**PCA Case No. 2015-30**

# IN THE MATTER OF AN ARBITRATION UNDER THE AGREEMENT BETWEEN THE KINGDOM OF SPAIN AND THE BOLIVARIAN REPUBLIC OF VENEZUELA ON THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS, DATED NOVEMBER 2, 1995

**- between -**

**CLOROX SPAIN S.L.**

**(the "Claimant")**

**- and -**

**THE BOLIVARIAN REPUBLIC OF VENEZUELA**

**(the "Respondent", and together with the Claimant, the "Parties")**

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## FINAL AWARD

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*Tribunal*

Mr. Yves Derains (Presiding Arbitrator)
Prof. Bernard Hanotiau
Prof. Raúl Emilio Vinuesa

**August 9, 2023**

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# I. INTRODUCTION

## A. THE PARTIES

1. Parties to the Arbitration:

**Claimant**

**Clorox Spain S.L.**[2]
Ayala 66, 1° Izquierda
Madrid 28001
Spain

**Counsel for the Claimant**[1]

**Doak Bishop**
**Edward Kehoe**
**Aloysius Llamzon**
**Fernando Rodríguez Cortina**
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[1] Claimant's representatives indicated hereinafter are those who were appointed to represent it in this procedural phase and who do not coincide exactly with those who intervened in the previous procedural phase, whose names appear in the Awards of May 20, 2019 and June 17, 2021.
[2] Strictly speaking and pursuant to Claimant's terms of reference (Exhibit **C-1**), it is more appropriate to refer to Clorox Spain S.L than to Clorox España, but given that the Parties have interchangeably used the form Clorox Spain and Clorox España (translating the word Spain), the Tribunal will also use both denominations alternatively.

| Respondent | Counsel for the Respondent[3] |
|---|---|
| **Bolivarian Republic of Venezuela**<br><br>**Dr. Reinaldo Muñoz Pedroza**<br>Attorney General of the Bolivarian Republic of Venezuela<br>**Dr. Henry Facchinetti**<br>General Manager of Litigation<br>Attorney General's Office of the Bolivarian Republic of Venezuela<br><br>Emails:<br>casosinternacionalesvzla@gmail.com<br>henryfacchinetti@yahoo.com<br><br>Procuraduría General de la República Bolivariana de Venezuela<br>Av. Los Ilustres, Cruce con Calle Francisco Lazo Martí, Edificio Sede Procuraduría General de la República,<br>Urb. Santa Mónica<br>Caracas, 1040<br>Venezuela | **Mr. Carlos Alberto Dugarte Obadía**<br>García & Morris Abogados<br>Calle 59 # 5-30<br>Bogotá D.C.<br>Colombia<br>Tel.: (57-1) 211 33 23<br>Fax: (57-1) 211 90 19<br><br>Emails:<br>cdugarte@garciamorris.com |

2. Claimant and Respondent shall be referred to collectively as the "**Parties**" and, respectively, "Claimant", "**Clorox**", "**Clorox España**" or "**Clorox Spain**", and "Respondent" or "**Venezuela**".

## B. ARBITRATION BACKGROUND

3. According to Claimant, a dispute has arisen between the Parties under the Agreement between the Kingdom of Spain and the Bolivarian Republic of Venezuela on the Reciprocal Promotion and Protection of Investments, entered into on November 2, 1995 (the "**Treaty**", "**BIT**" or "**Spain-Venezuela BIT**").

4. By Notice of Arbitration dated May 18, 2015 and received by Respondent on the same date (the "**Notice of Arbitration**"), Claimant commenced arbitral proceedings against Respondent pursuant to Article XI of the Treaty and the Arbitration Rules of

[3] Respondent's representatives indicated hereinafter are those who were appointed to represent it in this procedural phase and who do not coincide exactly with those who intervened in the previous procedural phase, whose names appear in the Awards of May 20, 2019 and June 17, 2021.

the United Nations Commission on International Trade Law dated December 15, 1976.

5. Upon agreement of the Parties, the 2010 Arbitration Rules of the United Nations Commission on International Trade Law (the "**UNCITRAL Rules**") shall be applicable to the present dispute.

6. Pursuant to Article 3.2 of the UNCITRAL Rules, these arbitral proceedings are deemed to have commenced on May 18, 2015, the date on which Respondent received the Notice of Arbitration.

## C. ARBITRATION AGREEMENT

7. Article XI of the Treaty provides:

> "*DISPUTES BETWEEN A CONTRACTING PARTY AND INVESTORS OF THE OTHER CONTRACTING PARTY*
>
> *1.- The details of any dispute which may arise between an investor of one Contracting Party and the other Contracting Party concerning the fulfilment by that Party of the obligations established in this Agreement shall be notified in writing by the investor to the Contracting Party receiving the investment. As far as possible, the parties to the dispute shall try to settle their differences by amicable agreement.*
>
> *2.- If a dispute cannot be settled in this way within a time limit of six months from the date of the written notification referred to in paragraph 1, it shall be submitted, at the investor's choice:*
>
> *a) To the competent courts of the Contracting Party in whose territory the investment was made, or*
>
> *b) To the International Centre for Settlement of Investment Disputes (ICSID) established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was opened for signature in Washington on 18 March 1965, provided that both States parties to this Agreement have acceded to the Convention. If either Contracting Party has not acceded to the Convention, recourse shall be had to the Additional Facility for the administration of conciliation, arbitration and fact-finding procedures by the ICSID secretariat.*
>
> *3.- If for any reason the arbitral bodies referred to in paragraph 2 (b) of this article are not available, or if the two parties so agree, the dispute shall be submitted to an ad hoc court of arbitration established in*

*accordance with the arbitration rules of the United Nations Commission on International Trade Law*."[4]

## II. PROCEDURAL HISTORY

### A. APPOINTMENT OF THE TRIBUNAL

8. In its Notice of Arbitration, Claimant appointed Prof. Bernard Hanotiau as arbitrator. His contact details are as follows:

Prof. Bernard Hanotiau
IT Tower (9th floor)
480 Avenue Louise B9
1050 Brussels
Belgium
Tel.: +32 02 290 3909
Fax: +32 02 290 3939
Email: bernard.hanotiau@hvdb.com

9. On June 17, 2015, Respondent appointed Prof. Raúl Emilio Vinuesa as arbitrator. His contact details are as follows:

Prof. Raúl Emilio Vinuesa
Tel.: +54 11 47236664
+54 11 47236780
Email: raul.vinuesa43@gmail.com; revinu@fibertel.com.ar

10. Pursuant to the Appointment of Presiding Arbitrator dated September 22, 2015, the Secretary-General of the Permanent Court of Arbitration (the "PCA") appointed Mr. Yves Derains as presiding arbitrator.

11. His contact details are as follows

Mr. Yves Derains
Derains & Gharavi
25 rue Balzac
75008 Paris
France
Tel.: +33 1 40 55 55 51 00
Fax: +33 1 40 55 55 51 05
Email: yderains@derainsgharavi.com

[4] Article XI, Treaty (Exhibit **C-02**).

## B. DEVELOPMENT OF THE PROCEEDINGS

12. Throughout these proceedings the Arbitral Tribunal issued 14 procedural orders, the content of which are summarized below. For the sake of brevity, the Tribunal refers to the specific background information that served as grounds for each of these decisions, described in the respective procedural orders.

13. On October 6th [sic], the Tribunal requested the Parties to provide their respective positions in relation to: (i) the language of the proceedings; (ii) the Tribunal's proposal to resort to the PCA's services as the administrator of the proceedings.

14. On November 4, 2015, in accordance with Article 17.1 of the UNCITRAL Rules, the Tribunal, by way of **Procedural Order No. 1**, after consultation with the Parties, decided that Spanish shall be the language of this arbitration and, consequently, communications and decisions of the Arbitral Tribunal shall be drafted in the Spanish language.

15. The Tribunal also decided that the Parties will be authorized to communicate and express themselves in the English language. However, the Parties' Memorials (without exhibits), witness statements and expert reports, and document production requests, shall necessarily be translated from English into Spanish, at the expense of the Party submitting them, within a term between one week and 15 days, according to the nature and size of the document, calculated as of the date the document was submitted to the Tribunal and to the other Party. Hearings shall take place with simultaneous interpretation and a transcription thereof shall be made in English and Spanish. Claimant shall bear the cost of the simultaneous interpretation and transcription in English.

16. On November 27, 2015, the Tribunal circulated a draft of Procedural Order No. 2 and the Terms of Reference and proposed dates to the Parties to hold a conference call. On the other hand, the Presiding Arbitrator of the Tribunal indicated his intention to be assisted by an associate of his law firm, Aurore Descombes, whose curriculum vitae was transmitted to the Parties.

17. On December 3, 2015, the Tribunal confirmed that the conference call to organize the arbitration would be held on December 9, 2015 at 1:00 p.m. Paris time.

18. On December 4, 2015, Respondent stated that it had no comments in connection with the draft versions of the Terms of Reference and Procedural Order No. 2 sent by the Tribunal and indicated its agreement with the procedural calendar suggested by Claimant.

19. On that same day, Claimant sent its comments on the draft versions of the Terms of Reference and Procedural Order No. 2 and confirmed the agreement reached between the Parties in connection with the dates of the procedural calendar set forth in Annex 1 of Procedural Order No.2.

20. On December 9, 2015, the conference call relating to the organization and procedure of the arbitration was held.

21. On December 4, 2015, the Terms of Reference were signed by way of which the PCA was designated as the administrating entity of this arbitration, with Mr. Martín Doe Rodríguez from the PCA acting as Secretary of the Tribunal.

22. The PCA's contact details are as follows:

**Permanent Court of Arbitration**
Mr. Martín Doe Rodríguez, Deputy Secretary-General
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands
Tel.: +31 70 302 4140
Fax: +31 70 302 4167
Emails: mdoe@pca-cpa.org

23. The Terms of Reference also provided that:

> -The Parties confirm that they have no objection to the appointment of any of the members of the Tribunal on the grounds of conflict of interest or lack of independence or impartiality in respect of matters known to him as at the date of signature of these Terms of Reference.
>
> -The Parties are in agreement that the legal place of arbitration will be Geneva (Switzerland).
>
> -The Parties are in agreement that each member of the Tribunal shall be remunerated at the rate of EUR 600 per hour, plus VAT. Time spent on travel will be remunerated at 50% of this rate.

24. On December 17, 2015, the Tribunal notified **Procedural Order No. 2** to the Parties, enclosing the procedural calendar.

25. On April 8, 2016, and pursuant to the agreed procedural calendar, Claimant submitted its Statement of Claim (the "**Statement of Claim**").

26. On April 19, 2016, Claimant stated by way of a letter that it was sending a USB to the members of the Tribunal and to the PCA, of its request for arbitration that had not yet been received.

27. On August 8, 2016, Respondent submitted its Objections to Jurisdiction and Competence and Counter-Memorial on the Merits (the "Counter-Memorial to Claim").

28. On November 4, 2016, Claimant submitted its Reply on the Merits and Counter-Memorial on Jurisdiction (the "Reply Memorial"), along with a letter in which its requested the Tribunal's authorization to file a Rejoinder on Jurisdiction.

29. On November 24, 2016, Respondent acknowledged receipt of the hard copy of the Reply Memorial submitted by Claimant and with respect to Claimant's request set out in its letter dated November 4, 2016, it requested the Tribunal to refrain from examining it as a Spanish version of said document had not been sent.

30. On November 25, 2016, Claimant responded that Respondent had misinterpreted the requirements of Procedural Orders Nos. 1 and 2 in relation to the language [of the proceedings] and argued that such rules did not require a translation of correspondence with the Tribunal to be remitted. Notwithstanding the foregoing, it remitted a courtesy translation of its letter dated November 4, 2016 into Spanish.

31. On November 28, 2016, Respondent reiterated its position that the Tribunal should consider Claimant's request as extemporaneous, ratifying its position that Procedural Orders Nos. 1 and 2 required the submission of the translation of the memorials within the indicated timeframes, explaining that by containing a claim the brief in dispute should be considered as a memorial.

32. On November 28, 2016, Claimant reiterated its position.

33. On November 30th, Respondent reaffirmed its position that briefs that require a decision from the Tribunal had the nature of memorials.

34. On December l, 2016, the Tribunal decided the following:

> "*In connection with Claimant's letter dated November 4, 2016 requesting authorization to file a Rejoinder on Jurisdiction within six (6) weeks of Respondent's last filing on February 2, 2017, that is, until March 16, 2017, the Tribunal:*
>
> *- Notes Respondent's request, expressed in its letter dated November 23, 2016, and reiterated in its e-mails dated November 28 and 30, to consider Claimant's request as extemporaneous for failing to submit the respective translation within the indicated terms;*
>
> *- Notes that Claimant has attached a Spanish translation of its letter dated November 4, 2016 to its e-mail dated November 24, 2016, and that Claimant has also stated its position with respect to Respondent's request that its request be considered extemporaneous by the Tribunal in its email dated November 28, 2016;*
>
> *- Informs the parties that it will communicate its position on both Claimant's request and Respondent's request shortly;*
>
> *- Notwithstanding Respondent's position on the admissibility of Claimant's request, the Tribunal invites Respondent to communicate its position on the merits of Claimant's request by no later than December 5, 2016*."

35. On December 5, 2016, Respondent filed its memorial in response to Clorox's request to file a Rejoinder on Jurisdiction.

36. On December 7, 2016, the Tribunal issued **Procedural Order No. 3** granting Claimant's request to file a Rejoinder on Jurisdiction, fixing the filing date thereof for March 2, 2017.

37. On January 23, 2017, the attorney Dr. Ignacio Torterola sent a letter informing that Respondent had retained the law firm GST LLP and requesting the Tribunal to extend the deadline for the submission of Respondent's Rejoinder Memorial by 28 days.

38. On January 24, 2017, the Tribunal took note of GST LLP's intervention and invited Claimant to comment on Respondent's request.

39. On January 26, 2017, Claimant objected to [Respondent's] petition, requesting the Tribunal to confirm the procedural calendar agreed to in Procedural Orders Nos. 2 and 3.

40. On January 26, 2017, Respondent replied to Claimant's letter of the same date and reiterated its request.

41. On January 26, 2017, the Tribunal invited Claimant to respond to Respondent's letter by no later than January 27, 2017.

42. On January 27, 2017, Claimant replied to Respondent's letter dated January 26, 2017 and reiterated its objection to the requested extension.

43. On January 27, 2017, the Tribunal notified the Parties of **Procedural Order No. 4** by which it granted Respondent until February 14, 2017 to submit its Rejoinder and consequently changed the date of submission of Claimant's rejoinder on jurisdiction to March 13, 2017.

44. On February 2, 2017, Respondent filed with the Tribunal a motion for reconsideration of the Tribunal's decision.

45. On February 2, 2017, the Tribunal invited Claimant to comment on Respondent's motion.

46. On February 3, 2017, Claimant objected to Respondent's motion.

47. On February 5, 2017, Respondent submitted a new letter supplementing the arguments on which is based its motion for reconsideration.

48. On February 6, the Tribunal invited Claimant to comment on Respondent's letter dated February 5, 2017.

49. On February 7, 2017, Claimant reiterated its objection to Respondent's request.

50. On February 8, 2017, the Tribunal requested the consent of the Parties to proceed to change the Presiding Arbitrator's assistant. To that end, it sent the Parties the curriculum vitae of Marie Girardet, an associate of the law firm of Yves Derains.

51. On February 8, 2017, the Tribunal notified the Parties of **Procedural Order No. 5** by way of which it confirmed the agreement set out in Procedural Order No. 4 and dismissed Respondent's motion for reconsideration.

52. On February 13, 2017, Respondent filed its Rejoinder on the Merits and Reply on Jurisdiction (the "**Reply on Jurisdiction**").

53. On February 15, 2017, Claimant confirmed its agreement to the intervention of Marie Girardet as assistant to the Presiding Arbitrator.

54. On February 15, 2017, the Tribunal informed the Parties that the modifications to the arbitral calendar agreed by the Tribunal entailed changing the date of notification of witnesses to April 3, 2017 as well as the date of the pre-hearing conference. The Tribunal suggested several date proposals with respect to the latter.

55. On February 15, 2017, Respondent submitted a letter by way of which it (i) agreed to April 3, 2017 as the date to notify witnesses; (ii) expressed its availability to hold the conference on April 3, 4, and 5, 2017; and (iii) agreed to the appointment of Marie Girardet as assistant to the Presiding Arbitrator.

56. On February 20, 2017, Claimant agreed to the notification of witnesses on April 3, 2017 and its availability to hold the conference on April 4 and 6, 2017.

57. On February 21, 2017, the Tribunal set the pre-hearing conference for April 4, 2017 at 6:30 p.m. Paris time.

58. On February 22, 2017, Claimant submitted a link with electronic access to its Rejoinder Memorial, as well as an erratum.

59. On March 1, 2017, Claimant sent a communication stating that Respondent had introduced a piece of evidence into the record along with its rejoinder that it should have submitted together with its first memorial, and in light of that action it breached Procedural Order No. 2. It requested the Tribunal to consider such evidence as not submitted or in the alternative to refuse to admit the witness statements and legal report submitted together with the Rejoinder Memorial.

60. On March 2, 2017, the Tribunal invited Respondent to comment on Claimant's letter.

61. On March 6, 2017, Respondent replied to Claimant's arguments by enclosing in Annex A a table detailing to which aspect of the Reply the arguments in the Rejoinder Brief and the evidence provided replied.

62. On March 13, 2017, Claimant filed Claimant's Rejoinder on Jurisdiction (the "**Rejoinder on Jurisdiction**").

63. On March 15, 2017, Respondent complained that Claimant had, according to Respondent, abused the submission process of its rejoinder on jurisdiction to argue and present evidence on matters relating to the merits of the dispute. It also requested the Tribunal to submit its observations thereon.

64. On March 15, 2017, the Tribunal shared with the Parties its interpretation of paragraph 5.3 of Procedural Order No. 2 before inviting them to comment simultaneously on Annex A to Respondent's Letter.

65. On March 15, the Tribunal acknowledged receipt of a new communication from Respondent in connection with Clorox's Rejoinder on Jurisdiction and invited Claimant to comment on it.

66. On March 15, 2017, Respondent requested confirmation from the Tribunal of its correct interpretation of its communication of the same date. The Tribunal promptly confirmed Respondent's interpretation.

67. On March 20, 2017, Claimant submitted its comments in connection with Respondent's communication that alleged that Clorox's Rejoinder on Jurisdiction "hides arguments and documents intended to discuss the merits of this arbitration."

68. On March 24, 2017, the Parties provided the Tribunal and the PCA with their comments with respect to Annex A to Respondent's letter of March 6, 2017.

69. In this regard, Respondent submitted an introductory letter from the Venezuelan Attorney General, as well as a letter to the Tribunal signed by Mr. Torterola and Mr. Dugarte. Both documents raised the possibility of postponing the date of the hearing.

70. On March 28, 2017, Claimant commented on Respondent's request dated March 24, 2017. In particular, Respondent objected to the possibility of postponing the date of the hearing.

71. On March 28, 2017, the Tribunal acknowledged receipt of the latest communications from the Parties and stated that the Tribunal at that time did not consider there existed reasons justifying a postponement of the hearing.

