred to in Article 1.9, and the Charter and Bylaws of the Mixed Company.<sup>32</sup>

92. Article 1.7 of the Conversion Contract further provides as follows:

The Mixed Company shall undertake its operations in accordance with the business plan attached hereto as Annex 1 (hereinafter the Business Plan). The work programs and budgets adopted on an annual basis pursuant to the Charter and By-Laws of the Mixed Company shall be consistent with such Business Plan, it being understood that the Business Plan may be amended by decision of the Shareholder's Meeting of the Mixed Company in accordance with its Charter and Bylaws.<sup>33</sup>

93. Additionally, Article 9 of the Conversion Contract provides as follows:

9.1 Capacity and Basic Representation from Parties. Each Party acknowledges that each one of the other Parties is entering into this Contract in its own name and in its capacity as a legal entity empowered to contract on its own behalf. [ . . . ]

9.2 Certain Practices. Each Party represents and guarantees to each one of the other Parties that neither such party, nor any of its affiliates, or any contractor or subcontractor of such Party, or any affiliate, employee, agent, or representative of any of the foregoing has, directly or indirectly, offered, promised, authorized, paid, or given money or anything of value to any officer or employee of any government or international or national public organization or to any political party, officer, or employee thereof, or to any candidate for public office, in order to influence his or her action or decision, or to gain any undue advantage, in connection with this Contract or any activity to be carried out hereunder. Each Party binds itself, with regard to any trading activity to be performed under this Contract, to require its contractor and subcontractors to abide by and comply with contractual clauses being substantially similar to those set forth in this Article 9.2. Each Party binds itself to: (i) keep appropriate internal controls; (ii) duly record all operations, (iii) comply with all applicable laws and that set forth in this Article 9.2. Each party shall immediately notify the Mixed Company about any failure to comply with that

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<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

set forth in this Article 9.2 and shall investigate and promptly cure such failure. Except in cases when such notice is received, each Party may assume that all other Parties comply with that set forth in this Article 9.2, that they keep appropriate internal controls, and that the factual, and financial information, as well as the information of any other nature furnished with regard to operations carried out by the Mixed Company is correct, complete, and accurate. No Party is hereby authorized in any way as to undertake, on behalf of any other Party, any measure that could result in the incorrect or inaccurate recording or reporting of assets, liabilities, or any other operation that could make such Party to be failing to comply with duties set forth in those laws applicable to operations to be carried out hereunder.<sup>34</sup>

94. Article 16 of Petroritupano's Articles of Incorporation and Bylaws provides as follows:

General and Special shareholders meetings shall be validly convened when more than fifty per cent (50%) of the Company's capital stock is represented, and shall decide with the favorable vote of more than fifty percent (50%) of the Company's capital stock, except in the case of resolutions requiring a qualified majority voting. [. . .]

(ii) Qualified majority: In order to make the following decisions, shareholders owning at least three fourths (3/4) of the capital stock of the Company must be present or represented by proxy, and the shareholders owning at least three fourths (3/4) of the shares of the Company's must vote in favour:

[. . .]

(e) Resolution on the disposal of all or a substantial part of the Company's assets through sale, gift, lease, barter, transfer or otherwise, except for the disposal of property in the ordinary course of business or assets that are no longer useful to the Company pursuant to the Business Plan, all of it in accordance with statutory provisions regarding reversion;

(f) Decide on the terms and conditions of any financing agreement in an amount greater than ten million United States of America dollars (US \$10,000,000) (or any group of lesser financing agreements which, together, exceed such amount), or its equivalent in other currency, as well as any modification thereto;

(g) Approval of or changes to the duly audited balance sheet and profit and loss statement based on the information provided by the Statutory Auditor; provided, however, that no

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<sup>34</sup> *Ibid.*

shareholder may withhold approval unless he can prove the existence of errors in those financial statements;

[. . .]

(j) Approval of any motion for change in the provisions regarding dividends and other distributions established in Article 32 of these Articles of incorporation and Bylaws;

(k) Approval of any motion for change in the Business Plan attached as Annex I to the Conversion Contract (as amended pursuant to this provision);

[. . .]

(o) Approval of any waiver of substantial rights, including the rights to develop Primary Activities in the Delimited Area pursuant to the Transfer Decree or the filing, commencement, termination, settlement or any other act related to or resulting from any litigation, procedure or judicial, arbitral or administrative claims in which the Company is a party, for an amount higher than one million United States dollars (US\$ 1,000,000), or its equivalent in other currencies;

[...].<sup>35</sup>

95. Article 32 of Petroritupano's Articles of Incorporation and Bylaws provides as follows:

Subject to Article 1.6(A) of the Conversion Contract, the dividends and other distributions specified in this Article 32 shall be paid *pro rata* to the number of shares issued, regardless of their Class. The Company's dividend policy, once the reserve requirements for the reserve funds mentioned in Article 30, its investment plans and its financial liabilities, tax liabilities, and any other obligations shall consist of an annual payment in cash of the maximum amount of dividends that is feasible, avoiding the unnecessary withholding of funds. The Company's distribution policy shall also include the payment of advanced dividends (loans to shareholders), capital reductions and premium repayments (which cannot be returned in the form of dividends) to pay shareholders, to the extent deemed feasible and prudent by the Board of Directors in light of the company's situation and outlook, out of funds not required for the aforementioned purposes. The Board of Directors shall consider the possibility of making such distributions at least on a quarterly basis. All payments of dividends, advances, capital reductions and premium repayments

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<sup>35</sup> Exhibit C-3, Articles of Incorporation and Bylaws of the Mixed Company Petroritupano, S.A., published in the Official Gazette No. 38.518 on 8 September 2006.

pursuant to this Article must be made by the Company to each shareholder registered as such at the time of the declaration or approval by immediate wire transfer within five (5) Days following the date of declaration or approval. All payments made to shareholders pursuant to this Article 32 shall be made in US Dollars through the accounts maintained by the company abroad. The right to receive payment will be triggered at the time the Shareholders' Meeting approves it. Under no circumstances will distributions be made to shareholders if the Company does not have available cash to pay for them.<sup>36</sup>

96. On 29 September 2006, the President of the Republic issued Decree No. 4798 by means of which Petroritupano was granted the right to develop the primary activities mentioned therein.<sup>37</sup>
97. On the same day, Petroritupano and PDVSA Petróleo, entered into a Hydrocarbons Purchase and Sale Agreement for the sale of the oil and gas produced in the "Delimited Area".<sup>38</sup>
98. On 4 April 2008, Anadarko Venezuela LLC ("**Anadarko**") and PetroFalcon Corporation ("**PetroFalcon**") executed a Sale and Purchase Agreement for the shares of Anadarko Venezuela Company<sup>39</sup> (which is the Claimant's sole shareholder<sup>40</sup>).
99. On 7 April 2008, the aforementioned acquisition was announced in the press: "On Monday, Venezuelan oil outfit PetroFalcon intends to acquire Anadarko Venezuela from Anadarko Petroleum for \$200.0 million in cash. The deal requires regulatory approval from the Venezuelan Ministry of Energy and Petroleum."<sup>41</sup>
100. On 11 June 2008, the Claimant requested the Ministry of Energy and Petroleum to authorize the change of indirect control in its capital stock so that Anadarko could sell its holding in Anadarko Venezuela Company to PetroFalcon.<sup>42</sup>

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<sup>36</sup> *Ibid.*

<sup>37</sup> Exhibit C-50, Decreto No. 4.798 mediante el cual se transfiere a la empresa Petroritupano, S.A., el derecho a desarrollar las actividades primarias de exploración que en él se señalan, Gaceta Oficial No. 38.533 (29 September 2006).

<sup>38</sup> Exhibit C-53, Contrato de Compraventa de Hidrocarburos entre Petroritupano, S.A. y PDVSA Petróleo, S.A. (29 September 2006).

<sup>39</sup> Exhibit C-54, Sale and Purchase Agreement between Anadarko Venezuela, LLC and PetroFalcon Corporation (4 April 2008).

<sup>40</sup> Exhibit C-22, Letter from L. Derrota (VUS) to Minister of Energy R. Ramírez (11 June 2008).

<sup>41</sup> Exhibit C-55, "Anadarko: Don't Cry for Me Venezuela", FORBES (7 April 2008).

<sup>42</sup> Exhibit C-22, Letter from L. Derrota (VUS) to Minister of Energy R. Ramírez (11 June 2008).



101. By letter dated 4 July 2008, PetroFalcon's Chairman notified PDVSA of the request for authorization made to the Ministry of Energy and Petroleum following the agreement of 4 April 2008.<sup>43</sup>
102. By e-mail dated 14 August 2008, the President of CVP informed VUS that PDVSA had decided to exercise a right to buy Anadarko's 18% interest in Petroritupano. According to him, they would "match the best offer" they received in the sale process.<sup>44</sup>
103. By letter dated 20 August 2008, Anadarko proposed a meeting to discuss the acquisition of its stake in Petroritupano.<sup>45</sup> On 1 September 2008, representatives of Anadarko and VUS met with representatives of PDVSA and CVP in Caracas.<sup>46</sup>
104. On 17 September 2008, the authorization for change of control requested by the Claimant was denied by the Minister of Energy and Petroleum.<sup>47</sup>
105. By letter dated 6 October 2008, PDVSA invited Anadarko to extend a formal offer for the sale of its interest in Anadarko Venezuela Company.<sup>48</sup>
106. By letter dated 15 October 2008, Anadarko answered PDVSA that it would sell its stake for US\$ 200 million.<sup>49</sup>
107. On 7 May 2009, a law that "reserves to the State the assets and services related to primary hydrocarbon activities" was enacted.<sup>50</sup>

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<sup>43</sup> Exhibit C-23, Letter from J.F. Clerico (PetroFalcon) to E. Del Pino (CVP) (4 July 2008).

<sup>44</sup> Exhibit C-24, E-mail from E. Del Pino (CVP) to T. Heinzler (VUS) (14 August 2008).

<sup>45</sup> Exhibit C-58, Letter from A. Richey to E. Del Pino (20 August 2008).

<sup>46</sup> Exhibit C-59, Letter from E. Del Pino to A. Richey (28 August 2008); Exhibit CWS-1, Witness Statement of Luis H. Derrota, ¶ 30; Exhibit CWS-3, Witness Statement of Joseph F. Carroll, ¶ 12.

<sup>47</sup> Exhibit C-25, Letter from Minister R. Ramírez to L. Derrota (VUS) (17 September 2008).

<sup>48</sup> Exhibit C-62, Letter of E. Del Pino (CVP) to S. Akers (Anadarko) and L. Derrota (VUS) (6 October 2008).

<sup>49</sup> Exhibit C-26, Letter from A. Richey to E. Del Pino (15 October 2008); Exhibit C-63, Letter from A. Richey to E. Del Pino, with attached commercial terms (15 October 2008).

<sup>50</sup> Exhibit C-65, Organic Law that Reserves to the State the Assets and Services Related to Primary Hydrocarbons Activities, Official Gazette No. 39.173 (7 May 2009).

108. From 2006 to 2009, Petroritupano was a profitable operation, with net profits of US\$ 146 million in 2006, US\$ 260 million in 2007, US\$ 341 million in 2008, and US\$ 177 million in 2009.<sup>51</sup>
109. On 9 April 2010, the Shareholders' Assembly of Petroritupano "unanimously approved ordering the distribution of Dividends for the period from January 01, 2008 to December 31, 2008, in the amount of [ . . . ] (US\$245,328,710.39)." <sup>52</sup> Those dividends were never distributed, notwithstanding the terms of Article 32 of Petroritupano's Articles of Incorporation and Bylaws.<sup>53</sup>
110. On 16 September 2010, CVP decided that Petroritupano would not pursue the collection of interest on delayed payments for oil deliveries.<sup>54</sup>
111. By the end of 2010, PDVSA Petróleo owed Petroritupano US\$ 681.79 million for the oil it received.<sup>55</sup> That year, Petroritupano suffered a US\$ 243 million after-tax loss and took a loan from PDVSA in the amount of US\$ 24.8 million.<sup>56</sup>
112. On 24 January 2011, CVP approved a moratorium on penalty interest for unpaid oil deliveries.<sup>57</sup>
113. On 4 April 2011, the shareholder's assembly of Petroritupano "unanimously approved ordering the distribution of Dividends corresponding to the period from January 1, 2009 to December 31,

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<sup>51</sup> Exhibit CER-1, Expert Report of Brent Kaczmarek, Navigant Consulting (30 September 2014) ("Navigant Report"), ¶46, Appendix C – Petroritupano Financial Statements.

<sup>52</sup> Exhibit C-67, Petroritupano Shareholders Resolution (9 April 2010).

<sup>53</sup> Memorial, ¶ 70; Exhibit C-3, Articles of Incorporation and Bylaws of the Mixed Company Petroritupano, S.A., published in the Official Gazette No. 38.518 on 8 September 2006. Article 32 states that "All payments of dividends, advances, capital reductions and premium repayments pursuant to this Article must be made by the Company to each shareholder registered as such at the time of the declaration or approval by immediate wire transfer within five (5) Days following the date of declaration or approval."

<sup>54</sup> Exhibit CER-1, Navigant Report, ¶ 106; NAV-16. Petroritupano Board of Directors' Meeting Minutes, 16 September 2010, p. 8.

<sup>55</sup> Exhibit CER-1, Navigant Report, ¶¶ 93-94: "At the end of 2006, Petroritupano had an accounts receivable balance of US\$ 526 million. The company's accounts receivable balance grew considerably in the following years, reaching a value of US\$ 925 million as of July 2014. [ . . . ] Despite its revenues decreasing [ . . . ], Petroritupano's accounts receivable balance grew from US\$ 628 million to US\$ 925 million over the same period. This trend indicates that PDVSA is taking longer and longer to pay Petroritupano for the oil it receives."

<sup>56</sup> *Ibid.*, ¶¶ 46, 77, Appendix C – Petroritupano Financial Statements.

<sup>57</sup> Presentation by Brent C. Kaczmarek, CFA Navigant Consulting, Inc., 28 November 2017, Slide 28; Exhibit C-2, Conversion Contract, Annex K, Clause 7; NAV-16, pp. 8-9; NAV-17, p. 18; NAV-18, p. 13; NAV-19, p. 7; NAV-75, Note 13, pp. 32-33.

2009, in the amount of [ . . . ] (USD 81,731,835.00).”<sup>58</sup> The Claimant asserts that those dividends were never distributed to it.<sup>59</sup>

114. On 19 May 2011, CVP reported at the Petroritupano Board of Directors that (i) the Minutes of the 9 April 2010 Shareholders meeting were in the hands of CVP’s President Mr. Eulogio Del Pino for signature and finalization, (ii) the Minutes of the 4 April 2011 meeting were submitted to the “CVP Corporate legal and finance departments for their approval”, and (iii) CVP Corporate received the funds necessary to pay Petrobras Argentina its share of the dividends for 2008 and 2009.<sup>60</sup>
115. According to the same report, in 2010, Petroritupano had an income of US\$ 507.143 million from crude oil sales and expenses of US\$ 95.137 million in operational costs, US\$ 53.436 million in depreciation and amortization, US\$ 10.387 million in general and administrative expenses, US\$ 56.966 million in currency fluctuations, US\$ 175.609 million in royalties and other taxes, US\$ 42.339 million in financial expenses, US\$ 5.931 million in other expenses, and US\$ 310.805 million in income tax, leading to a net loss of US\$ 243.466 million.<sup>61</sup> According to the Claimant, PDVSA and its affiliates “wrongfully manipulated Petroritupano’s finances to make it appear that Petroritupano had no profits and could not declare dividends”.<sup>62</sup>
116. In 2011, according to Petroritupano’s Financial Statements, Petrobras Argentina received its share of the dividends that were approved on 9 April 2010 and 4 April 2011,<sup>63</sup> and CVP received its dividends after the company proceeded to offset its accounts with PDVSA Petróleo. The portion

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<sup>58</sup> Exhibit C-69, Minutes of Petroritupano Shareholders Meeting (4 April 2011).

<sup>59</sup> Memorial, ¶ 71.

<sup>60</sup> Exhibit C-27, PDVSA PowerPoint presentation, Reunión Junta Directiva No. 27 Petroritupano, Gestión Enero-Abril 2011 (19 May 2011), Slides 93-94.

<sup>61</sup> *Ibid.*, Slide 98. The slide also shows the financial performance for fiscal year 2009: income of US\$ 484.139 million from crude oil sales, and expenses of US\$ 50.792 million in operational costs, US\$ 50.456 million in depreciation and amortization, US\$ 23.192 million in general and administrative expenses, US\$ 0 in currency fluctuations, US\$ 190.788 million in royalties and other taxes, US\$ 8.674 million in financial expenses, US\$ 27.376 million in other expenses, with US\$ 43.858 million recovered from income tax credits, leading to a net profit of US\$ 176.872 million.

<sup>62</sup> Memorial, ¶ 78.

<sup>63</sup> It was noted that “[t]he portion corresponding to the shareholders Petrobras Argentina S.A. for \$17,981,000 (Bs. 77,318,000) was paid during 2011, together with the dividend indicated in the previous paragraph” Exhibit C-73 Petroritupano, S.A. Audited Financial Statement for 31 December 2011 (20 July 2013) at p. 25. According to Claimant this was confirmed by the summary of Petroritupano dividends paid between 2006 and 2012 that was produced by the Respondent, see Reply, ¶ 12.

corresponding to the Claimant was noted as pending in the accounts payable to the shareholders.<sup>64</sup> According to Claimant, this was the last audited financial statement to be issued.

117. In April 2012, according to a press report, Minister Ramírez referred to a policy not to distribute dividends to foreign partners until they have signed their share of capital funding to increase production capacity:

according to Rafael Ramírez, PDVSA's minority shareholders will not receive dividend payments until they have provided the state-owned oil company a plan to increase production by more than 50 percent in 2015 [ . . . ] Minister Ramírez said 'it's logical that if we invite someone to become a shareholder with a contribution of over 40%, they must contribute to all the shares, or in other words, we would be subsidizing minority shareholders, which we will not do.'<sup>65</sup>

118. On 4 May 2012, the President of the Republic issued a Decree on the National Savings Fund and the Popular Savings Fund in which he ordered PDVSA to create PDVSA Social as its affiliate in order to support the operation of the National Savings Fund.<sup>66</sup> The new entity was ordered to hold 4% of the shares owned by PDVSA or its affiliates in the mixed companies created pursuant to the Hydrocarbons Law.
119. By letter dated 17 October 2012, CVP's President notified the Claimant that it would transfer 4% of its Class A shares in Petroritupano to PDVSA Social.<sup>67</sup>
120. In October 2013, Mr. Rafael Ramírez was appointed as Vice President of the Area of Economics within the Council of Revolutionary Ministers.<sup>68</sup>

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<sup>64</sup> Exhibit C-73, Petroritupano, S.A. Audited Financial Statement for 31 December 2011 (20 July 2013) at p. 25.

