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")

FINAL AWARD
(QUANTUM)

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

4 November 2022

TABLE OF CONTENTS

GLOSSARY OF DEFINED TERMS / LIST OF ABBREVIATIONS

Claimant	Venezuela US, SRL
Claimant's PHB	Claimant's Post-Hearing Brief, dated 4 March 2022
Claimant's Statement of Costs	Claimant's Statement of Costs, dated 18 March 2022
Conversion Contract	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)
Counter-Memorial	Counter-Memorial on Quantum, dated 20 July 2021
FET	Fair and Equitable Treatment
Hearing	Hearing on Quantum held on 11-12 February 2022
ILC Articles	International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) II (Part Two) Yearbook of the ILC 31
Memorial	Memorial on Quantum, dated 30 April 2021
Partial Award	Partial Award on Jurisdiction and Liability, dated 5 February 2021
Parties	Claimant and Respondent
PCA	Permanent Court of Arbitration
Petrobras	Petrobras Energía S.A.
Petroritupano	Petroritupano S.A.
Rejoinder	Rejoinder Memorial on Quantum, dated 25 October 2021
Reply	Reply Memorial on Quantum, dated 17 September 2021
Respondent	Bolivarian Republic of Venezuela
Respondent's PHB	Respondent's Post-Hearing Brief, dated 4 March 2022
Respondent's Statement of Costs	Respondent's Statement of Costs, dated 18 March 2022
Treaty	Agreement between the Government of Barbados and the Republic of Venezuela for the Promotion and Protection of Investments
UNCITRAL Rules	Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976
Venezuela	Bolivarian Republic of Venezuela

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
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 International Law

II. OVERVIEW OF THE DISPUTE

3. This arbitration concerns a dispute between the Claimant and Venezuela arising out of the Claimant's investment in the mixed company Petroritupano S.A. ("**Petroritupano**"), submitted to arbitration on the basis of the Agreement between the Government of Barbados and the Republic of Venezuela for the Promotion and Protection of Investments (the "**Treaty**"), and the Arbitration Rules of the United Nations Commission on International Trade Law, 15 December 1976 (the "**UNCITRAL Rules**").

4. In its Partial Award on Jurisdiction and Liability, dated 5 February 2021 (the "**Partial Award**"), the Tribunal unanimously decided that, for the reasons set out therein:

> 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.

5. This Final Award determines the amount of the compensation to be paid by the Respondent as a result of the breach committed.

6. The Interim Award on Jurisdiction, issued by the Tribunal on 26 July 2016, and the Partial Award (Jurisdiction and Liability), issued by the Tribunal on 5 February 2021, constitute an integral part of this Final Award.

III. PROCEDURAL HISTORY

7. The Partial Award recounts in detail the procedural history of this arbitration from its commencement through the date on which that award was issued. Only the key procedural developments since that date are therefore recorded below.

8. On 5 February 2021, the Tribunal issued the Partial Award.

9. On 25 February 2021, after having been invited by the Tribunal to confer on the timetable for the proceedings on quantum, the Parties separately advised that they had been unable to reach an agreement and presented their respective proposed timetables to the Tribunal.

10. On 1 March 2021, after having considered the Parties' views and proposals, the Tribunal issued Procedural Order No. 5, establishing the procedural calendar for the quantum phase leading up to a hearing on 1-2 December 2021.

11. On 30 April 2021, the Claimant submitted its Memorial on Quantum (the "**Memorial**").

12. On 29 June 2021, the Parties advised of their agreement to modify the procedural calendar, which was approved by the Tribunal on 30 June 2021. On 13 July 2021, the Parties advised that they had agreed a further modification of the timetable, which was confirmed by the Tribunal on 14 July 2021.

13. On 20 July 2021, the Respondent submitted its Counter-Memorial on Quantum (the "**Counter-Memorial**").

14. On 17 September 2021, the Claimant submitted its Reply on Quantum (the "**Reply**").

15. On 10 October 2021, the Tribunal, in view of the situation of the COVID-19 pandemic, and as provided for in paragraph 6 of Procedural Order No. 5, invited the Parties to consult each other and attempt to agree on whether the Hearing on Quantum (the "**Hearing**") should be held in person or by videoconference.

16. By respective letters of 17 and 18 October 2021, the Claimant and the Respondent advised that they had been unable to reach an agreement on the format of the Hearing and communicated their respective positions on the matter.

17. On 19 October 2021, the Claimant communicated, on behalf of the Parties, that they had agreed to re-schedule the pre-hearing conference originally scheduled for 27 October 2021 for the week of 1 November 2021.

18. By letter dated 20 October 2021, the Tribunal proposed to take up the question of the format of the Hearing at the pre-hearing conference, which it proposed to hold on 5 November 2021. In addition, the Tribunal invited the Parties to consult each other and attempt to agree on the agenda and time allocations during the Hearing.

19. On 25 October 2021, the Respondent submitted its Rejoinder on Quantum (the **"Rejoinder**").

20. By respective e-mails of 1 November 2021, the Parties communicated a joint proposed agenda and time allocations for the Hearing.

21. On 5 November 2021, the Tribunal, the Parties, and the PCA held a pre-hearing videoconference where the Parties reiterated their positions on the format of the Hearing and expressed their views on other issues that remained to be decided.

22. On 9 November 2021, having sought and considered the Parties' views, the Tribunal issued Procedural Order No. 6, deciding on the organization of the Hearing in a hybrid format, with some participants joining in person in The Hague and others by videoconference.

23. On 27 November 2021, the Tribunal informed the Parties that the Presiding Arbitrator had tested positive for COVID-19, and asked the Parties to indicate whether they preferred that he participate by videoconference under the circumstances.

24. On 27 November 2021, the Claimant advised that it considered that the most prudent option would be to conduct the Hearing in a fully remote format.

25. On 28 November 2021, the Respondent objected to holding the Hearing in a fully remote format and requested that the Hearing be postponed in order to allow for the Presiding Arbitrator to recover from his infection and then allow the Hearing to proceed in the planned hybrid format.

26. On 28 November 2021, the Tribunal advised that it had decided to postpone the Hearing to 11-12 February 2022, unless the Parties agreed to hold the Hearing entirely by videoconference on the originally-scheduled dates.

27. On 29 November 2021, the Parties advised that they had been unable to reach an agreement and confirmed their availability for the new proposed dates of 11-12 February 2022.

28. On 30 November 2021, the Tribunal confirmed the postponement of the Hearing to the new dates of 11-12 February 2022.

29. On 13 January 2022, the Tribunal issued Procedural Order No. 7, by which Procedural Order No. 6 was replaced and supplemented with those provisions necessary for either a hybrid hearing or, in the alternative, a fully remote videoconference hearing, if so required by the COVID-19 pandemic situation.

30. On 1 February 2022, the Tribunal informed the Parties that, in view of the worsening COVID-19 situation in the Netherlands, it had decided that the Hearing would take place in a fully remote videoconference format, according to the relevant provisions of Procedural Order No. 7.

31. On 11 and 12 February 2022, the Hearing was held by videoconference. The following persons attended the Hearing:

Tribunal
H.E. Judge Peter Tomka (Presiding Arbitrator)

The Honourable L. Yves Fortier PC CC OQ QC
Professor Marcelo Kohen

Claimant
Ms. Jennifer Edwards
Mr. Elliot Friedman
Mr. Sam Prevatt
Ms. Paige von Mehren
Ms. Cassia Cheung
Ms. Sindi Gavarette
Mr. Gabriel Perkinson

Respondent
Mr. Reynaldo Muñoz Pedroza
Mr. Henry Rodríguez Facchinetti
Mr. Osvaldo César Guglielmino
Mr. Guillermo Moro
Dr. María de la Colina
Mr. Miguel Colquicocha Martínez
Mr. Marcos Maciel
Mr. Ciro García Fiorito

Experts
Mr. Brent Kaczmarek
Mr. Fabián Bello
Mr. Alejandro Daniel Hassan

PCA
Mr. Martin Doe Rodríguez
Ms. Clara Ruiz Garrido
Ms. Magdalena Legris

Court Reporters
Mr. David A. Kasdan
Mr. Virgilio Dante Rinaldi
Ms. Micaela Sofía Fernández

Interpreters
Ms. Silvia Colla
Mr. Daniel Giglio

32. On 14 February 2022, the Tribunal fixed the timetable for the Parties' final submissions, as discussed at the conclusion of the Hearing.

33. On 4 March 2022, the Claimant and the Respondent simultaneously submitted their Post-Hearing Briefs (the "**Claimant's PHB**" and the "**Respondent's PHB**", respectively).

34. On 18 March 2022, the Claimant and the Respondent simultaneously submitted their Statements of Costs (the "**Claimant's Statement of Costs**" and the "**Respondent's Statement of Costs**", respectively).

IV. RELEVANT LEGAL PROVISIONS

35. In their arguments on quantum, the Parties have cited Articles 31, 36 and 38 of the Articles on Responsibility of States adopted by the International Law Commission (the "**ILC Articles**"), reproduced here below:

Article 31

Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 36

Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 38

Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

V. REQUESTS FOR RELIEF

A. CLAIMANT'S REQUEST FOR RELIEF

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

a. AWARD to the Claimant damages for the Respondent's breach of its obligation under Article 2, paragraph 2 of the Treaty, in the total amount of US$ 58,870,898.14, consisting of:

i. US$ 44,159,167.87 for the fiscal year 2008; and

ii. US$ 14,711,730.27 for the fiscal year 2009.

b. AWARD to the Claimant pre-award interest on (a) above, at a rate equal to Petroritupano's cost of equity, compounded annually, or at such other rate and/or compounding period as the Tribunal determines will ensure full reparation, to run until the date of the Award.

c. AWARD to the Claimant post-award and post-judgment interest, at a rate equal to Petroritupano's cost of equity, compounded annually, or at such other rate and/or compounding period as the Tribunal determines will ensure full reparation, to run from the date of the Award to the date of full and final payment.

d. DECLARE that (*i*) the Award is made net of all Venezuelan taxes; and (*ii*) Venezuela shall not tax or attempt to tax the Award.

e. AWARD to the Claimant all of its costs of arbitration on an indemnity basis, including legal and expert costs, with interest compounded annually until full and final payment.

f. AWARD such further and other relief as the Tribunal considers justified under the law.[1]

B. RESPONDENT'S REQUEST FOR RELIEF

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

(A) Rejects completely the claim for compensation submitted by the Claimant in its Memorial on Quantum;

[1] Memorial, ¶ 67; Reply, ¶ 80; Claimant's PHB ¶ 29.