72. On March 28, 2017, the Tribunal, in connection with Respondent's allegation that Claimant's Rejoinder on Jurisdiction concealed arguments on the merits, granted Respondent until April 4 to develop its observations and Claimant until April 7 to respond to the latter. In light of these developments, the Tribunal proposed to postpone the dates for the pre-hearing conference and proposed two new dates to the Parties in this regard.

73. On March 30, 2017, Claimant confirmed its availability to hold the pre-hearing conference on the dates proposed by the Tribunal with a preference for April 19, 2017. In addition, Claimant indicated that it would be appropriate to postpone the witness notification date.

74. On March 30, 2017, the Tribunal clarified that its decision to postpone the pre-hearing conference implicitly entailed postponing the date of delivery of witness notices. In turn, it indicated that such date would be communicated once the date of the pre-hearing conference had been agreed upon.

75. On April 3, 2017, Claimant suggested to the Tribunal the possibility of holding the hearing in Washington D.C. instead of Paris.

76. On April 3, the Tribunal indicated that it was not in the arbitrators' interest to hold the hearing in Washington and confirmed Paris as the place of the hearing.

77. On April 3, Claimant took note of the Tribunal's preference to hold the hearing in Paris while expressing its agreement.

78. On April 4, 2017, and as decided by the Tribunal on March 28, 2017, Respondent submitted its comments in connection with Claimant's Rejoinder on Jurisdiction. It

also took note of the location of the hearing and expressed its availability to hold the pre-hearing conference on April 20, 2017.

79. On April 7, 2017, and as decided by the Tribunal on March 28, 2017, Claimant submitted its comments in connection with Respondent's allegations in connection with Clorox's Rejoinder on Jurisdiction.

80. On April 9, 2017, the Tribunal issued **Procedural Order No. 6**, by way of which it decided as follows:

> *"(i) Admit all evidence annexed to Respondent's Rejoinder, as well as all evidence annexed to Claimant's Rejoinder on Jurisdiction.*
>
> *(ii) Authorize Claimant to present a maximum of 3 witnesses and one additional expert at the hearing, provided that it has indicated by April 18, 2017 their names and the issues on which they will be examined.*
>
> *(iii) Ask the parties and their counsel not to stray from the serenity and fellowship that characterize international arbitration proceedings*".

81. On that same day, in the e-mail attaching Procedural Order No. 6, the Tribunal set the date of notification of witnesses for April 18, 2017.

82. On April 13, 2017, the Tribunal indicated to the Parties the points to be addressed at the pre-hearing conference.

83. On April 18, the Parties indicated the witnesses they intended to examine during the hearing.

84. On April 18, 2017, Claimant requested the appointment of an expert and a supplementary witness, respectively Professor Chavero and Mr. Costello, based on the provisions of Procedural Order No. 6.

85. On April 19, 2017, the Tribunal granted Claimant authorization to appoint Mr. Costello and Professor Chavero. It also decided that the date by which Respondent would have to indicate whether it wished to proceed with the cross-examination of the additional expert and witness would be fixed during the conference call on April 20, 2017.

86. On April 19, 2017, Respondent requested the Tribunal to set a deadline for Respondent so that it could submit rebuttal documents regarding the testimony of the new witness and the supplementary expert's report. In addition, it indicated that it accepted the date of May 3, 2017 to indicate whether it wished to cross-examine Mr. Costello and Mr. Chavero Gazdik.

87. On April 20, 2017, the Tribunal indicated that Claimant would have an opportunity to comment on Respondent's request, if it submitted rebuttal documents of the testimony and expert report during the conference call on the same day.

88. On April 20, 2017, Respondent and Claimant indicated to the Tribunal their points of agreement and disagreement regarding the agenda and various aspects of the hearing.

89. On April 20, 2017, the pre-hearing conference call was held.

90. On April 20, 2017, Respondent sent a communication to the Tribunal in which it (i) ratified the importance of incorporating rebuttal documents to the new testimonies and expert reports; (ii) offered the possibility that Claimant could also submit documents at this stage for the examination of experts and witnesses.

91. On April 21, 2017, the Tribunal invited Claimant to comment on Respondent's communication dated April 20, 2017, no later than April 24, 2017.

92. On April 24, 2017, Claimant commented on Respondent's communication in which it affirmed its request to submit documents rebutting the new testimonies.

93. On April 25, 2017, the Tribunal issued **Procedural Order No. 7** concerning the organization of the hearing.

94. On April 27, 2017, the Tribunal decided to authorize Respondent, on a limited and non-systematic basis, to submit documents rebutting the written statements of witnesses authorized by Procedural Order No. 6 after submitting a specific request to the Tribunal justifying which documents it wished to submit and specifying why they were relevant and necessary for the purpose of rebutting Mr. Costello's testimony and Professor Chavero's expert report. The Tribunal also invited Respondent to make such a request by May 3, 2017.

95. On April 29, 2017, Claimant requested the Tribunal to reconsider its decision dated April 27, 2017.

96. On April 29, 2017, Claimant submitted Mr. Costello's testimony and Professor Chavero's expert report, along with their respective exhibits, to the arbitration record.

97. On April 30, 2017, the Tribunal dismissed Respondent's motion for reconsideration.

98. On May 1, 2017, Claimant provided a Spanish translation of Mr. Costello's testimony.

99. On May 3, 2017, Respondent submitted its detailed request for rebutting Mr. Costello's testimony and Professor Chavero's report.

100. On May 3, 2017, Claimant requested the Tribunal to take note of the Parties' agreement to extend the duration of direct examinations to 20 minutes in the case of witnesses and 45 minutes in the case of experts.

101. On May 3, 2017, Respondent confirmed the Parties' agreement to the duration of the direct examinations.

102. On May 3, 2017, Respondent requested an extension until May 5 to deliver the rebuttal documents of witness Michael Costello and expert Prof. Chavero.

103. On May 3, 2017, the Tribunal rejected Respondent's extension request and clarified that Respondent was in any event not authorized to provide rebuttal documents but to file a request for authorization to submit rebuttal documents whose relevance would be further assessed by the Tribunal.

104. On May 3, 2017, shortly after the Tribunal's decision, Claimant objected to Respondent's request for an extension.

105. On May 3, 2017, Respondent submitted a letter with its justifications for submitting the rebuttal documents.

106. On May 4, 2017, Respondent requested that Mr. Costello and Professor Chavero be cross-examined.

107. On May 5, 2017, Claimant provided comments on Claimant's detailed request to submit rebuttal documents.

108. On May 5, 2017, Claimant took note of Respondent's witness notification dated May 4 and requested the Tribunal to rule on the Parties' joint request to extend the duration of the direct examination of experts and witnesses.

109. On May 6, 2017, Respondent, after arguing that Claimant's response to its request of submitting rebuttal documents extended beyond the scope authorized by the Tribunal, requested the Tribunal's authorization to comment on Clorox's objection.

110. On May 6, 2017, Claimant objected to Respondent's request to comment on Clorox's response.

111. On May 8, 2017, the Parties transmitted their respective lists of participants to the hearing.

112. On May 9, 2017, the Tribunal issued **Procedural Order No. 8** concerning Respondent's request to submit rebuttal documents to Mr. Costello's testimony and Professor Chavero's report. That order provided as follows:

> "*IN VIEW OF THE FOREGOING, THE TRIBUNAL DECIDES TO:*
>
> - *Accept the request to submit the documents under the categories 3, 4 and 5;*
> - *Accept the request to submit the category 7 documents, with the exception of the legal authorities mentioned in Professor Chavero Gazdik's curriculum vitae that are not invoked in his statement;*
> - *Reject the request to submit documents under categories 1, 2 and 6;*
> - *Set May 12, 2017 as the date to submit the authorized documents.*"

113. On May 9, 2017 the Tribunal notified **Procedural Order No. 7 bis** in which it completed the provisions of Procedural Order No. 7 concerning the organization of the hearing and obtained the Parties' agreement to fix the duration of the direct examinations of witnesses and experts.

114. On May 12, 2017, Respondent submitted the authorized rebuttal documents to be included into the record, pursuant to Procedural Order No. 8.

## C. HEARING

115. From May 22 to 26, 2017, the hearing was held at the ICC Hearing Centre in the presence of the members of the Tribunal, the secretary of the PCA, Julia Solana, replacing Martin Doe, and the assistant to the Presiding Arbitrator, Marie Girardet (the "**Hearing**").

116. On the part of Claimant, the following were present:

Angela Hilt (Clorox Spain S.L.)
Gonzalo Gioja (Clorox Spain S.L.)
Sebastián Minotti (Clorox Spain S.L.)

Caline Mouawad (King & Spalding LLP)
Vera de Gyarfas (King & Spalding LLP)
Aloysius Llamzon (King & Spalding LLP)
Fernando Rodríguez Cortina (King & Spalding LLP)
Jessica Beess und Chrostin (King & Spalding LLP)
Veronica Garcia (King & Spalding LLP)

Michael Costello (Witness)
Manuel Abdala (Expert)
Miguel Nakhle (Expert)
Daniela Bambaci (Expert)
Rafael Chavero Gazdik (Expert)

117. On the part of Respondent, the following were present:

Henry Rodríguez (Office of the Attorney General of the Bolivarian Republic of Venezuela)
Lidsay Maryori Medina Porras (Legal Consultant to the Ministry of the People's Power for the Social Labor Process)
Carlos Dugarte (García & Morris Attorneys-at-Law)
Ignacio Torterola (GST LLP)
Diego Gosis (GST LLP)
Veronica Lavista (GST LLP)
Guillermo Moro (Special Counsel)
Alejandro Vulejser (Special Counsel)
Joaquín Coronel (Assistant to the Legal Team)

José Luis Rodríguez Bastidas (Witness)
Maximil Armando Machado Martínez (Witness)
Fabián Bello (Expert)
Alejandro Asan (Expert)

118. Also present were the court reporters Virgilio Dante Rinaldi and David Kasdan.

119. On May 25, 2017, the Parties e-mailed their respective opening argument presentations as well as the presentations of their respective experts.

120. At 11:00 p.m. on the evening of May 25, 2017, namely, after the fourth and penultimate day of the hearing, Claimant requested that a document attached to its e-mail, proposing to refer to it as document C-190, be introduced into the record. The email also enclosed a letter presenting the so-called C-190 document as follows: "*the letter dated December 7, 2010 issued by Ms. Laura Stein, Senior Vice President, General Counsel of The Clorox Company, as well as the accompanying related 'Unanimous Written Consent of the Board of Directors' dated December 21, 2010, duly signed by each of the members of the Board of Directors of The Clorox Company. As Respondent raised this issue only today, and the Tribunal has made it clear that this is a matter of importance to the resolution of this case, we respectfully request for leave to introduce the enclosed letter and Board of Directors consent document dated December 7 and 21, 2010, respectively, into the record as Exhibit C-190. (Note that the consent was transmitted to The Clorox Company Board of Directors as an attachment to the letter, and bears a later effective date of December 21, 2010, to ensure that the signatures could be received by that date in accordance with Deleware* [sic] *law*.)"

121. At 6:00 a.m. on May 26, 2017, the Tribunal acknowledged receipt of Claimant's communication dated May 25 and invited Respondent to submit its observations at the commencement of the Hearing.

122. On May 26, the Parties discussed the admissibility of document C-190. Respondent questioned the authenticity of the document and suggested that it had been manufactured by Claimant and/or its counsel. The Tribunal asked the Parties to come forward to establish a forensic procedure to resolve the issue and, in the event that they were unable to do so within a reasonable time, to refer the matter to the Tribunal for the appointment of an expert to that end. The Tribunal proposed to the Parties to address the Tribunal regarding the forensic procedure by June 9, 2017.[5]

[5] Hearing, Transcript, day 5, p. 945, line 1.

123. On the same day, at the conclusion of the Hearing, the President (i) set July 31, 2017 as the date for the simultaneous filing of the briefs on costs,[6] (ii) indicated that the filing of post-hearing briefs was not necessary,[7] and (iii) that the parties would file a short brief within 3 weeks of the decision on admissibility in the event that a decision on admissibility were rendered in connection with document C-190.[8]

## D. POST-HEARING PROCEEDINGS

124. On June 2, 2017, the Tribunal notified **Procedural Order No. 9** relating to the post-hearing proceeding. Said document provided the following:

> *"The purpose of the present Procedural Order is to set out the next stages of the proceedings, and the terms in connection therewith agreed by the parties at the conclusion of the hearing. Additionally, this Procedural Order shall fix a date to submit the corrections of the transcripts.*
>
> *In regards to the forensic procedure to which the parties have agreed to submit the document that Claimant intends to produce in the proceedings under number C-190, as set forth in its letter dated May 25, 2017, during the hearing it was agreed that the parties shall inform the Tribunal by June 9, 2017 whether they have reached an agreement on such forensic procedure. In the event the parties have not reached an agreement on the forensic procedure, the Tribunal shall decide on the adequate procedure.*
>
> *The Tribunal has also indicated that, in the event Document C-190 is included into the arbitral record upon issuing a decision on admissibility in that regard, the parties will have a term of 3 weeks as of the issuance of the decision on admissibility to submit a summary to the Tribunal (one single submission) presenting their respective positions on the issue of jurisdiction in light of Document C-190.*
>
> *On June 9th, Respondent shall clarify its position with respect to its contribution to the deposit relating to the arbitration costs.*
>
> *In relation to the parties' respective statements on costs, the parties have agreed with the Tribunal to file these simultaneously on July 31, 2017.*
>
> *In connection with the transcripts, the Tribunal hereby invites the parties to submit their corrections, whether agreed to or otherwise, by June 16, 2017.*"

[6] Hearing, Transcript, day 5, p. 943, line 1
[7] Hearing, Transcript, day 5, p. 939, line 8.
[8] Hearing, Transcript, day 5, p. 941, line 9.

125. On June 7, 2017, Respondent informed the Tribunal that the Parties had agreed to extend the period set forth by Procedural Order No. 9, concerning corrections to the transcripts, until June 23, 2017. On the same day, Claimant confirmed that agreement.

126. On June 7, 2017, the Tribunal confirmed the agreement reached with respect to the extension of the deadline for the correction of the transcripts.

127. On June 9, the Parties informed the Tribunal of their respective positions with respect to the forensic proceeding as they did not reach an agreement on the matter.

128. On June 9, 2017, the date on which Procedural Order No. 9 provided for Respondent to report its share of the arbitration costs, Respondent requested an extension of time until June 16, 2017 to do so.

129. On June 16, 2017, Respondent informed its decision not to participate in the arbitration costs and requested the suspension of the proceedings in the event that Claimant failed to assume payments requested by Respondent.

130. On June 20, 2017, Claimant requested permission to comment on Respondent's letter dated June 16, 2017.

131. On June 20, 2017, the Tribunal authorized Claimant to comment on Respondent's letter dated June 16 and granted Claimant until June 23 to do so.

132. On June 23, 2017, Claimant submitted its revisions to the transcripts stating that the Parties had agreed to revise only the Spanish transcripts as Spanish would be the language of the award. With respect to the parts of the transcripts in which each party proposed different terms, Claimant indicated that the Parties left the choice of the most faithful interpretation of what was said at the Hearing to the discretion of the court reporter.

133. On June 23, 2017, Claimant replied to Respondent's letter dated June 16, 2017.

134. On June 23, 2017, Respondent submitted its revisions to the transcripts confirming the agreement of the Parties expressed in Claimant's prior communication.

135. On June 26, 2017, the PCA Secretary, on behalf of the Arbitral Tribunal, addressed the Parties, taking note of the contents of Respondent's letter dated June 16, 2017 and Claimant's letter dated June 23, 2017 and ordered: "*in light of the contents of Respondent's letter and in accordance with Article 43.4 of the UNCITRAL Rules, the Tribunal invites Claimant to make payment in lieu of Respondent's share of the initial deposit (EUR 50,000), as provided for in section 11.1 of the Terms of Reference of December 14, 2015, and the supplementary deposit (EUR 200,000) requested in the PCA's letter of April 4, 2017*."

136. On July 13, 2017, the PCA Secretary forwarded the corrected version of the transcripts prepared by the court reporter of the Spanish version following receipt of the corrections from the Parties.

137. On July 18, 2017, the PCA Secretary acknowledged receipt of Claimant's payment in lieu of Respondent's share of Respondent's initial and supplementary deposits.

## E. EXPERT PROCEEDING RELATING TO EXHIBIT C-190

138. On July 20, 2017, the Tribunal informed the Parties that, in the absence of an agreement between the Parties to appoint a forensic expert, the Tribunal would appoint such an expert in accordance with Article 29 of the UNCITRAL Rules, adding that it was already studying the profiles of several experts.

139. On July 31, 2017, the date set forth by Procedural Order No. 9 for the filing of the costs submissions, Claimant informed the Tribunal of the Parties' agreement to file their costs submissions within one month after the conclusion of the forensic proceeding.

140. On August 1, 2017, Respondent confirmed the above agreement by referring to the one-month extension of the deadline.

141. On August 2, 2017, the Tribunal took note of the Parties' agreement, but requested that the Parties clarify whether they intended to file the submissions within one month, or one month after the conclusion of the forensic proceeding.

142. On August 10, 2017, Respondent confirmed its agreement that the costs submission would be filed within 30 days upon the conclusion of the forensic proceeding. In addition, it requested the Tribunal to decide on the admissibility of the document C-190 prior to the completion of the forensic expert examination or to set short deadlines for the completion of the forensic expert examination.

143. On August 10, 2017, the Tribunal acknowledged receipt of Respondent's communication of the same day and invited Respondent to comment on it the following day.

144. On August 11, 2017, Claimant replied that its position was that the issue of the admissibility of document C-190 had to be considered after establishing the authenticity of the document.

145. On August 15, 2017, the Tribunal found that there were no reasons to justify that the admissibility of the document be examined prior to the forensic expert examination. In that communication, the Tribunal defined the mission of the expert to be appointed and informed that, with the support of the PCA secretary, the Tribunal had initiated a procedure to obtain a proposal for the name of an expert from the ICC's ADR International Centre. The expert's mission was to examine the document to determine the original's date of creation and the date of its transmission to the board members The Clorox Company.

146. On September 16, 2017, Claimant requested information regarding the status of the expert's appointment.

147. On September 18, 2017, the Tribunal provided information relating to the expert proposed by the ICC, Dr. Stephen Castell, his curriculum vitae, his declaration of independence, as well as other relevant information provided by the proposed expert.

148. On September 26, 2017, Claimant stated that it had no objection to the appointment of Dr. Stephen Castell.

149. On September 26, 2017, Respondent stated that it had no objection to the appointment of Dr. Stephen Castell. In addition, it requested the opportunity to argue on the object of the expert examination.

150. On September 26, 2017, the Tribunal invited Claimant to comment on Respondent's request to [be allowed to submit its] arguments on the object of Dr. Stephen Castell's expert opinion. To that end, the Tribunal granted Claimant until September 28 to comment.

151. On September 28, 2017, Claimant commented on Respondent's letter dated September 26, 2017.

152. On September 29, 2017, the Tribunal considered the debate regarding Respondent's letter of September 26 as closed, and stated that it would communicate its decision on the matter at the beginning of the following week.