<sup>65</sup> Exhibit C-33, PETROLEUM WORLD.COM, "PDVSA Cero pago a Socios" (20 April 2012).

<sup>66</sup> Exhibit C-17, Decreto con Rango, Valor y Fuerza de Ley Orgánica relativa al Fondo de Ahorro Nacional de la Clase Obrera y al Fondo de Ahorro Popular, Gaceta Oficial No. 39.915 (4 May 2012), Article 21.

<sup>67</sup> Exhibit C-18, Letter from CVP (E. Del Pino) to VUS (S. Akers) regarding transfer of interest to PDVSA Social (17 October 2012).

<sup>68</sup> Exhibits C-31, Presidential Decree No. 457, GACETA OFICIAL No. 40.266 (7 October 2013); C-32 WALL STREET JOURNAL, "Venezuela Names Oil Minister Ramírez as Economic Vice President" (8 October 2013).

121. In 2014, Mr. Rafael Ramírez was removed from his previous positions and was appointed as Foreign Minister.<sup>69</sup> Mr. Asdrubal Chavez replaced him as Minister of Petroleum and Mr. Eulogio Del Pino was promoted to President of PDVSA.<sup>70</sup>
122. By late 2014, Petroritupano's revenues had decreased from US\$ 1.05 billion in 2008 to US\$ 352 million in 2014.<sup>71</sup> Although the company earned US\$ 144 million in net profits in 2011, profits sharply declined thereafter, with net losses of US\$ 197 million in 2013 and US\$ 50 million in the first seven months of 2014.<sup>72</sup>

#### IV. RELEVANT LEGAL PROVISIONS

##### A. THE TREATY

123. The following are the relevant provisions of the Treaty:

*Article 1*

*Definitions*

For the purposes of this Agreement:

(a) "investment" means every kind of asset invested by nationals or companies of one Contracting Party in the territory of the other Contracting Party and in particular, though not exclusively, includes:

- (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
- (ii) shares in and stock and debentures of a company and any other form of participation in a company;
- (iii) claims to money or to any performance under contract having a financial value;

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<sup>69</sup> Exhibit C-44, "Venezuelan President Replaces Oil Minister Rafael Ramírez," WALL STREET JOURNAL (3 September 2014).

<sup>70</sup> *Ibid.*

<sup>71</sup> Exhibit CER-1, Navigant Report, ¶ 94, Appendix C – Petroritupano Financial Statements.

<sup>72</sup> *Ibid.*, ¶ 46, Appendix C – Petroritupano Financial Statements.

- (iv) intellectual property rights, goodwill, technical processes and know-how;
- (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments and the term “investment” includes all investments, whether made before or after the date of entry into force of this Agreement.

This agreement, however, does not apply to disputes arising from acts or occurrences which have taken place before its entry into force.

(b) “returns” means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties and fees;

(c) “nationals” means, in respect of each contracting party, physical persons deriving their status as nationals from the law in force in that Contracting Party;

(d) “companies” means, in respect of each Contracting Party, corporations, firms and associations incorporated or constituted under the law in force in that Contracting Party;

For the purposes of the Convention referred to in Article 8 “Company” shall include any company incorporated or constituted under the law in force in one Contracting Party which is owned or effectively controlled by nationals or companies of the other Contracting Party.

(e) “territory” means in respect of each contracting party, the territory thereof, the territorial sea and the exclusive economic zone designated under the national law of that contracting party in accordance with the international law as an area within which that contracting party has sovereign rights and jurisdiction to explore, exploit and preserve the natural resources.

## *Article 2*

### *Promotion and Protection of Investment*

1. Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its rights to exercise powers conferred by its laws, shall admit such capital.

2. Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment in accordance with the rules and principles of International law and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to the treatment of investments of nationals or companies of the other Contracting Party.

*Article 3*

*National Treatment and Most-favoured-nation Provisions*

1. Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

2. Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

3. The treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

*Article 5*

*Expropriation*

1. Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a

judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

2. Where a Contracting Party expropriates the assets of accompany which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party owns shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.

## **B. VIENNA CONVENTION ON THE LAW OF TREATIES**

124. It is also instructive to reproduce here the rules on the interpretation of treaties set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the “VCLT”). While Barbados is a Party to the VCLT, having ratified it on 24 June 1971, Venezuela is not. However, it is now well accepted that Articles 31 and 32 of the VCLT reflect customary international law,<sup>73</sup> and both Parties acknowledge that they govern the interpretation of the Treaty:

### *Article 31*

#### *General rule of interpretation*

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

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

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

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<sup>73</sup> See e.g. *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, 2001 ICJ REPORTS 466, p. 501, ¶ 99; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 ICJ REPORTS 43, pp. 109-110, ¶ 160.



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

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

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

*Article 32*

*Supplementary means of interpretation*

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

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

**C. ILC ARTICLES ON STATE RESPONSIBILITY**

125. In their arguments on attribution, the Parties have also extensively cited Articles 4, 5 and 8 of the Articles on Responsibility of States adopted by the International Law Commission (the “**ILC Articles**”), reproduced here below:

*Article 4*

*Conduct of organs of a State*

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

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

*Article 5*

*Conduct of persons or entities exercising elements of governmental authority*

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

*Article 8*

*Conduct directed or controlled by a State*

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

**V. Requests for Relief**

**A. CLAIMANT'S REQUEST FOR RELIEF**

126. The Claimant requests that the Tribunal grant the following relief:

- a. A declaration that Venezuela has violated the BIT in connection with its treatment of VUS and VUS' investment;
- b. An award of damages in compensation for the full amount of damages suffered by VUS due to Venezuela's unlawful expropriation, to be determined by the Tribunal following the damages phase of the proceeding;
- c. Alternatively, in the event the Tribunal does not find an expropriation, then an award of damages in compensation for the full amount of damages suffered by VUS due to Venezuela's breaches of its other BIT obligations, to be determined by the Tribunal following the damages phase of the proceeding;
- d. An award of all costs and fees incurred in connection with the prosecution of this arbitration, to be determined by the Tribunal following the damages phase of the proceeding;
- e. An award of interest on any compensatory amounts until the date of full satisfaction of the award, at a rate to be determined by the Tribunal in accordance with the BIT; and

f. Such other and further relief to which VUS may be justly entitled.<sup>74</sup>

**B. RESPONDENT’S REQUEST FOR RELIEF**

127. The Respondent requests that the Tribunal grant the following relief:

For the reasons set forth above, all claims brought by Claimant in this Arbitration are outside the jurisdiction of this Tribunal and inadmissible. Therefore, all claims should be dismissed and this Tribunal should order Claimant to reimburse Respondent for all costs and expenses, including legal fees, relating to this Arbitration.<sup>75</sup>

**C. TRIBUNAL’S PRELIMINARY OBSERVATIONS**

128. It appears from the Respondent’s requested relief that in its view the Tribunal is without jurisdiction to consider “all claims brought by Claimant”<sup>76</sup> and that the claims are inadmissible. The Respondent concludes that “therefore, all claims should be dismissed”.<sup>77</sup>

129. The Tribunal discerns some contradiction in the Respondent’s position. If the Tribunal is without jurisdiction, it cannot rule on the Claimant’s claims and dismiss them. It can just declare itself without jurisdiction to consider the claims. It can eventually take a decision on the costs of the proceedings and close the case.

**VI. REMAINING ISSUES ON JURISDICTION AND LIABILITY**

130. The main argument advanced by the Respondent against the Tribunal’s jurisdiction is that the actions of PDVSA and its affiliates complained of by the Claimant are not attributable to Venezuela. The Respondent submits that “the obligations and alleged breaches asserted by Claimant exclusively relate to obligations either of CVP as a shareholder in Petroritupano or of Petroritupano itself in connection with the payment of dividends and the financial situation of Petroritupano.”<sup>78</sup>

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<sup>74</sup> Reply, ¶ 152.

<sup>75</sup> Rejoinder, ¶ 125.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

<sup>78</sup> Counter-Memorial, ¶ 20.

## A. ATTRIBUTION

### 1. Claimant's Position

131. The Claimant asserts that the conduct of PDVSA and its affiliates is attributable to Venezuela under Articles 4, 5 and 8 of the ILC Articles, as well as under the structural and functional tests that inform the application of these provisions.<sup>79</sup> The Claimant adds that, although “a breach of a contract between an investor and a State-owned entity may certainly be attributed to the State if it amounts to a breach of an international obligation”, the Claimant’s claims in this case “allege breaches of Venezuela’s obligations under the BIT, and the wrongful conduct [. . .] goes well beyond breach of contractual obligations.”<sup>80</sup> Additionally, according to the Claimant, “[n]either the ILC Articles nor relevant international law precedent require an ‘act by act’ recitation of the acts attributable to the State or that the victim of this conduct identify which act falls under what rule of attribution.”<sup>81</sup>
132. According to the Claimant, PDVSA can be considered as a *de facto* organ of the Government of Venezuela under Article 4 of the ILC Articles and, as such, its actions are attributable to the State regardless of its classification, position, or functions.<sup>82</sup> The Claimant asserts that PDVSA is used by the State to control and operate “all aspects of hydrocarbons exploration, development, production, and sale in Venezuela.”<sup>83</sup>
133. The Claimant argues that, pursuant to the Constitution, Organic Law of Public Administration,<sup>84</sup> the Hydrocarbons Law, and PDVSA’s articles of incorporation and bylaws, hydrocarbons exploration and production is reserved to the State in the first instance, but then delegated to PDVSA and its subsidiaries through the Venezuelan Energy Ministry, which has express power:
- (i) to define the company’s policies; (ii) to exercise coordination, supervision, and control functions over the company on a permanent basis; (iii) to evaluate, on a continuous basis, the company’s performance and management and report to the President of the Republic;
  - (iv) to inform the national planning entity, on a quarterly basis, of the company’s

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<sup>79</sup> Memorial, ¶ 118.

<sup>80</sup> Reply, ¶ 55.

<sup>81</sup> *Ibid.*, ¶ 84.

<sup>82</sup> Memorial, ¶¶ 115, 127-136; Reply, ¶ 60.

<sup>83</sup> *Ibid.*, ¶ 127; Reply, ¶ 61.

<sup>84</sup> Exhibit C-16, Organic Law of Public Administration, enacted on 31 July 2008.

execution of its plans; and (v) to propose to the President of the Republic any necessary modifications to create, modify, or eliminate the State-owned company.<sup>85</sup>

134. Similarly, the Executive appoints and dismisses PDVSA's President and the members of its Board of Directors. The Claimant highlights that the Energy Minister and the PDVSA's President have been the same person for most of the period in question.<sup>86</sup>
135. The Claimant also points to numerous official statements by the Executive, the Energy Ministry, the Venezuelan Supreme Court, and PDVSA and its subsidiaries themselves wherein PDVSA and its subsidiaries are described as affiliates to the Government of Venezuela and subordinated to the Venezuelan State.<sup>87</sup> According to the Claimant, PDVSA stopped acting as a commercial company with the Chávez administration's "revolution" and that "nothing in Petroritupano's or the PDVSA companies' conduct could be considered routine commercial activities with a view of being profitable."<sup>88</sup>
136. The Claimant provides various examples of analogous cases where tribunals have found the acts of State-owned enterprises attributable to the State notwithstanding their independent legal personality.<sup>89</sup> The Claimant asserts that "PDVSA's role in support of the [Government of

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<sup>85</sup> Memorial, ¶¶ 129, 138-143; Reply, ¶ 61; Hearing Transcript (28 November 2017), 48:10-51:3; Exhibit C-40, Venezuelan Constitution, Articles 302-303; Exhibit C-16, Organic Law of Public Administration, enacted on 31 July 2008; Exhibit C-5, Hydrocarbons Law, Articles 1, 5, 8, 9, 22; Exhibit C-9, PDVSA Articles of Incorporation, Presidential Decree No. 1.123, Gaceta Oficial No. 1.770 Extraordinario (30 August 1975); Exhibit C-76, PDVSA Bylaws, Decree No. 8327 (24 May 2011).

<sup>86</sup> Memorial, ¶¶ 130, 132, 137; Reply, ¶¶ 65, 99-106; Hearing Transcript (28 November 2017), 40:4-13, 51:4-53:5. The Claimant adds that President Maduro recently "appointed a new Board of Directors for PDVSA and made changes to PDVSA's senior management", and that his new appointments "were more notable for their loyalty to the Chavismo movement and their lack of experience in the oil industry." Reply, ¶ 104. Exhibit C-155, "PDVSA: Maduro names general to head Venezuela oil firm", BBC.com (26 November 2017); Exhibit C-156, Irina Slav "Maduro Tightens Grip On PDVSA As Production Plunges", Oilprice.com (27 November 2017); Exhibit C-157, Alexandra Ulmer & Delsev Buitrago, "New Venezuela oil boss to give military more PDVSA posts", Reuters (27 November 2017).

<sup>87</sup> Memorial, ¶¶ 132-134; Reply, ¶¶ 62-66; Hearing Transcript (28 November 2017), 53:6-54:5; Exhibit C-77, Excerpt from Ministry of Energy and Mines of Venezuela, listing PDVSA and its affiliates as the Ministry's 'affiliated entities' (16 September 2014); Exhibit C-78, Excerpt from Ministry of Energy and Mines of Venezuela website, describing PDVSA as a 'National Company, subject to the Venezuelan State' (16 September 2014); Exhibit C-80, Statements of Minister Rafael Ramírez before the Venezuelan National Assembly with respect to PDVSA –Exxon Mobil Arbitration (14 February 2008); Exhibit C-11, Excerpt from PDVSA website, "About PDVSA: Petróleos de Venezuela"; Exhibit C-15, Excerpt from PDVSA website, "Plena soberanía, Auténtica nacionalización"; Exhibit C-108, "10 años de Plena Soberanía Petrolera Venezuela, Venezuela: De asociaciones y convenios imperiales a empresas nacionales" Article from PDVSA website (May 2017).

<sup>88</sup> Memorial, ¶ 134; Reply, ¶ 73; Hearing Transcript (28 November 2017), 54:6-25; Exhibit CER-1, Navigant Report; Exhibit CER-2, Supplemental Report Of Brent C. Kaczmarek, Navigant Consulting, (16 June 2016).

<sup>89</sup> Memorial, ¶¶ 120-125; Exhibit CLA-21, *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objection to Jurisdiction, 25 January 2000, ¶ 77-89; Exhibit CLA-60,

Venezuela] is more pervasive and integral than any of the situations addressed by the tribunals in the[se] cases.”<sup>90</sup> In particular, the Claimant cites the decisions adopted in *Ampal American v. Egypt* and *Flemingo Duty Free Shop v. Poland*, which in its view support the proposition that “[i]n every respect other than their nominal legal form, PDVSA and its subsidiaries form, and act as, part of the Venezuelan State.”<sup>91</sup>

137. Even if PDVSA and its subsidiaries were not deemed *de facto* State organs under Article 4 of the ILC Articles, the Claimant contends that their conduct is attributable to the Respondent under Article 5 of the ILC Articles because they were exercising governmental authority as authorized by law.<sup>92</sup> According to the Claimant,

it is important to recognize the breadth of PDVSA’s sovereign authority, which encompasses all activities in the exploration, production, and exploitation of hydrocarbons, acts reserved solely to the State. In addition to the facts mentioned above, by statute PDVSA and CVP control and manage all aspects of the Mixed Companies. Also by statute, the Mixed Companies are required to sell their production to PDVSA Petróleo, which serves its own role in the sovereign scheme. The acts by PDVSA and its subsidiaries of which Claimant complains [ . . . ] all fall within the scope of this sovereign authority over the petroleum sector and the Mixed Companies.<sup>93</sup>

138. In the further alternative, the Claimant asserts that PDVSA’s and its affiliates acts are attributable to Venezuela under Article 8 of the ILC Articles because, even if they were to be considered as

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*EnCana Corp. v. Ecuador*, LCIA Case No. UN3481, Award, 3 February 2006, ¶ 154; Exhibit CLA-62, *Wintershall A.G. v. Government of Qatar*, UNCITRAL, Partial Award on Liability, 5 February 1988, and Final Award, 31 May 1988, 28 I.L.M. 798, 811 (1989); Exhibit CLA-38, *Wena Hotels Ltd. v. Egypt*, ICSID Case No. ARB/98/4, Award, 4 I.L.M. 896 (2002), 8 December 2000, ¶ 65-69; Exhibit CLA-63, *Helnan Int’l. Hotels A/S v. Egypt*, ICSID Case No. ARB/05/19, Decision on Jurisdiction, 17 October 2006, ¶ 82-94; Exhibit CLA-66, *Chevron Bangladesh Block Twelve, Ltd., and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People’s Republic of Bangladesh*, ICSID Case No. ARB/06/10, Award, 17 May 2010, ¶ 144-148; Hearing Transcript (28 November 2017), 38:2-39:18.

<sup>90</sup> Memorial, ¶ 126.

<sup>91</sup> Reply, ¶¶ 67-69; Hearing Transcript (28 November 2017), 41:23-43:19; Exhibit CLA-62, *Wintershall A.G. v. Government of Qatar*, UNCITRAL, Partial Award on Liability, 5 February, 1988, 28. I.L.M. 798 (1989), p.1; Exhibit RLA-162, *Wintershall A.G., et al. v. Government of Qatar*, UNCITRAL Final Award, 31 May 1988, 28 I.L.M. 833 (1989), ¶ 3; Exhibit RLA-163, *Ulysseas, Inc. v. The Republic of Ecuador*, PCA Case No. 2009-19, Interim Award, 28 September 2010, ¶ 156; Exhibit CLA-159, *Ampal-American Israel Corp, EGI Series Investors LLC, EGI-Fund (08-10) Investors LLC, and BSS-EMG Investors LLC v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶¶ 135-139; Exhibit CLA-158, *Flemingo Duty Free Shop Private Limited v. The Republic of Poland*, PCA Case No. 2014-11, Award, 12 August 2016.