(B) In the event that the Tribunal decides to grant any compensation in this proceeding, (i) it does not apply interest prior to the final award, or, if it does, that the starting date for the computation of interest is not prior to the date of presentation of the Request for Arbitration, and that any interest subsequent to the final award that may be established does not begin to be computed until after a period of no less than 60 days from its issuance; and (ii) it rejects the application of the interest rates proposed by the Claimant and, instead, apply the interest rate proposed by the Republic, calculated at a simple basis;

(C) Order the Claimant to pay the Republic all costs and legal fees that this groundless proceeding has forced it to incur.[2]

VI. ISSUES ON QUANTUM

A. CAUSAL LINK

38. The Parties are in agreement that, since the Treaty is silent on the standard of compensation payable for non-expropriatory breaches, the applicable standard is the customary international law rule of full reparation for the injury caused by the internationally wrongful act committed by Venezuela.[3] However, the Respondent submits that there is no causal link between the internationally wrongful act found in the Partial Award and the damages claimed by the Claimant. Thus, the Respondent contends that the Claimant is not entitled to any compensation whatsoever in this arbitration.

1. Claimant's Position

a) The Respondent's breach of the Treaty

39. The Claimant asserts that the damages that it seeks flow directly from Venezuela's breach of the Treaty as found in the Partial Award.[4] The Claimant notes that, according to the Partial Award, Venezuela breached the Treaty's non-impairment provisions when it gave the discriminatory instruction to pay dividends to Petrobras Energía S.A. ("**Petrobras**"), while omitting to cause

[2] Counter-Memorial, ¶ 124; Rejoinder, ¶ 181; Respondent's PHB, ¶ 49.

[3] Memorial, ¶¶ 21-22; Counter-Memorial, ¶¶ 36-37; Exhibit CLA-55, ILC Articles, Art. 31; Exhibit CLA-192, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶¶ 1568-1571; Exhibit CLA-129, *Case Concerning the Factory at Chorzów*, Judgment, 13 September 1928, PCIJ Series A No. 17, p. 47.

[4] Memorial, ¶ 21; Reply, ¶ 34.

payment to the Claimant.[5] According to the Claimant, there are two components of such breach: first, the act whereby Venezuela caused payment of dividends to Petrobras and, second, the omission to cause payment to the Claimant as well.[6] The Claimant submits that those two components are inherent in the nature of discriminatory conduct, "which, by definition, means that similar cases were treated differently without justification."[7]

40. The Claimant further submits that "[t]he non-impairment breach concerned Venezuela's *direct* breach of the Treaty by virtue of Venezuela's *direct* acts in causing the payment of dividends to Petrobras in a discriminatory manner."[8] According to the Claimant, "[t]hat breach finding did not concern, and is unaffected by, whether CVP's and/or Petroritupano's conduct could be attributed to Venezuela, because that conduct is not relevant to whether Venezuela's conduct was discriminatory."[9] Therefore, contrary to the Respondent's allegations, the Claimant sustains that the Tribunal's attribution analysis leading to the dismissal of its fair and equitable ("**FET**") treatment claim is irrelevant to this quantum phase.[10]

b) The damages that flow from the Respondent's breach

41. The Claimant argues that the remedy awarded should "reestablish the situation which would, in all probability, have existed" if Venezuela's breach had not been committed.[11] According to the Claimant, there are two scenarios in which Venezuela would have complied with its Treaty obligations: (A) the scenario in which Venezuela gave no instruction and neither Petrobras nor the Claimant received any dividends; and (B) the scenario in which Venezuela gave a non-discriminatory instruction for all Petroritupano shareholders, including the Claimant, to be paid dividends in equal measure.[12] The Claimant notes that reestablishing scenario (A) is not possible, as the Tribunal cannot order Petrobras to return the dividends that it received. Therefore, it

[5] Memorial, ¶ 17; Reply, ¶¶ 23, 26; Hearing Transcript (11 February 2022), 9:18-19:2.

[6] Reply, ¶¶ 26-27. The Claimant maintains that, as the ILC Articles observe, an internationally wrongful act can consist both of an action or an omission. See Reply, ¶ 27; Exhibit CLA-55, ILC Articles, Art. 2.

[7] Reply, ¶ 26; Hearing Transcript (11 February 2022), 19:3-20:22. See also Reply, ¶ 15; citing Partial Award, ¶ 224.

[8] Reply, ¶ 18 (emphasis in original).

[9] Reply, ¶ 18.

[10] Reply, ¶ 18; Hearing Transcript (11 February 2022), 20:23-22:22, 27:19-29:23.

[11] Reply, ¶ 23; Hearing Transcript (11 February 2022), 22:18-23:16; Exhibit CLA-129, *Case Concerning the Factory at Chorzów*, Judgment, 13 September 1928, PCIJ Series A No. 17, p. 47.

[12] Reply, ¶ 24.

maintains that the only viable standard for reparation is the payment by Venezuela of the amount that the Claimant would have received in scenario (B): its corresponding portion of the dividends for 2008 and 2009 (US$ 58,870,898.14) plus interest.[13] The Claimant contends that this conclusion is consistent with investment treaty jurisprudence on damages for discriminatory acts in violation of international law, citing in particular the decisions in *LG&E v. Argentina* and *Feldman v. Mexico*.[14]

42. The Claimant further submits that it is irrelevant that the compensation claimed is identical to that which would have been owing for the other breaches dismissed by the Tribunal, as "multiple heads of claim can give rise to the same measure of damages."[15]

43. Finally, the Claimant rejects the Respondent's factual argument, raised in the Rejoinder, that Petroritupano did not have enough funds to pay dividends to all of its shareholders. First, the Claimant sustains that this is irrelevant as a matter of law, as full reparation is required under international law.[16] Second, the Claimant asserts that the argument is factually inaccurate, as Petroritupano's financial statements show that it had "more than sufficient funds to pay all the Shareholders the dividends they were owed."[17] The Claimant further maintains that it is not believable that the only cash available in 2011 just happened to be "the exact amount down to the dollar of Petrobras's 22 percent share of the total declared dividends."[18]

[13] Reply, ¶¶ 25, 28, 33; Hearing Transcript (11 February 2022), 23:17-27:18.

[14] Reply, ¶¶ 29-30; Hearing Transcript (11 February 2022), 29:24-30:18, 33:22-34:17; Exhibit CLA-41, *LG&E Energy Corp. and others v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, ¶¶ 48, 58; Exhibit CLA-199, *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶¶ 197, 202-206.

[15] Reply, ¶ 32; referring to Exhibit CLA-203, *Murphy Exploration & Production Company – International v. Republic of Ecuador*, PCA Case No. 2012-16, Partial Final Award, 6 May 2016, ¶ 294; Exhibit RLA-368, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 874.

[16] Claimant's PHB, fn. 1; Hearing Transcript (11 February 2022), 30:19-32:19.

[17] Claimant's PHB, fn. 1; Hearing Transcript (11 February 2022), 32:20-33:10. See also Hearing Transcript (12 February 2022), 165:23-166:7.

[18] Hearing Transcript (11 February 2022), 33:11-21.

2. Respondent's Position

a) The Respondent's breach of the Treaty

44. The Respondent asserts that the analysis of the attribution of conduct under the ILC Articles remains relevant and applies *mutatis mutandis* to all claims based on the same conduct.[19] The Respondent thus points to the Tribunal's finding that the non-payment of the 2008 and 2009 dividends to the Claimant was not attributable to Venezuela for the purposes of the FET and discriminatory treatment claims, and that "the only conduct that had not been covered by such analysis" was the payment of Petrobras' corresponding dividends, which it found to be attributable to Venezuela.[20] According to the Respondent, the Tribunal did not consider that the discriminatory conduct was composed of two elements.[21] Otherwise, both the non-payment of the dividends to the Claimant and the payment of the dividends to Petrobras should have been attributable to Venezuela.[22]

45. The Respondent further submits that there is no such thing as "direct conduct" by a State under the ILC Articles, as "a State is a legal entity that may not act 'directly' or by itself, but instead it necessarily acts through persons."[23] Thus, the Respondent argues that Venezuela's discriminatory instruction is not the conduct in breach of the Treaty, but "the act of an organ of the State by virtue of which Petroritupano's payment of dividends to Petrobras is attributed to Venezuela."[24] The Respondent concludes that the only conduct in breach of the Treaty, as decided by the Tribunal, was the discriminatory payment of dividends to Petrobras.[25]

---

[19] Rejoinder, ¶¶ 32-34.

[20] Rejoinder, ¶¶ 37-40; Respondent's PHB, ¶ 5; Hearing Transcript (11 February 2022), 60:11-61:13, 67:11-72:7; Partial Award, ¶¶ 216, 222.

[21] Rejoinder, ¶ 41.

[22] Rejoinder, ¶ 41; Hearing Transcript (11 February 2022), 72:8-79:25.

[23] Rejoinder, ¶ 51-56; Hearing Transcript (11 February 2022), 80:1-85:22; referring to Reply, ¶ 18; Exhibit RLA-317, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its fifty-third session, U.N. Doc. A/56/10, Art. 2, Commentary 5, p. 35.

[24] Rejoinder, ¶ 49; Hearing Transcript (11 February 2022), 85:23-87:19; Exhibit RLA-317, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its fifty-third session, U.N. Doc. A/56/10, Art. 8, p. 47.