153. On October 2, 2017, the Tribunal reminded the Parties of the expert's mission, previously defined in its communication of August 15, 2017, and rejected Respondent's request dated September 26 to reopen the discussion regarding the expert's mission.

154. On October 2, 2017, the Tribunal informed the Parties that it had contacted the expert to inform him of the Parties' acceptance of his appointment and to request the expert to report his fees.

155. On October 2, 2017, Respondent again requested an opportunity to comment on the expert's mission, considering that the extent of Claimant's response constituted a notorious inequality.

156. On October 2, 2017, Claimant informed the Tribunal that it saw no need to refer the matter back to the Tribunal.

157. On October 4, 2017, the Tribunal acknowledged receipt of the latest communications from the Parties and decided that there were no grounds for reopening the discussion on the expert's mission and confirmed its decision of October 2. It added that the methodology and the definition of the documents necessary to issue a decision on the authenticity of the C-190 document would be defined by the expert in consultation with the Parties and the Tribunal.

158. On October 25, 2017, the Tribunal issued **Procedural Order No. 10** in English with a copy to expert Dr. Stephen Castell. That procedural order set out the stages of

the forensic procedure, confirmed the appointment of Dr. Stephen Castell, and invited Claimant to deposit the expert's fees calculated on a provisional basis into the PCA's account.

159. On November 16, 2017, the Tribunal took note of Claimant's deposit of November 15, 2017. It also invited the expert to commence his mission in accordance with the provisions of Procedural Order No. 10.

160. On November 21, 2017, Dr. Stephen Castell communicated the methodology he intended to apply to perform his mission.

161. On November 28, 2017, Respondent requested an extension until December 1, 2017 of the deadline given for commenting on the expert's methodology and indicated that it had obtained Claimant's agreement to this end.

162. On November 29, 2017, Claimant confirmed the agreement reached between the Parties.

163. On November 29, 2017, the Tribunal confirmed its agreement for the Parties to submit their comments to the expert's methodology by December 1, 2017.

164. On December 1, 2017, the Parties submitted their respective comments to the expert's methodology.

165. On December 6, 2017, Respondent provided an English translation of its comments initially submitted in Spanish in order to enable the expert to become acquainted with them.

166. On December 6, 2017, Claimant placed on the record its firm objection to Respondent's request to amend Procedural Order No. 10, stating that any doubts presented by the expert relating to his mission would have to be addressed to the Tribunal.

167. On December 7, 2017, Respondent ratified its request and criticized Claimant's unilateral intervention.

168. On December 8, 2017, the Tribunal denied Respondent's request for a round of communications and requested that the expert begin his mission in light of the comments of the Parties.

169. On December 12, 2017, Dr. Stephen Castell delivered his "Expert Mission Plan."

170. On December 28, 2017, Claimant submitted a letter requesting instructions from the Tribunal regarding the visit of expert Stephen Castell on January 3 and 4 at the Clorox facilities.

171. On December 28, 2017, Respondent requested the Tribunal to grant it until midnight on December 29 to respond to Claimant's letter.

172. On December 29, 2017, the Tribunal granted Respondent the opportunity to respond within the requested time limit, requested the expert to maintain the scheduled dates for his visit, and informed that the Tribunal's decision on the disputed issues in connection with the visit would be made no later than noon of the following day.

173. On December 29, 2017, Respondent submitted its comments to Claimant's letter dated December 28, 2017.

174. On December 30, 2017, the Tribunal acknowledged receipt of Respondent's communication. By e-mail on the same day, the Tribunal resolved the issues raised by the communications from the Parties in connection with Mr. Castell's visit to Claimant's facilities.

175. The expert appointed by the Tribunal conducted a visit of Clorox's facilities in Pleasanton, California on January 3 and 4, 2018. The persons that witnessed this visit were as follows:

Dr. Stephen Castell and Mr. David Shaw (experts)
Ms. Caline Mouawad, Ms. Angela Hilt, Ms. Stephanie Tang, Mr. Gene Shantz, Mr. Juan Pablo Calderón, Mr. Scott Davis (for Claimant)
Mr. Guillermo Moro, Mr. Andrew Neal (for Respondent)

176. On January 4, 2018, between 12:00 a.m. and 2:30 a.m. (Paris time), while the expert's visit to Claimant's facilities took place, the Parties and the expert called the

President of the Tribunal in connection with items 4 and 7 of the Tribunal's decision dated December 30, 2017.

177. On January 5, 2018, the Presiding Arbitrator of the Arbitral Tribunal confirmed the directions given verbally by telephone the previous evening in connection with items 4 and 7 of the decision dated December 30, 2017.

178. On January 9, 2018, Respondent reported the Parties' agreement on recording Dr. Stephen Castell's inspection after the stenographer had to leave the Clorox facilities.

179. On January 9, 2018, Claimant confirmed the content of Respondent's communication of the same day.

180. On January 25, 2018, Claimant filed a request to remove the expert from his mission, along with the transcripts of the expert's inspection.

181. On January 25, 2018, the Tribunal acknowledged receipt of Claimant's request and requested the expert to suspend his mission until the Tribunal decided on Claimant's request. By separate communication on the same day, the Tribunal invited Respondent and the expert to comment on Claimant's request by February 1, 2018.

182. On January 26, 2018, Respondent requested an extension of the deadline granted by decision of January 25, 2018, and suggested that the expert's potential attorney expenses be included in the arbitration costs.

183. On January 27, 2018, the Tribunal acknowledged receipt of Respondent's request to postpone its deadline for comments on the request for the expert's dismissal and requested Claimant to comment on that request by January 30, 2018, as well as its position on the expert's potential attorney expenses. The Tribunal also suspended the one-week term provided for in its communication of January 25, 2018.

184. On January 30, 2018, Claimant objected to the extension of time requested by Respondent by accepting only a 5-day extension and added that Respondent's suggestion that any potential attorney representation expenses incurred by Mr. Castell should be included in the arbitration costs was unreasonable.

185. On January 30, 2018, Respondent reiterated its request for an extension, arguing that the extension consented to by Claimant was insufficient. As an alternative to its request for an extension until February 12, it requested an extension until at least February 9, 2018.

186. On February 1, 2018, the Tribunal granted Respondent until February 9, 2018 to submit its response to Claimant's request to remove the expert from his mission. On the same day, Dr. Stephen Castell, who had requested information on the matter, was informed that he could provide his comments within the same timeframe as Respondent.

187. On February 7, 2018, the expert provided his comments and sent his preliminary report to the Parties and to the Tribunal.

188. On February 9, 2018, Respondent submitted its comments on Claimant's request to remove the expert from his mission, along with a witness statement from Mr. Andrew Neal.

189. On February 11, 2018, Claimant requested the Tribunal the opportunity to respond to Respondent's comments.

190. On February 11, 2018, Respondent objected to Clorox's request for a new round of communications.

191. On February 12, 2018, the Tribunal decided to close the discussion provisionally, leaving open the possibility of requesting further information from the Parties if deemed necessary at a later stage.

192. On the same day, Dr. Stephen Castell expressed to the Tribunal his availability to provide the Tribunal with information it might need.

193. On February 22, 2018, the Tribunal asked the Parties for their respective positions "*on Dr. Castell's preliminary report dated February 7, 2018 and more precisely, in the light of this report, on the possibility of reaching a conclusion on the authenticity of document C-190 as well as on the date of the original's creation and the date of its transmission to The Clorox Company's board members*." In sum, the Tribunal wished to know whether the Parties considered that it was possible "to reach some type of

conclusion, irrespective of the personality of the author of the expert examination, within a reasonable term and at reasonable cost."

194. On March 6, 2018, the PCA delivered the comments of each Party. On that same day, the Tribunal acknowledged receipt of the Parties' comments and requested the Parties to refrain from submitting further comments.

195. On March 20, 2018, the Tribunal issued **Procedural Order No. 11**, dismissing the request to remove Dr. Stephen Castell and declaring Exhibit C-190 inadmissible:

> *"25. Whereas, in light of these factual elements, the practical possibility of establishing the authenticity of Exh. C-190 is, if not impossible, unrealistic and at all events very remote, which renders it incompatible with the most evident requirements of procedural economy;*
>
> *26. Whereas, the inspection conducted by the Expert and its Preliminary Report reveal no element whatsoever that would allow for inferring that Claimant and/or its attorneys had the willingness to deceive the Tribunal or Respondent;*
>
> *27. Whereas, in such circumstances, the Expert's and Respondent's proposals in favor of continuing the forensic examination lack interest and it is convenient to put an end to the Expert's commission;*
>
> *28. Whereas, a document whose authenticity cannot be established by the party invoking it in proceedings cannot be admitted in these proceedings, and therefore Exh. C-190 must be found as inadmissible;*
>
> *29. Whereas, Respondent's objections to the admissibility of Exh. C-190 were legitimate because the authenticity thereof has not been established and, consequently, Claimant must bear the costs relating to the forensics expert examination, which the Tribunal shall confirm and quantify in its final award.*
>
> *FOR THE FOREGOING REASONS, THE TRIBUNAL:*
>
> *1. Dismisses the petition to remove Dr. Stephen Castell, Forensics Expert;*
>
> *2. Finds that the authenticity of Exh. C-190 cannot be established within the framework of these arbitral proceedings;*
>
> *3. Finds that Exh. C-190 is inadmissible;*
>
> *4. Confirms that there is no indication revealing Claimant's intent to deceive the Tribunal and/or Respondent;*

*5. Decides that the costs relating to the forensics expert examination, to be quantified in the final award, shall be borne by Claimant*."

196. On April 3, 2018, the Tribunal notified **Procedural Order No. 12**, which declared the expert's mission as concluded.

## F. THE FIRST AWARD AND THE ANNULMENT THEREOF

197. On April 10, 2018, the Tribunal proposed to the Parties to hold a conference call to consider the possibility of filing post-hearing briefs.

198. On April 16, 2018, the Tribunal informed the Parties that if none of the Parties had opined by the following day, then it would consider that neither of them considered it appropriate to reopen the issue of post-hearing briefs.

199. On April 17, 2018, both Parties stated that they did not consider it necessary to file post-hearing briefs and Claimant requested confirmation of the filing date of the costs submissions.

200. On the same day, Claimant requested permission to respond to Respondent's letter dated April 17, 2018. The Tribunal authorized Claimant to respond, noting that the discussion would then be deemed closed and that the Tribunal would provide indications on the cost statements.

201. On April 20, 2018, Claimant replied to Respondent's communication dated April 17, 2018.

202. On April 26, 2018, the Tribunal acknowledged receipt of Claimant's communication and clarified that the filing date for the costs submissions was May 26, 2018.

203. On May 28, 2018, the PCA sent the respective submissions on costs of the Parties and the Tribunal acknowledged receipt thereof. Upon delivery of these submissions, the proceedings were declared closed.

204. On May 20, 2019, the Award (the "**First Award"**) was issued and the electronic delivery thereof to the Parties took place on the same day.

205. In such award, the Tribunal had decided that it lacked jurisdiction to resolve the claims brought by Clorox Spain in these proceedings because Clorox Spain did not hold an investment protected by the BIT.[9]

206. On June 18, 2019, Clorox filed an appeal for annulment against the award with the Swiss Federal Court.

207. On March 24, 2020, the Swiss Federal Court partially upheld the annulment request lodged by Clorox and decided to annul the award of May 20, 2019 and to remand the case to the Tribunal for a new decision in accordance with its recitals.

208. In its recitals, the Swiss Court stressed that the BIT does not contain requirements beyond the holding by an investor of a contracting party of assets in the territory of the other contracting party and that, by requiring additional conditions for declaring itself lacking jurisdiction, the Arbitral Tribunal had not validly justified its decision.[10] The Swiss Federal Court, however, indicated that the case should be remanded back to the Arbitral Tribunal for a decision on the issue of "abuse of process" and other possible objections to its jurisdiction.[11]

## G. THE SECOND JURISDICTIONAL PHASE

209. On April 24, 2020, the Tribunal, after receiving the operative part (ruling) of the Swiss Federal Court's decision, informed the Parties to advise them that it would contact them as soon as it received the decision in its entirety.

210. On June 2, 2020, the Tribunal informed the Parties that the Swiss Federal Court's decision had been dispatched to it on that same day despite having been sent by the Swiss Federal Court on May 22, 2020. The Tribunal attached to its communication the Swiss Federal Court's decision together with the envelope bearing the date of dispatch of the decision by the Swiss Federal Court. Finally, the Tribunal stated that it would soon contact them to organize the procedure required by the decision of the Swiss Federal Court.

[9] May 20, 2019 Award, operative part and ¶ 835.
[10] CLA-192, Decision of the Swiss Federal Supreme Court, March 24, 2020, no. 3.4.2.7.
[11] CLA-192, Decision of the Swiss Federal Supreme Court, March 24, 2020, no. 4.

211. On June 3, 2020, the Tribunal indicated to the Parties the following: "*In its decision dated March 25, 2020, the Swiss Federal Court has determined to remand the case back to the Arbitral Tribunal for a decision on the issue of "abuse of process" and other possible objections to its jurisdiction. The Tribunal requests the Parties to enter into a dialogue in order to communicate to the Tribunal by June 12, 2020 a common proposal concerning the next stage of the proceeding consecutively to the decision of the Swiss Federal Court. In the hypothetical event that the Parties are unable to reach an agreement, the Tribunal will organize a telephone conference to hear the Parties' respective proposals before making a decision on the matter.*"

212. On June 13, 2020, Respondent informed the Tribunal as to the dialogue with Claimant as provided in the Tribunal's communication dated June 3, 2020.

213. On the same day, Claimant submitted, in the absence of an agreement with Respondent, several proposals for future proceedings following the annulment of the award by the Swiss Federal Court.

214. On June 15, 2020, the Attorney General's Office of the Republic of Venezuela submitted a letter in which it explained that it had entered into a dialogue with Claimant to submit a joint proposal on the proceeding without reaching an agreement. It also requested that the Tribunal take into consideration the situation arising from the OFAC sanctions and the limits imposed by OFAC on the lawyers representing Respondent to date.

215. On June 15, 2020, the Tribunal acknowledged receipt of the Parties' communications dated June 12, 2020, as well as of the letter from the Attorney General's Office of the Bolivarian Republic of Venezuela dated June 15, 2020. It in turn granted Claimant until June 17, 2020 to comment on Respondent's communications.

216. On June 17, 2020, Claimant submitted its observations on Respondent's communications. At the same time, Claimant drew attention to the new professional contact details of counsel Caline Mouawad.

217. On June 18, 2020, the Tribunal acknowledged receipt of Claimant's letter. The Tribunal in turn invited Respondent to indicate by June 22, 2020 who would be its representatives in this new phase of the arbitral proceedings...

218. On June 22, 2020, the Attorney General's Office of the Republic of Venezuela indicated *inter alia* that it would "*communicate in due course to the Tribunal the full composition of the team of lawyers it would form to represent it in any further action in these proceedings*."

219. On the same day, the Tribunal acknowledged receipt of Respondent's communication.

220. On June 24, 2020, Claimant commented on the contents of Respondent's communication dated June 22, 2020.

221. On June 29, 2020, the Tribunal indicated that it did not consider it necessary to organize a conference call, but invited the Parties to express their views on whether they wished to hold a conference call to develop their position on the second phase of the proceedings.

222. On July 6, 2020, the Tribunal issued **Procedural Order No. 13** concerning the next stages of the proceedings by which it organized two rounds of pleadings "*concerning the objections relating to the jurisdiction of the Arbitral Tribunal raised during the arbitral proceedings that were not resolved by the Swiss Federal Court, taking into account*, inter alia, *the observations of the Swiss Federal Court*."

223. On September 4, 2020, the Parties delivered to the PCA Secretary their respective first written submissions ("**Claimant's 2020 First Submission on Jurisdiction**" and "**Respondent's 2020 First Submission on Jurisdiction**") which were sent to the opposing Party and the Tribunal the following day.

224. On September 7, 2020, the Tribunal noted that it had not received Respondent's exhibits.

225. On September 8, 2020, Respondent delivered its exhibits.

226. On the same day, Respondent indicated that it would forward no later than Wednesday, September 9, the legal authorities submitted with its brief on a USB flash drive pursuant to paragraph 3.4 of Procedural Order No. 2.

227. On September 8, 2020, the Tribunal indicated to Respondent that the delivery of a hard copy of the brief and the exhibits thereof was not required.

228. On the same day, the Tribunal acknowledged receipt of Respondent's exhibits.

229. On September 18, 2020, Claimant submitted a Spanish translation of its 2020 First Submission on Jurisdiction.

230. On October 19, 2020, the Parties delivered to the PCA Secretary their respective second written submissions ("**Claimant's 2020 Second Submission on Jurisdiction**" and "**Respondent's 2020 Second Submission on Jurisdiction**") which were delivered to the Tribunal and the opposing Party the following day.

231. On October 22, 2020, the Tribunal acknowledged receipt of the Parties' second written submissions and noted that it had not received the index of exhibits announced by Respondent in its cover letter or the legal exhibits.

232. On November 11, 2020, Claimant submitted a Spanish translation of its 2020 Second Submission on Jurisdiction.

233. On June 2, 2021, the Tribunal declared the closure of the debates relating to that phase of the arbitral proceedings.

## H. THE SECOND AWARD AND SUBSEQUENT PROCEEDINGS

234. On June 17, 2021, the Tribunal rendered a second award dismissing Respondent's abuse of process objection, thus confirming the Tribunal's jurisdiction and that the claim submitted to it by Claimant under the auspices of the Spain-Venezuela BIT is admissible (the "**Second Award**").

235. On July 16, 2021, the Tribunal invited the Parties to decide on the possibility of submitting summation memorials on the merits, damages and costs of the dispute, and on the appropriate procedural timetable for doing so.

236. On July 23, 2021, Claimant proposed a procedural timetable for the filing of summation briefs.

237. On July 24, 2021, Respondent communicated that it would file an annulment action against the Award of June 17, 2021 and requested that the time limits for further submissions not run until such request had been decided by the Swiss Federal Court. At the same time, Respondent clarified that, should the action be rejected, it agreed to the submission of summation memorials.

238. On July 26, 2021, the Tribunal invited the Parties to comment on the opposing party's communications.

239. On July 30, 2021, Claimant objected to the stay requested by Respondent and maintained its intention to continue with the proceedings in parallel with the processing of the annulment action.

240. On the same day, Respondent ratified what it had said in its communication of July 23, 2021, and expressed its opinion on the procedural deadlines proposed by Claimant.

241. On August 3, 2021, the Tribunal issued Procedural Order No. 14 by way of which it decided to continue the proceedings in parallel with the annulment action. 14 by way of which it decided to continue the proceedings in parallel with the annulment action and established a procedural timetable, according to which: (i) on October 29, 2021, the Parties were to submit a First Summation Memorial on the merits of the dispute and damages, the length of which was to be limited to 60 pages; (ii) on January 10, 2022, the Parties were to submit a Second Summation Memorial on the merits of the dispute and damages, the length of which was to be limited to 40 pages; (iii) on February 14, 2022, the Parties were to submit a First Submission on Costs limited to 15 pages in length; and (iv) on March 7, 2022, the Parties were to submit a Second Submission on Costs limited to ten pages in length.