<sup>92</sup> Memorial, ¶ 116; Reply, ¶¶ 70-74.

<sup>93</sup> Reply, ¶ 71.

private entities, they were acting under the instructions, direction and control of the Government of Venezuela to achieve a particular result.<sup>94</sup> According to the Claimant, even the “Respondent does not assert that the PDVSA companies acted on their own initiative and without direction from the [Government of Venezuela] with respect to the wrongful acts and omissions resulting in harm to VUS and ultimately in the expropriation of VUS’s investment.”<sup>95</sup> Thus, while the Claimant admits that “[i]t is true that Claimant does not have in hand a piece of paper in which the [Government of Venezuela] directed PDVSA to pay the Petroritupano dividends to Petrobras, directing CVP to engage in its manipulations to pay itself, or directing PDVSA not to pay dividends to VUS,” it should be inferred that such actions were directed or controlled by the State.<sup>96</sup> In addition, the Claimant argues that the Respondent has not offered any contrary evidence, despite ample opportunities to do so.<sup>97</sup>

139. Finally, the Claimant affirms that, events since 2014 and up to the date of its Reply confirm that PDVSA and its affiliates exercise sovereign authority and act under the direction and control of the State.<sup>98</sup> The Claimant cites the example of the Petromonagas deal where, it asserts, the Venezuelan Supreme Court held that there is no impediment for the Executive to incorporate mixed companies under the umbrella of PDVSA, and that it can delegate to PDVSA the exercise of sovereign authority on behalf of the Executive.<sup>99</sup>

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<sup>94</sup> Memorial, ¶ 117; Reply, ¶¶ 75-84.

<sup>95</sup> Reply, ¶ 78.

<sup>96</sup> *Ibid.*, ¶ 81; Hearing Transcript (28 November 2017), 55:1-60:18. The Claimant adds that the “lack of documentation only goes to show the depth of the [Government of Venezuela’s] control over PDVSA and its subsidiaries, and the lack of any true separation among them.” Reply, ¶ 83; Hearing Transcript (28 November 2017), 57:11-15.

<sup>97</sup> Hearing Transcript (28 November 2017), 60:19-62:8.

<sup>98</sup> Reply, ¶¶ 85-97. The Claimant contends as well that “one way in which the [Government of Venezuela] plans to assure its continued control over PDVSA and the hydrocarbons sector is by injecting the Venezuelan military into PDVSA and its operations” by creating the Compañía Anónima Militar de Industrias Mineras, Petrolíferas y de Gas, to provide security to PDVSA. The Claimant asserts they’re working together to “achieve the [Government of Venezuela’s] political aims”. Reply, ¶¶ 107-108. The Claimant notes as well that Venezuela’s national strategic plan insists on the importance of consolidating sovereignty over natural resources by, among others, maintaining and guaranteeing control over PDVSA, and ensuring State hegemony over national oil production. See Exhibit C-95, Ley del Plan de la Patria, Segundo Plan Socialista de Desarrollo Económico y Social de la Nación 2013-2019, Gaceta Oficial No. 6.118 Extraordinario (4 December 2013). Additionally, the Claimant asserts that the strategic plan of PDVSA defines its existence in terms of the [Government of Venezuela’s] Socialist political philosophy, and states that “it acts according to guidelines and policies it receives from the Energy Ministry, on behalf of the National Executive, representing its sole shareholder.” Reply, ¶112.

<sup>99</sup> Reply, ¶ 94; Hearing Transcript (28 November 2017), 46:23-49:1, referring to Exhibit C-93, Decision No. 156, Supreme Tribunal of Justice, Constitutional Chamber (29 March 2017).

## 2. Respondent's Position

140. In the Respondent's view, the alleged obligations and breaches relate exclusively to "obligations either of CVP as a shareholder in Petroritupano, or of Petroritupano itself in connection with the payment of dividends and the financial situation of Petroritupano."<sup>100</sup> Therefore, these acts cannot be attributed to Venezuela and the Claimant's claims are inadmissible.<sup>101</sup>
141. The Respondent asserts that, according to the Claimant, PDVSA, its affiliates and Petroritupano are simultaneously State organs, non-governmental entities exercising governmental authority and private corporations acting under the instruction or control of the State, which are mutually exclusive positions. The Respondent adds that, in any case, Articles 4, 5 and 8 "cannot form the basis for attributing contractual obligations to a State that were entered into by separate legal entities and are governed by domestic law; [ . . . ] even if the contracting entities are directly or indirectly controlled by the State."<sup>102</sup>
142. The Respondent highlights that Venezuela was not a party to the Conversion Contract and argues that "[i]nternational law differentiates between a State's responsibility for breaches of contractual undertakings given to foreign nationals by the State itself and a State's responsibility for breaches of a contract to which it is not a party."<sup>103</sup> Therefore, the State cannot be held liable for a breach of a contract it has not entered into unless "the act is (i) attributable to the State and (ii) inconsistent with the State's international law obligations."<sup>104</sup> According to the Respondent, "since there is no allegation that a breach of the Conversion Contract could amount to a breach of an international obligation of the state, one of the two requisite elements for a wrongful act to exist, the rules on attribution in the ILC Articles are not applicable to this case."<sup>105</sup>

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<sup>100</sup> Counter-Memorial, ¶ 20; Hearing Transcript (28 November 2017), 78:18-80:3, 108:8-17; Hearing Transcript (29 November 2017), 263:8-24.

<sup>101</sup> Hearing Transcript (29 November 2017), 257:1-7. Exhibit C-93. Decision No. 156, Supreme Tribunal of Justice, Constitutional Chamber (29 March 2017).

<sup>102</sup> Counter-Memorial, ¶ 21; Hearing Transcript (29 November 2017), 259:7-260:22.

<sup>103</sup> Counter-Memorial, ¶¶ 23-24; Rejoinder, ¶ 41. The Respondent notes that the parties to the Conversion Contract are CVP, Petrobras Energía Venezuela S.A., Petrobras Energía S.A., APC Venezuela S.R.L, Venezuela US S.R.L and Corod Producción, S.A., and as established in article 9.1 "Each party acknowledges that each one of the other Parties is entering into this Contract in its own name and in its capacity as a legal entity empowered to contract on its own behalf." Exhibit C-2, Conversion Contract.

<sup>104</sup> Counter-Memorial, ¶ 23.

<sup>105</sup> *Ibid.*, ¶ 30.



143. The Respondent asserts that PDVSA, CVP, PDVSA Petróleo and Petroritupano cannot be considered State organs under Article 4 of the ILC Articles because they are not recognized as such by any Venezuelan law.<sup>106</sup> The Respondent explains that the companies were constituted as *sociedades anónimas* having separate legal personalities that have been recognized and affirmed by Venezuelan legislation, the Venezuelan Supreme Court, and Venezuelan legal experts.<sup>107</sup> In addition, the Respondent contends that the structural and functional criteria mentioned by the Claimant are not independent rules for attribution, but only “epistemological tools used to determine whether certain conduct may be attributed to a State pursuant to ILC Articles 4 or 5.”<sup>108</sup>
144. The Respondent argues that PDVSA and its affiliates cannot be considered *de facto* State organs either. According to the Respondent, “[t]he ICJ made clear in the *Nicaragua* and the *Bosnian Genocide* cases that a finding of a *de facto* organ cannot be made absent ‘complete dependence’ of the alleged organ on the State.”<sup>109</sup> The Respondent distinguishes the decisions cited by the Claimant and refers instead to the case of *Almas v. Poland*, where the tribunal differentiated between an institution that performs public functions and one that engages on its own in commercial activities even if they are important for the national economy.<sup>110</sup> In the Respondent’s view, the fact that the oil industry is reserved to the Venezuelan State only means that “private participation in that sector of the economy, although permitted, is limited and highly regulated.”<sup>111</sup>
145. The Respondent contends similarly that PDVSA, its affiliates and Petroritupano, did not exercise elements of governmental authority as to Petroritupano’s project, and emphasizes that Article 5 of the ILC Articles can only form the basis of attribution if the entity in question not only was empowered to exercise governmental authority but actually exercised it when performing the act to be attributed to the State.<sup>112</sup> The Respondent explains that the concept of governmental

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<sup>106</sup> *Ibid.*, ¶33, 62.

<sup>107</sup> *Ibid.*, ¶¶ 34-36; Rejoinder, ¶¶ 29-40; Hearing Transcript (28 November 2017), 85:16-92:5.

<sup>108</sup> Counter-Memorial, ¶ 59.

<sup>109</sup> Rejoinder, ¶ 70; Hearing Transcript (28 November 2017), 92:6-93:19, 109:3-117:17; Hearing Transcript (29 November 2017), 260:23-262:12; Exhibit RLA-190, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 1986 ICJ REPORTS 14, pp. 62-63, ¶¶ 109-110; Exhibit RLA-248, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007 ICJ REPORTS 43, pp. 204-205, ¶¶ 390-393.

<sup>110</sup> Counter-Memorial, ¶ 37; Rejoinder, ¶¶ 71-72; Exhibit RLA-149, *Kristian Almas and Geir Almas v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, ¶ 210.

<sup>111</sup> Counter-Memorial, ¶ ¶ 37-38; Rejoinder, ¶¶ 26-28; Hearing Transcript (28 November 2017), 83:15-23, 89:4-18; Hearing Transcript (29 November 2017), 267:20-271:3.

<sup>112</sup> Counter-Memorial, ¶¶ 39-40, 68-72; Hearing Transcript (28 November 2017), 118:4-119:24.

authority means “the authority to exercise sovereign prerogatives” and not just activities of a commercial nature routinely carried out by State companies.<sup>113</sup> The Respondent contends that the “Claimant cannot identify a single provision of Venezuelan law granting PDVSA and its affiliates specific governmental authority under which they were allegedly acting in connection with the actions that it alleges constitute wrongdoing by PDVSA, PDVSA Petróleo, CVP or Petroritupano.”<sup>114</sup> The Respondent argues that “the fact that Venezuelan law provides that all mixed companies must sell their oil to [PDVSA Petróleo] cannot mean that compliance with the law by mixed companies would transform the activity of selling oil into a function of a public character.”<sup>115</sup>

146. The Respondent distinguishes the cases cited by the Claimant as all relating to situations where the State (or its direct authorized agent) was party to the contract in question, as opposed to this case, where the Conversion Contract recognized that each party of them “enter[ed] into this Contract in its own name and in its capacity as a legal entity empowered to contract on its own behalf.”<sup>116</sup> The Respondent argues instead that the present case is analogous to that of *Amto v. Ukraine*, where the claim was rejected in the following terms: “[t]he origin of the Claimant’s claims is the non-payment of contractual debts by Energoatom. The payment or non-payment by a state entity of contractual debts owed to a service provider involves no exercise of sovereign authority or *puissance publique*, and cannot be attributed to the Ukraine.”<sup>117</sup> The Respondent concludes that “[i]f Claimant’s theory were correct, there would be no reason for any State-owned company to exist, as all contracts with state companies would then be deemed to be contracts with their governments and all acts of such companies would amount to State acts.”<sup>118</sup>
147. The Respondent further asserts that acting under the instructions, direction or control of a State does not automatically allow attribution under Article 8 of the ILC Articles, because it is necessary that “the conduct carried out under such direction or control breaches an international obligation of the State.”<sup>119</sup> The Respondent insists that obligations arising under the Conversion

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<sup>113</sup> Counter-Memorial, ¶¶ 41-42; Hearing Transcript (28 November 2017), 117:18-119:24.

<sup>114</sup> Counter-Memorial, ¶ 43; Rejoinder, ¶ 76; Hearing Transcript (29 November 2017), 264:21-25.

<sup>115</sup> Rejoinder, ¶¶ 77-78.

<sup>116</sup> Counter-Memorial, ¶¶ 64-66; Exhibit C-2, Conversion Contract, Article 9.1.

<sup>117</sup> Counter-Memorial, ¶ 44; Exhibit RLA-139, *Limited Liability Company AMTO v. Ukraine*, SCC Case No. 080/2005, Final Award, 26 March 2008, p. 61, ¶ 107.

<sup>118</sup> Counter-Memorial, ¶ 45.

<sup>119</sup> *Ibid.*, ¶¶ 47-49.

Contract and/or Petroritupano Bylaws are not international obligations of Venezuela, and that the fact that a State-owned entity is supervised by and reports to a State Ministry is not enough to attribute its acts to the State.<sup>120</sup>

148. To support its position, the Respondent cites the decision in *Amoco v. Iran*, where the tribunal considered the obligations allegedly breached to be obligations as between the parties, and not international obligations of the State.<sup>121</sup> It emphasized that the State-owned entity had individual legal personality and that, even if the activities developed by the oil company were considered to be of strategic national importance, the State did not want to participate directly in the industry.<sup>122</sup> Based on the *Amoco* decision, the Respondent insists that (i) obligations assumed by Petroritupano's shareholders cannot have any effect against a third party, (ii) regardless of Venezuela's control over PDVSA and its affiliates, they all have individual legal personalities, and (iii) it has not been proven that Venezuela instructed CVP to not pay the dividends.<sup>123</sup>
149. The Respondent notes that the lack of evidence of a governmental instruction ordering the performance of an act was decisive to deny State attribution in *Hamester v. Ghana*.<sup>124</sup> According to the Respondent, this position was confirmed by the tribunal in the *Almas* case, which held that "State instructions must have been given 'in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violation.'" <sup>125</sup> The Respondent therefore asserts that the "Claimant's allegations that the Republic had put in place a general policy of non-payment of dividends to foreign participants in *Empresas Mixtas* are insufficient to maintain a claim against Respondent."<sup>126</sup>
150. Furthermore, in the Respondent's view, the requirements for attribution set forth in Article 8 of the ILC Articles are in any event not met in this case, because it is necessary that the entity in

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<sup>120</sup> *Ibid.*, ¶¶ 50-51.

<sup>121</sup> *Ibid.*, ¶ 52; Exhibit CLA-36, *Amoco International Finance Corporation v. Islamic Republic of Iran*, Case No. 56, Partial Award No. 310-56-3, 14 July 1987, ¶ 164.

<sup>122</sup> Counter-Memorial, ¶ 53.

<sup>123</sup> *Ibid.*, ¶ 54.

<sup>124</sup> *Ibid.*, ¶ 55; Exhibit RLA-153, *Gustav F. W. Hamester v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 256.

<sup>125</sup> Counter-Memorial, ¶ 56; Exhibit RLA-149, *Kristian Almas and Geir Almas v. The Republic of Poland*, PCA Case No. 2015-13, Award, 27 June 2016, ¶ 268.

<sup>126</sup> Counter-Memorial, ¶ 56.

question actually acts according to the governmental instructions it received, but the Claimant “only points to alleged acts or omissions of either CVP or Petroritupano acting in their capacity as shareholders.”<sup>127</sup>

151. According to the Respondent, the Claimant has not met its burden of proof, having failed to provide any evidence of its claims and “simply cit[ing] its own description of the allegations in its submissions.”<sup>128</sup> The Respondent adds that the Claimant’s description does not support its arguments as it “basically refers to (i) how generally the hydrocarbons sector is organized in Venezuela, (ii) the unsurprising fact that the State formulates the energy policy of the nation, with which all the companies participating in the oil industry in Venezuela have to comply, and (iii) the fact that the Republic owns the shares of PDVSA, which is not even a shareholder in Petroritupano.”<sup>129</sup>
152. For the Respondent, the only act attributable to the Respondent was “the denial of the authorization for the change in control in Claimant, which the Ministry of Energy did in accordance with Article 6.3 of the Conversion Contract.”<sup>130</sup> The Respondent argues that the remaining acts complained of by the Claimant, namely the delay in payment of dividends and the alleged mismanagement of Petroritupano, were committed by CVP or Petroritupano and are explainable by the latter’s cash flow situation or other facts of the case.<sup>131</sup>

### 3. Tribunal’s Analysis

153. It is true that some tribunals have expressed the view that “[t]he issue of attribution relates both to the Tribunal’s jurisdiction and to the merits of [the] dispute”.<sup>132</sup> Another tribunal took the view that “[t]he question whether the issue of attribution is, in a given case, one of jurisdiction or of merits is not [. . .] susceptible of a clear-cut answer.”<sup>133</sup> It added that “in many instances,

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<sup>127</sup> *Ibid.*, ¶ 57; Hearing Transcript (28 November 2017), 104:21-108:17.

<sup>128</sup> Rejoinder, ¶¶ 48-58, 73-74, 78-83; Hearing Transcript (28 November 2017), 101:10-102:9, 107:9-108:7; Hearing Transcript (29 November 2017), 266:20-271:16.

<sup>129</sup> Rejoinder, ¶ 55 ; Hearing Transcript (28 November 2017), 83:6-14, 89:4-18.

<sup>130</sup> Rejoinder, ¶ 43.

<sup>131</sup> *Ibid.*, ¶¶ 44-47, 80-83.

<sup>132</sup> *Tulip Real Estate and Development Netherlands v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, 10 March 2014, ¶ 276.

<sup>133</sup> Exhibit RLA-153, *Gustav F.W. Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 140.

questions of attribution and questions of legality are closely intermingled, and it is then difficult to deal with the question of attribution without a full enquiry into the merits.”<sup>134</sup>

154. The Tribunal recalls that attribution is a concept of international law firmly rooted in the rules on State responsibility. According to the ILC, it is one of the elements of an internationally wrongful act of a State. According to Article 2 of the ILC Articles, entitled *Elements of an internationally wrongful act of a State*:

[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State.<sup>135</sup>

155. Both elements must be established in order to reach the conclusion that an internationally wrongful act has been committed by a State, engaging its international responsibility. Where there is a claim of a breach of an international obligation of a State under a BIT, the claimant has to prove (i) that the conduct complained of is, under international law, attributable to a State, i.e., under international law it is considered to be the conduct of a State; and (ii) that the obligation allegedly breached is an obligation which that State has undertaken under the applicable BIT. There is a breach only when the conduct of a State is not in conformity with what is required of it by an international obligation, provided that there are no circumstances precluding the wrongfulness.<sup>136</sup>

156. The Tribunal believes that, in the present case, it is more appropriate to consider the Parties’ arguments on attribution in the context of the merits rather than as an issue of jurisdiction. If the conduct complained of by the Claimant cannot be attributed to the Respondent, then there can be no breach of any of the Respondent’s obligations under the BIT and the “claims should be dismissed”<sup>137</sup>, as requested by the Respondent in its prayer for relief.