[25] Rejoinder, ¶ 57.

b) The damages that flow from the Respondent's breach

46. The Respondent insists that "only damages caused by the internationally wrongful act can be compensated, and not any consequence derived from the internationally wrongful act."[26] The Respondent adds that the burden of proving the existence of the damages, the identification of the specific loss or damage, and the factual and legal causal link with the internationally wrongful act is on the investor claiming compensation.[27]

47. In this case, the Respondent submits that the Claimant has failed to prove or quantify the existence of any damages specifically arising out of the conduct which the Tribunal found to be in breach of the Treaty.[28] In particular, the Respondent maintains that the damages claimed by the Claimant (its portion of the dividends for 2008 and 2009) were caused by conduct that the Tribunal found was not attributable to Venezuela (the non-payment of dividends to Venezuela US for fiscal years 2008 and 2009).[29] The Respondent argues that those damages do not arise from the conduct that the Tribunal considered unlawful, but instead have the goal of putting the Claimant on equal footing with Petrobras, which is not required by international law.[30] According to the Respondent, this fact also distinguishes the present case from the decisions cited by the Claimant.[31] The Respondent thus rejects the scenarios proposed by the Claimant.[32]

48. Alternatively, the Respondent submits that, if the Tribunal accepts the scenarios proposed by the Claimant, opting for the scenario where both the Claimant and Petrobras are paid dividends is "wholly unjustified".[33] In the Respondent's view, the Claimant's arguments to reject the

---

[26] Counter-Memorial, ¶¶ 36-43; Rejoinder, ¶ 68; Exhibit CLA-55, ILC Articles, Art. 31; Exhibit RLA-358, James Crawford, The International Law Commission's Articles on State Responsibility, Cambridge University Press, 2002, pp. 203-204; Exhibit RLA-301/381, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment on Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, 2018 ICJ REPORTS, p. 15, ¶ 32; Exhibit RLA-317, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its fifty-third session, U.N. Doc. A/56/10, Art. 31, Commentary 2, p. 91.

[27] Counter-Memorial, ¶¶ 41-57.

[28] Counter-Memorial, ¶ 32; Respondent's PHB, ¶¶ 4-9.

[29] Counter-Memorial, ¶¶ 22-31; Partial Award, ¶¶ 204, 206. See also Reply, ¶¶ 8, 10, 16; Respondent's PHB, ¶¶ 11-13.

[30] Counter-Memorial, ¶¶ 27-28, 33; Rejoinder, ¶¶ 10, 69; Hearing Transcript (11 February 2022), 87:20-91:5.

[31] Rejoinder, ¶¶ 86-89; Exhibit RLA-334, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, ¶¶ 46-48; Exhibit CLA-199, *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶¶ 202-205.

[32] Rejoinder, ¶ 75; Hearing Transcript (11 February 2022), 91:6-93:5.

[33] Rejoinder, ¶¶ 76-77.

alternative scenario where neither the Claimant nor Petrobras are paid dividends are "nonsense".[34] A counterfactual analysis, the Respondent says, simply requires the consideration of what would have been the situation if the wrongful measure had not been adopted by the respondent State; it does not require jurisdiction over other parties involved in the counterfactual scenario.[35]

49. Finally, the Respondent argues that, even if the Tribunal accepted the counterfactual where both the Claimant and Petrobras are paid dividends, damages could never amount to US$ 58,870,898.14, as claimed by the Claimant. The Respondent argues that, in accordance with Article 32 of the Conversion Contract, "[u]nder no circumstances will distributions be made to shareholders if the Company does not have available cash to pay for them."[36] The Respondent submits that Petroritupano did not have enough funds to pay dividends to all of Petroritupano's shareholders, and that the Claimant would have received at most US$ 12,951,597.58.[37]

3. Tribunal's Analysis

50. The Tribunal starts with recalling its findings in the Partial Award (Jurisdiction and Liability). It found that "[t]he 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" and that "[t]he 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."[38]

51. The task of the Tribunal in the present, and final, stage of the proceeding is thus to determine the amount of compensation to which the Claimant is entitled on account of the breach of its obligation under Article 2, paragraph 2, of the BIT.

52. The relevant part of Article 2, paragraph 2, provides that "[n]either Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use,

---

[34] Rejoinder, ¶¶ 78-80.

[35] Rejoinder, ¶ 81; Hearing Transcript (11 February 2022), 93:6-94:7.

[36] Rejoinder, ¶¶ 96-97; Respondent's PHB, ¶ 10; citing Hearing Transcript (12 February 2022), 133:19-25, 155:14-25, 156:1-10; 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, Art. 32.

[37] Rejoinder, ¶¶ 91-94; Respondent's PHB, ¶¶ 14-20; Hearing Transcript (11 February 2022), 94:8-97:5. According to the Respondent, Petroritupano's available funds at that moment amounted to US$ 71,953,319.96, and the Claimant held an 18% of Petroritupano's shares.

[38] Partial Award (Jurisdiction and Liability), 5 February 2021, ¶ 258.

enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party".

53. It is true, as emphasized by the Respondent,[39] that the non-payment of the dividends declared for 2008 and 2009 by Petroritupano to the Claimant, was not, in the Tribunal's analysis, attributable to Venezuela.[40] It is to be noted that the declared dividends were neither paid, within the required period of five days following the date of declaration of approval of dividends by the Shareholders' Meeting,[41] to another foreign investor, namely Petrobras.

54. However, it has been established by the Claimant before the Tribunal that Petrobras was later, in 2011, paid the dividends in full "shortly before the visit of the Venezuelan President to Brazil to discuss, among other things, cooperation in energy matters".[42] The Tribunal considered that "[t]he Government of Venezuela, no doubt, was in a position to make that instruction [that the payment of the declared dividends be made to Petrobras], as Petroritupano is controlled by CVP, which in turn is controlled by PDVSA wholly-owned by the State".[43] Recalling that PDVSA's Chairman at the relevant time was the Minister of Energy and Petroleum, the Tribunal was of the view that there was a presumption that the payment was made under the instruction of the Government of Venezuela. While the Respondent was in a position to request explanations from PDVSA and CVP for the payment of the dividends made to Petrobras in 2011, it, however, did not provide any explanation. In view of the above, the Tribunal concluded that it was "convinced that the payment of the dividends to Petrobras was made on the instructions of the Government of Venezuela".[44]

55. The Tribunal accepts that the Government of Venezuela was entitled to pursue its policy of developing cooperation in energy matters with Brazil when it considered it important to arrange for the payment of the declared dividends to Petrobras, on the eve of the visit of the President of Venezuela to Brazil.[45] It could have done so while, however, respecting its international legal obligation, set out in Article 2, paragraph 2, of the BIT prohibiting discriminatory treatment of

[39] Counter-Memorial, ¶¶ 22-23; Rejoinder, ¶ 10; Respondent's PHB, ¶ 5.

[40] Partial Award, ¶ 207.

[41] See 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, Art. 32.

[42] Partial Award, ¶ 222.

[43] Partial Award, ¶ 222.

[44] Partial Award, ¶ 222.

[45] Partial Award, ¶ 220.

Barbadian companies. The Claimant, a company incorporated in Barbados, was in the same situation as Petrobras, and both did not receive the declared dividends from Petroritupano within the prescribed time. The non-discrimination obligation required the Government of Venezuela, once it decided for policy reasons to arrange in 2011 for the payment of the dividends to Petrobras, to arrange for the payment of the dividends also to the Claimant. In this way, while pursuing its energy policy objectives, the Respondent would have complied with its obligation under Article 2, paragraph 2, of the BIT. Had the Respondent proceeded in this way, and thus complied with its obligation of non-discrimination, the Claimant would have been treated in the same way as Petrobras, and consequently would have received the declared dividends in the amount of US$ 58,870,898.14 in the same period as Petrobras, i.e., in late May 2011.

56. The arrangement by the Government of Venezuela for the payment of the dividends to Petrobras in 2011 cannot be undone. To remedy the consequences for the Claimant of the discriminatory treatment against it by the Respondent, it is necessary, in the view of the Tribunal, to order the Respondent to pay the Claimant US$ 58,870,898.14 which shall be paid within two months from the date of this Final Award, unless this amount has been paid in that period by Petroritupano or CVP.

B. PRE-AWARD INTEREST

1. Claimant's Position

57. The Claimant submits that it is entitled to pre-award interest from the date of the Respondent's breach. According to the Claimant, full reparation requires that "interest runs from the date when the principal sum should have been paid."[46] According to the Claimant, this means that interest should run from when it should have received its portion of the 2008 and 2009 dividends in May 2011, at the same time as Petrobras received its dividends.[47]

58. The Claimant submits that this has been recognized by "the weight of modern authority".[48] The Claimant argues that the cases cited by Venezuela are distinguishable on the basis of the

[46] Memorial, ¶ 25; Reply, ¶¶ 38-39; Hearing Transcript (11 February 2022), 34:18-39:2; Exhibit RLA-317, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its fifty-third session, U.N. Doc. A/56/10, Art. 38.

[47] Reply, ¶ 40; Memorial, ¶ 27.