242. On August 13, 2021, the Tribunal requested that the Parties make an additional deposit to ensure that there were sufficient funds to cover the Tribunal's fees and expenses.

243. On September 1, 2021, Claimant made the requested deposit.

244. On October 29, 2021, Respondent communicated the Parties' agreement to extend the deadlines for submissions set forth in Procedural Order No. 14 by one week. On the same day, Claimant confirmed this agreement.

245. The following day, the Tribunal confirmed the new procedural calendar agreed by the Parties, whereby the due dates became: (i) November 5, 2021, for the First Summation Memorial on the Merits; (ii) January 17, 2022, for the Second Summation Memorial on the Merits; (iii) February 21, 2022, for the First Submission on Costs; and (iv) March 14, 2022, for the Second Submission on Costs.

246. On November 5, 2021, the Parties submitted the First Summation Memorial.

247. On November 19, 2021, Claimant submitted the Spanish translation of its First Summation Memorial, in accordance with paragraphs nos. 2.3 and 2.4 of Procedural Order no. 2.

248. On January 17, 2022, the Parties submitted the Second Summation Memorial.

249. On January 31, 2022, Claimant submitted the Spanish translation of its Second Summation Memorial.

250. On February 21, 2022, Claimant filed its First Submission on Costs.

251. The following day, Respondent filed its First Submission on Costs.

252. On February 24, 2022, Claimant requested the Tribunal that, because Respondent did not submit arguments in its first submission on costs, Claimant be granted the opportunity to file its second submission on costs sequentially, 20 days after Respondent, in order to respond to the arguments Respondent submits therein.

253. On March 2, 2022, Respondent opposed Claimant's request.

254. On March 8, 2022, the Tribunal decided to maintain the simultaneity of the second round of submissions on costs but to leave open the opportunity, if necessary, for Claimant to file an additional submission.

255. On March 14, 2022, the Parties filed their Second Submission on Costs.

256. On March 17, 2022, Claimant requested that it be allowed to file an additional brief as provided for in the letter of March 8, 2022.

257. On March 21, 2022, the Tribunal decided that an additional submission on costs was not necessary.

258. On March 31, 2022, Claimant submitted the Spanish translation of its Second Submission on Costs.

259. On May 20, 2022, the Swiss Federal Court dismissed Respondent's request for annulment of the award dated June 17, 2021.

260. On June 27, 2022, Claimant transmitted to the Arbitral Tribunal the judgment of the Swiss Federal Court dated May 20, 2022 together with an English translation thereof. In the same communication, Claimant complained that the *Investment Arbitration Reporter* had published the arbitral award dated June 17, 2021, as well as the dissenting opinion thereto. Claimant also requested the Arbitral Tribunal to recall the confidential nature of the proceedings as set forth in Procedural Order No. 2.

261. On June 29, 2022, the Tribunal reminded the Parties of their obligation to respect Article 9 of Procedural Order No. 2 concerning the confidentiality of the arbitration.

262. On July 3, 2023, pursuant to Article 31 of the UNCITRAL Rules, the Tribunal declared the arbitral proceedings closed.

## III. MERITS

263. The Tribunal has carefully considered the written and oral submissions of the Parties, as well as the documentary, testimonial and expert evidence submitted in the course of this arbitration. The following summary merely recalls the main arguments and/or evidence of the Parties, and the omission of the others does not mean that they were not considered by the Tribunal. In addition, supplementary aspects of each Party's position not included in this section of the Award, may be added where the Tribunal considers the specific claims of the Parties in Section IV of this Award.

## A. CLAIMANT'S POSITION

### (a) Introduction

264. Claimant explains that, when the Bolivarian Republic of Venezuela entered into the Spain-Venezuela BIT, it committed to treat investors and Spanish investments in Venezuela fairly and equitably, as well as to grant them full protection and security. Venezuela also promised not to expropriate these investments unlawfully without prompt and adequate compensation, and it promised to refrain from taking measures that would impair their management, development, use, enjoyment, or sale. In violation of all of these commitments, Venezuela adopted a series of measures that treated the investment-Clorox Venezuela-as a State enterprise, forcing it to assume the cost of the Government's policies of subsidized consumption. Venezuela usurped Clorox Venezuela's right to set the prices for its products by compelling it to sell at Government-imposed artificially depressed prices, without regard to production costs or inflation. Deprived of the fundamental ability and operational control to set its own prices, Clorox Venezuela accumulated losses-with no promise of reprieve-which, together with Venezuela's other measures, ultimately annihilated Clorox Venezuela's business. Venezuela's conduct violates the protections to which Claimant is entitled under the Spain-Venezuela BIT, and Venezuela must compensate Claimant in full.[12]

265. Claimant reminds the Tribunal that, before 2011, Clorox Venezuela was a profitable business with an average gross margin of approximately 40% and an average operating margin of 20%.[13] Between 2009 and 2011, the Company's net sales fluctuated between US$ 88 million and US$ 118 million, and its annual EBIT ranged between US$ 21 million and US$ 25 million. Until then, the sales volume impacted by the price regulations was 0.4%.[14] In November 2011, however, Venezuela froze the prices of products that accounted for 73% of Clorox Venezuela's sales, and in early 2012, Venezuela published lists of maximum prices of those products, effective as of April 1, 2012, depriving Clorox Venezuela of the ability to set its own product prices to reflect market conditions, its cost structure and the rampant inflation

[12] Statement of Claim, ¶ 1.
[13] Statement of Claim, ¶ 2.
[14] Claimant's Second Summation Memorial, ¶ 2.

Venezuela was experiencing at the time. Previously, regulated prices could not be lower than the total production costs, but this was changed by the new regulation.[15] That marked the beginning of a series of measures that ultimately transformed a profitable business into a company that generated a US$ 14.1 million loss in 2014.[16]

266. According to Claimant, Venezuela's price control regulations remained in place over the following years, with no mechanism for price adjustments, until September 4, 2014, the date on which Respondent's creeping expropriation of Clorox Venezuela crystallized. On that date, Venezuela issued new maximum prices for Clorox Venezuela products that made it unmistakably clear that Clorox Venezuela would be forced to continue operating at a loss indefinitely and that the Government would not permit periodic price reviews to account for market conditions.[17]

267. Claimant further adds that in addition to depriving Clorox Venezuela of the ability to set its own product prices, Respondent also imposed stringent and unreasonable restrictions on Clorox Venezuela's ability to manage its workforce by prohibiting the termination of any employee except for cause and only upon approval of a governmental labor inspector, which Venezuela unjustifiably withheld time and again. During this same period, Venezuela adopted increasingly opaque currency conversion regulations that adversely impacted the Company's ability to ensure a steady supply of raw materials and inputs. Moreover, Venezuela simultaneously withheld VAT reimbursements due to Clorox Venezuela under Venezuela's own tax regulations.[18]

268. Claimant considers that with these measures, Venezuela deprived Clorox Venezuela and, by extension, its sole shareholder, Claimant Clorox Spain, of control over the day-to-day operations of Clorox Venezuela's business, the value of which decreased to nil. Venezuela's measures annihilated the value of Clorox Venezuela, forcing it to manufacture products at significant losses to the Company indefinitely, or else risk criminal sanctions. Having lost both the value of the Company and the opportunity to exercise control at the hands of the Venezuelan Government, with no

[15] Claimant's Second Summation Memorial, ¶ 2.
[16] Statement of Claim, ¶ 2.
[17] Statement of Claim, ¶ 3.
[18] Statement of Claim, ¶ 4.

prospect of recovering either, Clorox Venezuela was forced to discontinue operations on September 22, 2014. [19]

269. Claimant asserts that Respondent then proceeded to take over Clorox Venezuela's production facilities. On September 26, 2014, in a textbook example of direct expropriation, the Government of Venezuela physically occupied and directly took over Clorox Venezuela's production facilities. During the takeover, Vice President of Venezuela Jorge Arreaza publicly announced that the Government of President Maduro was occupying Clorox Venezuela's facilities and would continue to do so, together with the Company's former employees, and that it would assist the workers in resuming operations at those facilities. Venezuela also threatened to criminally prosecute any employees of Clorox Venezuela suspected of being involved in the discontinuance of Company operations and proclaimed that the Government's actions against Clorox Venezuela should be treated as a warning to other companies contemplating discontinuing operations.[20] Venezuela also issued a Joint Resolution conferring on Respondent full ownership rights in Clorox Venezuela and appointing a new board of directors for Clorox Venezuela, comprised largely of governmental representatives, which is still in place today. To this day, Venezuela continues to occupy Clorox Venezuela's production facilities and to manufacture its products using an unlawfully altered version of the trademarked Clorox brand logo with the addition of an image of a heart with the phrase "*Hecho en Socialismo*".[21]

270. In short, Claimant argues that Venezuela unlawfully expropriated Claimant's investment in Venezuela, treated Clorox Venezuela unfairly and inequitably, failed to afford Clorox Venezuela full protection and security, and impaired the management, use, enjoyment, and sale of the investment. The result of these breaches is that Claimant has been deprived of its entire investment in Venezuela and has suffered damages amounting to no less than USD 184.6 million (plus interest), for which it must be compensated in full under the Spain-Venezuela BIT.[22]

[19] Statement of Claim, ¶ 5.
[20] Statement of Claim, ¶ 6.
[21] Statement of Claim, ¶ 7.
[22] Statement of Claim, ¶ 8.

**(b) Applicable Law**

271. Claimant considers that the Spain-Venezuela BIT, as supplemented by international law and Venezuelan domestic law, is the applicable law in this dispute.

272. Claimant explains that Article XI(4) of the Treaty provides that "*the arbitration shall be based on*:"

> (a) The provisions of this Agreement [the Treaty] and the other agreements concluded between the Contracting Parties;
>
> (b) The rules and principles of international law;
>
> (c) The national law of the Contracting Party in whose territory the investment was made, including the rules on conflicts of law.[23]

273. Therefore, applicable law arises from three sources: the Treaty, which is the *lex specialis*; general rules and principles of international law; and Venezuelan domestic law.[24]

274. In applying these bodies of law, the Tribunal should be cognizant of the corrective function of international law. Investment arbitration tribunals and scholars have accepted the principle that international law prevails in case of an inconsistency with domestic laws.[25]

275. Claimant maintains that, if domestic law could excuse international law violations, this would provide a carte blanche to host States to adopt any law, no matter how unfair, arbitrary or discriminatory, and never be held liable because that

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[23] Statement of Claim, ¶ 101, with reference to Art. XI(4), Treaty (Exhibit **C-02**).
[24] Statement of Claim, ¶ 102.
[25] Statement of Claim, ¶ 103, with reference to *Compañia del Desarrollo de Santa Elena, S.A. (CDSE) v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, February 17, 2000, ¶ 64 (Exhibit **CLA-15**) (stating that, in case of inconsistency between international and national law, international law prevails); *Wena Hotels Ltd. The Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Annulment Decision, February 5, 2002, 41 ILM 933 (2002), ¶¶ 41-42 (Exhibit CLA-16) (concluding that international law prevails over domestic law); Christoph H. Schreuer, *The Relevance of Public International Law in International Commercial Arbitration*: *Investment Disputes*, 4 (Exhibit **CLA-14**), William W. Park and Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L. REV. 251, 252 (2006) (Exhibit **CLA-17**) (recognizing that "*[p]revailing opinion holds that an act wrongful under the law of nations remains so even if a nation's internal law deems otherwise.*").

legislation is part of the State's domestic law. This would be especially problematic in cases such as the present, in which the State's unlawful conduct is embodied in both the manner in which Respondent executed and applied the laws outlined and the very enactment of those domestic laws.[26]

1) Venezuela's Violation of Treaty Obligations

276. Claimant considers that Venezuela violated several Treaty obligations, including its obligation to abstain from taking unreasonable measures that impair the "*management, maintenance, development, use, enjoyment, extension, sale or, where appropriate, liquidation*" of Claimant's investment (1); not to expropriate Claimant's investment directly or indirectly without prompt, adequate and effective compensation (2); to treat Claimant's investment fairly and equitably (3); and to afford Claimant's investment full protection and security (4).[27]

*(i) Venezuela's Arbitrary Measures Impaired Claimant's Investment*

277. Claimant first analyzes the applicable legal standard (a) before applying the law to the facts of this case, demonstrating that Venezuela breached the Treaty's non-impairment clause (b).

*a. The Applicable Legal Standard*

278. Claimant underscores that Article III(1) of the Treaty provides that Respondent "*shall not obstruct by arbitrary or discriminatory means the management, maintenance, development, use, enjoyment, extension, sale or, where appropriate, liquidation*" of Claimant's investment. The phrase "*arbitrary or discriminatory means*" uses the disjunctive "*or*" instead of the conjunctive "*and*," meaning that either "*arbitrary*" or "*discriminatory*" measures will violate this provision of the Treaty.[28]

279. The Treaty does not define the adjective "*arbitrary*" and, therefore, the Tribunal should interpret the term according to its ordinary meaning, and may look to the

[26] Statement of Claim, ¶ 105.
[27] Statement of Claim, ¶ 106.
[28] Statement of Claim, ¶ 108; Claimant's First Summation Memorial, ¶ 81.

awards of other investment arbitration tribunals for guidance on this matter.[29] The terms arbitrary, unjustified and unreasonable are considered equivalent by treaties, doctrine and courts. [30]

280. In any case and notwithstanding the foregoing, Claimant explains that according to Article IV(2) of the Treaty, it is also entitled to treatment that is "*no less favorable than the treatment accorded by each Contracting Party to investments made and returns obtained in its territory by its own investors or by investors of any third State*."[31] Article IV(2) of the Treaty is a so-called "*most-favored-nation*" clause that allows a claimant to benefit from substantive guarantees contained in other investment treaties, effectively broadening the protections available to Claimant and its investment.[32]

281. Claimant indicates that pursuant to the Law Approving the Agreement between the Government of the Bolivarian Republic of Venezuela and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments, November 20, 2008 ("**Venezuelan-Vietnam BIT**"),[33] Venezuela agreed not to undermine the management, use, enjoyment, or disposal of its investments through "*unreasonable or discriminatory measures.*" Accordingly, Claimant is entitled to these same protections under the MFN clause of the Treaty. Thus, even if the Tribunal were to somehow consider that the Spanish term "*arbitrario*" does not denote "*unreasonable*" conduct, the MFN clause would nonetheless operate to have the latter standard directly apply in this case.[34]

282. Claimant asserts that in order to analyze Venezuela's conduct under Article III(1) of the Treaty, it bears emphasizing that compliance with domestic law is not sufficient to demonstrate that the host State's measures are not arbitrary, especially where it is those very laws that constitute a Treaty breach.[35] The regulatory nature of the host

[29] Claimant's First Summation Memorial, ¶ 82.
[30] Statement of Claim, ¶ 110; Claimant's First Summation Memorial, ¶ 83.
[31] Art. IV(2), Treaty (Exhibit **C-02**).
[32] Claimant's First Summation Memorial, ¶ 58.
[33] Law Approving the Agreement between the Government of the Bolivarian Republic of Venezuela and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments, November 20, 2008 ("Venezuelan-Vietnam BIT"), Art. 2(2) (Exhibit **C-135**), (agreeing to protect the impairment caused by "unreasonable or discriminatory measures") (emphasis added).
[34] Statement of Claim, ¶ 112.
[35] Claimant's First Summation Memorial, ¶ 84.

State's conduct cannot insulate it from a finding of "*arbitrariness*" or "*unreasonableness*."[36]

283. Moreover, it follows from *Occidental v. Ecuador*[37] that an act committed out of desire or whim may be arbitrary without the need for it to be intentional. Arbitrariness may be rooted in confusion and lack of clarity.[38]

284. Claimant notes that in *LG&E vs. Argentina*,[39] the tribunal found that State measures are arbitrary if they "affect the investments of nationals of the other party without engaging in a rational decision-making process. Such process would include a consideration of the effect of a measure on foreign investments and a balance of the interests of the State with any burden imposed on such investment". According to the *LG&E* tribunal, determining whether a measure is "arbitrary" requires balancing between the burden the measure imposes on the foreign investor and the interest(s) of the State in adopting and maintaining that measure.[40]

285. Claimant cites Professor Schreuer, who distinguishes four categories of measures that can be described as arbitrary: (i) measures that are not reasonably related to an apparently legitimate purpose or that, having an objectively verifiable legitimate purpose, impose a disproportionate burden on the investor or his investment, (ii) measures that are not based on legal standards but on personal judgement, prejudice or preference, (iii) measures taken "for reasons other than those indicated by the decision maker, and (iv) measures taken "intentionally disregarding due process and proper procedure." [41]

286. Claimant notes that Respondent argues that "*arbitrary*" is not the same as "*unlawful*" and that, therefore, the standard is "*extremely high*". Claimant agrees with the former, but denies the latter, stating that there is no support for such a claim and

[36] Claimant's First Summation Memorial, ¶ 84.
[37] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA No. UN 3467, Award, July 1, 2004 (Exhibit **CLA-09**).
[38] Statement of Claim, ¶ 114.
[39] *LG&E v. The Republic of Argentina*, ICSID Case No. ARB/02/1, Award, October 3, 2006 (Exhibit **CLA-08**)
[40] Statement of Claim, ¶ 115.
[41] Statement of Claim, ¶ 116.

that for the standard to be breached it is sufficient to identify that the conduct in question is arbitrary and impairs the investment. [42]

*b. Venezuela's Treatment of Claimant's Investment Was Arbitrary and Impaired Claimant's Management, Use, Enjoyment, Development, and Sale of its Investment*

287. Claimant submits that Venezuela breached Article III(1), (i) enacting new laws that arbitrarily harmed Claimant's investment, (ii) through its application of the then-existing CADIVI Currency Exchange and VAT reimbursement regimes after Claimant acquired its investment. It also asserts that the Sovereign Police Powers Doctrine does not allow Venezuela to adopt arbitrary or discriminatory measures that impair Claimant's investment (iii).

1. Venezuela Breached Article III(1) By Enacting New Laws That Arbitrarily Impaired Claimant's Investment

288. Claimant indicates that Respondent has adopted the following arbitrary measures that impaired the management, use, enjoyment and development by Claimant, Clorox Venezuela:

- the price controls empowered Venezuelan government entities to set prices for Clorox Venezuela's products without regard to Clorox Venezuela's actual costs and without any procedure allowing for price adjustments to reflect changes in circumstances or inflation, even in the face of significant losses, under penalty of sanction. Even if the price controls were considered reasonable, their application to Claimant's investment was disproportionate because they took away control of its business and, by not limiting the price of its suppliers, caused it to bear the full cost of the subsidy on domestic consumption;[43]

[42] Claimant's Second Summation Memorial, ¶ 57.
[43] Claimant's First Summation Memorial, ¶¶ 87-89.