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<sup>134</sup> *Ibid.*, ¶ 143.

<sup>135</sup> ILC Articles, Article 2.

<sup>136</sup> ILC Articles, Articles 12, 20-25.

<sup>137</sup> Rejoinder, ¶ 125.

157. The Claimant alleges that the Respondent has, at least since 2009,<sup>138</sup> directly and through its State-owned companies acting under its direction or control, breached its obligations under the BIT and under international law.

158. More specifically, the Claimant alleges that Venezuela:

- (i) failed to guarantee fair and equitable treatment to the Claimant's investment;
- (ii) impaired the value of the Claimant's investment by arbitrary and discriminatory measures;
- (iii) failed to comply with the legal obligations it and its State-owned enterprises entered into with respect to the Claimant's investment; and
- (iv) denied the Claimant the value of its investment and improperly expropriated that investment, without compensation.<sup>139</sup>

159. The Tribunal will now consider these allegations. It observes at the outset that Venezuela can be held *responsible* only for conduct which is attributable to it under international law and which is not in conformity with what is required of it under the provisions of the BIT. However, before turning to the Claimant's allegations, the Tribunal still has another preliminary issue to deal with, namely the Respondent's contention that the Claimant's claims are inadmissible.<sup>140</sup>

## **B. REFERRAL OF DISPUTES TO THE VENEZUELAN COURTS**

### **1. Respondent's Position**

160. Even if the acts and omissions alleged by the Claimant were attributable to the Respondent, the Respondent contends that Claimant's claims remain inadmissible given that Claimant agreed to the condition, included in Annex A to the Conversion Contract, that the Venezuelan courts would decide any dispute related to Petroritupano.<sup>141</sup> In addition to this contention, such a condition is also rendered effective, according to the Respondent, through the BIT's "admission clause".<sup>142</sup>

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<sup>138</sup> Memorial, ¶ 2.

<sup>139</sup> *Ibid.*, ¶ 14.

<sup>140</sup> Rejoinder, ¶ 124.

<sup>141</sup> Counter-Memorial, ¶¶ 141-143; Hearing Transcript (28 November 2017), 80:11-23.

<sup>142</sup> Counter-Memorial, ¶¶ 145-146; Rejoinder, ¶¶ 119-122; Hearing Transcript (28 November 2017), 98:8-24, 144:1-146:8; Hearing Transcript (29 November 2017), 258:14-20.

The Respondent contends that the only answer the Claimant offers to this objection is based upon the decision in *Aguas del Tunari*, which, in its view, actually supports the position that a State can condition the admission of the investment on the resolution of related disputes by domestic courts and tribunals.<sup>143</sup>

## 2. Claimant's Position

161. The Claimant argues that the “Respondent’s argument subordinates the BIT to Venezuela’s national law” and contradicts the dispute resolution provision at Article 8 of the BIT, which expressly provides that disputes regarding its breach shall be submitted to international arbitration.<sup>144</sup> The inclusion of an admission clause in the BIT does not, according to the Claimant, subvert the effect of Article 8.<sup>145</sup> The Claimant asserts that the tribunal in *Aguas del Tunari, S.A. v. Republic of Bolivia* studied a broader admission clause and rejected the Respondent’s proposed interpretation.<sup>146</sup>

## 3. Tribunal's Analysis

162. Annex A to the Conversion Contract is a document by which the National Assembly of Venezuela approved the incorporation of the Mixed Company Petroritupano, S.A., between CVP, Petrobras Energía Venezuela, S.A., APC Venezuela, S.R.L., and Corod Producción, S.A. According to the Annex:

[t]he creation and operation of the Mixed Company Petroritupano, S.A., shall be subject to the following Terms and conditions:

[. . .]

12. The differences and controversies arising from the failure to perform the conditions, rules, procedures and actions that constitute the subject-matter of this document or arising

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<sup>143</sup> Rejoinder, ¶ 123; Exhibit CLA-157, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005.

<sup>144</sup> Reply, ¶¶ 45-50.

<sup>145</sup> *Ibid.*, ¶ 46.

<sup>146</sup> *Ibid.*, ¶¶ 50-53; Exhibit CLA-157, *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent’s Objections to Jurisdiction, 21 October 2005, ¶¶ 138-155.

from this document shall be settled in accordance with the legislation of the Bolivarian Republic of Venezuela and before its judicial authorities.<sup>147</sup>

163. In the view of the Tribunal, this clause establishes the exclusive jurisdiction of the Venezuelan judicial authorities for settling, in accordance with Venezuelan legislation, the dispute regarding the performance, conditions, rules and actions constituting “the subject-matter of this document”. The subject-matter of the document is the approval of the incorporation of the Mixed Company Petroritupano, S.A. and the establishment of the terms and conditions for its operation. The disputes regarding the document itself (i.e., the Annex to the Conversion Contract) also fall within the jurisdiction of the Venezuelan courts, as the phrase “[t]he differences and controversies [. . .] arising from this document” indicates.

164. In this context, it is necessary to quote Clause 11 of Annex A. It provides:

The other basic terms and conditions that shall govern Petroritupano, S.A., are in the Draft Contract for the Conversion into a Mixed Company and the draft Charter/By-laws which have been submitted for the review of this National Assembly, jointly with the report of the National Executive in relation to the incorporation of Petroritupano, S.A. and the Memorandum of Understanding between Corporación Venezolana del Petróleo, S.A., PDVSA Petróleo, S.A., Petrobras Energía Venezuela, S.A., APC Venezuela, S.R.L. and Corod Producción, S.A. dated March 31, 2006.

165. Accordingly, the differences and controversies arising from the failure to perform and comply with the basic terms and conditions of the Conversion Contract and Petroritupano Bylaws fall within the exclusive jurisdiction of the Venezuelan courts. This is in line with, and confirmed by, Article 7 of the Conversion Contract.<sup>148</sup> This article on applicable laws and jurisdiction provides that:

the Contract shall be governed by and construed in accordance with the laws of the Republic and any dispute or controversy that may arise with this Contract which cannot be solved by the Parties in a friendly way shall be exclusively submitted to the competent courts of the Republic.

166. From the above, it follows that disputes arising from the Conversion Contract and “from the failure to perform the conditions, rules, procedures and actions which constitute the subject-

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<sup>147</sup> Exhibit C-2(A), Acuerdo de la Asamblea Nacional of 4 May 2006.

<sup>148</sup> Exhibit C-2, Conversion Contract.



matter” of Annex A to the Conversion Contract or arising therefrom, are not admissible before this Tribunal, even if they may otherwise fall within its jurisdiction.

### C. ALLEGED BREACHES OF THE BIT

#### (a) *Fair and Equitable Treatment*

##### 1. Claimant’s Position

167. The Claimant contends that “Venezuela, directly and through PDVSA and its affiliates, has breached its obligations of fair and equitable treatment of VUS’s investment.”<sup>149</sup>

168. The Claimant asserts that fair and equitable treatment (“FET”) should “be interpreted as an autonomous standard in light of the specific language of the particular treaty.”<sup>150</sup> The Claimant points to the *Crystallex v. Venezuela* and *Vivendi v. Argentina* tribunals, which analyzed a similar formulation of the FET standard and held that the reference to the principles of international law in the treaty did not make the standard equal to the minimum standard of treatment.<sup>151</sup> In addition, the Claimant highlights that the *Crystallex* and *Gold Reserve* tribunals rejected the formulation of the standard in the *Neer* case cited by the Respondent.<sup>152</sup>

169. In any case, the Claimant asserts that “even under the FET standard Venezuela advocates, Respondent’s conduct breached, and continues to breach, its obligations to treat VUS and its investment fairly and equitably.”<sup>153</sup> The Claimant further explains that, according to international tribunals and scholars, the elements of FET include “the requirements not to violate the investor’s

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<sup>149</sup> Memorial, ¶ 144.

<sup>150</sup> *Ibid.*, ¶ 145; Reply, ¶ 129; Hearing Transcript (28 November 2017), 63:5-64:17.

<sup>151</sup> Reply, ¶¶ 118-119; Exhibit CLA-155, *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award, 4 April 2016, ¶¶ 491, 530; Exhibit CLA-131, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Resubmitted Case, Award, 20 August 2007, ¶ 7.4.6.

<sup>152</sup> Reply, ¶¶ 120-121; Hearing Transcript (28 November 2017), 64:18-66:24; Exhibit RLA-209, *L.F.H. Neer and Pauline E. Neer v. Mexico*, General Claims Comm. United States-Mexico, Docket No.136, Opinion, 15 October, 1926, 21 AM. J. OF INT’L. 555, 556 (1927); Exhibit CLA-155, *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/11/2, Award, 4 April 2016, ¶ 534; Exhibit CLA-162, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/09/1, Award, 22 September 2014, ¶ 567; Exhibit CLA-95, *Mondev Int’l. Ltd. v. United States*, ICSID Case No. ARB (AF)/99/2 (NAFTA), Award, 11 October 2002, ¶ 116; Exhibit CLA-75 *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004, ¶ 93; Exhibit CLA-163, *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, ¶ 491.

<sup>153</sup> Reply, ¶ 129.

legitimate expectations and to act in good faith toward the investor and investment.”<sup>154</sup> Additionally, the Claimant asserts that the analysis should be focused on the entirety of State’s treatment of the investment rather than on individual actions undertaken by the State.<sup>155</sup>

170. Focusing on the protection of the investor’s legitimate expectations, which it characterizes as a “dominant element of the standard”,<sup>156</sup> the Claimant asserts that a violation of FET does not require subjective bad faith on the part of the State: “a violation can be found even if there is a mere objective disregard of the rights enjoyed by the investor under the FET standard.”<sup>157</sup> The Claimant adds that the obligation to act in good faith with respect to the investment “constitutes a fundamental aspect” of FET, and “condemns conduct that is intentionally malicious or aimed at harming the investor.”<sup>158</sup>
171. With regards to its legitimate expectations, the Claimant contends that, when executing the Conversion Contract, “VUS reasonably expected that Venezuela would treat it fairly, would not unjustly discriminate against it, would cause PDVSA and its affiliates to abide by their contractual and other legal commitments, and would not interfere with VUS’s rights under those instruments. Venezuela did not act in accordance with any of these expectations.”<sup>159</sup> The Claimant further summarizes its claim as follows:

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<sup>154</sup> Memorial, ¶ 146; Reply, ¶ 122. The Claimant cites, among others, Exhibit CLA-56, *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF/00/2), Award, 29 May 2003, ¶ 348; Exhibit CLA-71, *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 302; Exhibit CLA-22, *MTD Equity Sdn. Bhd. v. Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 113-115; Exhibit CLA-72, *Eureko B.V. v. Poland*, Partial Award, 19 August 2005, ¶ 235; Exhibit CLA-2, *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 264; Exhibit CLA-73, *Occidental Exploration & Prod. Co. v. Ecuador*, LCIA Case No. UN 3467, Award, 1 July 2004, ¶¶ 183-185; Exhibit CLA-74, *Bayindir Insaat Ticaret Ve Sanay A.S. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶¶ 237-239.

<sup>155</sup> Memorial, ¶ 149-150; Reply, ¶ 127; Hearing Transcript (28 November 2017), 66:25-67:22.

<sup>156</sup> Memorial, ¶ 151; Reply, ¶¶ 123-124; Hearing Transcript (28 November 2017), 67:23-68:12; Exhibit CLA-71, *Saluka Investments BV v. Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 301-302; Exhibit CLA-86, Catherine Yannaca-Small, Fair and Equitable Treatment Standard: Recent Developments, in *Standards of Investment Protection* 112, 124-125 (A. Reinisch ed., 2008).

<sup>157</sup> Memorial, ¶ 153.

<sup>158</sup> Memorial, ¶¶ 154-156; Reply, ¶ 128; Hearing Transcript (28 November 2017), 68:13-70:7.

<sup>159</sup> Memorial, ¶ 159; Reply, ¶ 130; Hearing Transcript (28 November 2017), 70:8-20; Exhibit CWS-1, Witness Statement of Luis H. Derrota, ¶¶ 13, 24 (“Anadarko considered its options with respect to its existing substantial investment in and rights under the Oritupano Leona OSA and the changes imposed by Venezuela. Anadarko ultimately determined to proceed with the transition to the mixed company and to maintain its investment in Venezuela. Acting in good faith, representatives of Anadarko and Petrobras negotiated with PDVSA the terms of the agreements for the conversion from the OSA to the new *empresa mixta*. [. . .] VUS entered into the Conversion Contract and its related instruments in good faith and with the expectation that the parties would perform the

Anadarko recognized that the Chávez government was hostile to what it perceived as foreign control over petroleum exploration and production. However, in determining to continue VUS's investment in Venezuela as a shareholder in the Petroritupano *empresa mixta*, Anadarko's management expected that the [Government of Venezuela] would abide by the new investment framework the [Government of Venezuela] had designed and enacted. The [Government of Venezuela] had, after all, already restructured the foreign participants' interests to achieve its goal of full control over exploration and production activities in Venezuela. The [Government of Venezuela] and PDVSA had created the forms for the conversion contracts and related instruments governing the *empresas mixtas* containing the basic assurances and protections for minority shareholders upon which VUS relied. And, Venezuela had approved the specific terms of the Conversion Contract and related instruments negotiated and agreed to by PDVSA's affiliates.

It was reasonable for VUS to rely on the [Government of Venezuela's] and PDVSA's representations and contractual commitments and to expect them to honor those commitments. Venezuela, however, breached its commitments, operated its State organs for its own benefit in derogation of VUS's rights, and frustrated VUS's legitimate expectations. That conduct violated the fair and equitable treatment Venezuela promised to accord to VUS under the BIT.

Venezuela's conduct, directly and through PDVSA and its affiliates, further leaves no doubt it has not acted in good faith in its treatment of VUS's investment.

Venezuela, through PDVSA and its affiliates, intentionally chose not to distribute to VUS its share of Petroritupano's declared dividends, while Venezuela opted, for political

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related agreements according to their terms and the applicable law. VUS expected that Venezuela would treat VUS and its investment fairly and equitably on a going-forward basis following the migration to the *empresa mixta*, and that Venezuela would ensure that its state-owned and controlled companies abided by their obligations in regard to VUS and its investment"); Exhibit CWS-2, Witness Statement of Robert P. Daniels, ¶¶ 9, 16-17 ("Anadarko's management was not in favor of the [Government of Venezuela]-mandated transition from the OSA to the *empresa mixta* and we considered our options with respect to the Venezuela investment. [ . . . ] As negotiations continued, the Anadarko negotiators reported to me that the [Government of Venezuela]/PDVSA negotiators appeared to be negotiating reasonably and in good faith, within the confines of their directions from the [Government of Venezuela]. The [Government of Venezuela ] and PDVSA put together the *empresa mixta* structure and set the basic terms of the related agreements, and we expected that they would abide by the legislative and contractual structure they had created. I believe that if they agreed to the terms and signed the contracts, they would execute their contractual commitments and perform the agreements as written and agreed. In August 2006, VUS and APC Venezuela executed the Conversion Contract, VUS entered into the Petroritupano shareholder relationship in good faith and with the expectation that the investment would be reasonably successful and profitable going forward. At the same time, Anadarko and VUS expected that the [Government of Venezuela], directly and through PDVSA and its affiliates, would honor its commitments to VUS as a minority shareholder in Petroritupano and as a Barbadian investor in Venezuela.").

expediency, to distribute to Petrobras, the other foreign shareholder, Petrobras's share of those dividends. Venezuela also distributed its share of those dividends to itself, as a credit from PDVSA Petróleo to PDVSA CVP. But it pocketed VUS's share for its own use.

Venezuela then caused or allowed its State organs, PDVSA and its affiliates, to manipulate Petroritupano's oil sales and purchases to starve Petroritupano of income while causing it to incur very sizable unauthorized debt. PDVSA Petróleo has taken hundreds of millions of dollars in oil without paying for it, while PDVSA CVP caused Petroritupano to accept loans from PDVSA to pay for operating expenses, without shareholder approval. Venezuela engaged in financial obfuscation and manipulation to make it appear Petroritupano suffered losses in order to avoid having to pay dividends to the minority shareholders, denying VUS any return on its investment. It has failed to provide audited financial statements for recent years, declared neither profit nor loss, and not addressed dividends at all.

Venezuela also did not act in good faith with respect to the sale of the investment. Minister Ramírez denied consent to the indirect transfer of control of VUS's Petroritupano shares to a qualified third-party buyer, without giving any reasons for the denial, at the same time PDVSA said it would buy those shares for the same price as PetroFalcon had agreed to pay. PDVSA did not engage in good faith negotiations regarding that offer, then proceeded to destroy the value of VUS's interest in Petroritupano, making it impossible for VUS to sell its interest, directly or indirectly, to a third party.<sup>160</sup>

172. The Claimant argues that the Respondent does not deny any of these facts and asserts that "Respondent has continued this behavior, directly and through the PDVSA companies, breaching its Treaty obligations and magnifying the harm to VUS and its investment," all of which has, according to the Claimant, been allegedly confirmed by its expert.<sup>161</sup>

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<sup>160</sup> Memorial, ¶¶ 160-165; Reply, ¶¶ 125-126, 130-133; Hearing Transcript (28 November 2017), 70:21-71:18.

<sup>161</sup> Reply, ¶¶ 16-25. According to Mr. Kaczmarek, the Respondent manipulated seven key factors driving Petroritupano's financial performance, and affirms that it found that "at least two of these factors have worsened" while the others still continue to create losses. In particular, Mr. Kaczmarek noted that "[a]s of 2015, PDVSA Petróleo owed Petroritupano US\$1.136 billion for oil delivered but not paid for", and "Petroritupano's operating and administrative costs have continued to rise, rapidly and inexplicably by any commercial standards."