[48] Memorial, ¶ 25; Reply, ¶¶ 38-42; citing Exhibit CLA-196, *Cairn Energy PLC and Cairn UK Holdings Limited v. Republic of India*, PCA Case No. 2016-7, Award, 21 December 2020, ¶ 1955-1963; Exhibit CLA-192, *Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia*, ICSID Case No. ARB/16/6, Award, 27 August 2019, ¶¶ 1578, 1616; Exhibit CLA-37, *Asian Agricultural Products, Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID

applicability of domestic law or uncertainty as to the principal to which interest would be applied at the relevant times.[49] The Claimant likewise rejects the Respondent's subsidiary arguments that interest should run from the date of commencement the arbitration or that a "grace period" of at least 60 days following the issuance of the final award should be applied, distinguishing the authorities cited by Venezuela on the same basis.[50]

2. Respondent's Position

59. The Respondent submits that the Claimant is not entitled to any interest prior to the rendering of the final award. First, the Respondent rejects the Claimant's calculation of interest, because it is based on the fact that its dividends were "trapped" in Petroritupano, something which, the Respondent reiterates, is not attributable to Venezuela.[51] Second, the Respondent notes that "[t]here is no uniform approach, internationally, to questions of quantification and assessment of amounts of interest payable. In practice, the circumstances of each case and the conduct of the

---

Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 114; Exhibit CLA-138, *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 128; Exhibit CLA-173, *Gemplus S.A. and others v. United Mexican States and Talsud S.A. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 and ARB(AF)/04/4, Award, 16 June 2010, ¶ 16.21; Exhibit CLA-59, *Kardassopoulos and Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, ¶¶ 665-667; Exhibit CLA-7, *BG Group Plc. v. Argentine Republic*, UNCITRAL, Final Award, 21 December 2007, ¶ 457; Exhibit CLA-190, *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award, 8 March 2019, ¶¶ 818-825; Exhibit CLA-22, *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/07, Award, 25 May 2004, ¶ 247; Exhibit CLA-148, *Pope & Talbot, Inc. v. Canada*, UNCITRAL, Award in Respect of Damages, 31 May 2002, ¶ 90; Exhibit RLA-368, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶¶ 1273, 1276; Exhibit CLA-194, *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, ¶¶ 852-853; Exhibit CLA-199, *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, ¶ 205; Exhibit CLA-41, *LG&E Energy Corp. and others v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, ¶ 104; Exhibit CLA-202, *Hrvatska Elektroprivreda D.D. v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Award, 17 December 2015, ¶ 544; Exhibit CLA-113, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 308.

[49] Reply, ¶ 41; Hearing Transcript (11 February 2022), 39:3-40:1; Exhibit RLA-318, *Libyan American Oil Company (LIAMCO) v. Government of Libyan Arab Republic*, Award, 12 April 1977, ¶¶ 366; Exhibit RLA-320, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 618; Exhibit RLA-319, *SGS Société Générale de Surveillance SA v. Republic of Philippines*, ICSID Case No. ARB/02/6, Order of the Tribunal on Further Proceedings, 17 December 2007, ¶¶ 16, 24; Exhibit CLA-174, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 362.

[50] Reply, ¶¶ 44-47; Hearing Transcript (11 February 2022), 40:2-41:16; Exhibit CLA-208, *Serafín García Armas and Karina García Gruber v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-3, Final Award, 26 April 2019, ¶ 539; Exhibit CLA-140, *Amco Asia Corporation, and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on the Merits, 20 November 1984, and Decision on Application for Annulment, 16 May 1986, ¶¶ 148, 281; Exhibit RLA-324, *Mr. Franz Sedelmayer v. The Russian Federation*, SCC, Award, 7 July 1998, ¶¶ 3.6.1, 3.6.3; Exhibit RLA-325, *Swembalt AB, Sweden v. The Republic of Latvia*, UNCITRAL, Decision by the Court of Arbitration, 23 October 2000, ¶¶ 46-47; Exhibit RLA-0326, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, ¶¶ 621, 630-631.

[51] Rejoinder, ¶¶ 103-104; Respondent's PHB, ¶¶ 21-23; Hearing Transcript (11 February 2022), 98:20-101:2.

parties strongly affect the outcome."[52] Third, the Respondent cites various arbitral tribunals that have rejected pre-award interest on the basis that interest cannot be calculated until the actual amount of damages is established in a final award, and even until the expiry of a grace period of at least 60 days thereafter.[53]

60. Contrary to the Claimant's allegations, the Respondent submits that the authorities it cites are not predicated on the applicability of domestic law[54] or the vagueness of the claim, but held that interest can be awarded only from the date of the award, "that being 'the moment when the amount of the sum due has been fixed and the obligation to pay has been established'."[55]

61. Alternatively, the Respondent argues that interest should only run from the Notice of Arbitration on 22 March 2013—the date on which a claim was first made—which would also be consistent with the provisions set forth in the Civil Code of Venezuela.[56] The Respondent claims that this criterion has been adopted "by a broad array of tribunals",[57] and it again disputes that these decisions were premised on domestic law standards.[58]

---

[52] Counter-Memorial, ¶ 63; Rejoinder, ¶ 105; Exhibit RLA-317, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its fifty-third session, U.N. Doc. A/56/10, Art. 38.

[53] Counter-Memorial, ¶¶ 62-67; Rejoinder, ¶¶ 106-110, 118; Respondent's PHB, ¶¶ 24-25; Hearing Transcript (11 February 2022), 101:3-102:16; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 363; Exhibit RLA-375, *"S.S. Wimbledon", United Kingdom et al. v. Germany*, Judgment, 17 August 1923, PCIJ Series A No. 1; *Libyan American Oil Company (LIAMCO) v. Government of Libyan Arab Republic*, Award, 12 April 1977, ¶ 366; Exhibit RLA-319, *SGS Société Générale de Surveillance SA v. Republic of Philippines*, ICSID Case No. ARB/02/6, Order of the Tribunal on Further Proceedings, 17 December 2007, ¶ 16; Exhibit RLA-327, *SD Myers Inc. v. Canada*, UNCITRAL, Second Partial Award, 21 October 2002; Exhibit RLA-384, *Mobil Cerro Negro, Ltd. v. Petróleos de Venezuela, S.A., PDVSA Cerro Negro, S.A.*, ICC Case No. 15416/JRF/CA, Final Award, 23 December 2011, ¶¶ 855-857; Exhibit RLA-301/381, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment on Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, 2018 ICJ REPORTS, p. 47, ¶¶ 151-152.

[54] Rejoinder, ¶ 113; *Libyan American Oil Company (LIAMCO) v. Government of Libyan Arab Republic*, Award, 12 April 1977, ¶ 366.

[55] Rejoinder, ¶¶ 116-117; Exhibit RLA-319, *SGS Société Générale de Surveillance SA v. Republic of Philippines*, ICSID Case No. ARB/02/6, Order of the Tribunal on Further Proceedings, 17 December 2007, ¶ 16; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011, ¶ 363.

[56] Counter-Memorial, ¶¶ 69-70, 74; Rejoinder, ¶¶ 120-121, 126; Hearing Transcript (11 February 2022), 102:17-103:5; Exhibit RLA-327, Civil Code of Venezuela, Sections 1,277 and 1,269.

[57] Counter-Memorial, ¶¶ 71-73; Exhibit CLA-140, *Amco Asia Corporation, and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award on the Merits, 20 November 1984, and Decision on Application for Annulment, 16 May 1986, ¶ 281; Exhibit RLA-0326, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Final Award, 14 March 2003, ¶¶ 630; Exhibit RLA-327, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Second Partial Award, 21 October 2002, ¶ 303.

[58] Rejoinder, ¶¶ 122-125; Hearing Transcript (11 February 2022), 103:6-104:2.

3. Tribunal's Analysis

62. Had the Respondent not breached its obligation of non-discrimination, while pursuing its legitimate energy policy objectives, the Claimant would have received by the end of May 2011, on the same date as Petrobras, the amount of US$ 58,870,898.14. In the view of the Tribunal, the Claimant is entitled to receive interest from the moment the Respondent breached its obligation of non-discrimination. Under Article 38, paragraph 2, of the ILC Articles, which both Parties have cited in their submissions,[59] "[i]nterest runs from the date when the principal sum should have been paid until the obligation to pay is fulfilled."[60] The interest on the principal amount due will provide the Claimant with the full reparation of the injury caused by the Respondent's breach. It remains for the Tribunal to determine the appropriate interest rate to which it turns next.

C. INTEREST RATE

63. The Respondent argues that, if the Tribunal determined that compensation should be paid by Venezuela and that an interest rate should be applied on such amount, the applicable interest rate should be a short-term risk-free rate.[61]

1. Claimant's Position

a) Interest rate equivalent to Petroritupano's cost of equity

64. The Claimant submits that the pre-award and post-award interest rates[62] should be equivalent to Petroritupano's cost of equity of 11.83%.[63] The Claimant sustains that the loss that it suffered as a result of Venezuela's breach is "the opportunity cost of having been deprived of the funds in question, and instead having been forced to reinvest those funds into Petroritupano."[64] Thus, the

[59] Reply, ¶ 39; Counter-Memorial, ¶ 63.

[60] Exhibit RLA-317, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, adopted by the International Law Commission at its fifty-third session, U.N. Doc. A/56/10.

[61] Counter-Memorial, ¶ 75.

[62] According to the Claimant, "[t]here is no reason to differentiate between the rate applicable to delayed payment damages accruing prior to or after the Award." See Memorial, ¶ 44; Reply, ¶ 75.

[63] Reply, ¶ 60; Hearing Transcript (11 February 2022), 45:17-46:2; Exhibit CER-4, Fourth Kaczmarek Report, 17 September 2021, ¶ 106-110 and Table 7.

[64] Memorial, ¶ 28; Exhibit CLA-170, T. J. Sénéchal, J. Y. Gotanda, Interest as Damages, 47 Columbia Journal of Transnational Law 491 (2009), p. 495; Exhibit CLA-149, J. Y. Gotanda, A Study of Interest, 2 Villanova University School of Law Public Law and Legal Theory Working Paper Series (2007), p. 34; Exhibit CLA-171, P. Bienvenu, M. J. Valasek, Compensation for Unlawful Expropriation, and Other Recent Manifestations of the Principle of Full Reparation in International Investment Law, in A. Jan van den Berg (ed.), 50 Years of the New

Claimant argues that the interest rate should be equivalent to the return that the Claimant would have demanded and received to compensate it for the risks of an equity investment in Petroritupano, which, according to the Claimant, is Petroritupano's cost of equity.[65]

65. The Claimant submits that this was recognized in *ConocoPhillips v. Venezuela*, where the claimant had been also wrongfully deprived of dividends,[66] as well as in "a growing body of investment arbitration decisions [which] focus on the investor's opportunity cost of capital in awarding interest."[67]

66. The Claimant rejects Venezuela and its expert's critique that the cost of equity would compensate the Claimant for risks that it has not borne.[68] The Claimant notes that willing equity investors would demand a return equal to Petroritupano's cost of equity to invest in that company.[69] The Claimant sees no justification why the Claimant, "which was unlawfully forced to invest US$ 58.9 million in Petroritupano for over a decade", should be compensated at a lower rate than willing investors.[70]

67. Finally, the Claimant points out that neither the Respondent nor its expert have provided an alternative cost of equity calculation to the one proposed by the Claimant.[71] The Claimant claims

---

York Convention: ICCA International Arbitration Conference, 14 ICCA Congress Series 231 (2009), pp. 261-262. See also Reply, ¶ 49.