- Venezuela's enforcement of labor laws barred Clorox Venezuela from terminating employees for cause, making it impossible for it to manage its productivity or reduce its workforce;[44]

- Venezuela's foreign exchange regimes severely and arbitrarily restricted Clorox Venezuela's access to foreign currency to import the raw materials necessary to run and develop its business,[45] hindering its ability to repatriate any profits or cash it had in Venezuela; and Venezuela's refusal to issue VAT tax credits undeniably owed to Clorox Venezuela, with no legal basis and intentionally disregarding due process and proper procedure, precluded Claimant from managing, using and enjoying its cash assets.[46]

289. Claimant alleges that Venezuela did not enact the Law on Fair Costs and Prices, the Organic Fair Prices Law, the Organic Labor Law, and the SICAD I and SICAD II foreign exchange regulations until after Claimant had made its investments in April 2011. [47]

290. Claimant adds that Venezuela applied VAT refund regulations arbitrarily after Clorox Spain made its investment.[48] Moreover, many of these adopted laws required further action by the government, such as setting prices on Clorox Venezuela's products, and these were issued after 2012, long after Claimant acquired its investment. [49]

### 2. The Price Control Regime Imposed on Clorox Venezuela from 2011-2014 Is Subsequent to Claimant's Investment and Arbitrarily Undermined It

291. Claimant underscores that Venezuela enacted the Law on Fair Costs and Prices on July 18, 2011, several months after Claimant made its investment on April 15, 2011. Moreover, the Law on Fair Costs and Prices only came into force

[44] Claimant's First Summation Memorial, ¶¶ 91-92.
[45] Claimant's First Summation Memorial, ¶ 94.
[46] Statement of Claim, ¶ 119.
[47] Reply Memorial, ¶ 54.
[48] Reply Memorial, ¶ 86.
[49] Reply Memorial, ¶ 54.

on November 22, 2011, and the arbitrary prices of Clorox Venezuela's regulated products set by the National Superintendence of Costs and Prices ("**SUNDECOP**") under this law did not come into force until April 1, 2012, namely many months later. It was not until January 23, 2014 that President Maduro enacted the Organic Fair Prices Law. As such, Venezuela cannot credibly assert that the laws that struck at the base of Clorox Venezuela's economic operations, harmed it and ultimately proved fatal to its business, predates Clorox Spain's investment.[50]

292. Claimant alleges that such regulatory regime was arbitrary; among other aspects, it lacked clarity and imposed a disproportionate burden on Claimant. In addition to the existence of an objective with a legitimate public interest, there must be a relationship of proportionality between the measures taken by a State and the objective to be achieved.[51]

293. Claimant contends that Venezuela usurped Claimant's ability to manage, use and develop Clorox Venezuela, stripping Clorox Venezuela of any meaningful control over the most important aspects of its business—setting product prices, correcting prices to reflect changing market conditions, and regulating output, *inter alia*—without any means of compensation. The law afforded SUNDECOP sole and absolute discretion to accept or reject requests for price increases.[52]

294. Claimant emphasizes that the Law on Fair Costs and Prices, from its entry into force, meant that Claimant was forced to freeze the prices of most of its products and subsequently sell those products at artificially low prices set by Venezuela.[53]

295. Claimant adds that the Law and subsequent regulations created a confusing legal environment that deprived Clorox of any possibility to challenge or object to the prices arbitrarily set by Venezuela. This confusion and lack of clarity placed Venezuela in direct breach of its obligations under the Treaty.[54]

[50] Reply Memorial, ¶ 55.
[51] Reply Memorial, ¶ 57.
[52] Reply Memorial, ¶ 60.
[53] Reply Memorial, ¶ 58.
[54] Reply Memorial, ¶ 60.

296. Claimant indicates that, on January 23, 2014, President Maduro enacted the Organic Fair Prices Law,[55] acting pursuant to the Enabling Law that granted the president the power to enact laws on certain matters by decree, at his discretion. The Organic Fair Prices Law authorized the Venezuelan Government to fix the prices of products and services and to limit profit margins, with the objective of *"favoring the national production of goods and services*" and achieving the *"consolidation of the socialist economic order, consecrated in the Nation's Plan*."[56]

297. The Organic Fair Prices Law also declared that all products and services required to develop production, manufacturing, import, storage, transportation, distribution and commercialization activities would be of "*public utility and social interest*."[57] Significantly, the Law also authorized the Venezuelan Government to expropriate, occupy private property, confiscate or seize goods, close companies, impose fines and/or suspend permits for any violation of the Organic Fair Prices Law.[58]

### 3. The Organic Labor Law is Subsequent to Claimant's Investment and Arbitrarily Harmed It

298. Claimant explains that Venezuela's labor regulations became progressively arbitrary during the course of Claimant's investment. On May 7, 2012, Venezuela enacted the Organic Labor and Workers Law ("**Organic Labor Law")** more than a year after Claimant's investment in Clorox Venezuela. This law imposed restrictions on working hours, granted two days off per week and prohibited employers from terminating an employment contract without the Government's approval.[59]

299. Claimant adds that the system of penalties introduced in 2012 as a product of the Organic Labor Law was particularly arbitrary and draconian[60] and

[55] Organic Fair Prices Law, (Exhibit **C-09**).
[56] Reply Memorial, ¶ 61.
[57] Reply Memorial, ¶ 62, with reference to the Organic Fair Prices Law, Art. 7, (Exhibit **C-09**).
[58] Reply Memorial, ¶ 62, with reference to Organic Fair Prices Law, Arts. 7, 39, and 45, (Exhibit **C-09**).
[59] Reply Memorial, ¶ 63.
[60] Reply Memorial, ¶ 66.

concludes that the 2012 Organic Labor Law and the implementation thereof were arbitrary and in violation of the Treaty.[61]

### 4. The SICAD I and SICAD II Foreign Exchange Regulations Postdate and Arbitrarily Impaired Claimant's Investment

300. Despite the existence of foreign exchange regulations in Venezuela since 2003, Clorox Venezuela was able to maintain profitable business operations and meet its foreign currency requirements. That situation deteriorated rapidly from 2011 onwards. When Claimant made its investment in April 2011, the *Comisión de Administración de Divisas* (Foreign Exchange Administration Commission or "**CADIVI**") (the government entity regulating the foreign exchange regime) was the sole entity responsible for authorizing the purchase of foreign currencies. Although obtaining foreign currency to import inputs and raw materials was cumbersome at the time, modifications to Venezuela's foreign exchange regime after April 2011, both with respect to the non-application of the regulations stipulated in the existing laws and the adoption of new regulations, exacerbated the flaws in the system and thus arbitrarily impaired Claimant's investment.

301. It is undisputed that Venezuela established the Complementary System for Currency Management ("**SICAD**") on February 9, 2013, almost two years after Claimant made its investment. The SICAD I system allowed the Venezuelan government to exercise absolute control over access to foreign currency in an inherently arbitrary and non-transparent manner, which further hindered the administration, use and enjoyment and development of Clorox Venezuela in violation of the Treaty. The SICAD I system, by allocating foreign currency through government-run auctions, exacerbated the unpredictability and opacity of Venezuela's investment framework. The SICAD II system exacerbated the mistreatment of Clorox Venezuela, since only companies that reported income could access U.S. dollars through SICAD II at the much higher rates of SICAD II. Since

[61] Reply Memorial, ¶ 67.

Clorox Venezuela did not earn profits in 2014, Clorox Venezuela was not authorized access to SICAD II.

### 5. Venezuela Violated Article III(1) in the Application of the Then Existing CADIVI Foreign Exchange System and VAT Refund Regimes After Claimant Acquired Its Investment

302. Under international law, the date on which a measure is first enacted (such as new legislation) is not necessarily the decisive date for assessing whether the adoption of a measure is subsequent to an investment.

303. General laws establishing a policy are governmental measures different from the regulatory actions that flow from that policy. Even for laws that possess a level of specificity involving simple, non-discretionary implementation by the government, their implementation may still violate treaty obligations. It has been settled case law that a non-impairment clause may be breached through the enactment of arbitrary laws or through the manner in which they are implemented with respect to a particular investor or its investment (or both).

304. In this case, Claimant complains not only about the enactment of certain laws and regulations after its investment was made, but also about the way in which Venezuela applied certain existing laws and regulations to Clorox Venezuela.

### 6. International Law Protects Investors Both From The Enactment of Arbitrary Regulations and From the Arbitrary Application of Otherwise Harmless Regulations

305. The common meaning of the term "*arbitrary*" requires a review of the way in which a State conducts itself, *i.e.*, the way in which a measure is applied in addition to the existence of such a measure.

306. International law rejects Venezuela's argument that the measures enacted prior to Claimant making its investment are irrelevant. The manner in which those laws were actually implemented form an equivalent part of the overall regulatory framework

that affected Claimant's investment, and the Tribunal has sufficient jurisdiction to consider the legality of the implementation of such measures that occurred after Claimant made its investment. Effectively, the implementation of the host State's regulatory framework by its government officials in an arbitrary, discretionary, or even intentionally prejudicial manner may cause as much or more harm to the investor than the adoption of the regulation itself.[62]

### 7. Venezuela Arbitrarily Applied the CADIVI Foreign Exchange Regime After Claimant Made Its Investment

307. CADIVI did not adopt nor did it comply with any clear deadline for the payment of the amounts of foreign currency it had already approved, and by March 2014, it was 288 days late in approving the payment of foreign currency (which had been previously authorized in 2013).

308. CADIVI's unreasonable and unjustified delays in paying the amounts it had approved severely affected Clorox Venezuela's ability to purchase raw materials and pay its foreign suppliers.

309. Thus, in addition to the restrictions on foreign imports themselves, the manner in which the Government applied the CADIVI system to Clorox Venezuela arbitrarily impaired the operation of Clorox Venezuela's business, contributing to Claimant's injury. The fact that CADIVI predated Claimant's investment in no way diminishes or excuses CADIVI's arbitrary impairment of Clorox Venezuela's business after Claimant had made its investment.[63]

310. Venezuela's defense is that it "*recently*" gave its approval for Clorox Venezuela to purchase $1,500,000 through CENCOEX for the import of raw materials. Nevertheless, Venezuela failed to submit any evidence in support of its claim. In any event, it is irrelevant whether or not Venezuela approved Clorox Venezuela's requests for foreign currency; what matters is that such requests were never timely fulfilled.

[62] Reply Memorial, ¶ 81.
[63] Reply Memorial, ¶ 84.

### 8. Venezuela Applied Its VAT Refund Regulations Arbitrarily After Claimant Made Its Investment

311. As Claimant sets out in its Statement of Claim, under Venezuela's tax regime, Claimant was entitled to recover (within 30 days of each request for a refund for excess VAT withholding) the VAT credits. Without justification, Venezuela never responded to Claimant's refund requests, conduct that forms part of Claimant's claims in these proceedings.[64]

312. It is worth noting that Claimant does not contend that Venezuela's VAT regulation itself violates international law, but rather that Venezuela's failure to comply with its own VAT regulations, as applied to Clorox Venezuela, violates the Treaty.

313. Prior to Claimant's investment, Clorox Venezuela had not filed any application with the *Servicio Nacional Integrado de Administración Aduanera y Tributaria* (the National Integrated Services of Customs and Tax Administration or "**SENIAT**") for such purposes (at least not before 2006). At the time, when Claimant acquired Clorox Venezuela in 2011, Clorox Venezuela was a going concern with assets and liabilities, which were assumed by Claimant through the acquisition. One of the assets that Claimant acquired was the amount owed to Clorox Venezuela by SENIAT for VAT credits. Clorox Venezuela was legally entitled to recover those excess VAT withholdings. Clorox Venezuela filed its first request with the SENIAT to recover such excess VAT withholdings on October 20, 2011, more than six months after Claimant acquired Clorox Venezuela.[65]

314. After the first recovery claim and until July 2014, Clorox Venezuela filed six additional claims with the SENIAT, but, once again, the Venezuelan Government never responded to even one of them. Venezuela is liable for each recovery claim it ignored.

315. Venezuela's failure to respond to Clorox Venezuela's requests, resulting in the failure to authorize Clorox Venezuela's recovery of the VAT credits, was a violation of Article III(1) of the Treaty. Claimant had no reason to foresee that the SENIAT

[64] Statement of Claim, ¶¶ 69, 70.
[65] Statement of Claim, ¶¶ 69, 70.

would violate Venezuelan regulation and simply ignore the seven claims submitted by Clorox Venezuela between October 2011 and July 2014, totaling Bs. 90,124,413.15. The State's international responsibility was triggered when it adopted the measures that violated international law, and it is irrelevant according to the facts of this case that the tax regulation applicable to the State's conduct predated Claimant's investment.

### 9. Contrary to Venezuela's General Assertions, Claimant Did Not Assume the Risk That Venezuela Would Arbitrarily Impair Claimant's Investment

316. Claimant has demonstrated that Venezuela's premise is incorrect: the measures at issue were not "the facts and circumstances known" at the time Claimant made its investment. Venezuela's position lacks any factual support since Claimant is only challenging measures adopted or implemented by Venezuela subsequent to Claimant's investment.

317. Notwithstanding the foregoing, the argument lacks the slightest legal basis, since a State cannot hide behind its national legislation to escape its international responsibility.

318. Claimant's expectations as to whether or not Venezuela would breach its own laws are irrelevant. Accordingly, the Tribunal must conclude that Claimant was entitled to non-arbitrary treatment consistent with the Treaty and that Venezuela's objectively arbitrary application of its laws and regulations impaired Claimant's investment in breach of Article III(1).[66]

### 10. Doctrine of Sovereign Police Powers Does Not Permit Venezuela To Adopt Arbitrary Or Discriminatory Measures That Impair Claimant's Investment

319. Venezuela claims that it has the absolute power to regulate as it sees fit and that the measures it adopted are within that power to regulate.

[66] Reply Memorial, ¶ 96.

320. Such a position is contrary to international law.

321. Venezuela freely entered into binding treaty obligations that have the force of international law precisely through the exercise of its sovereign power. By agreeing to assume these obligations, Venezuela freely limited the exercise of its police powers to modalities that do not violate its obligations under the Treaty, including its obligation under Article III(1) of the Treaty not to obstruct Claimant's investment through arbitrary or discriminatory measures.

2) Venezuela Unlawfully Expropriated Claimant's Investment

322. Contrary to Respondent's assertion, Venezuela's measures substantially deprived Claimant of its ability to exercise control over its investment and annihilated the value of its equity stake in Clorox Venezuela, thus giving rise to an indirect and creeping expropriation under international law. It also directly expropriated Claimant's investment.[67]

*(i) Venezuela's Measures Substantially Deprived Claimant of Its Investment*

323. Article V(1) of the Treaty protects investors from unlawful direct and indirect expropriation.

324. Tangible and intangible assets may be subject to expropriation under international law. An expropriation requires a deprivation of the asset corresponding to a substantial deprivation resulting from a loss of control over the investment or over the value of the investment.

325. Respondent does not disagree with these basic principles, nor does it dispute that Venezuela stripped Claimant of control over its investment (although the Parties disagree on the timing of the deprivation of control). Moreover, Respondent does not dispute the decrease in value of Clorox Venezuela caused by Venezuela's measures.

326. Venezuela's sole defense is that somehow the loss of control and the breakdown in the value of the investment is not tantamount to an expropriation because (i) Clorox Spain continues to own 100% of the shares in Clorox Venezuela and (ii) Claimant

[67] Claimant's First Summation Memorial, ¶ 117.

failed to prove that it was deprived of its rights as a partner of Corporación Clorox Venezuela. None of these claims is supported by either the facts or the law.

327. Venezuela acknowledges that Claimant no longer has control over its investment, yet argues that it did not substantially deprive Claimant of its investment because Claimant still owns its shares in Clorox Venezuela. Indirect expropriation, however, is understood as interference with an investor's investment that "*leaves the investor's title untouched, but deprives him of the possibility to utilize the investment in a meaningful way.*"[68]

328. There are two alternative ways to establish such substantial deprivation: (i) by demonstrating that the government—or a government-directed third party—deprived the investor of control over the investment; or (ii) by demonstrating that the government's actions or omissions virtually destroyed the value of the investment.[69]

329. Allegedly, Claimant has not invoked any measure demonstrating that it has been deprived of control over Clorox Venezuela. However, this contravenes Respondent's own admission that what Clorox Venezuela "*did actually lose was management control of its business*."[70] Respondent's allegation is also contradicted by the following elements:

- Venezuela's price regulation regime deprived Clorox Venezuela of the freedom to set prices for its own products, forcing Clorox Venezuela to assume the cost of Venezuela's subsidized consumption policy;
- Venezuela's labor regulatory regime forced Clorox Venezuela to maintain a full workforce, despite operating at a significant loss as a result of Venezuela's regulatory restrictions on Clorox Venezuela's business operations;
- Venezuela's foreign exchange regulatory regime—its administration of

[68] Claimant's First Summation Memorial, ¶ 106; Rudolf Dolzer and Christoph H. Schreuer, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW, 101 (Oxford University Press, 2d ed. 2012) (Exhibit **CLA-128)**; *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland*), Judgment, May 25, 1926, PCIJ Ser. A. No. 7 (Exhibit **CLA-44**); *Norwegian Ship Owners' Claims (Norway v. USA)*, Permanent Court of Arbitration, Award, October 13, 1922 (Exhibit **CLA-43**).
[69] Claimant's First Summation Memorial, ¶ 107.
[70] Respondent's Counter-Memorial, ¶ 135.

the CADIVI system and its adoption and application of the SICAD systems—accelerated Clorox Venezuela's financial deterioration and contributed to further depriving Clorox Venezuela of control over its business by hindering its access to imports of necessary raw materials and completely blocking the repatriation of investment earnings; and

- Venezuela's refusal to reimburse Clorox Venezuela for its VAT credits that were indisputably due in violation of its own tax regulations deprived Clorox Venezuela of the ability to use its cash to operate and support its business.

330. As to the *Pope & Talbot* test argument, Claimant considers that such test supports Claimant's own reasoning since it refers to circumstances similar to those experienced by Claimant, and it is clear that the requirements detailed therein are not cumulative.[71]

331. As to the substantial deprivation standard, Claimant asserts that Respondent's measures succeeded in virtually annihilating the value of the investment.

332. There is no doubt on this point that Venezuela's regulatory actions completely neutralized the value and economic and commercial use of Claimant's investment, and that Claimant received no compensation for this expropriation.

*(ii) Claimant Did Not "Voluntarily" Abandon Its Investment, But, in Any Event, International Law Does Not Excuse Expropriation Based on Disposal*

333. The cessation of operations by Clorox Venezuela was not voluntary: it was caused by the inability of continuing operations under the ruinous conditions that Venezuela imposed on Clorox Venezuela's operations and the obliteration of the value of the investment. The measures imposed by the Government substantially deprived Claimant of its investment by stripping Clorox Venezuela of its ability to set prices, manage its workforce, procure raw materials, access its cash resources (VAT) and pay its suppliers or repatriate its dividends.[72]

[71] Reply Memorial, ¶ 111.
[72] Claimant's First Summation Memorial, ¶ 125.

334. Clorox Venezuela is not to blame for its decline. Faced with an increasingly hostile regulatory landscape, Clorox Venezuela submitted countless petitions to the authorities for relief and adopted strategies to sell its products at prices above production costs. These efforts were insufficient to alleviate the adverse effects of the measures adopted by Venezuela and, faced with the expectation of continuing to operate at a loss indefinitely, Clorox Venezuela was forced to discontinue its operations.[73]

335. In any event, the fact that Clorox Venezuela had voluntarily ceased operations is irrelevant under international law, which does not restrict the rights of an investor even if it voluntarily withdraws from or sells its investment.