## 2. Respondent's Position

173. The Respondent asserts that “the scope that Claimant attempts to accord to the FET obligation does not correspond to the text of the Treaty and is incorrect.”<sup>162</sup> Moreover, according to the Respondent, even if the alleged breach of the contractual commitments entered into by CVP and Petroritupano were to be attributed to Venezuela, and even under the expansive FET interpretation advanced by the Claimant, the Respondent has not breached its FET obligation under the BIT.<sup>163</sup>
174. The Respondent first contends that, as established in Article 2.2 of the BIT, the FET is specifically tied to international law, such that it must “be equated with the minimum standard of treatment under customary international law.”<sup>164</sup> According to the Respondent, that standard was enunciated in the case of *L.F.H. Neer and Pauline E. Neer v. Mexico* where the tribunal held that a breach of the standard requires the treatment of an alien to amount to “an outrage, to bad faith, to wilful neglect of duty, or to insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”<sup>165</sup>
175. The Respondent points to commentators who have alluded to “state practice amongst major capital exporting states suggesting that fair and equitable treatment was viewed as reflecting, and as synonymous with, the minimum standard of treatment.”<sup>166</sup> The Respondent cites various examples of what it characterizes as State practice against an expansive interpretation of the FET standard, as well as various arbitral decisions criticizing such an approach.<sup>167</sup> According to the Respondent, the *Crystallex* case relied upon by the Claimant was wrongly decided, and the *Vivendi II* tribunal’s statements were *obiter dicta*.<sup>168</sup> The Respondent concludes that “in the

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<sup>162</sup> Counter-Memorial, ¶ 108.

<sup>163</sup> *Ibid.*; Rejoinder, ¶ 106.

<sup>164</sup> Counter-Memorial, ¶ 109; Rejoinder, ¶¶ 99-106; Hearing Transcript (28 November 2017), 127:21-128:11.

<sup>165</sup> Counter-Memorial, ¶ 115. Exhibit RLA-209, *L.F.H. Neer and Pauline E. Neer v. Mexico*, Mexico U-S General Claims Commission United States - Mexico, Docket No. 136, Opinion, 15 October 1926, 21 *The American Journal of International Law* 555 (1927).

<sup>166</sup> Counter-Memorial, ¶ 111. Exhibit RLA-187, Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009).

<sup>167</sup> Counter-Memorial, ¶¶ 110-114; Hearing Transcript (28 November 2017), 128:12-131:4. The Respondent cites, among others, Exhibit CLA-84, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ABR/03/15, Award, 31 October 2011, ¶¶ 336, 342; Exhibit RLA-200, Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007), p. 89; Exhibit RLA-202, Graham Mayeda, *Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treatment*, 41 (2) *Journal of World Trade* 273 (2007), pp. 274-275; Exhibit RLA-203, Marcos Orellana, *International Law on Investment: The Minimum Standard of Treatment (MST)*, 1(3) *Transnational Dispute Management* (July 2004), p. 7.

<sup>168</sup> Rejoinder, ¶¶ 101-102; Hearing Transcript (28 November 2017), 128:20-129:11.

present case, where the Contracting States specifically tied the FET standard to ‘the rules and principles of international law’, Claimant’s attempt to expand FET beyond the minimum standard of treatment provided by customary international law is even more nonsensical.”<sup>169</sup>

176. The Respondent argues further that the FET standard cannot be breached on the basis of alleged contract breaches by PDVSA affiliates or Petroritupano.<sup>170</sup> The Respondent asserts that the alleged breaches of a commercial contract cannot be attributed to Venezuela. Even if they were, they would not constitute a breach of the FET standard in any event; for a breach of FET to be found, the State would have to “significantly interfere with a contract through its sovereign powers.”<sup>171</sup>
177. The Respondent asserts that Claimant’s FET claims in this case should be rejected, considering that, first, the contract for the purchase of oil was entered into between Petroritupano and PDVSA Petróleo only, “neither of which is a party to this proceeding,”<sup>172</sup> and second, because “a persistent lack of payment by a contracting party does not amount to a breach of the FET standard.”<sup>173</sup> In relation to this last point, the Respondent cites the decision adopted in the case of *BIVAC v. Paraguay*, where the tribunal noted that Paraguay, in refusing to pay an outstanding debt, “had not availed itself of the kinds of powers that are normally available to a sovereign if it wishes to interfere with the rights of an ordinary party”, and then stated that “time alone, coupled with the repetition of the conduct, [cannot] as such transform the act of a sovereign contracting party into an exercise of sovereign authority.”<sup>174</sup> Similarly, the Respondent contends that the Claimant’s case “is nothing more than a contractual claim based on the lack of payment of dividends by Petroritupano or the delay in declaring dividends. Whether this lack of payment has occurred more than once over a period of several years does not change the nature of the contractual claim.”<sup>175</sup> The Respondent also contends that the claim regarding the denial of authorization to

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<sup>169</sup> Counter-Memorial, ¶ 114.

<sup>170</sup> *Ibid.*, ¶ 117.

<sup>171</sup> *Ibid.*, ¶¶ 117-119; Hearing Transcript (28 November 2017), 132:11-25; Exhibit RLA-215. *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award, 22 December 2003; Exhibit RLA-130, *Impregilo S.p.A. v. Islamic Republic of Paksitan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005.

<sup>172</sup> Counter-Memorial, ¶ 120.

<sup>173</sup> *Ibid.*, ¶ 121.

<sup>174</sup> *Ibid.*, ¶¶ 121-124; Hearing Transcript (28 November 2017), 133:1-135:9; Exhibit RLA-216, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Further Decision on Objections on Jurisdiction, 9 October 2012.

<sup>175</sup> Counter-Memorial, ¶ 124; Hearing Transcript (28 November 2017), 131:5-136:19.

the change of control must be rejected. It highlights that the Ministry was expressly entitled to do so under Article 6.3 of the Conversion Contract and Article 12 of Petroritupano's Bylaws and "never promised to Claimant that the PetroFalcon deal would be authorized."<sup>176</sup>

178. As for the Claimant's legitimate expectations, the Respondent underlines that the statutory framework applicable to Petroritupano has not changed, and that aside from contractual commitments entered into by third parties, the "Claimant is unable to point to any promise of commitment given by the Republic to Claimant that could have been the basis for its FET claim."<sup>177</sup> The Respondent further asserts that, even if the contractual obligations referred to by Claimant were to be attributed to Venezuela, the fulfillment of such obligations is not an expectation covered by the FET standard under the BIT.<sup>178</sup> The Respondent cites the *Parkerings* and *Hamester* cases, where the tribunals held that mere contract breaches cannot, without more, "sustain a claim for a violation of the FET standard."<sup>179</sup> The Respondent emphasizes that Venezuela did not "in any way guarantee performance of [PDVSA's affiliates' contractual] commitments."<sup>180</sup> Further, the Respondent argues that Claimant's expectations for the Republic to "abide by the new investment framework that it had designed and enacted" is "just a failed attempt to artificially link the specific contractual claims Claimant asserts against Petroritupano and CVP to the Republic."<sup>181</sup>
179. Finally, in relation to the expert evidence as to Petroritupano's management, the Respondent asserts that it is based on flawed comparisons using outdated data that does not take into account actual costs and market conditions.<sup>182</sup> The Respondent also argues that there is nothing unusual about the intercompany transactions that the Claimant complains of.<sup>183</sup> In any case, the Respondent asserts that these accusations come "from a shareholder that has abandoned its

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<sup>176</sup> Counter-Memorial, ¶ 125; Rejoinder, ¶¶ 114-116; Hearing Transcript (28 November 2017), 137:8-138:1.

<sup>177</sup> Counter-Memorial, ¶ 126; Rejoinder, ¶¶ 108-113; Hearing Transcript (28 November 2017), 136:20-137:16.

<sup>178</sup> Counter-Memorial, ¶ 127.

<sup>179</sup> Counter-Memorial, ¶¶ 128-131; Hearing Transcript (28 November 2017), 135:23-136:19; Exhibit RLA-180, *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007; Exhibit RLA-153, *Gustav F. W. Hamester v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010.

<sup>180</sup> Counter-Memorial, ¶ 132.

<sup>181</sup> *Ibid.*, ¶ 133; Rejoinder, ¶¶ 107-113.

<sup>182</sup> Rejoinder, ¶¶ 9-14; Hearing Transcript (29 November 2017), 274:19-281:20.

<sup>183</sup> Rejoinder, ¶¶ 15-20.

investment for all practical purposes and is not willing to invest the time, money and effort required to resolve the very difficult financial situation in which Petroritupano finds itself.”<sup>184</sup>

### 3. Tribunal’s Analysis

180. The Tribunal recalls that VUS’ investments consists of a minority equity interest of 18% in a mixed company providing oil production services, Petroritupano, S.A. CVP owns 60% of the equity interest of Petroritupano, whilst two other companies own the remaining 22%.<sup>185</sup> CVP is owned in its entirety by PDVSA, whilst the Government of Venezuela owns 100% of PDVSA’s shares. Oil produced by Petroritupano is sold exclusively to PDVSA Petr leo.

181. The Claimant argues that Venezuela, through its State organs, PDVSA, CVP, PDVSA Petr leo and its control of Petroritupano, breached its obligations under the BIT.<sup>186</sup> It asserts that the acts and omissions of PDVSA, CVP, PDVSA Petr leo, and Petroritupano are attributable to the State.<sup>187</sup> In particular, the Claimant alleges that:

- (i) Venezuela, through its Minister of Energy and Petroleum, did not allow the Claimant to sell its investment to a third party but would not buy it itself through CVP;<sup>188</sup>
- (ii) Venezuela, through CVP and the control it exercised over Petroritupano, denied distributing the declared Petroritupano dividends for the fiscal years 2008-2009 to the Claimant;<sup>189</sup>
- (iii) Venezuela wrongfully manipulated its relationship with and between its State-owned enterprises and caused them to ignore their contractual obligations, all to have the State benefit over the foreign investors. In particular, [PDVSA Petr leo] has failed up to this day to pay Petroritupano for oil purchased and received, and Petroritupano, managed by CVP, did not, and does not insist on payment or exercise its contractual remedies for late payment. It further complains

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<sup>184</sup> *Ibid.*, ¶ 21.

<sup>185</sup> Exhibit C-3, Articles of Incorporation and Bylaws of the Mixed Company Petroritupano, S.A., published in the Official Gazette No. 38.518 on 8 September 2006, Article 6; Exhibit C-2, Conversion Contract, Article 1.3.

<sup>186</sup> Memorial, ¶¶ 13-14.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*, ¶¶ 9, 165 (FET) and 214 (expropriation).

<sup>189</sup> *Ibid.*, ¶¶ 10, 163 (FET), 176 (arbitrary and discriminatory treatment) and 204 (umbrella clause).



that PDVSA made, and CVP accepted on behalf of Petroritupano, substantial loans to fund ongoing operations, without the other shareholders' approval. Based on these loans and improper charges and taxes, CVP fraudulently asserted to Claimant that Petroritupano suffered losses and could not issue dividends for the 2010 and 2011 fiscal years;<sup>190</sup>

- (iv) CVP has improperly failed to provide financial data for fiscal years 2012 and 2013 to the shareholders and to declare profits or losses in furtherance of a purported governmental policy to deny foreign investors the payment of dividends from the mixed companies unless they make additional capital investments to increase production and meet the State's productions goals.<sup>191</sup>

182. There is little doubt that the act of the Minister of Energy and Petroleum to deny authorization to the Claimant to sell its shares in Petroritupano to a third party (PetroFalcon) is attributable to Venezuela. The Minister of Energy and Petroleum has the status of a State organ in accordance with Venezuelan law and, therefore, his acts are considered acts of Venezuela under international law.<sup>192</sup>

183. Venezuela denies that all other acts complained of by the Claimant are attributable to it. It argues that all obligations and alleged breaches asserted by the Claimant exclusively relate to obligations of CVP as a shareholder in Petroritupano, or of Petroritupano itself, in connection with the payment of dividends and the financial situation of Petroritupano.<sup>193</sup>

184. The Tribunal notes that the Claimant asserts that Venezuela committed the acts complained of through CVP and Petroritupano, which is controlled by it through CVP. The Claimant submits that they are *de facto* organs of Venezuela. The Claimant's arguments focus to a large extent on the fact that PDVSA is an organ of Venezuela. However, PDVSA has not itself committed any of the acts complained of by the Claimant; these were acts of CVP and Petroritupano. Therefore, there is no need for the Tribunal to determine the status of PDVSA. The question for the Tribunal to answer is whether the acts of CVP and Petroritupano are attributable to Venezuela.

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<sup>190</sup> *Ibid.*, ¶¶ 11, 79-82, 164 (FET), 177 (arbitrary and discriminatory treatment) and 214 (expropriation).

<sup>191</sup> *Ibid.*, ¶¶ 12, 178 (arbitrary and discriminatory treatment) and 213 (expropriation).

<sup>192</sup> ILC Articles, Article 4.

<sup>193</sup> Counter-Memorial, ¶ 20.

185. CVP, a wholly-owned PDVSA's affiliate, is registered as a commercial corporation ("una sociedad mercantil anónima") in the Commercial Register ("el Registro de Comercio").<sup>194</sup> CVP concluded the Conversion Contract in its own name, as is clearly indicated in Article 9.1 thereof, which provides that: "[e]ach Party acknowledges that each one of the other Parties is entering into this Contract in its own name and in its capacity as a legal entity empowered to contract on its own behalf."<sup>195</sup>
186. The Claimant puts emphasis on the fact that PDVSA and its affiliates were created and are wholly owned by the State. Relying on the *Maffezini* and the *Flemingo* awards, it contends that these factors create a presumption in favour of State control.<sup>196</sup> The Respondent maintains that the fact that a company is a State-owned company is clearly not sufficient to consider it as an organ of the State.<sup>197</sup> This argument is correct. In the *Maffezini* award, the tribunal recognized that "the intent of the State to create still another corporate entity, particularly one which is intended to operate in the private sector, even if State-owned, is not sufficient to raise a presumption of an entity being an organ of the State."<sup>198</sup> The tribunal observed that "[m]ore is required in terms of the functional test"<sup>199</sup> that looks into the functions, or the role to be performed by, the corporate entity.<sup>200</sup>
187. The Claimant's argument that PDVSA's and CVP's funds are public because these companies are wholly State-owned cannot be accepted. PDVSA, CVP, and Petroritupano have legal personalities and patrimonies of their own, are subject to the payment of taxes and contributions, and are governed by their own corporate documents. In fact, no evidence has been adduced to show that the companies in question lack financial autonomy. Under Article 303 of the Venezuelan Constitution, the State shall retain all shares of the PDVSA, but it does not own the latter's assets and funds, which are owned by PDVSA itself. As far as CVP is concerned, the State

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<sup>194</sup> Exhibit C-46, Decree No. 1127 of the President of Venezuela of 2 September 1975, described by Claimant as CVP Articles of Incorporation (Memorial, fn. 276), Articles 1 and 2.

<sup>195</sup> Exhibit C-2, Conversion Contract.

<sup>196</sup> Memorial, ¶¶ 119-120, Reply, ¶ 68.

<sup>197</sup> Counter-Memorial, ¶ 33, referring to Exhibit RLA-135, J. Crawford, State Responsibility, The General Part, p. 118, where he states: "Mere ownership of an entity by a [S]tate, however, will not automatically convert that entity into an organ of the [S]tate."

<sup>198</sup> Exhibit CLA-21, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, ¶ 84.

<sup>199</sup> *Ibid.*

<sup>200</sup> *Ibid.*, ¶ 79.

does not even own the shares in CVP, they are owned by PDVSA. According to the same provision of the Venezuelan Constitution, the State cannot be a shareholder in “subsidiaries [or affiliates; in the original Spanish: “las filiales”], strategic associations, business enterprises and any other venture established or subsequently established as a consequence of the development of the businesses of [PDVSA]”.<sup>201</sup>

188. Regarding the functional test, the Claimant argues that the companies in question are to be considered *de facto* organs of Venezuela because they are empowered to perform functions reserved to the State by the Venezuelan Constitution and the Hydrocarbons Law.<sup>202</sup> It is true that under Article 302 of the Venezuelan Constitution, “the State reserves the right to carry out activities related to the oil industry”.<sup>203</sup> However, it does not necessarily follow from this provision that the companies carrying these activities are to be considered State organs, not even *de facto*, as argued by Claimant. PDVSA and CVP engage predominantly in seemingly commercial transactions and they are, and operate as, private entities under domestic law. The Tribunal cannot conclude that they constitute organs of the State on the basis of their functions.
189. The Claimant adduces several arguments in support of its submission that PDVSA and its subsidiaries form part of the Venezuelan State. It argues that Venezuela “guide[s] the policies” and “exercise[s] coordination and control functions” over PDVSA and its affiliates pursuant to domestic law applicable to State-owned companies.<sup>204</sup> It contends that PDVSA is required to follow the guidelines, plans and strategies of the National Executive through the Energy Ministry according to its Articles of Incorporation and Bylaws.<sup>205</sup>
190. With respect to CVP, the Claimant asserts that CVP manages Petroritupano pursuant to the Energy Ministry’s and PDVSA’s instructions and interests.<sup>206</sup> In this context, the Claimant refers to statements from PDVSA’s website describing CVP’s role as “control[ing] the business with

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<sup>201</sup> Exhibit C-40, Exhibit RLA-159, Venezuelan Constitution, Article 303.

<sup>202</sup> Memorial, ¶ 131 citing Exhibit C-40, Venezuelan Constitution, Articles 302-303, and Exhibit C-5, Hydrocarbons Law, Article 1.

<sup>203</sup> Exhibit C-40, Venezuelan Constitution, Article 302.

<sup>204</sup> Memorial, ¶ 129.

<sup>205</sup> *Ibid.*, ¶ 130 referring to Exhibit C-76, PDVSA Bylaws, Decree No. 8327 (24 May 2011), Article 2 “The performance of the social purpose shall be carried out according to the guidelines and policies that the National Executive, through the People’s Ministry for Energy and Petroleum, establishes or agrees pursuant to the faculties conferred by law.”.