[65] Memorial, ¶ 28; Claimant's PHB, ¶ 2; Hearing Transcript (11 February 2022), 41:17-42:25; Exhibit CLA-170, T. J. Sénéchal, J. Y. Gotanda, Interest as Damages, 47 Columbia Journal of Transnational Law 491 (2009), pp. 524, 526. See also Reply, ¶¶ 49-50; Exhibit CER-4, Fourth Kaczmarek Report, 17 September 2021, ¶ 103.

[66] Memorial, ¶¶ 29-30; Claimant's PHB, ¶ 3; Hearing Transcript (11 February 2022), 43:1-45:10; Exhibit CLA-190, *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award, 8 March 2019, ¶¶ 809-812, 818-819, 821. See also Reply, ¶¶ 50-51.

[67] Memorial, ¶¶ 31-34; Reply, ¶¶ 50-54; Hearing Transcript (11 February 2022), 45:11-16; Exhibit CLA-131, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, ¶¶ 9.2.3, 9.2.8; Exhibit RLA-169, *Alpha Projektholding GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 514; Exhibit CLA-178, *Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. v. Petróleos de Venezuela, S.A.*, ICC Case No. 16848/JRF/CA, Final Award, 17 September 2012, ¶¶ 294-307; Exhibit CLA-181, *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, 22 May 2014, ¶ 429-430, 308-310.

[68] Reply, ¶ 55; Claimant's PHB, ¶ 4; Hearing Transcript (12 February 2022), 276:19-277:4; referring to Counter-Memorial, ¶¶ 77, 96; Exhibit RER-1, Bello Report, 20 July 2021, ¶¶ 15-16, 71.

[69] Reply, ¶ 56; Claimant's PHB, ¶ 5.

[70] Reply, ¶ 56; Claimant's PHB, ¶ 5.

[71] Claimant's PHB, ¶ 6; Hearing Transcript (12 February 2022), 259:3-7.

that "if they had, it would be far higher" than the 11.83% proposed by its expert, given the increase in Venezuela's country risk since 2011.[72]

b) Alternative interest rates

68. The Claimant posits that the interest rate set in Article 1.6 of the Conversion Contract for shareholders' failure to pay required contributions (i.e., LIBOR + 10%) would also be "a commercially reasonable and justifiable rate", which at the same time confirms the reasonableness of the 11% interest rate proposed by the Claimant in the first place.[73] The Claimant submits that, regardless of whether Article 1.6 applies specifically to unpaid dividends, the rate established in Article 1.6 reflects "the contemporaneous views of the contracting parties and Venezuela[74] regarding the time value and opportunity cost of money in the context of the Petroritupano project."[75] The Claimant maintains that this approach is consistent with decisions applying contractual interest rates to treaty breaches.[76] Moreover, the Claimant rejects the Respondent's argument that the LIBOR + 10% rate found in the Conversion Contract is not a "commercial" rate, when the Respondent itself argues for an alternative contractual rate, LIBOR + 4%, as found in the Hydrocarbons Purchase and Sales Contract.[77] In response to the Respondent's objection to Mr. Kaczmarek's use of the 12-month LIBOR rather than the 1-month LIBOR, the Claimant sustains that (i) the Conversion Contract refers to the two rates;[78] and (ii) "when properly applied", the difference between using one or the other is "negligible".[79]

---

[72] Claimant's PHB, ¶¶ 6-7; Hearing Transcript (11 February 2022), 119:7-121:15; Hearing Transcript (12 February 2022), 270:20-271:14.

[73] Memorial, ¶¶ 38-41; Reply, ¶ 62; Claimant's PHB, ¶ 8; Exhibit C-2, Conversion Contract, Art. 1.6(A).

[74] The Claimant maintains that, although Venezuela is not a party to the Conversion Contract, it approved the terms of such instrument. The Claimant notes that this has not been disputed by the Respondent. See Memorial, ¶ 38; Reply, ¶ 62; Claimant's PHB, ¶¶ 9-10; Exhibit C-2, Conversion Contract, Preamble; Exhibit C-2(A), Acuerdo of the National Assembly, 5 May 2006; Exhibit C-2(C), Decree of Creation issued by President Chávez, 22 June 2006, Art. 4; Exhibit C-3, Petroritupano Articles of Incorporation and Bylaws, Art. 32; Partial Award, ¶¶ 88-90, 162.

[75] Memorial, ¶ 38; Reply, ¶¶ 62-63; Claimant's PHB, ¶¶ 9, 11-13; Hearing Transcript (11 February 2022), 46:3-23.

[76] Memorial, ¶¶ 39-40; Reply, ¶ 63; Claimant's PHB, ¶ 9; Hearing Transcript (11 February 2022), 46:24-47:6; referring to Exhibit CLA-59, *Kardassopoulos and Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, Part V.F; Exhibit CLA-188, *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, Section V(H)(9).

[77] Claimant's PHB, ¶¶ 14-17.

[78] Reply, ¶ 64; referring to Exhibit C-2, Conversion Contract, Art. 1.6(A).

[79] In particular, the Claimant submits that, over the period of May 2011 to the present, the average 12-month LIBOR + 10% rate has been 11.22% and the average 1-month LIBOR + 10% rate, 11.24%. See Reply, ¶ 64;

69. In the further alternative, the Claimant submits that the appropriate interest rate would be the yield on Venezuela's sovereign debt. The Claimant submits that, as an unwilling lender to Venezuela, Venezuela US should be compensated no less than any willing lender to Venezuela.[80] The Claimant notes that Venezuela's borrowing rate as of May 2011 was approximately 13.42%.[81] The Claimant maintains that this rate "is consistent with, and indeed higher than, the cost of equity sought by the Claimant as its primary argument, confirming the reasonableness of the Claimant's primary case on interest."[82] The Claimant rejects the Respondent's argument that, if the Claimant were in the same position as a willing lender to Venezuela, the Claimant would have suffered from the destruction in the value of Venezuela's sovereign debt that has actually occurred in the real world.[83] The Claimant sustains that "Venezuela misses the point of comparison", as the question is not what return the Claimant would have achieved, but rather the interest rate that Venezuela must pay in order to convince investors to lend to it.[84]

70. As yet a further alternative but "far less justified economically" rate, the Claimant's expert proposes the interest rate established in the Hydrocarbons Purchase and Sales Contract for any delay by PDVSA in paying Petroritupano for hydrocarbons it purchased, i.e., LIBOR + 4%.[85] The Claimant's expert maintains that this rate is less reliable because "PdVSA never honored this aspect of the Hydrocarbons Purchase and Sales Contract. As such PdVSA's actions demonstrate that the cost of lending money to it are higher than LIBOR + 4 percent."[86]

71. Finally, the Claimant maintains that the risk-free rate proposed by the Respondent is not appropriate because "the purpose of this quantum phase is to assess the risks associated with, and ultimately to value, the Claimant's lost investment (i.e., its dividends); it is not to assess the risks

---

Hearing Transcript (11 February 2022), 47:7-23; Exhibit CER-4, Fourth Kaczmarek Report, 17 September 2021, ¶ 164-165 and Tables 9, 10.

[80] See generally Memorial, Section IV.C; Claimant's PHB, ¶¶ 18-21; Hearing Transcript (11 February 2022), 47:24-48:19.

[81] Memorial, ¶ 43.

[82] Reply, ¶ 68.

[83] Reply, ¶ 67; referring to Counter-Memorial, ¶¶ 110-115.

[84] Reply, ¶ 67.

[85] Exhibit CER-3, Third Kaczmarek Report, 30 April 2021, ¶ 23; Exhibit C-2(K),Conversion Contract Annex, K, Proyecto de Contrato de Compraventa de Hidrocarburos entre Petroritupano, S.A. y PDVSA Petróleo, S.A., June 2006, Clause 7.

[86] Exhibit CER-3, Third Kaczmarek Report, 30 April 2021, ¶ 24; Exhibit CER-4, Fourth Kaczmarek Report, 17 September 2021, ¶¶ 150-152.

associated with, or to value, the eventual Award."[87] In any event, the Claimant defends that an award rendered against Venezuela is not a risk-free asset, as evidenced by the lack of compliance by Venezuela with awards rendered against it in the past.[88] In addition, the Claimant submits that the Respondent's 0.73% proposed interest rate[89] does not even compensate the Claimant for inflation, which makes it "patently unreasonable".[90]

2. Respondent's Position

a) Interest rate equivalent to Petroritupano's cost of equity

72. The Respondent submits that interest must be solely compensatory, and not punitive.[91] Accordingly, the Respondent maintains that the applicable interest rate, if any, should be a short term risk-free rate, in particular the rate of return on 1-year U.S. Treasury bills.[92]

73. Preliminarily, the Respondent argues that the Claimant is estopped from claiming interests pursuant to Petroritupano's cost of equity, because this claim was only with the "Claimant's Memorial on Quantum that this notion was first introduced, even though the same claim for unpaid 2008 and 2009 dividends has been a part of this proceeding since its inception."[93] In any event, the Respondent argues that the cost of capital or equity cost (i) is an expected rate of return which contains a risk premium to compensate for uncertainty and (ii) cannot be taken as a guarantee of future performance, seeing as "the return ultimately obtained by a project's shareholder may end up being above or below the Cost of Capital."[94] The Respondent contends

[87] Claimant's PHB, ¶¶ 22-26; Hearing Transcript (11 February 2022), 48:25-50:21.

[88] Claimant's PHB, ¶¶ 23-24; Transcript (11 February 2022), 11:22-25, 12:1-2, 64:17-21, 65:6-7.