336. In turn, although irrelevant under international law, Clorox Venezuela discontinued its operations with the utmost consideration for the safety of its employees, duly protecting them from dangerous machines and chemicals, providing severance and health benefits.

*(iii) The Assertion That Venezuela Was Obligated Under Its Domestic Law to Take Over Clorox Venezuela Is Irrelevant Under International Law*

337. Venezuela makes no attempt to deny that it directly took over Clorox Venezuela's production facilities, appointed a management board with full authority and authorization (granted by the Government) to operate such facilities, and continues to manufacture domestic products there. Venezuela argues that its actions were in accordance with its domestic law, but this would not exonerate it from liability under international law.

338. It is settled case law that the legality of the actions taken by the respondent State under domestic law does not mean that they are legal under the Investment Protection Agreement or international law. Even in situations where the treaty expressly specifies that international law and domestic law will be the governing law, domestic law still remains subordinate to international law.[74]

[73] Claimant's First Summation Memorial, ¶ 124.
[74] Claimant's First Summation Memorial, ¶ 127.

339. If domestic law could justify violations of international law, it would give *carte blanche* to host States to adopt any law, no matter how unjust, arbitrary or discriminatory, without even being held liable because such a law is part of the State's domestic law.

340. In any event, Venezuela's regulatory power is not absolute, but is limited by its international obligations.[75] Likewise, regulatory measures must be proportional to the objective sought.[76] In this case, the measures that supposedly sought to enable access to basic necessities were so disproportionate that they ended up annihilating the very business that produced those goods.[77]

*(iv) Venezuela's Assertion That There Can Be No Expropriation Because Its Takeover Is Temporary Is Irrelevant Under International Law*

341. Venezuela argues that it did not directly expropriate Claimant's investment because it is occupying Clorox Venezuela only on a temporary basis and is prepared to return the facilities to Claimant if Clorox Venezuela promises to resume operations.

342. First, Venezuela's proposal to return Claimant's investment is illusory. As a factual matter, the cumulative force of Venezuela's measures over time translates into the indirect expropriation of Claimant's investment, prior to the formal stoppage of Clorox Venezuela's operations.

343. When Clorox Venezuela ceased operations, there was no viable investment. Claimant's investment was destroyed prior to the direct, and acknowledged, takeover by Venezuela in September 2014.

344. A "*return*" would in no way compensate Claimant for the takeover, nor would it restore its investment. Respondent cannot return something void of content to Claimant and have the expectation of absolution.

[75] Claimant's First Summation Memorial, ¶ 127.
[76] Claimant's Second Summation Memorial, ¶ 35.
[77] Claimant's Second Summation Memorial, ¶ 35.

345. Second, Respondent's offer is simply not credible. No investor who ceased operations in Venezuela has been restored to its investment.[78]

346. Third, even if Venezuela had not substantially deprived Claimant of control over its investment, decimated the value of the investment, and directly occupied Clorox Venezuela's production facilities, and even if, in a hypothetical world, Venezuela's offer to "return" Claimant's investment were legally relevant and factually possible, such return would be no return at all. Venezuela's offer is merely an invitation for Clorox Venezuela to return to the same legal framework that destroyed it.

347. Fourth, Venezuela claims that its taking is not an expropriation because it is temporary. But Venezuela's allegedly "temporary" taking is now in its third year, and there is no end in sight. Even if Respondent were to cease operations at Clorox Venezuela's production facilities, dissolve the Board of Directors it appointed, and repeal all legislation empowering the Venezuelan Government to take control over and operate Clorox Venezuela, the taking would still be permanent because, as explained above, Venezuela's indirect expropriation of Claimant's investment was consummated before the direct taking of Clorox Venezuela's production facilities.

348. In short, there is no shortage of cases in which a host government has labeled measures as "temporary" and these measures nonetheless have been found to be expropriatory. [79]

349. What matters to determine whether there has been a taking is whether "there is no reasonable prospect of return of control"[80] and whether "an objective observer would conclude that there is no immediate prospect that the owner will be able to resume the enjoyment of his property."[81]

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[78] Reply Memorial, ¶126.
[79] Statement of Claim, ¶¶ 163-174.
[80] *Sedco v. National Iranian Oil Co.*, Interlocutory Award, October 28, 1985, 9 Iran-US Rep. Claims Tribunal 278-79 (Exhibit **CLA-61**); *Starrett Housing Corp. v. The Islamic Republic of Iran*, Case No. 24, Interlocutory Award, 4 Iran-US Claims, ¶ 1123 (Exhibit **CLA-37**); **CLA-38**, Award *Tippetts v. Iran* at 219; *Phelps Dodge Corp. v. Iran*, Case No. 99, Award No. 217-99-2, Mar. 19, 1986, 10 Iran-US Rep. Claims Tribunal 121 (Exhibit **CLA-71**); *Harold Birnbaum v. The Islamic Republic of Iran*, Award No. 549-967-2, July 6, 1993, 29 Iran-US Rep. Claims Tribunal, ¶ 28 (Exhibit **CLA-72**).
[81] Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens in Louis B. Sohn & Richard R. Baxter, RESPONSIBILITY OF STATES FOR INJURIES TO THE ECONOMIC INTERESTS OF ALIENS, 55 AM. J. INT'L L. 559 (1961), Art. 10(3), (Exhibit **CLA-70**); *see also CME*

350. In sum, Venezuela has presented no legally or factually credible defense to Claimant's case on indirect and direct expropriation, and therefore cannot escape liability for its internationally wrongful expropriation of Claimant's investment.

*(v) Venezuela's Substantial Deprivation of Claimant's Investment Was Unlawful*

351. Venezuela does not deny that it has paid Claimant no compensation for the takeover of Clorox Venezuela.

352. In conclusion, Venezuela indirectly and ultimately directly expropriated Claimant's investment in Clorox Venezuela, and failed to pay Claimant any compensation for the taking, in violation of the Spain-Venezuela BIT.

3) Venezuela Failed to Treat Claimant's Investment Fairly and Equitably

353. Because the Treaty's fair and equitable treatment ("**FET**") provision in Article IV(1) does not define the content of this protection, the Vienna Convention on the Law of Treaties ("Vienna Convention") applies to guide the Tribunal's interpretation:

> *"Each Contracting Party shall guarantee in its territory fair and equitable treatment, in accordance with international law, of investments made by investors of the other Contracting Party."*[82]

354. The Parties disagree on the correct application of the Vienna Convention.

*(i) Claimant Is Entitled to the Autonomous Fair and Equitable Treatment Standard*

*a. The Spain-Venezuela BIT Guarantees the Autonomous "Fair and Equitable Treatment" Standard, Not the "Minimum Standard of Treatment Under Customary International Law".*

355. Article IV(1) of the Treaty provides that Claimant is entitled to "fair and equitable treatment, in accordance with international law[.]" Article 31(1) of the Vienna

*Czech Republic BV v. Czech Republic,* UNCITRAL, Partial Award, September 13, 2001, ¶ 607 (Exhibit **CLA-11).**

[82] Art. IV(1), Treaty (Exhibit **C-02**).

Convention, which Respondent agrees applies, requires this language to 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*."[83] Therefore, the provision on FET should be analyzed according to its specific formulation with respect to the context, object and purpose of the BIT.

356. "FET" constitutes an autonomous standard of treatment distinct from the customary international law minimum standard. [84]

357. As Professor Schreuer directs, "the better view would seem to be that, in the absence of clear indication to the contrary, the fair and equitable treatment standard contained in BITs is an autonomous concept." [85]

358. Venezuela attempts to overlook the absence of an express reference to the minimum standard by (i) insinuating that the Treaty's specification with respect to *"in accordance with international law"* is sufficient in itself to unequivocally specify the minimum standard; (ii) citing several external Venezuelan BITs that allegedly demonstrate Venezuela's "practice" of equating "fair and equitable treatment" to the minimum standard of treatment; and (iii) relying on jurisprudence from the North American Free Trade Agreement ("**NAFTA**"). But the weight of arbitral authority, the text of Venezuela's BITs, and NAFTA's lack of comparability to the Spain-Venezuela BIT contravene Venezuela's arguments.

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[83] Vienna Convention, Art. 31 (1), (Article **CLA-12**).

[84] *See, for example*, *Azurix Corp. v. The Republic of Argentina*, ICSID Case No. ARB/01/12, Award, July 14, 2006, ¶¶ 359-61 (Exhibit **CLA-05**); *Enron Corp. Ponderosa Assets, LP v. The Republic of Argentina*, ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶¶ 256-58 (Exhibit **CLA-40**); *National Grid* Decision on Jurisdiction, ¶ 169 (Exhibit **CLA-105**); *Biwater Gauff (Tanzania) Limited v. Tanzania*, ICSID Case No. ARB/05/22, Award, July 24, 2008, ¶ 591 (Exhibit **CLA-85**); *Sempra v. Argentina*, ICSID Case No. ARB/02/16, Award, September 28, 2007, ¶ 296 (Exhibit **CLA-07**); *Compañía de Aguas del Aconquija SA, and Vivendi Universal, SA v. The Republic of Argentina*, ICSID Case No. ARB/97/3, Award, August 20, 2007, 2007 § 7.4.5 (Exhibit **CLA-60**); *Saluka v. The Czech Republic*, Partial Award ¶ 294 (Exhibit **CLA-34**); *MTD Equity Sdn. Bhd. and MTD Chile SA v. The Republic of Chile*, ICSID Case No ARB/01/7, Award, May 25, 2004, ¶ 111 ("*MTD v. Chile* Award") (Exhibit **CLA-02**); *Técnicas Medioambientales Tecmed S.A. v. The United States of Mexico*, ICSID Case No. ARB (AF/00/2, Award, May 29, 2003, ¶ 155 (Exhibit **CLA-04**); *CME v. Czech Republic*, Partial Award, September 13, 2001, ¶ 611 (Exhibit **CLA-11**); *Pope & Talbot, Inc. v. Canada*, UNCITRAL (NAFTA), Award on Compensation, May 31, 2002, ¶¶ 9-10 (Exhibit **CLA- 130**).

[85] Christoph H. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. World Inv. & Trade 357, 364 (Exhibit CLA-92). World Inv. & Trade 357, 364 (Exhibit **CLA-92**).

359. First, the majority of investment tribunals have found that treaties specifying FET "in accordance with international law"-without more-grant protections of the autonomous FET standard.[86]

360. Second, Venezuela's string cite of extraneous Venezuelan BITs does not support its position that Venezuela's "practice" is to limit the scope of fair and equitable treatment to the minimum standard of protection under customary international law. One will search in vain for evidence of this proposition in the cited BITs, as in fact not one of the treaties to which Venezuela explicitly cites references the minimum standard. But even assuming that they did, Venezuela's alleged "practice" cannot change the language of the Spain-Venezuela BIT.

361. Third, Venezuela's reliance on NAFTA jurisprudence is entirely inapposite. Venezuela fails to appreciate that this branch of case law is based on materially different treaty language, and that this language is also governed by a mandatory Note of Interpretation authored by the three Parties to NAFTA.[87]

*b. The Most Favored Nation Clause of the Spain-Venezuela Treaty Entitles Claimant to the Autonomous Standard of Fair And Equitable Treatment*

362. In any event, Claimant is entitled to the autonomous fair and equitable treatment standard by virtue of the most-favored-nation ("**MFN**") provision of the Spain-Venezuela BIT.[88] Article IV(2) of the Treaty provides that the treatment accorded to investors of one Contracting Party by the other Contracting Party "*shall not be less favorable than that accorded by* [the latter] *Contracting Party to investments made and returns obtained in its territory by its own investors or by investors of any third State*". Such MFN provisions allow protected investors to import more favorable protections available to investors of third States under other treaties to which the respondent State is a party. Venezuela grants FET protection, not limited by the phrase "*in accordance with international law*" or similar formulas, to investors from

[86] Claimant's First Summation Memorial, ¶ 57.

[87] Reply Memorial, ¶147.

[88] Claimant's First Summation Memorial, ¶ 58.

Belarus,[89] Iran,[90] Italy[91] and Vietnam,[92] so that, under the MFN provision, Spanish investors also enjoy such protection.[93]

*c. The Content of the Autonomous Fair and Equitable Treatment Standard*

363. Fair and equitable treatment affords investors the right to, inter alia, good faith treatment, due process, non-discrimination, and proportionality. It also imposes on the State an international law obligation to comply with the requirement to "do no harm," to guarantee procedural propriety and due process, to treat the investor's investment transparently, to protect the investor's legitimate expectations, and to act in good faith toward the investor and the investment.[94]

364. Venezuela does not contradict Claimant's prior submission on the content of the FET standard, except to take issue with one protection-the investor's right to protection of its legitimate expectations. Venezuela incorrectly claims that *"Claimant bases its claims of violation of the fair and equitable treatment standard in the controversial Tecmed award, particularly when claiming that the standard requires that the agreement's Contracting Parties treat foreign investment in a manner that does not distort the investor's expectations.*"[95]

365. First, while Claimant cites the Tecmed award as persuasive authority on the content of the FET standard, it does not "base" its explanation of the content of the standard on this one award. Claimant cites a plethora of sources of law[96] with respect to the content of the standard, none of which constitutes the sole "basis" for its position.

366. Second, the MTD ad hoc Committee did not issue a "*severe warning*" against the protection of investors' legitimate expectations under the FET standard. Rather, the ad hoc Committee stated that it "*can appreciate some aspects of these criticisms* [*i.e.*,

[89] Belarus-Venezuela BIT, Art. 2(2) (Exhibit **C-138**).
[90] Iran-Venezuela BIT, Art. 4(1) (Exhibit **C-141**).
[91] Italy-Venezuela BIT, Art. 2(2) (Exhibit **C-164**).
[92] Venezuela-Vietnam BIT, Art. 2(2) (Exhibit **C-135**).
[93] Claimant's First Summation Memorial, ¶ 59.
[94] Reply Memorial, ¶153.
[95] Counter-Memorial, ¶¶ 184.
[96] Statement of Claim ¶¶ 197, 198, and Reply Memorial ¶¶ 140-147.

of the MTD v. Chile tribunal's heavy reliance on the FET standard articulated in *Tecmed*]."

367. In any event, Claimant does not substantiate its FET claims solely on the violation of its legitimate expectations. Venezuela's conduct also violated the FET requirements of transparency, procedural fairness and due process, and good faith, among others. Thus, even if the Tribunal should disagree with the 26 investment tribunals holding that FET protects legitimate expectations, it should still find that Venezuela failed to afford Claimant and its investment FET.

*(ii) Respondent Misrepresents the Content of the Minimum Standard of Treatment, Which Has Evolved To Become Largely Synonymous with the Autonomous FET Standard*

368. Even assuming that Venezuela's unsupported position is correct and the Treaty guarantees investors only protection in accordance with the minimum standard of treatment under customary international law, Respondent misstates the content of the contemporary minimum standard. In essence, Venezuela advocates applying the minimum standard of treatment as articulated in *Neer v. Mexico* in 1926, an untenable position that even its own authorities do not support.

369. Contrary to Venezuela's position, (a) Neer does not, and never did, define the content of the minimum standard of treatment under international law; and (b) MST is an evolving standard that has progressed to become virtually synonymous with the autonomous FET standard.[97]

*(iii) Venezuela Failed To Accord Claimant and Its Investment Treatment in Accordance with the Minimum Standard of Treatment and the Autonomous FET Standard*

370. Venezuela's regulatory regime of price, labor, and currency exchange controls, and its failure to reimburse VAT payments, contravened the standard of fair and equitable treatment as they were applied to Claimant arbitrarily, with no regard to transparency, procedural fairness or due process, and in violation of Claimant's legitimate expectations.[98]

[97] Reply Memorial, ¶ 160.
[98] Statement of Claim, ¶ IV.C.

371. Venezuela failed to rebut this. All of these protections form part of the minimum standard of treatment under customary international law and the autonomous FET standard. Claimant's position is thus that Venezuela breached both standards even though its previous pleading focused only on the latter.[99]

*(iv) Venezuela's Price Fixing, Employment Immobility, Currency Exchange Controls and Tax Recovery Regimes Violated Claimant's Legitimate Expectations*

372. Claimant does not contend, and need not prove, that it legitimately expected that Venezuela's regulatory environment would remain static. Rather, Claimant's position is that Venezuela's manner of application of its price control, labor, currency exchange, and VAT regimes to Clorox Venezuela violated the Treaty's fair and equitable treatment provision, including Claimant's legitimate expectations. Venezuela has no response to this.[100]

373. First, Respondent violated Claimant's legitimate expectations that it would not be deprived of control of its investment, treated as a state-owned enterprise, forced to operate at a loss indefinitely and expropriated without compensation.[101]

374. The legitimate expectation that Venezuela would comply with its own regulations was also violated since neither SUNDECOP nor the National Superintendence for the Defense of Socioeconomic Rights ("**SUNDDE**") issued the guidelines to control "*fair prices*", nor was a price review or adjustment mechanism stipulated.[102]

375. Moreover, Venezuela had specifically led Clorox Venezuela to believe that it would adjust prices. At the June 5, 2014 meeting, Minister Rivas expressly committed to increase the prices of the disinfectants Mistolín and Nevex by 100% and 55%, respectively, by the second week of June of that year and to review the company's cost structure to bring the prices in line before the end of 2014. Respondent did not fulfill its promise. Even under the most restrictive interpretation of international law, specific promises made to an investor create legitimate expectations.[103]

[99] Reply Memorial, ¶ 182.
[100] Reply Memorial, ¶ 184.
[101] Claimant's First Summation Memorial, ¶ 71.
[102] Claimant's First Summation Memorial, ¶ 73.
[103] Claimant's First Summation Memorial, ¶ 75.

*(v) Venezuela's Price Fixing, Employment Immobility, Currency Exchange Controls and Tax Recovery Regimes Breached the Requirements of Transparency, Due Process, and Procedural Fairness*

376. Respondent's failure to reimburse the VAT credits it owed to Clorox Venezuela under its own law, without any justification or even a response to Clorox Venezuela's requests,[104] constitutes the pinnacle of the Venezuelan Government's disregard for due process, procedural fairness, and transparency, which is so self-evident that it frankly requires no further discussion.

377. Furthermore, Venezuela empowered administrative agencies to fix, with complete discretion, the prices of most of Clorox Venezuela's products, without defining the methodology to be used or the price adjustment mechanisms. Claimant had no way of knowing how such prices were set, the formula used or the information considered.[105]

378. The exchange controls imposed by Venezuela also lacked transparency, due process and procedural fairness. The delays in granting Claimant the approved foreign currency for the purchase of imported raw materials increased significantly without explanation, increasing the interest on the debt that Clorox Venezuela owed to its bank.[106]

379. The SICAD I or SICAD II auction systems never allowed Clorox Venezuela to access foreign currency because it could not prove payment of income tax for the previous year, an impediment caused by the measures adopted by Venezuela itself.[107]

380. Venezuela also limited Clorox Venezuela's ability to terminate or discipline its employees and forced a reduction in working hours, reducing efficiency and increasing losses. The lack of response to Claimant's requests for permission to terminate or discipline employees through the means provided in the law exemplifies the lack of transparency, due process and procedural fairness.[108]

[104] Claimant's First Summation Memorial, ¶ 66.
[105] Claimant's First Summation Memorial, ¶ 64.
[106] Claimant's First Summation Memorial, ¶ 67.
[107] Claimant's First Summation Memorial, ¶ 68.
[108] Claimant's First Summation Memorial, ¶ 69.