<sup>206</sup> Memorial, ¶140.

domestic and international private companies [ . . . ] while maximizing the value of hydrocarbons for the Venezuelan [S]tate.”<sup>207</sup>

191. The Claimant further stresses that the presidents and boards of directors of PDVSA and CVP are appointed by decree of the President of Venezuela.<sup>208</sup> However, as the Respondent explains, PDVSA’s board of directors is appointed by the State as its sole shareholder. CVP’s board of directors is then appointed by PDVSA as its sole shareholder.<sup>209</sup>
192. The Tribunal is of the view that all these factors, even if combined, do not support the conclusion that PDVSA, still less CVP and Petroritupano, are State organs and that on this basis their acts can be attributed to Venezuela. The evidence submitted by the Claimant only demonstrates that the State is the owner of the entirety of PDVSA’s shares, and that the Venezuelan oil industry is highly regulated. The appointment and dismissal of board members by the State as the sole shareholder of PDVSA is not sufficient to call for the lifting of corporate veil. It may be noted that the Claimant itself admits that “PDVSA might, at one point during the *apertura petrolera*, have been considered a commercial company.”<sup>210</sup> This implies that the right of the State to appoint the board members of the PDVSA is not dispositive of its characterization as a State organ. The link with CVP is even more tenuous as its board of directors is appointed by PDVSA, not by the State.
193. It is to be noted that in both the *Ampal-American* and *Flemingo* cases, to which the Claimant refers,<sup>211</sup> further restrictions were applicable on the decision-making processes of the State-owned companies in question, namely, that all their board decisions or all their contracts required governmental ratification or approval.<sup>212</sup> It has not been shown that this was the case here.

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<sup>207</sup> Reply, ¶ 64 referring to Exhibit C-106.

<sup>208</sup> Memorial, ¶¶ 130 and 137.

<sup>209</sup> Rejoinder, ¶ 47.

<sup>210</sup> Memorial, ¶ 134.

<sup>211</sup> Reply, ¶¶ 67-68.

<sup>212</sup> Rejoinder, ¶¶ 71-72; Exhibit CLA-159, *Ampal-American Israel Corp, EGI Series Investors LLC, EGI-Fund (08-10) Investors LLC, and BSS-EMG Investors LLC v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 138(iv); Exhibit CLA-158, *Flemingo Duty Free Shop Private Limited v. The Republic of Poland*, PCA Case No. 2014-11, Award, 12 August 2016, ¶ 427. It may be noted that while the tribunal in the *Ampal-American* award found that the wholly State-owned oil company (EGPC) was a State organ, it did not consider EGPC’s wholly-owned subsidiary (EGAS) to be a State organ as well, but rather attributed the latter’s conduct to Egypt under ILC Article 8 because, “the relevant acts of EGAS were directed by the Respondent or adopted by it as its own conduct” (Exhibit CLA-159, *Ampal-American Israel Corp, EGI Series Investors LLC, EGI-Fund (08-10) Investors LLC, and BSS-EMG Investors LLC v. Arab Republic*

194. The Tribunal now turns to the question whether the conduct in question can be attributed to the Respondent on the basis of the rule formulated in Article 5 of the ILC Articles. That rule provides that:

The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise the elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

195. Both Parties accept<sup>213</sup> that two cumulative conditions must be met for conduct of an entity to be attributable to the State, namely that:

- a) the entity is empowered by the law of the State to exercise elements of governmental authority; and
- b) the conduct was carried out by that entity in that capacity in that particular instance.

196. The Claimant asserts that PDVSA, CVP, and Petroritupano have “authority to perform public functions reserved to the State under the 1999 Venezuelan Constitution and the 2001 Hydrocarbons Law”.<sup>214</sup> It contends in particular that the “sovereign authority encompasses all activities in the exploration, production and exploitation of hydrocarbons” as they are all acts reserved solely to the State under domestic law.<sup>215</sup> It further argues that “by statute PDVSA and CVP control and manage all aspects of the Mixed Companies [and] the Mixed Companies are required to sell their production to PDVSA Petróleo, which serves its own role in the sovereign scheme.”<sup>216</sup> The Claimant asserts that all acts of which it complains “fall within the scope of [Venezuela’s] sovereign authority over the petroleum sector and the Mixed Companies.”<sup>217</sup>

197. Venezuela responds that the Claimant “cannot identify a single provision of Venezuelan law granting PDVSA and its affiliates specific governmental authority under which they were

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*of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶¶ 138-140, 269).

<sup>213</sup> Memorial, ¶ 116; Counter-Memorial, ¶ 41.

<sup>214</sup> Memorial, ¶¶ 135, 138, 141; Exhibit C-5, Hydrocarbons Law, Article 1; Exhibit C-40, Venezuelan Constitution, Articles 302-303.

<sup>215</sup> Reply, ¶¶ 61 and 71 citing Exhibit C-5, Hydrocarbons Law, Article 22.

<sup>216</sup> Reply, ¶ 71.

<sup>217</sup> *Ibid.*

allegedly acting in connection with the actions that it alleges constituted wrongdoing by PDVSA, PSVSA Petróleo, CVP or Petroritupano.”<sup>218</sup> It maintains that “a delay or failure to pay dividends is, by its nature, of a commercial character that can occur in the management of any commercial company.”<sup>219</sup> It further argues that “governmental authority” should not be equated with activities of a commercial character routinely carried out by State-owned companies.<sup>220</sup>

198. The concept of “governmental authority” is not defined in the ILC Articles. What, however, is required, is that the law of the State authorizes an entity to exercise some aspects of that State’s power, that is, public authority. The provisions relied on by the Claimant do not provide support to the assertion that State-owned or mixed companies are vested with governmental authority. Article 303 of the Venezuelan Constitution is the only provision that mentions PDVSA, but it does not seem to empower it to exercise any elements of governmental authority. It only compels the State to retain all shares of PDVSA.<sup>221</sup>
199. The acts complained of, namely that Petroritupano failed to distribute dividends and provide financial data to the Claimant for several fiscal years due to CVP’s mismanagement that consisted of incurring unexplained expenses and borrowing operating funds from PDVSA or CVP,<sup>222</sup> are not acts carried out in the exercise of governmental authority and are not envisaged in the provisions invoked by the Claimant.<sup>223</sup>
200. The Tribunal is not convinced by the Claimant’s contention that Petroritupano’s failure to collect payment and impose interests on deliverables from PDVSA Petróleo is an act carried out in the exercise of governmental authority.<sup>224</sup> In support of this contention, the Claimant points out that “Petroritupano [. . .] has acted against any concept of commercial reasonableness.”<sup>225</sup> The Tribunal agrees with the Respondent’s view that whether commercial activities are profitable or not is not the applicable test for finding that a State company is exercising governmental

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<sup>218</sup> Counter-Memorial, ¶ 43.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*, ¶ 42.

<sup>221</sup> Exhibit C-40, Venezuelan Constitution, Article 303.

<sup>222</sup> See ¶ 182 above.

<sup>223</sup> Reply, ¶¶ 61 and 99, see Exhibit C-5, Hydrocarbons Law, Article 22.

<sup>224</sup> Memorial, ¶ 78; Reply, ¶ 74.

<sup>225</sup> Reply, ¶ 73.

authority.<sup>226</sup> The Claimant's argument relates to the exercise of purely private rights by Petroritupano against PDVSA Petróleo and therefore cannot be accepted.

201. The Tribunal thus concludes that none of the acts complained of by the Claimant have been carried out in the exercise of governmental authority under Venezuelan law and therefore that they cannot be attributed to the Respondent.
202. Turning now to the issue of whether the conduct complained of was carried out on the instructions of, or under the directions or control of, Venezuela, the Tribunal notes that it is not disputed that the conduct of a person or group of persons is attributable to a State "if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."<sup>227</sup> The ILC, in its Commentary on Article 8 of the ILC Articles in relation to State-owned and controlled companies, recalled that "international law acknowledges the general separateness of corporate entities at the national level, except in those cases where the 'corporate veil' is a mere device or vehicle for fraud or evasion."<sup>228</sup> It has made clear that "[t]he fact that the State initially establishes a corporate entity, whether by a special law of otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity."<sup>229</sup> As the ILC explains, "[s]ince corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority within the meaning of article 5."<sup>230</sup> The ILC, however, also noted that "where there was evidence [. . .] that the State was using its ownership interest in or control of a corporation specifically in order to achieve a particular result, the conduct in question has been attributed to the State."<sup>231</sup> The determination has to be made in each case on the basis of the facts relating to the relationship between the instruction given or the direction or control exercised and the specific conduct complained of which is said to have amounted to an internationally wrongful act.<sup>232</sup>

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<sup>226</sup> Rejoinder, ¶ 78.

<sup>227</sup> ILC Articles, Article 8.

<sup>228</sup> ILC Articles, Article 8, Commentary, ¶ 6, referring to *Barcelona Traction, Light and Power Company Limited, Second Phase*, 1970 ICJ REPORTS 3, p. 39, ¶¶ 56-58.

<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*, referring to *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-U.S.C.T.R. 228 (1986); *American Bell International, Inc. v. Islamic Republic of Iran*, 12 Iran-U.S.C.T.R. 170 (1986).

<sup>232</sup> *Ibid.*, Article 8, Commentary, ¶ 7.

203. As to the circumstances relating to a possible transfer of the Claimant's shares in Petroritupano (which, however, did not materialize), communications between the Claimant and CVP corroborate the fact that the decision for the expression of interest in the acquisition of Claimant's investment was made by PDVSA.<sup>233</sup> However, both witness statements submitted by the Claimant suggest that a CVP representative disclosed to them that Minister of Energy and Petroleum Ramírez would not provide his consent for the transfer of the Claimant's investment to a third party (PetroFalcon), and authorized PDVSA to make an offer.<sup>234</sup> Venezuela did not provide any information in this respect in its Counter-Memorial and Rejoinder. The Tribunal considers that it is not denied that the expression of interest in the acquisition of the Claimant's shares in Petroritupano was authorized by the Energy Minister and thus was made under his control.
204. With respect to the non-payment of dividends for fiscal years 2008 and 2009, there is no evidence in the record that Venezuela instructed or directed Petroritupano or CVP not to pay dividends to the Claimant.
205. The Claimant further complains that Petroritupano wrote off receivables owed to it by PDVSA Petróleo "[o]n instructions received by the management of CVP' (from whom is unsaid)" in the amount which was credited to CVP as the dividends for its shares in Petroritupano.<sup>235</sup> In the Claimant's view, this act is attributable to Venezuela. The Claimant relies on an excerpt from Petroritupano's financial statement which reads: "[b]y instruction received by the Management of CVP, the Company proceeded to offset the accounts receivable resulting from the sales of crude oil to PDVSA Petróleo against the accounts payable to PDVSA Petróleo for labor costs and operating expense; said offset included the offset of dividends payable to CVP."<sup>236</sup> This evidence is at best inconclusive. It only shows that the write-off was done on the instructions of the Management of CVP, but it does not prove that CVP acted on the Government of Venezuela's instructions.
206. The Claimant further alleges that Petroritupano did not pay dividends to the Claimant in carrying out Venezuela's policy not to pay dividends to foreign investors in mixed companies unless and

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<sup>233</sup> Exhibit C-62, Letter of E. Del Pino (CVP) to S. Akers (Anadarko) and L. Derrota (VUS) (6 October 2008); Exhibit C-24, E-mail from E. Del Pino (CVP) to T. Heinzler (VUS) (14 August 2008).

<sup>234</sup> Exhibit CWS-1, Witness Statement of Luis H. Derrota, ¶ 30; Exhibit CWS-3, Witness Statement of Joseph F. Carroll, ¶ 12.

<sup>235</sup> Memorial, ¶ 75; Reply, ¶ 79.

<sup>236</sup> Exhibit C-73, Petroritupano Financial Statement 2011, at p. 35.



until they made additional capital contributions in an effort to boost PDVSA's falling production levels.<sup>237</sup> Venezuela denies that such general policy ever existed, pointing to the fact that the Claimant relies on news reports to substantiate its claim.<sup>238</sup> It is true that the statement by the Energy Minister on the need to increase output of mixed companies if dividends were to be paid was reported in the press,<sup>239</sup> and there is no evidence that this was controverted by the Government of Venezuela or the Energy Minister. The Tribunal, however, considers that the link between the Energy Minister's Statement reported in 2012 and 2013 and CVP's and Petroritupano's non-distribution of dividends for 2008 and 2009 to the Claimant, is at most tenuous. The Claimant's witness acknowledged that no such policy was ever communicated to VUS.<sup>240</sup> Such communication would have been necessary, by logical implication, if the Government of Venezuela wished to achieve its objective and induce foreign shareholders to contribute to the capital strengthening the position of the mixed companies.

207. On the basis of the above analysis, the Tribunal concludes that none of the acts complained of by the Claimant, with the exception of the Energy Minister's refusal to give consent to the transfer of the Claimant's shares in Petroritupano to a qualified third party (PetroFalcon), and his authorization to PDVSA to express interest in acquiring these shares, are attributable to Venezuela.
208. The Tribunal further notes that the Claimant agreed in the Conversion Contract that "no direct or indirect transfer of its control shall be made [. . .] within the term of the Mixed Company right to carry out Primary Activities as set forth in the Acuerdo of the National Assembly, without the prior written consent from the Minister".<sup>241</sup> The Claimant also agreed that if it fails to comply with such duty, its "interests in the Mixed Company shall be deemed as terminated and all its shares in the Mixed Company shall be transferred to CVP, entailing no duty to CVP as to pay any amount whatsoever for the transferred shares."<sup>242</sup> From the factual record before the Tribunal, it appears that when the Claimant's request for the written consent with the transaction was pending before the Minister, CVP informed the Claimant of PDVSA's interest in buying the Claimant's

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<sup>237</sup> Memorial, ¶¶ 89-90; Reply, ¶ 80.

<sup>238</sup> Rejoinder, ¶¶ 56 and 83.

<sup>239</sup> Exhibit C-34, "Venezuela says no dividends for underperforming oil partners", REUTERS (13 June 2013); Exhibit C-35, "Ministry of Petroleum to pay dividends only if output is raised", EL UNIVERSAL (14 June 2013).

<sup>240</sup> Exhibit CWS-1, Witness Statement of Luis H. Derrota, ¶ 46.

<sup>241</sup> Exhibit C-2, Conversion Contract, Article 6.3.

<sup>242</sup> *Ibid.*

18% interest in Petroritupano.<sup>243</sup> A meeting was arranged between the representatives of the parties on 1 September 2008. On 17 September 2008, the Minister, by a letter addressed to Claimant, denied the consent, “by the powers vested in [him] under Section 6.3 of the [Conversion Contract]”.<sup>244</sup> On 6 October 2008, the President of CVP confirmed to Anadarko PDVSA’s interest in acquiring all the shares of Anadarko Venezuela Company and requested a formal proposal.<sup>245</sup> Anadarko responded to that request and proposed to sell Anadarko Venezuela Company to PDVSA for US\$ 200 million.<sup>246</sup> There was no answer to that proposal nor any further meetings to discuss a possible deal. As confirmed by the Associate General Counsel-International for Anadarko Petroleum Corporation, who was responsible for supervising legal issues with respect to the investment of Venezuela US in Venezuela, “[s]ince then, Anadarko has not had any further discussions with PDVSA or any of its affiliates, or with any representative of Venezuela, regarding PDVSA’s expressed intent to purchase VUS’s interest in Petroritupano.”<sup>247</sup>

209. It remains unexplained why the issue of selling the Claimant’s interest in Petroritupano was not further pursued by the Claimant (or its parent company Anadarko) and that, instead, four and a half years later the present arbitration was commenced by the Claimant.
210. Finally, the Tribunal notes that the other complaints of the Claimant – namely the failure to pay it the dividends declared for 2008 and 2009, as well as the alleged manipulation and mismanagement of Petroritupano<sup>248</sup> – relate to the breaches of the Conversion Contract and Petroritupano’s Articles of Incorporation and Bylaws. For instance, the payment of the dividends and other distributions is governed by Article 32 of Petroritupano’s Articles of Incorporation and Bylaws,<sup>249</sup> and the convocation and the powers of the General Meeting of Shareholders (“Asambleas de Accionistas”) by Chapter III thereof,<sup>250</sup> while Chapter IV governs the matters relating to the Management of Petroritupano, including the composition of its Board of Directors,

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<sup>243</sup> Exhibit C-24, E-mail from E. Del Pino (CVP) to T. Heinzler (VUS) (14 August 2008).

<sup>244</sup> Exhibit C-25, Letter from Minister R. Ramírez to L. Derrota (VUS) (17 September 2008).

<sup>245</sup> Exhibit C-62, Letter of E. Del Pino (CVP) to S. Akers (Anadarko) and L. Derrota (VUS) (6 October 2008).

<sup>246</sup> Exhibit C-26, Letter from A. Richey to E. Del Pino (15 October 2008); Exhibit C-63, Letter from A. Richey to E. Del Pino, with attached commercial terms (15 October 2008).

<sup>247</sup> Exhibit CWS-4, Second Witness Statement of Luis H. Derrota, ¶ 12.

<sup>248</sup> Memorial, ¶¶ 77-78; Reply, ¶¶ 10, 12, 16-17.

<sup>249</sup> Exhibit C-3, Articles of Incorporation and Bylaws of the Mixed Company Petroritupano, S.A., published in the Official Gazette No. 38.518 on 8 September 2006, Article 32.

<sup>250</sup> *Ibid.*, Articles 13-18.

its meetings, required quorum and its powers.<sup>251</sup> Any matters not provided for in these Articles of Incorporation and Bylaws, according to their Article 36, shall be governed by the applicable laws of Venezuela. That article further specifies that “[u]nless otherwise required by the applicable provisions of Public Law, the Company shall be governed by Private Law, including, among the latter, the applicable provisions of the Commercial Code.”<sup>252</sup> Moreover, Mr. Luis Humberto Derrota, Associate General Counsel-International for Anadarko Petroleum Corporation, “responsible for legal issues arising in connection with [Anadarko Petroleum Corporation’s] and its subsidiaries’ international activities, including with respect to their interests in Venezuela,”<sup>253</sup> was appointed Alternate Director on Petroritupano’s Board of Directors.<sup>254</sup> It therefore appears that the Claimant was represented on Petroritupano’s Board of Directors.

211. Disputes relating to the Conversion Contract “shall be exclusively submitted to the competent courts of the Republic.”<sup>255</sup> Further, under Annex A to the Conversion Contract, the differences and controversies arising from the failure to perform the conditions, rules and actions that constitute the subject-matter of this document or arising from this document shall be settled in accordance with the legislation of the Bolivarian Republic of Venezuela and before its judicial organs.<sup>256</sup> In the view of the Tribunal, the subject-matter of the document is to provide basic terms and conditions that shall govern Petroritupano, S.A. This flows from paragraph 11 of Annex A which reads: “[t]he *other* basic terms that shall govern Petroritupano are in the Draft Contract for the draft Charter/By-laws which have been submitted for the review of this to the National Assembly”.<sup>257</sup>
212. The Tribunal thus concludes that it cannot uphold the Claimant’s claim that the Respondent breached its obligation under Article 2, paragraph 2, of the BIT to accord the Claimant’s investment fair and equitable treatment.