[89] The Claimant indicates that neither the Counter-Memorial nor Mr. Bello's report provides the Tribunal with a specific interest rate, other than referring to the rate of return on 1-year U.S. Treasury bills. The Claimant notes that, according to its expert, Mr. Kaczmarek, the approach advanced by Venezuela results in an interest rate of approximately 0.73%. See Reply, ¶ 54; Exhibit CER-4, Fourth Kaczmarek Report, 17 September 2021, ¶¶ 22-23, 76 and Tables 1, 5.

[90] Reply, ¶ 59; Hearing Transcript (11 February 2022), 48:20-24; Exhibit CER-4, Fourth Kaczmarek Report, 17 September 2021, ¶ 80 and Table 6.

[91] Counter-Memorial, ¶ 90; referring to Exhibit RLA-342, *Waguih Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 545.

[92] Counter-Memorial, ¶¶ 75-76; Rejoinder, ¶ 128; Hearing Transcript (11 February 2022), 104:3-11; Exhibit RER-1, Bello Report, 20 July 2021, ¶ 11.

[93] Respondent's PHB, ¶¶ 26-29.

[94] Counter-Memorial, ¶ 77; Respondent's PHB, ¶ 32; Hearing Transcript (11 February 2022), 107:6-108:24; Hearing Transcript (12 February 2022), 272:1-273:11, 281:17-19; Exhibit RER-1, Bello Report, 20 July 2021, ¶ 15.

that the right to receive unpaid dividends is a risk-free asset and, therefore, that "it must be updated applying a free-risk rate that compensates exclusively for the time value of money."[95] The Respondent maintains that the position that historical amounts should be updated applying a risk free rate has been upheld by experts[96] as well as international investment case law.[97] The Respondent further submits that the Claimant's expert, Mr. Kaczmarek, has also maintained this position in other cases.[98] The Respondent also distinguishes *ConocoPhillips v. Venezuela* and the other authorities cited by the Claimant on the basis that they concerned illegal expropriations where it was also shown that the State made use of the dividends that were not distributed.[99]

---

[95] Counter-Memorial, ¶ 78 Rejoinder, ¶ 138; Respondent's PHB, ¶¶ 30-36; Hearing Transcript (11 February 2022), 104:12-23; Exhibit RER-1, Bello Report, 20 July 2021, ¶ 40; Exhibit RER-2, Second Bello Report, 25 October 2021, ¶ 25.

[96] Counter Memorial, ¶¶ 79-82; Hearing Transcript (11 February 2022), 104:24-105:7; Exhibit RLA-328, Mark Kantor, Valuation for Arbitration: compensation standards, valuation methods and expert evidence (Kluwer Law International 2008), p. 49; Exhibit RLA-329, Franklin M. Fisher and R. Craig Romaine, Janis Joplin's Yearbook and the Theory of Damages, 5(1/2) (New Series) Journal of Accounting Auditing & Finance 145 (Winter/Spring 1990), p. 146; Exhibit RLA-330, Aaron Xavier Fellmeth, Below-Market Interest in International Claims against States, 13(2) Journal Of International Economic Law 423 (June 2010), p. 436; Exhibit RLA-331m S. Ripinsky and K. Williams, Interests in International Investment Law, (2008), p. 373.

[97] Counter-Memorial, ¶¶ 83-88; Rejoinder, ¶¶ 132-134; Hearing Transcript (11 February 2022), 105:8-107:5; Exhibit RLA-332, *Vestey Group Limited v. The Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, ¶ 446; Exhibit RLA-333, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 396; Exhibit RLA-0334, *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, ¶¶ 102, 105; Exhibit RLA-335, *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶ 455; Exhibit RLA-336, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Cases No. ARB/08/1 and ARB/09/20, Award, 16 May 2012, ¶¶ 323-324; Exhibit RLA-337, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 842; Exhibit RLA-338, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 471; Exhibit RLA-339, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶ 300; Exhibit RLA-340, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. 2005-04/AA227, ¶¶ 1683-1687; Exhibit RLA-341, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, ¶ 853; Exhibit RLA-371, *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, 19 February 2019, ¶¶ 535, 537; Exhibit CLA-203, *Murphy Exploration & Production Company International v. Republic of Ecuador* [II], PCA Case No. 2012-16, Partial Final Award, ¶ 450.

[98] Rejoinder, ¶ 140; Exhibit R-72, *Chemtura Corporation v. Government of Canada*, UNCITRAL, Respondent's Counter Memorial, 20 October 2008; Exhibit R-73, *Chemtura Corporation v. Government of Canada*, UNCITRAL, Respondent's Rejoinder, 10 July 2009; Exhibit R-74, *Spence et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Exhibit RWE-4 – Expert Report of Brent C. Kaczmarek, CFA, 15 July de 2014; Exhibit R-75, *Spence et al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Exhibit RWE-11 – Second Expert Report of Brent C. Kaczmarek, CFA, 22 December 2014; Exhibit R-76, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Exhibit RWS-012 – Expert Report of Brent C. Kaczmarek, CFA, 30 January 2012; Exhibit RLA-343, *PSEG Global Inc. y Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶ 345; Exhibit RLA-346, *Burlington v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 17 February 2017, ¶¶ 532-533.

[99] Rejoinder, ¶¶ 142-143; Respondent's PHB, ¶ 35; Hearing Transcript (11 February 2022), 108:25-111:8.

74. In addition, the Respondent claims that Mr. Kaczmarek's estimation of the cost of capital suffers from various technical deficiencies with respect to the free-risk rate, the beta and the equity risk premium.[100]

b) Alternative interest rates

75. The Respondent rejects any reference to the interest rate mentioned in Article 1.6 of the Conversion Contract, as it concerns a wholly different matter than declared but unpaid dividends.[101] In the Respondent's view, this rate is also not a commercial rate, as required by the Treaty, since it is an interest rate arising from a corporate relationship to which Venezuela was not a party.[102]

76. The Respondent adds that the rationale for using the rate stated in Article 1.6 of the Conversion Contract as an interest rate in this arbitration "makes no sense from a financial point of view." [103] First, the Respondent defends that "there is no reason to assume that Claimant would have borrowed at 30-day LIBOR + 10% premium when other more convenient financing alternatives were available at the same time in the financial market."[104] Second, the Respondent notes that, in half of the years under analysis, the 30-day LIBOR + 10% determined by the Claimant's expert is higher than Petroritupano's cost of capital (as estimated by that same expert). The Respondent defends that there are no grounds to assume that a shareholder would borrow at an interest rate that is higher than the return they expect to obtain from an investment in Petroritupano.[105] In any event, the Respondent claims that the cost of equity and the LIBOR + 10% estimated by Mr. Kaczmarek are not comparable, as the cost of equity is variable over time and the Claimant has only provided estimates for 2011 and 2014.[106] Finally, the Respondent maintains that the Conversion Contract refers to a rate equal to 1-month LIBOR + 10%, and not a 12-month LIBOR,

[100] Rejoinder, ¶ 145; referring to Exhibit RER-2, Second Bello Report, 25 October 2021, Sections E.1.a, E.1.b and E.1.c.

[101] Counter-Memorial, ¶ 99; Respondent's PHB, ¶ 41; Hearing Transcript (11 February 2022), 112:11-113:22.

[102] Rejoinder, ¶ 148; Respondent's PHB, ¶¶ 37-40; Hearing Transcript (11 February 2022), 111:9-112:10; Exhibit RER-2, Second Bello Report, 25 October 2021, ¶ 87; citing Exhibit C-1, Treaty, Art. 5.1.

[103] Counter-Memorial, ¶ 102.

[104] Counter-Memorial, ¶ 102; referring to Exhibit RER-1, Bello Report, 20 July 2021, ¶ 81. See also Rejoinder, ¶ 149; referring to Exhibit RER-2, Second Bello Report, 25 October 2021, ¶¶ 88-90.

[105] Counter-Memorial, ¶ 103; citing Exhibit RER-1, Bello Report, 20 July 2021, ¶¶ 82-83.

[106] Rejoinder, ¶ 151; Exhibit RER-2, Second Bello Report, 25 October 2021, ¶ 94.

which is, "on average, approximately 3 times higher than the 1-month LIBOR provided for in the Conversion Contract."[107]

77. As for Venezuela's cost of borrowing, the Respondent argues that the Claimant has not established that Venezuela has used or benefited from the funds corresponding to the dividends from Petroritupano.[108] The Respondent also contends that, if the Claimant was to be assumed to a willing investor, then it should be assumed that it would have reinvested both principal and interest collected on that principal on that same bond until maturity, increasing its exposure to Venezuelan risk.[109] The Respondent concludes that, in that situation, the "Claimant would currently be in the same position as the other willing lenders to the Republic and would have suffered a significant destruction of the value of the original principal."[110]

78. In addition, the Respondent submits that Venezuela's borrowing rate, which the Respondent does not dispute was equivalent to 13% in 2011, was elevated because it included a risk premium in order to compensate for a high probability of default and potential release of debt in the future.[111] The Respondent claims that this rate is "unjustly favorable" to the Claimant.[112]

79. The Respondent submits that the LIBOR + 4% rate proposed by the Claimant is the only rate that could be considered commercial, as it has been established in an agreement between a company and its client.[113] Nevertheless, the Respondent argues this last alternative "is also inconsistent from an internal standpoint", as the criticism that this rate was never honored would apply equally to the LIBOR + 10% rate.[114] The Respondent adds that the contract refers to a 1-month LIBOR and not to a 12-month rate.[115]

[107] Counter-Memorial, ¶ 101; Exhibit RER-1, Bello Report, 20 July 2021, ¶¶ 77-78.

[108] Respondent's PHB, ¶ 44; Hearing Transcript (11 February 2022), 115:23-116:18.

[109] Counter-Memorial, ¶ 106; Exhibit RER-1, Bello Report, 20 July 2021, ¶¶ 87-89.

[110] Counter-Memorial, ¶ 106; Respondent's PHB, ¶ 45; Exhibit RER-1, Bello Report, 20 July 2021, ¶ 89

[111] Rejoinder, ¶¶ 154-155; Exhibit RER-2, Second Bello Report, 25 October 2021, ¶ 99.