381. Regardless of how well or badly Venezuela manages its economy, the truth is that the application of its price, labor and currency exchange controls and its tax refund regime to Claimant's investment led to the destruction of Clorox Venezuela, totally lacking transparency, due process and procedural justice, all of which violated the minimum standard of treatment and, consequently, the autonomous standard of fair and equitable treatment.[109]

*(vi) Venezuela's Assertion that "Claimant Had at Its Disposal Resources To File a Complaint" in Venezuela Is of No Consequence*

382. Under the Spain-Venezuela BIT, a protected investor may elect-at its sole discretion-to pursue a dispute against the host State in the host State's domestic courts or in international arbitration under the ICSID, ICSID Additional Facility, or UNCITRAL Rules. There is absolutely no requirement that an investor pursue domestic remedies before instituting arbitral proceedings.[110]

383. Clorox Spain had every right to initiate this arbitration, whether or not domestic remedies were available, but, in all events, they were not. Mr. Chavero cited a study on Venezuelan court rulings from 2005 to 2013 in which not a single one was found that ruled against any State action or omission.[111]

4) Venezuela Failed To Provide Claimant's Investment Full Protection and Security

384. Venezuela failed to "*provide full protection and security in accordance with international law to investments made in its territory by investors of the other Contracting Party*," in breach of Article III(1) of the Treaty.

385. According to Claimant, "*full protection and security*" implies obligations to provide both legal and physical security[112] and imposes an obligation of vigilance and due diligence with respect to acts of third parties. In other words, it requires the adoption of preventive measures that a well-administered government would take in

[109] Reply Memorial, ¶200.
[110] Reply Memorial, ¶202.
[111] Claimant's Second Summation Memorial, ¶ 55.
[112] Claimant's First Summation Memorial, ¶101.

similar circumstances.[113] However, when the violation of the standard is perpetuated by a State entity or agency, attribution is direct and there is no question of attribution or due diligence, nor is negligence or willful misconduct required.[114]

386. The legal framework established by Venezuela through a succession of new laws and the arbitrary application of pre-existing laws affecting Clorox Venezuela created a completely unpredictable legal and regulatory environment that placed Claimant and its investment at the mercy and disposal of the whims of the Venezuelan Government.[115] Such measures include the Law on Fair Costs and Prices, the Organic Fair Prices Law, the Organic Labor Law and its application, as well as Venezuela's refusal to respond to Clorox Venezuela's requests for authorization to recover VAT credits and its erratic implementation of the foreign exchange system after Claimant made its investment.

387. Venezuela also failed to provide physical security. Instead of providing physical security in accordance with Article III(1) of the BIT, following Claimant's discontinuation of operations on September 26, 2014, Venezuela did exactly the opposite: it directly occupied and took over Clorox Venezuela's production facilities in St. Lucia and subsequently Clorox Venezuela's production facilities in Guacara and its administrative offices in Caracas.[116] Moreover, the Venezuelan Government threatened to criminally prosecute the Clorox Venezuela's management and, presently, they continue to use the adulterated Clorox trademark.[117]

5) Venezuela Continues To Infringe Intellectual Property Rights in Violation of the Treaty

388. Claimant has learned that Venezuela continues to openly and deliberately use the "Clorox" brand on products manufactured under its exclusive control. Claimant calls upon Respondent to immediately cease and desist: (i) the use of Clorox trademarks and brands in the manufacture and sale of products; and (ii) the use of the name Clorox

[113] Claimant's First Summation Memorial, ¶101.
[114] Claimant's First Summation Memorial, ¶101.
[115] Reply Memorial, ¶ 206.
[116] Reply Memorial, ¶207, Claimant's First Summation Memorial, ¶ 103.
[117] Claimant's Second Summation Memorial, ¶ 64.

to designate the entity under the exclusive control of the government that manufactures such products.[118]

**(c) Factual Background**

1) Claimant Acquired Clorox, a Profitable Business in Venezuela

389. Claimant recalls that Clorox Venezuela's presence in Venezuela dates back to 1990. Over the years, Clorox Venezuela became one of the leading and most reliable consumer products companies in Venezuela. Its product portfolio included Nevex bleach, Nevex powder, PineSol, Mistolín cleaner, Mistolín wax, Mistolín air freshener, and Bon-Bril, Marlene and Lustrillo cleaning utensils. Clorox Venezuela had two administrative offices in Caracas and owned two production plants in the city of Santa Lucia, Miranda State, as well as a third one in the city of Guacara, Carabobo State.[119]

390. Claimant emphasizes that, as of April 2011, Clorox Venezuela was a profitable business. Between FY2007 and FY2011, Clorox Venezuela's average operating margin was 20%. Clorox Venezuela reported an EBIT ranging between USD 21 million and USD 25 million between FY2009 and FY2011.[120]

2) Venezuela Deprived Clorox Venezuela of its Ability to Set Prices and Freely Manage its Business

*(i) Venezuela Implemented the Law on Fair Costs and Prices*

391. Claimant notes that, prior to the 2011 regulatory change, price controls were part of the general consumer protection regulations and set maximum prices only for basic necessities.[121] Thus, in 2003, only the price of regular bleach and lavender disinfectant cleaner was regulated, which impacted Clorox Venezuela by only 3.5% of the units sold by Clorox Venezuela and only 0.4% of its total sales.[122]

[118] Reply Memorial, ¶211.
[119] Claimant's First Summation Memorial, ¶ 4.
[120] Statement of Claim, ¶ 13; Claimant's First Summation Memorial, ¶ 6.
[121] Claimant's Second Summation Memorial, ¶ 8.
[122] Claimant's Second Summation Memorial, ¶ 8.

392. Claimant explains that, on July 18, 2011, the Venezuelan Government enacted the Law on Fair Costs and Prices, which entered into force on November 22, 2011.[123] Such Law introduced a legal framework that deprived Clorox Venezuela of its ability to operate as a commercial entity, granting broad powers to SUNDECOP to (i) review the cost structure of goods and services; and (ii) establish maximum retail prices ("**PMVP**") for certain goods and services.[124]

393. According to Claimant, the Law on Fair Costs and Prices failed to establish a methodology or set of criteria or guidelines to set or revise prices.[125] Interested parties could express their disagreement with the prices imposed by SUNDECOP by submitting a request for adjustment. In a circular fashion, such filing was subject to the conditions and requirements yet to be established by SUNDECOP. In sum, Clorox Venezuela could not submit a request for adjustment until SUNDECOP issued the regulations to make such a request. Yet SUNDECOP never issued any regulations for requesting a price adjustment.[126]

394. Claimant further adds that, on November 17, 2011, five days before the Law on Fair Costs and Prices entered into force, SUNDECOP issued the "Partial Regulations of the National Superintendence of Costs and Prices and the Integrated System for the Administration and Control of Prices" (the "**Partial Regulations**"). The Partial Regulations mainly regulated SUNDECOP's structure and organization and the operation of the National Registry of Prices of Goods and Services. SUNDECOP, however, failed to include in the Partial Regulations a methodology or set of guidelines by which to set or revise prices. Instead, Article 25 provided that SUNDECOP would develop (at an undetermined time in the future) the guidelines and criteria for setting prices based upon the nebulous factors of "*statistical, economic, and accounting methodologies that were best adapted to the Economic and Social Development Plan of Venezuela*." Article 29 of the Partial Regulations further confirmed SUNDECOP's authority to fix and revise prices *ex-officio*.[127]

[123] Law on Fair Costs and Prices, Decree No. 8331, published in the Official Gazette, July 18, 2011 (Exhibit **C-04**).
[124] Claimant's First Summation Memorial, ¶ 7.
[125] Statement of Claim, ¶ 15.
[126] Statement of Claim, ¶ 16.
[127] Statement of Claim, ¶17.

*(ii) Venezuela Unilaterally Imposed Prices on Clorox Venezuela's Products*

395. Claimant indicates that, on November 22, 2011, the day the Law on Fair Costs and Prices entered into force, SUNDECOP published Administrative Order No. 007/2011,[128] which listed 19 regulated products subject to the Law on Fair Costs and Prices, including food products, personal hygiene products, and cleaning products. Under this categorization, Clorox Venezuela's Nevex, PineSol, Mistolín, and Mistolín wax were subject to SUNDECOP's discretionary price restrictions.[129]

396. Pursuant to Administrative Order No. 007/2011, producers, distributors, importers and sellers of any of the regulated products had to notify SUNDECOP-no later than the next day, November 23, 2011-of the retail prices of the regulated products effective before the Law on Fair Costs and Prices and were required to freeze these prices until such time as SUNDECOP determined their maximum retail price.[130] This was possible under Article 16 of the Law on Fair Costs and Prices, which provided that, once the law entered into force on November 22, 2011, companies could no longer adjust prices of regulated products without SUNDECOP's approval. Accordingly, Clorox Venezuela notified SUNDECOP of the retail prices for its Regulated Products and was forced to freeze the prices of Regulated Products as of November 22, 2011.[131]

397. Claimant underscores that the Law on Fair Costs and Prices and specifically Administrative Order 007/2011 had a significant impact on Clorox Venezuela's operations: Clorox Venezuela's regulated products represented 73% of Clorox Venezuela's sales in FY2012 . Clorox Venezuela's gross margin on Regulated Products ranged between 35% and 38% between FY2008 and the first half of FY2012. Even more importantly, none of the raw materials and inputs that Clorox Venezuela used to manufacture these products was subject to price controls.[132]

[128] Administrative Order No. 053 of February 27, 2012 (Exhibit **C-05**).
[129] Claimant's First Summation Memorial, ¶ 8.
[130] Claimant's First Summation Memorial, ¶ 9.
[131] Statement of Claim, ¶ 19.
[132] Statement of Claim, ¶ 20.

398. Claimant indicates that pursuant to the Law on Fair Costs and Prices and Administrative Order No. 007/2011, Clorox Venezuela was forced to freeze prices until April 1, 2012, when SUNDECOP's insufficient price ceilings came into force.[133]

399. On February 27, 2012, SUNDECOP issued Administrative Order No. 053, fixing the maximum prices for the 19 regulated products, which would become effective on April 1, 2012. Specifically, this Administrative Order fixed the maximum prices for Clorox Venezuela's Regulated Products.[134]

400. Claimant contends that SUNDECOP fixed these maximum prices without analyzing the cost of manufacturing Clorox Venezuela's products. In fact, although Clorox Venezuela submitted its cost structures to SUNDECOP after the publication of Administrative Order No. 007/2011, SUNDECOP chose to ignore them when it issued Administrative Order No. 053.[135] The prices fixed by said Order were insufficient to cover the costs of Clorox Venezuela. It furthermore assigned a different price to each particular category of Regulated Products based on the stage of the supply chain at which that product was sold. Hence, the same product had three different maximum prices: (i) the maximum price at which producers and importers could sell the product ("**PMVPI**"); (ii) the maximum price at which the wholesale distributor could sell the product ("**PMVMC**"); and (iii) the maximum retail price ("**PMVP**"). The lowest price of all was the PMVPI, the maximum price at which producers, *i.e.*, Clorox Venezuela, could sell their Regulated Products to wholesalers.[136] On March 13, 2012, Clorox Venezuela submitted comments to Administrative Order No. 53, requesting a price adjustment. On March 29, 2012—right before Administrative Order No. 053 came into force—SUNDECOP issued Administrative Order No. 059, replacing Administrative Order No. 053. SUNDECOP had ignored Clorox Venezuela's comments of March 13, 2012, and confirmed, in their totality, the mandatory price ceilings set forth in Administrative Order No. 53, which would come into force on April 1, 2012.[137]

[133] Statement of Claim, ¶ 21.
[134] Statement of Claim, ¶ 22.
[135] Statement of Claim, ¶ 23.
[136] Statement of Claim, ¶ 24.
[137] Statement of Claim, ¶ 25-27.

*(iii) Despite Repeated Requests, Venezuela Systematically Refused To Increase Clorox Venezuela's Prices*

401. Claimant indicates that on February 26, 2013, Clorox Venezuela submitted a formal request to SUNDECOP to increase the prices of the Regulated Products, pursuant to Article 21 of the Law on Fair Costs and Prices and Article 14 of Administrative Order No. 59. In said request it stated that it only intended to achieve a reasonable margin that would allow it to compensate for the increase in its suppliers' prices. On March 1, 2013, it requested the Deputy Minister of Commerce to intervene so as to expedite this request, but the authorities ignored Clorox Venezuela's submission.[138]

402. Claimant underscores that Clorox Venezuela submitted multiple requests to different authorities to express the critical situation it faced, urging them to implement price increases that were consistent with inflation and Clorox Venezuela's increased production costs.[139] For Clorox Venezuela, it was important to meet with authorities at the highest level to express the precarious situation it faced and to request their intervention to obtain approval for higher prices. It was not until December 12, 2013, that officials of the Ministry of Industries met with Clorox Venezuela. During that meeting, Clorox expressed its concern regarding both its requests to recover its tax credits and Clorox's situation as a result of SUNDECOP's price control. Minister Meza agreed to channel the VAT requests to SENIAT and to escalate Clorox Venezuela's cost structure within the Ministry of Industry to consider an adjustment to the prices. However, Venezuela failed to deliver on its promises.[140]

403. Claimant explains that, on December 20, 2013, Clorox Venezuela once again requested the assistance of the Minister of Industries and the Minister of Commerce to obtain a price increase for the Regulated Products and to collect the Bs. 75 million that the Government owed Clorox Venezuela in VAT credits at the time. In addition, Clorox Venezuela submitted several requests for a meeting to analyze the price

[138] Statement of Claim, ¶ 8.

[139] Claimant's First Summation Memorial, ¶ 13; Letter of May 7, 2013 to SUNDECOP (Exhibit **C-039**); Letter of June 7, 2013 to the Deputy Minister of Commerce (Exhibit **C-40**); Letter of October 25, 2013 to the Deputy Minister of Industries (Exhibit **C-41**); Letter of November 27, 2013 to the Director of the Superior Body for the Popular Defense (Exhibit **C-42**); Letter to the Deputy Minister of Industries of the Ministry of the Popular Power of Industries dated December 6, 2013 (Exhibit **C-43**); Letter dated December 6, 2013 from the Deputy Minister of Industries (Exhibit **C-44**).

[140] Statement of Claim, ¶ 33, Claimant's First Summation Memorial, ¶ 13.

increases and the recovery of the VAT tax credits. The Venezuelan Government maintained its practice of ignoring Clorox Venezuela's requests.[141]

404. Claimant indicates that Clorox Venezuela's efforts to obtain price relief from the Government during 2012 and 2013 yielded no results.[142]

405. According to Claimant, stripped of its ability to operate as a commercial entity, Clorox Venezuela's business unraveled. Clorox Venezuela had to discontinue the production of several of its products in 2013. Clorox Venezuela also requested authorization to manufacture a new product that would fall outside the scope of Administrative Order No. 059. "*However, SUNDECOP rejected Clorox Venezuela's proposal and insisted that the new product would be regulated as well,* [...] *one of the few communications from Clorox Venezuela to which the Government responded*."[143]

*(iv) Venezuela Implemented the Organic Fair Prices Law*

406. Claimant recalls that, on November 19, 2013, the National Assembly passed a law granting the power to the President of Venezuela to issue laws on certain matters by decree without legislative approval. Within the new executive powers was the ability to regulate profit margins, exchange control, and the production, import, distribution of certain products produced by Clorox Venezuela.[144]

407. On January 23, 2014, the President exercised this power, issuing the Organic Fair Prices Law. Such law replaced the 2011 Law on Fair Costs and Prices and authorized the Government to fix the prices of products and services and to limit profit margins, with the objective of "favoring the national production of goods and services" and achieving the "*consolidation of the socialist economic order consecrated in the Nation's Plan*." SUNDDE replaced SUNDECOP as the supervising agency. From that moment on, the determination, modification and control of prices fell under the jurisdiction of SUNDDE, now with unfettered discretion to fix prices.[145]

[141] Statement of Claim, ¶ 34; Claimant's First Summation Memorial, ¶ 14.
[142] Statement of Claim, ¶ 35
[143] Statement of Claim, ¶ 36; Claimant's First Summation Memorial, ¶ 15.
[144] Statement of Claim, ¶ 37.
[145] Statement of Claim, ¶ 38; Claimant's First Summation Memorial, ¶ 17.

408. Claimant points out that when the Organic Fair Prices Law came into force, Clorox Venezuela's revenues had suffered a significant impact and the Company had been operating at a loss for six months. The average gross margin of regulated products decreased from 38% in fiscal year 2011 to 32% in fiscal year 2012, 16% in fiscal year 2013, and finally turned negative -24% in fiscal year 2014.[146]

409. Claimant asserts that, under the Organic Fair Prices Law, Clorox Venezuela risked expropriation, confiscation, closure and criminal penalties for its directors if it refused to operate at a loss indefinitely.[147]

*(v) Venezuela Did Not Carry Out the Price Increases It Had Promised to Clorox Venezuela*

410. Claimant notes that, when the Government published the Organic Fair Prices Law, the prices of Regulated Products had been frozen for more than 25 months and Clorox Venezuela had already generated a negative operating profit with respect to its Regulated Products in fiscal year 2013 and would generate a negative gross profit with respect to Regulated Products in fiscal year 2014, translating into a negative operating profit for that year.[148]

411. Claimant recalls that, on numerous occasions between January 24, 2014 and March 27, 2014, Clorox Venezuela approached several Venezuelan institutions (Minister of Industries, Minister of Commerce, and the Director of the Superior Agency for the People's Defense of the Economy) to request meetings.[149]

412. During a meeting held on April 8, 2014 with officials of the Superior Agency for the People's Defense of the Economy, Mr. Ledezma, General Manager of Clorox Venezuela, discussed Clorox Venezuela's proposal submitted through the Venezuelan Association of the Chemical and Petrochemical Industry ("ASOQUIM") to increase the prices of bleach (Nevex) by 83% and the prices of disinfectant cleaners

[146] Statement of Claim, ¶ 39; Claimant's First Summation Memorial, ¶ 19.
[147] Statement of Claim, ¶¶ 41-42, with reference to Articles 45, 51, 54 and 55 of the Organic Fair Prices Law, (Exhibit **C-09**).
[148] Statement of Claim, ¶ 43, with reference to Compass Lexecon's expert report, ¶¶ 45, 48-51 (Exhibit **CER-1**).
[149] Statement of Claim, ¶44 with reference to Exhibits **C-60 through C-70**.