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<sup>251</sup> *Ibid.*, Articles 19-26.

<sup>252</sup> *Ibid.*, Article 36.

<sup>253</sup> Exhibit CWS-1, Witness Statement of Luis H. Derrota, ¶ 2.

<sup>254</sup> Exhibit C-3, Articles of Incorporation and Bylaws of the Mixed Company Petroritupano, S.A., published in the Official Gazette No. 38.518 on 8 September 2006, Chapter XI, Section one. He was Alternate Director to Principal Director Mr. David John Santley. See also Exhibit CWS-1, Witness Statement of Luis H. Derrota, ¶ 6

<sup>255</sup> Exhibit C-2, Conversion Contract, Article 7.

<sup>256</sup> Exhibit C-2(A), Conversion Contract, Annex A, ¶ 12.

<sup>257</sup> *Ibid.*, ¶ 11, emphasis added.

**(b) Arbitrary or Discriminatory Conduct**

**1. Claimant's Position**

213. The Claimant begins by arguing that Article 2 of the BIT contains a specific prohibition against arbitrary or discriminatory conduct.<sup>258</sup> According to the Claimant, in order to violate this provision, a measure need only be arbitrary or discriminatory but not both, and proof of a discriminatory intent is not necessary.<sup>259</sup> It explains that “[r]egardless of the intent behind Venezuela’s and PDVSA’s acts, those measures clearly put VUS in a worse position than the other shareholders in Petroritupano – particularly PDVSA CVP – and in a worse position than shareholders in other *empresas mixtas* which have not suffered the denial of dividends and other wrongful treatment to which Venezuela has subjected VUS’s investment.”<sup>260</sup> Specifically, the Claimant contends that (i) VUS was the only shareholder to whom CVP did not distribute any part of the dividends for the 2008 and 2009 fiscal years<sup>261</sup> and (ii) PDVSA and its affiliates “engag[ed] in a scheme [. . .] to make it appear that Petroritupano suffered losses, while taking the full value of Petroritupano’s oil for itself”, the effect of which was compounded by the “unapproved ‘loans’ from PDVSA to Petroritupano and other improper manipulations of Petroritupano’s finances.”<sup>262</sup> The Respondent also argues that Venezuela’s policy of not paying dividends to foreign investors until they invest additional capital is discriminatory.<sup>263</sup>

**2. Respondent's Position**

214. The Respondent asserts that the standard definition of arbitrariness in international law is the one found in the *ELSI* case where it was described as “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety.”<sup>264</sup> In the Respondent’s view, the Claimant is “unable to point to any act of the Republic that would have impaired its investment, and instead repeats its disagreements with the manner CVP and Petroritupano have managed the business”, which cannot be attributed to Venezuela, do not imply the exercise of

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<sup>258</sup> Memorial, ¶ 166.

<sup>259</sup> Memorial, ¶¶ 167-174; Reply, ¶ 136; Hearing Transcript (28 November 2017), 71:20-72:23.

<sup>260</sup> Memorial, ¶¶ 174-175.

<sup>261</sup> Memorial, ¶ 176; Reply, ¶¶ 10-11, 137; Hearing Transcript (28 November 2017), 72:24-73:4.

<sup>262</sup> Memorial, ¶ 177; Reply, ¶ 18; Hearing Transcript (28 November 2017), 73:5-11.

<sup>263</sup> Memorial, ¶ 178.

<sup>264</sup> Counter-Memorial, ¶ 137; Exhibit RLA-181, *Elettronica Sicula S.p.A (ELSI)*, Judgment, 1989 ICJ REPORTS 15.

sovereign power, and do not amount to the threshold of Article 2.2 of the BIT.<sup>265</sup> The Respondent asserts that the fact that “[m]any oil companies around the world continue to participate in the oil industry in Venezuela, including some of the biggest oil companies in the world” contradicts the Claimant’s allegations of discrimination against foreigners.<sup>266</sup>

### 3. Tribunal’s Analysis

215. The Tribunal has already analysed the issue of whether the acts complained of by the Claimant can be attributed to Venezuela. It concluded that none of PDVSA, CVP, or Petroritupano can be considered State organs, nor have they been empowered to exercise elements of governmental authority, and thus that their acts cannot be attributed to the Respondent on the basis of Article 4 or 5 of the ILC Articles. The Tribunal further concluded that the Claimant had not adduced enough evidence to show that the various acts and omissions of PDVSA, CVP, and Petroritupano occurred on the instructions of, or under the direction or control of, the Respondent. That analysis was conducted in the context of the allegation that the Respondent had failed to accord fair and equitable treatment to the Claimant’s investment.
216. In the view of the Tribunal, the same conclusion applies to the conduct relied on by the Claimant for its claim that it has been a “victim” of discriminatory and arbitrary treatment. There is, however, one exception relating to the non-payment of dividends to the Claimant for the 2008 and 2009 fiscal years.
217. The Claimant asserts that, while it has not been paid the dividends for 2008 and 2009, another foreign investor, Petrobras Argentina, did receive the payment of the dividends for 2008 and 2009.<sup>267</sup> In support of this assertion, the Claimant submitted evidence<sup>268</sup> and a witness statement,<sup>269</sup> which remains unrebutted.<sup>270</sup>

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<sup>265</sup> Counter-Memorial, ¶¶ 139-140; Rejoinder, ¶ 118.

<sup>266</sup> Hearing Transcript (28 November 2017), 97:13-19.

<sup>267</sup> Memorial, ¶¶ 72-74; Reply, ¶¶ 10-12.

<sup>268</sup> Exhibit C-27, PDVSA Power Point presentation, Petroritupano Board of Directors Meeting on 19 May 2011 (slides 92-93); Exhibit C-73, Petroritupano, S.A. Audited Financial Statement for 31 December 2011 (29 July 2013), n. 11(e) at p. 25 and n. 17 at p. 33.

<sup>269</sup> Exhibit CWS-1, Witness Statement of Luis H. Derrota, ¶ 37.

<sup>270</sup> In fact, the Respondent during the exchanges concerning the requests for document production confirmed that the dividends for 2008 and 2009 were paid to Petrobras Argentina when it stated in relation to Request No. 9 that

218. The Claimant submits that the dividends were paid to Petrobras Argentina, which is a subsidiary of the Brazilian company Petrobras, because the Government of Venezuela “needed to curry favour with the Government of Brazil [and] President Chávez planned an official State visit to Brazil for early June 2011, with a subsequent visit of Brazil’s President to Venezuela for a meeting of the Community of Latin American and Caribbean States in early July, during which Venezuela planned to execute several cooperation and commercial agreements with Brazil.”<sup>271</sup>

219. The Respondent does not address the payment of the dividends for 2008 and 2009 to Petrobras Argentina. It does not contradict the factual circumstances concerning this payment as invoked by the Claimant. Instead, the Respondent limits itself to the statement that:

[the] Claimant is [ . . . ] unable to point to any act of the Republic that would have impaired its investment<sup>272</sup>

and that

[the] Claimant cannot carry its burden of proving arbitrary or discriminatory action on the part [ . . . ] of the Republic.<sup>273</sup>

220. The Tribunal does not believe that the payment of the declared dividends for 2008 and 2009 to Petrobras Argentina, a subsidiary of the major Brazilian company Petrobras, on the eve of the visit by the President of Venezuela to Brazil during which cooperation in energy matters was discussed, as confirmed by the President himself, is a mere coincidence.<sup>274</sup> According to the press reports, it was expected that “[o]ne of the highlights of the meeting should be the issue of the oil refinery ‘Abreu e Lima’ which is being built in the Brazilian state of Pernambuco. The project is originally considered as a joint enterprise, but Venezuela had not made financial contributions so far to it.”<sup>275</sup>

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“there is no dispute among the parties that Petrobras was paid dividends for fiscal years 2008 and 2009.” Procedural Order No. 3, 11 April 2017, Annex A, p. 13.

<sup>271</sup> Memorial, ¶ 74 referring to Exhibit C-28, “*Venezuela and Brazil Deepen Strategic Cooperation*”, VENEZUELANANALYSIS.COM (7 June 2011); Exhibit C-29, “*Brazilian president to visit Caracas in July*”, EL UNIVERSAL (11 May 2011); Exhibit C-30, “*Chávez confirms June visit to Brazil*”, XINHUANET (25 May 2011).

<sup>272</sup> Counter-Memorial, ¶ 139.

<sup>273</sup> Rejoinder, ¶ 118.

<sup>274</sup> Exhibit C-28, “*Venezuela and Brazil Deepen Strategic Cooperation*”, VENEZUELANANALYSIS.COM (7 June 2011).

<sup>275</sup> Exhibit C-30, “*Chávez confirms June visit to Brazil*”, XINHUANET (25 May 2011).

221. Although there is a general rule that it is for the party which alleges a fact in support of its claims to prove the existence of that fact, as the International Court of Justice stated:

it would be wrong to regard this rule, based on the maxim *onus probandi actori*, as an absolute one, to be applied in all circumstances. The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute.<sup>276</sup>

222. The Claimant has established that the dividends for 2008 and 2009 were paid to Petrobras in 2011 shortly before the visit of the Venezuelan President to Brazil to discuss, among other things, cooperation in energy matters. It would be too much to ask from it to adduce direct proof that this payment was carried out under the instruction of the Venezuelan Government. The Government of Venezuela, no doubt, was in a position to make that instruction, as Petroritupano is controlled by CVP, which in turn is controlled by PDVSA, wholly-owned by the State. PDVSA's Chairman at the relevant time was the Minister of Energy and Petroleum. There is thus a presumption that the payment was made under the instruction of the Government of Venezuela. The Respondent was in a position to request explanations from PDVSA and CVP for the payment made to Petrobras in 2011. The Respondent, however, did not provide any explanations on this matter. In view of the above, the Tribunal is convinced that the payment of the dividends to Petrobras was made on the instructions of the Government of Venezuela.

223. The BIT, in its Article 2, paragraph 2, prohibits discriminatory treatment when it provides that “[n]either Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party.” The BIT does not define discriminatory measures or treatment. Discrimination usually occurs when people or companies in similar situations are treated differently without any valid reason. As the Tribunal in *Saluka* observed, “State conduct is discriminatory, if (i) similar cases are (ii) treated differently (iii) and without reasonable justification.”<sup>277</sup> Usually, the discrimination is based on the nationality of the foreign investor.<sup>278</sup> The Respondent accepts the above standard.<sup>279</sup>

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<sup>276</sup> *Amadou Sadio Diallo (Guinea v. Democratic Republic of Congo)*, Merits, Judgment, 2010 ICJ REPORTS 639, p. 660, ¶ 54.

<sup>277</sup> Exhibit CLA-71, *Saluka Investments B.V. v. The Czech Republic*, PCA Case No. 2001-04, Partial Award, 17 March 2006, ¶ 313.

<sup>278</sup> See Exhibit RLA-223, UNCTAD *Most-Favored-Nation Treatment*, UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II (2010), p. 27.

<sup>279</sup> Counter-Memorial, ¶ 138.

224. While the Claimant, Venezuela US, SRL, a company organized and existing under the laws of Barbados, did not receive the payment of the declared dividends for 2008 and 2009, Venezuela caused the payment of the dividends for the same fiscal year to another foreign investor participating in Petroritupano, namely Petrobras Argentina, a subsidiary of Petrobras, a Brazilian company. This conduct was not in conformity with Venezuela's obligations under Article 2, paragraph 2, of the BIT as it impaired the enjoyment of the Claimant's investment by a discriminatory measure. The Tribunal thus concludes that Venezuela breached its obligations under Article 2, paragraph 2, of the BIT.

*(c) Umbrella Clause*

**1. Claimant's Position**

225. The Claimant contends that Venezuela breached its obligations under the BIT's umbrella clause. It explains that, as with all treaty provisions the umbrella clause should be interpreted "in accordance with its ordinary meaning, with due regard for its context and the object and purpose of the Treaty", and that it "protects foreign investors against the violation of or interference with contractual rights with respect to investments."<sup>280</sup> In particular, the Claimant asserts that "its placement in Article 2, alongside other substantive guarantees like 'fair and equitable treatment' and 'full protection and security' [and] the history and modern application of that clause in other BITs illustrate that the very purpose of this provision is to ensure that a State's violation of a contract that relates to foreign investment constitutes an international wrong, and thus an actionable wrong under the Treaty," regardless of the State's exercise of sovereign powers.<sup>281</sup>

226. In any case, the Claimant asserts that even under a restrictive interpretation of the clause, "PDVSA's and its affiliates' breaches of their contractual obligation go far beyond the merely commercial and well into the realm of the sovereign [. . .] The State-enterprises' breaches of the contractual obligations they undertook on behalf of Venezuela were at the direction and for the benefit of the sovereign."<sup>282</sup>

227. The Claimant contends as well that "the umbrella clause obligation extends to the contractual commitments of PDVSA and its affiliates, since, as established above, their conduct was and is

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<sup>280</sup> Memorial, ¶¶ 179-180; Hearing Transcript (28 November 2017), 73:12-74:2.

<sup>281</sup> Memorial, ¶¶ 182-194.

<sup>282</sup> *Ibid.*, ¶ 195.



fully attributable to Venezuela, both at the time they entered into contractual obligations and at the time they breached those contracts.”<sup>283</sup> To support such an argument, the Claimant cites the case of *Noble Ventures v. Romania*, where the tribunal concluded that, as the execution of the contracts under analysis were attributable to the State, those contracts constituted obligations of Romania under the umbrella clause.<sup>284</sup> The Claimant also refers to *Garanti Koza* for the proposition that “international law clearly recognizes that a breach of commitments subject to an umbrella clause is a breach of the treaty, not a breach of contract.”<sup>285</sup>

228. The Claimant further asserts that the umbrella clause applies regardless of any contractual forum-selection clause since its purpose is precisely to “provide for an extra, and neutral, mechanism for the enforcement of claims.”<sup>286</sup> According to the Claimant, the forum selection clauses included in the Conversion Contract and in other related agreements are thus of no relevance.<sup>287</sup>
229. On the basis of the above construction of the umbrella clause, the Claimant argues that “Venezuela must ensure that it and its State enterprises acting on behalf of the State or exercising governmental authority, and those enterprises it directs or controls, meet their obligations with respect to the Conversion Contract, Petroritupano’s Bylaws, and the Hydrocarbons Purchase and Sale Contract. In failing to do so, as detailed herein, it has breached the requirements of the BIT.”<sup>288</sup> In particular, the Claimant alleges:

Acting on behalf of and as part of the [Government of Venezuela], PDVSA and its affiliates refused to pay to VUS the declared Petroritupano dividends for fiscal years 2008 and 2009, and failed and refused to determine and declare dividends for all fiscal years since 2009, in breach of their obligations under the Conversion Contract and Petroritupano’s Bylaws. PDVSA Petr leo failed to pay sums due and owing for oil under the Hydrocarbons PSA, depriving Petroritupano of its sole source of income, and PDVSA CVP, as Petroritupano’s manager, acquiesced in that default. These State enterprises also engaged in a scheme of undisclosed “loans” and fees designed to deprive VUS of the value of and returns from its investment. Acting on behalf of the [Government of

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<sup>283</sup> *Ibid.*, ¶ 196.

<sup>284</sup> *Ibid.*, ¶¶ 197-199; Exhibit CLA-65, *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶¶ 68-83.

<sup>285</sup> Reply, ¶ 139; Exhibit CLA-165, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶¶ 328-332.

<sup>286</sup> Memorial, ¶¶ 200-201; Reply, ¶¶ 141-142.

<sup>287</sup> Memorial, ¶ 202; Reply, ¶ 141.

<sup>288</sup> Memorial, ¶ 203; Hearing Transcript (28 November 2017), 74:3-13.

Venezuela] and with governmental authority, PDVSA and its affiliates improperly manipulated and misrepresented Petroritupano's finances, and otherwise breached their obligations to VUS and its investment.<sup>289</sup>

## 2. Respondent's Position

230. According to the Respondent, the Claimant's interpretation of the umbrella clause is incorrect because breaches of contracts do not automatically give rise to breaches of the BIT, especially where, as here, the State is not a party to those contracts.
231. The Respondent explains that arbitral tribunals, such as *SGS v. Pakistan*, *Hamester v. Ghana*, and the CMS annulment committee, have rejected such equivalence between contract and treaty breaches, holding that "the effect of the umbrella clause is not to transform the obligation which is relied on into something else" and that the parties to the obligation "are likewise not changed by reason of the umbrella clause."<sup>290</sup> The Respondent relies on this jurisprudence to argue that CVP or Petroritupano cannot be substituted by the Republic or PDVSA in the former's contracts with the Claimant. Thus, the Respondent contends that the Claimant's claims fail because the "Claimant has failed to prove that the alleged breaches of the Conversion Contract and Petroritupano's By-laws can be considered sovereign acts of the Republic."<sup>291</sup> Moreover, in the Respondent's view, even if it was possible to automatically consider a breach of the contract as a breach of the treaty, there could not be a breach of the umbrella clause because the contracts under analysis were not entered into with Venezuela.<sup>292</sup>
232. Similarly, the Respondent distinguishes *Noble Ventures* and *Garanti Koza* on the basis that the contracts analysed in those cases were entered into by entities "entitled by Law to represent the Respondent."<sup>293</sup> However, in this case, "Claimant recognized in the Conversion Contract that

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<sup>289</sup> Memorial, ¶ 204.

<sup>290</sup> Counter-Memorial, ¶¶ 79-83; Exhibit RLA-166, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003, 18(1) ICSID Review—Foreign Investment Law Journal 307 (Spring 2003); Exhibit RLA-153, *Gustav F. W. Hamester v. Republic of Ghana*, ICSID Case No. ARB/07/14, Award, 18 June 2010.

<sup>291</sup> Counter-Memorial, ¶ 84; Hearing Transcript (28 November 2017), 120:11-121:1.

<sup>292</sup> Counter-Memorial, ¶¶ 85-89; Rejoinder, ¶ 85; Hearing Transcript (28 November 2017), 93:20-94:12, 121:2-122:11.