[112] Rejoinder, ¶ 154.

[113] Rejoinder, ¶ 157.

[114] Counter-Memorial, ¶ 108.

[115] Counter-Memorial, ¶ 109; Exhibit RER-1, Bello Report, 20 July 2021, ¶ 95.

3. Tribunal's Analysis

80. The Tribunal agrees with the Respondent that interest must be compensatory, not punitive.[116] International law does not accept the concept of punitive interests.

81. The Tribunal notes the various alternative interest rates suggested by the Claimant. When determining which one would be the most appropriate, the Tribunal must keep in mind that Venezuela, while having breached its obligation of non-discrimination, has not benefited from the amounts of unpaid dividends to the Claimant. It has also to be recalled that, in its Partial Award, the Tribunal concluded that the acts of Petroritupano were not attributable to the Respondent.[117] For these reasons the Tribunal does not consider it justified to accept the principal suggestion of the Claimant that the pre-award interest rate should be equivalent to Petroritupano's cost of equity of 11.83%.[118]

82. For the same reason, the Tribunal does not consider that the interest rate LIBOR + 10% set in Article 1.6 of the Conversion Contract for shareholder's failure to pay required contributions, an alternative suggested by the Claimant, would be appropriate.

83. The Tribunal is not convinced that it should apply an interest rate equivalent to the yield on Venezuela's sovereign debt, another alternative suggested by the Claimant. The Tribunal takes into account the nature of the breach committed by the Respondent, discriminatory treatment by failing to arrange for the payment of the declared dividends to the Claimant. The Respondent did not benefit personally from the unpaid amounts.

84. The Tribunal does not agree with the Respondent's view that, if any, "short-term risk-free rate should be applicable to any award on interest in this case".[119] Referring to its Expert Witness, the Respondent opines that the Claimant's Expert should have used a short-term risk-free rate, namely the rate of return on 1-year U.S. Treasury bills.[120] This view is based on the consideration that an award is a risk-free asset. The Respondent has, however, not shown that, in view of its past practice, this Award will be promptly complied with and not involve any element of risk. Moreover, the Tribunal has no reason to assume that the Claimant, had it been paid the principal

[116] Counter-Memorial, ¶ 90.

[117] Partial Award, ¶ 207.

[118] Reply, ¶ 49, Hearing Transcript (11 February 2022), 41:23.

[119] Respondent's PHB, ¶ 26; Counter-Memorial, ¶¶ 6, 75, 91.

[120] Counter-Memorial, ¶ 81.

amount in late May 2011, would have used this amount for the purchase of U.S. Treasury bills. For the above reasons, the Tribunal is of the view that a short-term risk-free interest is not appropriate in the circumstances of the present case.

85. The Claimant's Expert Witness suggested another alternative, the interest rate agreed in the Hydrocarbons Purchase and Sales Contract for any delay by PDVSA in paying Petroritupano for the delivered hydrocarbons, which was an annual rate equal to LIBOR + 4 percent.[121] The Tribunal believes that this is the best from the various options suggested by the Parties and their Expert Witnesses. It reflects economic and commercial realities prevailing in Venezuela in the oil sector in the period it was agreed on. Although the Contract was not concluded between Venezuela and the Claimant, both were aware of its content, Venezuela as being the sole shareholder of PDVSA and the Claimant as one of the three shareholders of Petroritupano.

86. The Claimant's Expert calculated the amount due as interest running from 31 May 2011 until 31 December 2021 to be US$ 41,955,408 in total.[122] The Respondent, while arguing against the adoption of this interest rate, has not taken issue with the calculations. Applying the same methodology up to the date of this Final Award produces a total amount of pre-award interest of US$ 46,624,436.

D. COMPOUND INTEREST

1. Claimant's Position

87. The Claimant submits that both pre- and post-award interest should be compounded annually.[123] The Claimant contends that (i) "tribunals have consistently affirmed that compound interest best gives effect to the customary international law rule of full reparation";[124] (ii) the most recent

[121] Exhibit CER-3, Third Kaczmarek Report, 30 April 2021, ¶ 23; Exhibit C-2(K), Conversion Contract, Annex, K, Proyecto de Contrato de Compraventa de Hidrocarburos entre Petroritupano, S.A. y PDVSA Petróleo, S.A., June 2006, Clause 7.

[122] Exhibit CER-4, Fourth Kaczmarek Report, 17 September 2021, Table ¶ 10.

[123] Memorial, ¶¶ 45, 50; Reply, ¶ 72.

[124] Memorial, ¶ 45; referring to Exhibit CLA-181, *SAUR International S.A. v. Argentine Republic*, ICSID Case No. ARB/04/4, Award, 22 May 2014, ¶¶ 431-432; Exhibit CLA-176, *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, 16 May 2012, ¶¶ 325-326; Exhibit CLA-177, *Quasar de Valores SICAV S.A. and others v. Russian Federation*, SCC, Award, 20 July 2012, ¶¶ 226, 228; Exhibit CLA-10, *Azurix Corporation v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 440; Exhibit CLA-113, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶¶ 308-313; Exhibit CLA-81, *National Grid p.l.c. v. Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 294; Exhibit CLA-19, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No.

practice of tribunals is to provide for compound interest;[125] and (iii) these conclusions also accord with economic reality.[126] The Claimant adds that Judge Crawford's comments on Article 38 of the ILC Articles, on which the Respondent relies, as well as the "few outlier cases which themselves rely upon those older remarks" are outdated.[127] The Claimant notes that Judge Crawford himself has recognized in more recent statements that "[s]ince 2001, compound interest has been awarded increasingly, particularly in investment arbitration."[128]

88. Further, the Claimant rejects the Respondent's argument that compound interest "cannot be granted under Venezuelan law." The Claimant submits that (i) this is an international arbitration where the Claimant's compensation must be determined in accordance with international law and (ii) the three cases cited by Venezuela do not support its argument, because they were all contractual disputes applying domestic law.[129]

2. Respondent's Position

89. The Respondent maintains that any interest rate that the Tribunal deems to be applicable in this case must be assessed as simple interest.[130] The Respondent asserts that there is no automatic right to compound interest but, rather, that the Claimant has the burden of proving that there are specific grounds that justify its application, which it has not done in the present case.[131]

ARB/07/17, Award, 21 June 2011, ¶ 382; Exhibit CLA-84, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 746. See also Reply, ¶ 69.

[125] Memorial, ¶¶ 45; citing Exhibit CLA-179, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, ¶ 834; Exhibit CLA-193, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt*, PCA Case No. 2012-07, Final Award, 23 December 2019, ¶ 534; Exhibit CLA-175, R. Dolzer, C. Schreuer, Principles of International Investment Law (2nd edn 2012) (excerpt), p. 298.

[126] Memorial, ¶¶ 47-49; Hearing Transcript (11 February 2022), 50:22-52:6; Exhibit CLA-196, *Cairn Energy PLC and Cairn UK Holdings Limited v. Republic of India*, PCA Case No. 2016-07, Award, 21 December 2020, ¶ 1956; Exhibit CLA-113, *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 309; Exhibit CLA-194, *PV Investors v. Kingdom of Spain*, PCA Case No. 2012-14, Final Award, 28 February 2020, ¶ 854; Exhibit CLA-180, J. Crawford, State Responsibility: The General Part (2013) (excerpt), p. 538. See also Reply, ¶ 69; Hearing Transcript (12 February 2022), 141:1-14.

[127] Reply, ¶ 70; referring to Counter-Memorial, ¶¶ 111-113. In this sense, the Claimant also cites Exhibit RLA-368, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 1266.

[128] Reply, ¶ 70; Hearing Transcript (11 February 2022), 52:7-53:10; Exhibit CLA-180, J. Crawford, State Responsibility: The General Part (2013) (excerpt), pp. 537-538.

[129] Reply, ¶ 71; referring to Counter-Memorial, ¶ 114.

[130] Counter-Memorial, ¶ 110; Rejoinder, ¶ 161.

[131] Rejoinder, ¶¶ 162-163.

90. In support of its argument, the Respondent cites Professor Crawford's Commentary to Article 38 of the ILC Articles, as well as various investment treaty decisions.[132] The Respondent also refers to the *Costa Rica v. Nicaragua* judgment of the International Court of Justice, as well as the decisions in *ConocoPhillips v. Venezuela* and *Micula v. Romania*, which were relied upon by the Claimant with regard to other issues.[133] The Respondent further cites cases that relied on the respondent's State domestic laws to find against compound interest.[134] The Respondent denies that these holdings are limited to contract-based cases with application of local law, as alleged by the Claimant.[135]

91. The Respondent further submits that, if the Tribunal were to apply the LIBOR + 10% rate, the Conversion Contract "is explicit in that it should be interpreted and applied pursuant to the laws of the Republic", which expressly forbid compounding.[136]

3. Tribunal's Analysis

92. The Tribunal is of the view that awarding a simple interest would not fully compensate the Claimant. Had the Claimant received the payment in late May 2011, the received funds would likely have been used by the Claimant for generating further profits. Even if the funds had simply been deposited in a bank account generating interest, that interest would have been compounded.

---

[132] Counter-Memorial, ¶¶ 111-113; Rejoinder, ¶¶ 164, 169-171; Exhibit RLA-358, James Crawford, The International Law Commission's Articles on State Responsibility, Cambridge University Press, 2002, pp. 237-238; Exhibit RLA-357, *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, April 8, 2013, ¶ 617, 620; Exhibit RLA-339, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, November 21, 2007, ¶ 296; Exhibit RLA-340, *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. No. 2005-04/AA227, Award, July 18, 2014, ¶ 1689.

[133] Rejoinder, ¶¶ 165-167; Respondent's PHB, ¶¶ 47-48; Hearing Transcript (11 February 2022), 116:21-117:16; Exhibit RLA-301/381, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Judgment on Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, 2018 ICJ REPORTS, p. 47 ¶ 153; Exhibit CLA-190, *ConocoPhillips Petrozuata B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Award, 8 March 2019, ¶ 822; Exhibit RLA-368, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 1266.