<sup>293</sup> Counter-Memorial, ¶ 90; Rejoinder, ¶ 87; Exhibit CLA-65, *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005; Exhibit CLA-165, *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Award, 19 December 2016, ¶ 328-332.

each shareholder, including CVP, was acting in its capacity as a legal entity contracting on its own behalf.”<sup>294</sup>

233. In any event, the Respondent asserts, claims regarding the breaches of the Conversion Contract are not admissible because the parties agreed on a specific choice of forum clause which does not allow for the resolution of disputes before this arbitral tribunal.<sup>295</sup> In this vein, the Respondent asserts that it is inconsistent for Claimant to pretend to enforce against Venezuela the contractual obligations entered into by PDVSA and its affiliates and, at the same time, avoid the exclusive jurisdiction clause included in the Conversion Contract.<sup>296</sup> The Respondent cites various decisions holding that umbrella clause claims are inadmissible where a claimant has not complied with a forum-selection clause.<sup>297</sup>

### 3. Tribunal’s Analysis

234. The Claimant invokes the following provision of the BIT, which it asserts Venezuela breached:

Each Contracting Party shall observe any obligation it may have entered into with regard to the treatment of investments of nationals or companies of the other Contracting Party.<sup>298</sup>

The Claimant emphasizes that “an umbrella clause in a BIT protects foreign investors against the violation of, or interference with, contractual rights with respect to investment.”<sup>299</sup> The Claimant further points out that “the very purpose of this provision is to ensure that a State’s violation of a contract that relates to foreign investment constitutes an international wrong, and thus an actionable wrong under the Treaty.”<sup>300</sup>

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<sup>294</sup> Counter-Memorial, ¶ 90.

<sup>295</sup> *Ibid.*, ¶¶ 92-93; Hearing Transcript (28 November 2017), 122:12-21.

<sup>296</sup> Counter-Memorial, ¶ 92.

<sup>297</sup> *Ibid.*, ¶¶ 93-95; Rejoinder, ¶¶ 88-89; Hearing Transcript (28 November 2017), 122:22-24; Exhibit RLA-167, *Toto Costruzioni General S.p.A v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009; Exhibit RLA-175, *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009.

<sup>298</sup> Exhibit C-1, BIT, Article 2, ¶ 2; Memorial, ¶ 179.

<sup>299</sup> Memorial, ¶ 180.

<sup>300</sup> *Ibid.*, ¶ 182.

235. The Tribunal notes that Venezuela has not entered into any contractual relationship with the Claimant regarding its investment in Petroritupano. The Conversion Contract was concluded by CVP, Petrobras Energía Venezuela, S.A., Petrobras Argentina, APC Venezuela, S.R.L., the Claimant, and Corod Producción, S.A.<sup>301</sup> Article 9.1 expressly provides that:

Each Party acknowledges that each one of the other Parties is entering this Contract in its own name and in its capacity as a *legal entity empowered to contract on its own behalf*.<sup>302</sup>

236. Since Venezuela has not entered into any contractual obligation with respect to the Claimant's investment, it could not have breached any contract. At any rate, the Tribunal found earlier that the acts and omissions of PDVSA, CVP and Petroritupano, in relation to the Claimant's investment, were not attributable to Venezuela.

237. In view of the above, the Tribunal cannot uphold the Claimant's claim that Venezuela breached the umbrella clause contained in Article 2, paragraph 2, of the BIT.

**(d) Expropriation**

**1. Claimant's Position**

238. The Claimant asserts that "Venezuela subjected VUS's investment to measures having the effect equivalent to nationalization or expropriation, and it did so for other than a legitimate public purpose, on a discriminatory basis, and without prompt, adequate, and effective compensation."<sup>303</sup> The Claimant avers that, even if a State does not purport to expropriate an investor's rights, it may "by its actions, render those rights so useless that it will be deemed to have expropriated them."<sup>304</sup> In addition, the Claimant notes that Article 5 of the BIT expressly covers measures that "have the equivalent effect" of expropriation.<sup>305</sup>

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<sup>301</sup> Exhibit C-2, Conversion Contract.

<sup>302</sup> *Ibid.*, emphasis added.

<sup>303</sup> Memorial, ¶ 206; Reply, ¶ 143.

<sup>304</sup> Memorial, ¶ 208; Exhibit CLA-122. Charles N. Brower, Current Developments in the Law of Expropriation and Compensation: A Preliminary Survey of Awards of the Iran-United States Claims Tribunal, 21 INT'L. L. 639 (1987); Exhibit CLA-123, *Compañía del Desarrollo de Santa Elena S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, 15 ICSID Rev.-Foreign Inv. L.J 169 (2000).

<sup>305</sup> Memorial, ¶¶ 209-211; Reply, ¶ 143.

239. The Claimant asserts that “Venezuela has substantially deprived VUS of the use and enjoyment of its property, benefits and rights in Petroritupano and the returns from that investment.”<sup>306</sup> In particular, the Claimant alleges that the Respondent indirectly expropriated its investment by: (i) depriving VUS of its share of dividends for fiscal years 2008 and 2009, (ii) depriving VUS of returns from Petroritupano that were not declared and distributed for subsequent years, (iii) preventing the sale of its interest in Petroritupano to a qualified third-party buyer, (iv) starving Petroritupano of sales proceeds by not paying for oil received and resold by PDVSA Petróleo; (v) accepting loans from PDVSA for Petroritupano to cover operating costs, and (vi) “engaging in a scheme to defraud the foreign shareholders through improper fees, charges and taxes.”<sup>307</sup>
240. The Claimant adds that such an expropriation was unlawful both under Venezuelan law and the BIT because the corresponding requirements of public purpose, non-discrimination, and compensation were not met.<sup>308</sup> It adds that “[e]ven if the expropriation could be found to be for a legitimate public purpose and non-discriminatory, Venezuela breached its obligations under Article 5 of the BIT by failing to promptly, adequately, and effectively compensate VUS for the lost value of its investment suffered due to the expropriatory measures.”<sup>309</sup>
241. The Claimant finally insists that, contrary to what the Respondent has argued, the expropriatory acts are not just private disputes among shareholders, because PDVSA and its affiliates were acting as representatives of the State.<sup>310</sup> In any case, the Claimant affirms that the conduct of the Respondent and the PDVSA companies “is marked by the lack of adherence to the terms of the contracts, and of the law, regarding the investor’s rights, and by the failure to act in any remotely reasonable commercial fashion,” as demonstrated by the Claimant’s expert’s analysis.<sup>311</sup>

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<sup>306</sup> Memorial, ¶ 212.

<sup>307</sup> *Ibid.*, ¶¶ 212-214; Hearing Transcript (28 November 2017), 74:14-75:4. According to the Claimant, Venezuela has continued this behavior directly and through PDVSA and its subsidiaries “in the 32 months since Claimant filed its Memorial.” Reply, ¶ 18.

<sup>308</sup> Memorial, ¶¶ 211, 215-216; Reply, ¶ 143.

<sup>309</sup> Memorial, ¶ 216.

<sup>310</sup> Reply, ¶ 145.

<sup>311</sup> *Ibid.*, ¶¶ 146-150.

## 2. Respondent's Position

242. The Respondent asserts that the Claimant's interest in Petroritupano has not been indirectly expropriated.<sup>312</sup> First, the Respondent explained that it had the contractual right to deny change in control of any of the Class-B Petroritupano Shareholders, which does not constitute an act of *puissance publique*.<sup>313</sup> Second, the Respondent explains that all of the actions identified by the Claimant as depriving it from enjoying its rights are private disputes between private parties which cannot amount to an indirect expropriation as there was no interference by the State.<sup>314</sup>
243. The Respondent argues that only the State exercising its sovereign powers may breach its treaty obligations, and that the tribunal in *Impregilo v. Pakistan* recognized as much in the context of an expropriation claim.<sup>315</sup> The Respondent contends that the "Claimant has not even alleged that such sovereign powers have been used by the Republic with respect to its investment in Petroritupano."<sup>316</sup> According to the Respondent, the Claimant restricted its argument to the fact that "Petroritupano and PDVSA's affiliates conduct is in breach of the Conversion Contract and Petroritupano's By-laws and that this conduct must be attributed to the Republic."<sup>317</sup> The Respondent insists that "such breach cannot amount to an indirect expropriation" in the absence of direct State interference.<sup>318</sup> The Respondent adds that a similar claim was rejected by the *Waste Management* tribunal, which held that "[a] failing enterprise is not expropriated just because debts are not paid or other contractual obligations are not fulfilled."<sup>319</sup>
244. The Respondent concludes that the Claimant cannot have been expropriated as it remains a shareholder of Petroritupano and in possession of its claim for the 2008-2009 dividends.<sup>320</sup> According to the Respondent, the Claimant's claim for loss of value "fails to consider, among

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<sup>312</sup> Counter-Memorial, ¶ 97.

<sup>313</sup> *Ibid.*, ¶ 98; Hearing Transcript (28 November 2017), 94:13-97:12.

<sup>314</sup> Counter-Memorial, ¶ 99; Rejoinder, ¶ 94; Hearing Transcript (28 November 2017), 94:20-95:10, 142:24-143:25.

<sup>315</sup> Counter-Memorial, ¶¶ 100-101; Hearing Transcript (28 November 2017), 141:13-142:23; Exhibit RLA-130, *Impregilo S.p.A v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005.

<sup>316</sup> Counter-Memorial, ¶ 99.

<sup>317</sup> *Ibid.*, ¶ 102.

<sup>318</sup> *Ibid.*, ¶¶ 103-104; Rejoinder, ¶¶ 92-93.

<sup>319</sup> Counter-Memorial, ¶ 105 citing Exhibit CLA-75, *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004.

<sup>320</sup> Counter-Memorial, ¶ 106; Rejoinder, ¶ 95; Hearing Transcript (28 November 2017), 95:3-10.

other important factors, the declining volume of oil produced by Petroritupano and the fluctuation of the Price of oil in the international market, and their repercussions on the value of Petroritupano's equity."<sup>321</sup>

### **3. Tribunal's Analysis**

245. The Claimant does not assert the direct expropriation of its investment by Venezuela. It still owns its investment in Petroritupano, as confirmed by the witness statement of the Associate General Counsel-International for Anadarko Petroleum Corporation. In his second witness statement, he writes that "VUS remains a shareholder in the Venezuelan mixed company Petroritupano S.A., with respect to which [he] continue[s] to hold the position of Alternate Director."<sup>322</sup>
246. The Claimant is thus alleging the indirect expropriation of its investment which, it is argued, occurred because Venezuela "substantially deprived VUS of the use and enjoyment of its property, benefits and rights in Petroritupano and the returns from that investment."<sup>323</sup> The Claimant specifies that it has been deprived through a discriminatory action of its share of declared dividends from Petroritupano for fiscal years 2008 and 2009.<sup>324</sup>
247. The Tribunal has already found that the Respondent, by causing the payment of the declared dividends for 2008 and 2009 to Petrobras Argentina while the Claimant did not receive any payment of such dividends for the same period, did not act in conformity with its obligations under Article 2, paragraph 2, of the BIT.<sup>325</sup> The Tribunal, however, does not consider that this conduct of the Respondent amounts to indirect expropriation. The Claimant remained the owner of 18% of the shares in Petroritupano. It is on this basis – as owner of the shares – that the Claimant asserts that "[f]or the subsequent years, Venezuela deprived VUS of returns from Petroritupano in the form of dividends that should have been declared."<sup>326</sup>
248. The Tribunal notes that the decision on the distribution of the dividends is to be made by Petroritupano, which is a commercial entity with its own legal personality distinct from Venezuela. As determined above by the Tribunal, Petroritupano's acts are not attributable to the

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<sup>321</sup> Rejoinder, ¶ 96; Hearing Transcript (28 November 2017), 94:21-95:2.

<sup>322</sup> Exhibit CWS-4, Second Witness Statement of Luis H. Derrota, ¶ 3.

<sup>323</sup> Memorial, ¶ 212,

<sup>324</sup> *Ibid.*

<sup>325</sup> See ¶ 225 above.

<sup>326</sup> Memorial, ¶ 213.

Respondent.<sup>327</sup> In the view of the Tribunal, the failure by Petroritupano to declare dividends in the years subsequent to 2009 and the complains by Venezuela US regarding that failure are disputes between the parties to the Conversion Contract. They cannot form the basis for any claim of indirect expropriation by the Respondent.

249. The complaints that CVP, as Petroritupano's manager, accepted loans from PDVSA for Petroritupano to cover operating costs, which were replete with excessive costs and fees and the failure of PDVSA Petróleo to pay Petroritupano for the oil received,<sup>328</sup> fall in the same category of commercial disputes that cannot, in the present case, form the basis for the claims of indirect expropriation.
250. In support of its allegation of indirect expropriation by Venezuela, Claimant further refers to the fact that it "prevent[ed] the sale of its interest in Petroritupano to a qualified third-party buyer."<sup>329</sup>
251. It is true that the Venezuelan Minister of Energy and Petroleum did not give his consent to the transfer of the Claimant's shares in Petroritupano to a prospective buyer, the Canadian company PetroFalcon.<sup>330</sup> His prior written consent to such transfer was required under Article 6.3 of the Conversion Contract.<sup>331</sup> The Claimant, as a party to the Conversion Contract, freely agreed to such a condition for the transfer of shares in Petroritupano. The Minister has no obligation to grant the requested consent, nor to provide any justification for his decision. In any case, the denial by the Minister to consent to the intended transfer of shares does not amount to an act of indirect expropriation. The Claimant has remained the owner of the shares and it is on this basis that it was entitled to receive the declared dividends for 2008 and 2009.
252. The Tribunal thus concludes that it cannot uphold the Claimant's claim that the Respondent indirectly expropriated Claimant's investment in breach of Article 5 of the BIT.

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<sup>327</sup> See ¶¶ 193, 200, 208 above.

<sup>328</sup> Memorial, ¶ 214; Reply, ¶ 148, 149.

<sup>329</sup> Memorial, ¶ 214.

<sup>330</sup> Exhibit C-25, Letter from Minister R. Ramírez to L. Derrota (VUS) (17 September 2008).

<sup>331</sup> Exhibit C-2, Conversion Contract.



## VII. COSTS

### 1. Claimant's Position

253. In respect of the allocation of costs, the Claimant contends that “VUS would not have incurred these arbitration costs if Venezuela had complied with its BIT obligations and paid compensation when it was owed. Therefore, in order to place VUS in the same position where it would have been had Venezuela not breached its international obligations, VUS should be awarded all costs, expenses, and attorney’s fees incurred herein.”<sup>332</sup> The Claimant adds that “the Tribunal must also recognize the egregious nature of the underlying conduct in determining the award of costs.”<sup>333</sup>
254. The Claimant claims a total of US\$ 3,457,934.59 in legal and expert costs and EUR 425,000.00 in costs of arbitration.<sup>334</sup> Of these costs, the Claimant asserts that US\$ 843,773.25 were incurred in connection with the Tribunal’s considering and ultimate dismissal of the Respondent’s objection to jurisdiction *ratione voluntatis*; US\$ 2,498,502.98 were incurred in connection with the merits of the dispute; and US\$ 115,658.36 were incurred in connection with the unsuccessful challenge by the Respondent to Maitre Fortier and the successful challenge by the Claimant to Dr. Bottini.<sup>335</sup>
255. The Claimant asserts that all its costs are reasonable in their amounts and have reasonably and necessarily incurred in the prosecution of its claims, taking into account the amount in dispute, the complexity of the case, the length of the proceeding, and other circumstances of the case.<sup>336</sup> The Claimant, however, notes that, once the costs associated with the Claimant’s expert are excluded, the Respondent’s legal costs are significantly higher than the Claimant’s and have not been properly substantiated.<sup>337</sup>

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<sup>332</sup> Memorial, ¶ 265.

<sup>333</sup> Claimant’s Amended Costs Submission (1 February 2018), ¶ 9.

<sup>334</sup> *Ibid.*, ¶ 18; Claimant’s Response on Costs (19 February 2018), ¶ 12.

<sup>335</sup> Claimant’s Amended Costs Submission (1 February 2018), ¶¶ 20-26; Claimant’s Response on Costs (19 February 2018), ¶ 12.

<sup>336</sup> Claimant’s Amended Costs Submission, ¶¶ 5, 10-12.

<sup>337</sup> Claimant’s Response on Costs (19 February 2018), ¶¶ 1-5.

## **2. Respondent's Position**

256. The Respondent requests the Tribunal to order “Claimant to reimburse Respondent for all reasonable costs and expenses, including legal fees, relating to this Arbitration,”<sup>338</sup> in a total amount of US\$ 3,400,000 in legal costs and EUR 425,000.00 in costs of arbitration.<sup>339</sup> The Respondent adds that “there can[not] be any doubt that Respondent’s costs are well within the range of reasonableness for cases of this kind.”<sup>340</sup>

## **3. Tribunal's Decision**

257. The decision on costs is reserved for the final award.

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<sup>338</sup> Counter-Memorial, ¶ 147; Rejoinder, ¶ 125.

<sup>339</sup> Respondent’s letter dated 31 January 2018.

<sup>340</sup> Respondent’s e-mail of 20 February 2018.

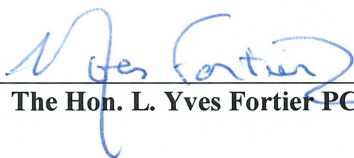
**VIII. DECISION**

258. For the reasons set forth above, the Tribunal decides that:

1. The Tribunal has jurisdiction in the present case;
2. The Bolivarian Republic of Venezuela breached its obligation under Article 2, paragraph 2, of the BIT by carrying out discriminatory measures impairing the Claimant's enjoyment of its investment;
3. The Bolivarian Republic of Venezuela is liable to pay compensation to the Claimant for the breach committed in an amount to be determined in the subsequent stage of the proceedings;
4. All other claims are rejected;
5. The decision on costs is reserved for the final stage of the proceedings; and
6. The Tribunal shall issue, after ascertaining the views of the Parties, directions for the further conduct of the proceedings relating to the quantum.

**Date:** 5 February 2021

**Place of arbitration:** The Hague



\_\_\_\_\_  
The Hon. L. Yves Fortier PC CC QC



\_\_\_\_\_  
Professor Marcelo Kohen  
(with the attached declaration)



\_\_\_\_\_  
H.E. Judge Peter Tomka  
(Presiding Arbitrator)