[134] Counter-Memorial, ¶¶ 114-115; Rejoinder, ¶ 174; Exhibit RLA-354, *Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, ¶¶ 366-397; Exhibit RLA-348, *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award, ¶ 457; Exhibit RLA-355, *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, ¶¶ 293-298.

[135] Rejoinder, ¶¶ 172-173; Exhibit RLA-354, *Autopista Concesionada de Venezuela, C.A. ("Aucoven") v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, ¶ 105.

[136] Respondent's PHB. ¶ 42; Exhibit C-2, Conversion Contract, Art. 7, p. 16; Counter-Memorial, ¶¶ 110-115.

The Tribunal finds that, taking into account the prevailing economic realities, it is appropriate to award interest to be compounded on a yearly basis.

VII. TAXES

93. The Claimant notes that it has already met its Venezuelan tax obligations on its share of Petroritupano's profits, "because the dividends were declared after all tax obligations had been satisfied", as required by Petroritupano's Articles of Incorporation.[137] For this reason, as well as "to ensure the finality of the Tribunal's Award, secure full reparation, and prevent double taxation, the Claimant respectfully requests that the Tribunal declare in the Award that: (*i*) the Award amount is net of all Venezuelan taxes; and (*ii*) Venezuela shall not tax or attempt to tax the Award."[138]

94. The Respondent does not deny these facts, nor oppose the Claimant's requests in this regard.

95. The Tribunal thus decides that the amounts awarded shall be free of all Venezuelan taxes for the reasons advanced by the Claimant.

VIII. COSTS

1. Claimant's Position

a) Allocation of costs

96. The Claimant submits that: "(i) under the UNCITRAL Rules and general arbitral practice, costs should follow the event and be awarded to the prevailing party; (ii) the Claimant is the prevailing party in this arbitration, having established that the Tribunal has jurisdiction over Venezuela, established that Venezuela breached the Treaty, defeated Venezuela's baseless challenge to Mr. Fortier, and succeeded in its challenge to Venezuela's first appointed arbitrator; and (iii) only an award of indemnity costs will achieve full reparation."[139]

97. The Claimant rejects the Respondent's allegations that the Claimant is not the prevailing party. The Claimant notes that "the Tribunal ruled in the Claimant's favor on the two fundamental

[137] Memorial, ¶ 51; referring to 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, Art. 32; Exhibit C-73, Petroritupano, S.A. Audited Financial Statement for 31 December 2011 (29 July 2013) at p. 25.
[138] Memorial, ¶ 55. See also Memorial, ¶¶ 52-54; Reply, ¶ 76.

[139] Reply, ¶ 77. See Memorial, ¶¶ 57-61.

questions of jurisdiction and liability", adding that there is "ample precedent for awarding costs to a claimant who prevailed on some but not all of its claims."[140]

b) Amount of costs

98. In addition to the costs of the arbitration, the Claimant seeks the following costs of legal representation and assistance:[141]

	Jurisdictional and Liability Phase	**Quantum Phase**	**Total**
Total Legal and Expert Costs	US$ 3,457,934.59	US$ 1,135,686.82	US$ 4,593,621.41

2. Respondent's Position

a) Allocation of costs

99. The Respondent rejects the Claimant's allegation that it is "the prevailing party in this arbitration", because (i) the proceeding has not been completed yet; (ii) the compensation requested by the Claimant cannot be awarded under international law; and (iii) "virtually all the claims filed by the Claimant on the merits of this controversy have been rejected by the Tribunal."[142] In view of the foregoing, the Respondent requests the Tribunal to instruct the Claimant to pay to the Republic "any and all arbitration and legal costs in which the Republic was forced to incur by virtue of Claimant's adventurous conduct."[143]

[140] Reply, ¶ 78; Hearing Transcript (11 February 2022), 53:11-54:1; referring to Exhibit CLA-191, *Stans Energy Corp. and Kutisay Mining LLC v. Kyrgyz Republic* PCA Case No. 2015-32, Award, 20 August 2019, ¶¶ 892-893; Exhibit CLA-182, *Yukos Universal Limited (Isle of Man) v. Russian Federation*, PCA Case No. 2005-04/AA227, Final Award, 18 July 2014, ¶¶ 1885, 1887; Exhibit CLA-204, *Windstream Energy LLC v. Government of Canada*, PCA Case No. 2013-22, Award, 27 September 2016, ¶ 514.

[141] See Claimant's Statement of Costs.

[142] Counter-Memorial, ¶¶ 119-121. See also Rejoinder, ¶¶ 176-179.

[143] Counter-Memorial, ¶ 123; Rejoinder; ¶ 180.

b) Amount of costs

100. In addition to the costs of the arbitration, the Respondent seeks the following costs of legal representation and assistance:[144]

	Jurisdictional and Liability Phase	**Quantum Phase**	**Total**
Total Legal and Expert Costs	US$ 3,400,000.00	US$ 904,256.00	US$ 4,304,256.00

3. Tribunal's Analysis

101. This arbitral proceeding is conducted under the UNCITRAL Rules. Article 40 thereof provides in the relevant parts:

> 1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
>
> 2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

102. According to Article 38 of the UNCITRAL Rules, the Tribunal shall fix the costs of arbitration in its award. These costs include (i) the fees of the arbitral tribunal; (ii) the travel and other expenses incurred by the arbitrators; (iii) fees and expenses of the appointing authority; and (iv) fees and expenses of the PCA which has acted as the Registry.

103. The Parties each made deposits to cover the abovementioned costs of the arbitration in the amount of EUR 525,000.00. The costs of arbitration covered from such deposits, taking into account the Terms of Appointment agreed upon by the Parties, the Tribunal, and the PCA, are as follows:

[144] See Respondent's Statement of Costs.

TRIBUNAL	**EUR 615,625.00**
H.E. Judge Peter Tomka	EUR 294,125.00
The Honourable L. Yves Fortier PC CC OQ QC	EUR 125,000.00
Professor Marcelo Kohen	EUR 141,500.00
Mr. G. Bottini	EUR 55,000.00
PCA	**EUR 123,500.00**
OTHER EXPENSES (including court reporting, hearing facilities, interpretation, translation, travel, etc.)	**EUR 139,527.10**
TOTAL	**EUR 878,652.10**

104. Following the issuance of this Final Award, the PCA shall return the unexpended balance to the Parties in equal shares.

105. The Tribunal also notes that the Parties' costs for legal representation and assistance reflected above are comparable, there being only a minor difference between them. Therefore, under Article 38(e) of the UNCITRAL Rules, the Tribunal determines that they are reasonable.

106. As regards the allocation and apportionment of costs, the Tribunal notes that the Claimant has prevailed in this proceeding, even if the Tribunal has rejected a number of the Claimant's claims.[145] The Tribunal further recalls that while the Claimant's challenge of an arbitrator was successful, the appointing authority rejected the Respondent's challenge of another arbitrator. Accordingly, the Tribunal considers that the Claimant is the successful party, and the Respondent the unsuccessful party, in accordance with Articles 38(e) and 40 of the UNCITRAL Rules. Taking these circumstances into account, the Tribunal considers it reasonable to apportion the costs of arbitration between the Parties. The Respondent shall therefore bear 70% of the costs of arbitration borne from the deposit held by the PCA, and the Claimant the remaining 30% of these costs. The Respondent shall also reimburse 70% of the costs incurred by the Claimant for legal representation and assistance.

[145] Partial Award, ¶ 258(4). The Tribunal rejected the claims concerning fair and equitable treatment, expropriation, and umbrella clause.

IX. DECISION

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

1. The Respondent, the Bolivarian Republic of Venezuela, shall pay compensation to the Claimant, Venezuela US, S.R.L, in the amount of US$ 58,870,898;

2. The Respondent shall pay to the Claimant interest on the amount awarded under sub-paragraph 1 above, accrued between 31 May 2011 and the date of this Final Award, in the amount of US$ 46,624,436;

3. The Respondent shall pay to the Claimant interest on the amounts awarded under sub-paragraphs 1 and 2 above, from the date of this Final Award until the date of full payment of these amounts, at the rate of twelve-month USD LIBOR plus a margin of four percent (4%) with annual compounding of the accrued interest;

4. Should, for any reason, twelve-month USD LIBOR cease to be operative while any amount remains outstanding under sub-paragraphs 1 to 3 above, the interest due shall be calculated from that date onward on the basis of whatever rate is generally considered equivalent to twelve-month USD LIBOR plus a margin of four percent (4%) with annual compounding;

5. If, within two months following the date of this Final Award, the Claimant is paid by Petroritupano or CVP the amounts due under sub-paragraphs 1 to 4 above, the Claimant shall be prevented from seeking enforcement of these amounts;

6. Upon compliance by the Respondent with this Final Award, the Claimant shall be precluded from requesting from Petroritupano or CVP the payment of the amounts determined in sub-paragraphs 1 to 4 above;

7. The Respondent shall pay the Claimant EUR 615,056.47 for the costs of this arbitration borne from the deposit held by the PCA and US$ 3,215,534.99 for the costs of legal representation and assistance incurred by the Claimant, plus simple interest at a rate of six percent (6%), from the day one month following the date of this Final Award until the date of full payment of these amounts;

8. All the above payments to the Claimant by the Respondent shall be free of any taxation in the Bolivarian Republic of Venezuela; and

9. All other claims by the Parties are rejected.

Date: 4 November 2022

Place of arbitration: The Hague

The Hon. L. Yves Fortier PC CC OQ QC

Professor Marcelo Kohen
(with the attached declaration)

H.E. Judge Peter Tomka
(Presiding Arbitrator)

Arbitrator Professor Marcelo Kohen makes the following declaration:

"Without prejudice to my positions taken in the two prior Partial Awards, I subscribe to the decision of the Tribunal on quantum because I consider that the solution chosen is one among those that are possible under the circumstances of the case and in line with its precedent awards. Indeed, contrary to aspects of jurisdiction or the merits, in matters of reparation the Tribunal disposes of some margin of discretion in order to decide which are the consequences arising from the commission of an internationally wrongful act."