(Mistolín by 129%). He pointed out that the proposed prices were still insufficient since Clorox Venezuela was facing an emergency situation.[150]

413. Claimant underscores that the prices of local inputs continued to increase significantly, but Clorox Venezuela was unable to increase the prices of its products as these were regulated and subject to price ceilings. For example, companies such as Tecni Tapa, the supplier of plastic caps to Clorox Venezuela, and Gamacolor, the supplier of plastic labels for Mistolín, were allowed to pass on increases in their production costs to Clorox, but Clorox was precluded from doing the same.[151]

414. At a meeting on June 5, 2014, the Minister of the People's Power for Commerce committed (i) to increase the prices of the Mistolín disinfectant cleaners and Nevex bleach products by 100% and 55%, respectively, no later than the second week of June 2014 and (ii) going forward, to review the Clorox Venezuela's cost structure so that its prices could be increased to appropriate levels before the end of calendar year 2014, with periodic increases thereafter. While these immediate price increases would not have compensated for Clorox's inability to sell at prices determined by it, they could have allowed for a delay in the cessation of its operations and potentially avoided the severe sanctions applicable under the Organic Fair Prices Law. Despite the fact that its cap supplier increased its prices, Clorox maintained its production and continued to purchase plastic caps at exorbitant prices, relying on the commitments made by Minister Rivas.[152]

415. Claimant indicates that on July 21, 2014, Clorox Venezuela had to suspend production of Nevex products and operations at its Guacara plant for about 15 days after running out of caps due to the high price of the caps, as well as the failure to implement the price increases promised by the Government. [153]

416. Claimant alleges that, despite its promises, the Venezuelan Government did not publish any price increase applicable to Clorox Venezuela's regulated Products until

[150] Statement of Claim, ¶45; Claimant's First Summation Memorial, ¶ 21.
[151] Statement of Claim, ¶49.
[152] Statement of Claim, ¶¶ 51-52; Claimant's First Summation Memorial, ¶ 26.
[153] Statement of Claim, ¶ 53.

September 4, 2014, through Administrative Order No. 42/2014 issued by SUNDDE.[154]

417. Claimant considers that these increases were insufficient because they arrived far too late.[155] According to its expert Compass Lexecon, even with the price increases, Clorox would have had a negative gross margin of -15.5% on the sale of regulated products in 2015, leading to an operating loss of US$ 11.4 million.[156]

418. Claimant cites the fact that, despite the price regulation, several regulated products were being sold in some stores at prices between 11 times and 18 times the regulated price as evidence of the unviable nature of the prices of the regulated products.[157]

419. Claimant emphasizes that contrary to Venezuela's allegations, 2014 was not the first year in which Clorox operated at a loss: as seen in the audited balance sheets, in 2013 the company had operating losses of US$ 1.3 million.[158]

*(vi) Venezuela Restricted Clorox Venezuela's Ability To Manage Its Workforce Freely*

420. Claimant explains that the price controls were not the only Venezuelan measures that negatively impacted Clorox Venezuela's business and its ability to operate as a company. On May 7, 2012, just one month after SUNDECOP set maximum prices for regulated products, Venezuela adopted the Organic Labor Law,[159] imposing new obligations on Clorox Venezuela that further restricted its ability to manage its business. The Organic Labor Law required Clorox Venezuela to limit overtime and to provide workers with at least two consecutive days off in any calendar week. In addition, the Organic Labor Law introduced severe penalties, including criminal penalties, for managers who failed to comply with these mandatory requirements. These measures decreased Clorox Venezuela's productivity and efficiency and

[154] Statement of Claim, ¶ 55, with reference to Administrative Order No. 42/2014 issued by SUNDDE, September 4, 2014 (Exhibit **C-19**).
[155] Claimant's First Summation Memorial, ¶ 28.
[156] Claimant's Second Summation Memorial, ¶ 20.
[157] Statement of Claim, ¶ 57.
[158] Claimant's Second Summation Memorial, ¶ 21.
[159] Organic Law on Labor, Workers, April 30, 2012, published in the Official Gazette on May 7, 2012 (Exhibit **C-7**).

increased its labor costs. They were particularly damaging at a time when Clorox Venezuela needed to be cost efficient to offset the impact of price controls.[160]

421. Claimant adds that the Organic Labor Law included a guarantee of stability and immovability; thus, Article 86 of the Organic Labor Law granted employees a guarantee of permanent employment, called "*guarantee of labor stability*." Also, Clorox Venezuela could not dismiss employees unless there was just cause. An employer was required to reinstate any employee who had been terminated without such cause and was subject to imprisonment if it failed to do so.[161] Even dismissal with cause was *de facto* restricted within the legal framework of the Organic Labor Law, and Presidential Decree No. 9322 dated December 27, 2012 further restricted dismissals, almost rendering them impossible. For example, according to Article 2 of the Presidential Decree, employers could not dismiss any employee without prior authorization from the labor authorities.[162]

422. Claimant alleges that the Government failed to meet the deadlines provided by the Organic Labor Law for dismissals with cause and, in practice, the dismissal of an employee could be delayed for months or even years. No Labor Inspector ever issued a final decision regarding Clorox Venezuela's numerous requests to dismiss employees. Consequently, Clorox Venezuela was stripped of its ability to lay off employees. The immediate effect was an increase of up to 20% in absenteeism and a significant drop in the level of performance. Contrary to Venezuela's allegations, Claimant compensated its employees generously by extending health coverage for an additional year, offering the services of a call center to manage benefits, and a face-to-face meeting to assist employees in the transition.[163]

3) Venezuela Did Not Approve the Recovery of Excess VAT Withholdings from Clorox Venezuela, Which Deepened Its Cash Flow Crisis

423. Claimant explains that VAT applies*, inter alia,* to the sale of goods or services performed in Venezuela. The VAT is designed to operate based on a debit and credit system. A VAT taxpayer must collect VAT on the price of the goods or services it

[160] Statement of Claim, ¶ 59.
[161] Statement of Claim, ¶ 61.
[162] Statement of Claim, ¶ 62.
[163] Claimant's Second Summation Memorial, ¶ 24.

sells (the "**output VAT**") and may offset the VAT it pays to other suppliers of goods and services or when importing goods and services (the "**input VAT**"). Taxpayers must file a monthly VAT return. If the output VAT (on sales) is greater than the input VAT (on purchases or imports), the difference, which is the payable VAT, must be paid to the Venezuelan treasury. The Venezuelan VAT Law refers to such difference or VAT payable as "tax quota". The National Tax Authority SENIAT is responsible for collecting and auditing the VAT. If the input VAT exceeds the output VAT, then the taxpayer may carry forward the excess input VAT to the next tax period indefinitely and apply it against the output VAT generated in future tax periods until it is fully exhausted.[164]

424. Companies qualified as "special taxpayers" by the tax authority are appointed as VAT withholding agents. Clorox Venezuela was a special taxpayer. When a taxpayer supplies goods or services and invoices a VAT withholding agent, the withholding agent withholds 75% or 100% of the output VAT and issues a VAT withholding certificate to the supplier indicating the amount of VAT withheld. Subsequently, the appointed special taxpayer pays the withheld VAT to the Venezuelan Treasury on behalf of the supplier. [165]

425. The VAT withheld is deemed an advance payment of the VAT due by the taxpayer for the relevant month. For that reason, the taxpayer has the right to credit the withheld VAT against the tax liability. This means that the withholding agent can offset the withheld VAT against its monthly VAT liability or "tax quota."[166]

426. Where the VAT withheld declared by a taxpayer in a given month is not fully offset against the tax quota due in that month or over the subsequent three consecutive months, the taxpayer has the right to recover the excess VAT withholdings from SENIAT. This can be done by filing a claim with the SENIAT's Regional Management of Internal Taxes Office to recover the excess VAT withholdings. SENIAT was required to approve the VAT recovery request within 30 business days after the VAT claim was filed. In practice, however, SENIAT has not allowed the recovery of excess VAT payments for most VAT taxpayers that are suppliers of

[164] Statement of Claim, ¶ 67.
[165] Statement of Claim, ¶ 68.
[166] Statement of Claim, ¶ 69.

special taxpayers. The result is that most VAT taxpayers that also qualify as "special taxpayers", such as Clorox Venezuela, have had to act as tax collectors for the Government, while being completely deprived of their legal claim regarding the recovery of excess VAT withholdings. Clorox Venezuela filed repeated claims with the SENIAT for excess VAT withholdings and indisputably should have received authorization to recover such excess withholdings within 30 days of the filing of each claim.[167]

427. Claimant alleges that Clorox Venezuela repeatedly filed recovery claims with SENIAT for excess VAT withholdings, and should have indisputably received authorization to recover such excess withholdings within 30 days of the filing of each petition. Specifically, Clorox Venezuela filed several recovery claims.[168] The Government, however, never replied to any of the recovery petitions, nor did it grant any of the tax credits owed. As of March 2014, Clorox Venezuela's requests to recover excess VAT, still unanswered, amounted to Bs. 90,124,413.15 plus interest. Clorox also made multiple requests to different governmental authorities.[169] On June 4, 2014, Clorox Venezuela informed SENIAT the chosen mode for the application of the VAT credits but, despite these instructions, SENIAT did not grant the tax credits due.[170]

4) Venezuela Improperly Restricted Clorox Venezuela's Access to Foreign Currency, Which Adversely Affected Clorox Venezuela's Operations

428. Claimant alleges that Venezuela restricted access to foreign currency, which negatively impacted Clorox Venezuela's operations and its ability to manage its

[167] Statement of Claim, ¶ 69.
[168] Recovery Claim filed by Clorox Venezuela with SENIAT, October 20, 2011 (Exhibit **C-100**); Recovery Claim filed by Clorox Venezuela with SENIAT, December 4, 2013 (Exhibit **C-101**); Recovery Claim filed by Clorox Venezuela with SENIAT, March 20, 2013 (Exhibit **C-102**); Recovery Claim filed by Clorox Venezuela with SENIAT, December 4, 2013 (Exhibit **C-103**); Recovery Claim filed by Clorox Venezuela with SENIAT, undated (Exhibit **C-104**); Recovery Claim filed by Clorox Venezuela with SENIAT, February 14, 2014 (Exhibit **C-105**); Recovery Claim filed by Clorox Venezuela with SENIAT, July 9, 2014 (Exhibit **C-106**).
[169] Claimant states that on August 1, 2014 Clorox Venezuela requested the intervention of the Deputy Minister of Commerce for the return of more than Bs. 100,000,000 in tax credits owed to Clorox Venezuela by SENIAT as of that date. *See* Letter from O. Ledezma, Clorox Venezuela, to L. Ortega, Deputy Minister of Commerce /Superintendent of Fair Prices, August 1, 2014 (Exhibit **C-86**); Claimant's First Summation Memorial, ¶ 30.
[170] Statement of Claim, ¶¶ 70-71; Claimant's First Summation Memorial, ¶ 30.

business efficiently. During the period of Clorox Venezuela's presence in Venezuela, there were various exchange control mechanisms or "*systems*", all of which restricted Clorox Venezuela's access to foreign currency.[171]

*(i) CADIVI*

429. Claimant explains that since February 2003, Clorox Venezuela filed foreign currency purchase requests with CADIVI. CADIVI was the only entity responsible for authorizing the purchase of foreign currency when Clorox Spain acquired Clorox Venezuela in April 2011. At that time, the Venezuelan Central Bank initially set the official exchange rate at Bs. 4.3 per U.S. dollar.[172]

430. Access to foreign currency under the CADIVI system was limited and subject to the conditions established in Exchange Agreements executed between the Venezuelan Central Bank and the Ministry of Finance. In theory, private parties could access foreign currency through CADIVI at an exchange rate of Bs. 4.3 per US dollar, to import goods, repatriate capital from international investments, make remittances of profits, income and interest from international investments, pay royalties for trademarks and contracts for technical assistance, and repay debts.[173]

431. Claimant alleges that, in practice, obtaining foreign currency to import inputs and raw materials was a cumbersome process: Clorox Venezuela had to first obtain a Certificate of Non-Production ("**CNP**") or a Certificate of Insufficient Production ("**CIP**") from the relevant Ministry overseeing the relevant economic sector. CADIVI could take up to nine months to pay the Bank and Clorox Venezuela was responsible for the payment of accrued interest in favor of the Bank. ASOQUIM—which gathers the most representative chemical companies in Venezuela and is a strong voice and a leading advocate for preserving the chemical industry's economic vitality—pointed out in March 2014 that the Government was 288 days behind in approving the payment of foreign currencies (which had been previously authorized in 2013), a circumstance that seriously harmed the sector's production.[174]

[171] Statement of Claim, ¶ 72.
[172] Claimant's First Summation Memorial, ¶ 31.
[173] Statement of Claim, ¶ 74.
[174] Statement of Claim, ¶ 75; Claimant's First Summation Memorial, ¶ 32.

*(ii) SICAD*

432. Claimant notes that following the devaluation of the official exchange rate of the Venezuelan Bolivar on February 9, 2013, the Venezuelan Government introduced a new exchange regime that would operate in parallel to CADIVI for the import of products not covered by the CADIVI system. On March 22, 2013, the Venezuelan Government established an auction mechanism for the purchase of foreign currency for imports: the SICAD.[175] The rules for participating in the SICAD system lacked clarity and transparency. Clorox Venezuela submitted two bids in two auctions that included products pertaining to Clorox Venezuela's sector. Although Clorox Venezuela filed the required applications and submitted bids in both auctions, the Venezuelan Central Bank denied Clorox Venezuela access to the SICAD system for both applications.[176] The SICAD system thus gave the Government tight and opaque control over the purchase and use of foreign currency. On January 23, 2014, the Venezuelan Government published Exchange Agreement No. 25 which established the various transactions to be carried out through CADIVI, but with the exchange rate resulting from the SICAD auctions. Thus, the SICAD exchange rate became the applicable rate for, among other transactions, international investments and the payment of royalties, use and exploitation of patents, trademarks, licenses and technical services.[177]

*(iii) SICAD II*

433. Claimant explains that on March 24, 2014, a third exchange system, SICAD II, was created and started to operate pursuant to Exchange Agreement No. 27 between the People's Ministry of Economy, Finance and Public Banking and the Central Bank of Venezuela.[178] The implementation of SICAD II had a significant impact on Clorox Venezuela's operations. In particular, the inputs that Clorox Venezuela needed to produce regulated (and non-regulated) products became even more expensive. A clear example is the increase in the price of label supplier Gamacolor's labels. Starting in May 2014, Gamacolor was forced to purchase inputs at the SICAD II rate because

[175] Claimant's First Summation Memorial, ¶ 33.
[176] Claimant's First Summation Memorial, ¶ 34.
[177] Statement of Claim, ¶¶ 79-81.
[178] Claimant's First Summation Memorial, ¶ 35.

CADIVI had failed to authorize its foreign currency requests since October 2013. As a result, Gamacolor had to further increase its prices—by 22.5%—while Clorox Venezuela's prices remained frozen.[179]

434. Claimant alleges that the Venezuelan Government's exchange rate regime imposed an arbitrary and undue burden on Claimant Clorox Spain and its subsidiary and prevented Clorox Venezuela from operating as a functional, commercial company that purchased and imported materials, paid royalties and technical assistance fees, and repatriated the proceeds of its investment freely.[180]

5) The Cumulative Impact of Venezuela's Measures Forced Clorox Venezuela to Discontinue Operations

435. According to Claimant, as a direct result of the Government's self-proclaimed authority to determine the costs and prices of Clorox Venezuela's products, the penalization of any adjustments to Clorox Venezuela's workforce, the decision to deny Clorox Venezuela's rightful claim to the recovery of VAT credits, and the restrictive foreign exchange regulations, Clorox Venezuela became an unsustainable operation.[181]

436. Moreover, from November 2011, when the Government first forced Clorox Venezuela to freeze the prices of regulated products, Clorox Venezuela began accumulating losses that ultimately led to its operations no longer being viable.[182]

437. Claimant rejects Respondent's allegation that Clorox Venezuela self-sabotaged itself as incorrect, contrary to the evidence and which accusation primarily stems from the statements of Mr. Andres Torres, an employee and union leader, who has never held a leadership position and is clearly biased against Clorox.[183] His lack of knowledge is evidenced by his statements that, as Clorox products are mainly water, they are not affected by the increase in the price of inputs.[184]

[179] Statement of Claim, ¶ 85.
[180] Statement of Claim, ¶ 86.
[181] Claimant's First Summation Memorial, ¶ 43.
[182] Claimant's First Summation Memorial, ¶ 43, with reference to Compass Lexecon Expert Report, ¶ 43 (Exhibit **CER-1**).
[183] Claimant's Second Summation Memorial, ¶ 26.
[184] Claimant's Second Summation Memorial, ¶ 26.

438. Claimant states that on September 22, 2014 Clorox Venezuela was forced to discontinue operations as a direct result of significant and unsustainable losses under operating restrictions imposed by the Venezuelan Government.[185]

439. It further adds that there was still no mechanism in place under the Organic Fair Prices Law to adjust prices in the future and it was clear that Clorox Venezuela could not trust the Government to take any positive action in this regard.[186]

440. Respondent contends that The Clorox Company, Clorox Spain and Clorox Venezuela promptly announced their intention to sell Clorox Venezuela's assets on an expedited basis in. order to mitigate its damages and thus allow for the prompt transfer of Clorox Venezuela's assets to a new owner. However, on September 26, 2014, the Venezuelan Government directly occupied and seized Clorox Venezuela's factories in Santa Lucia and, later, the Guacara factories and its offices in Caracas.[187]

6) Venezuela Took Over Clorox Venezuela's Factories and Unilaterally Restarted Operations

*(i) Venezuela Occupied the Clorox Venezuela Plant in Santa Lucia on Public Television, and Announced That It Would Take Over the Cuenca Plant*

441. Claimant explains that on September 26, 2014 the Venezuelan Government took over Clorox Venezuela's factories. During the takeover, Venezuelan Vice President Jorge Arreaza announced from the Santa Lucía plant in that Clorox Venezuela's facilities were being occupied by the Government of President Maduro.[188] On Venezuelan State Television, Venezolana de Televisión, Vice President Arreaza further stated that the Venezuelan Government would continue to occupy Clorox Venezuela's plants along with the Company's former employees. He stated that the factory had been "*liberated*" by the workers and that the Government would bring in

[185] Claimant's First Summation Memorial, ¶ 44.
[186] Statement of Claim, ¶ 88.
[187] Statement of Claim, ¶ 89, with reference to *Venezuela takes over plants left by U.S. firm Clorox*, REUTERS, Sept. 26, 2014 (Exhibit **C-21**); *Venezuela gov't occupies plants of U.S. multinational Clorox*, FOX NEWS LATINO, Sept. 26, 2014 (Exhibit **C-22**); *Arreaza y trabajadores reactivan planta Clorox*, Venezolana de Televisión, Sept. 26, 2014, (original Spanish video and English transcript (Exhibit **C-23**); Press Release, The Clorox Company, *Maduro Government Occupation of Clorox Venezuela's Plants*, Sept. 26, 2014) (Exhibit **C-36**).
[188] Claimant's First Summation Memorial, ¶ 46.

experts, including businessmen from the industry and other national companies, to assist the former employees in resuming operations at the Santa Lucía and Guacara plants.[189] Moreover, Vice President Arreaza threatened to criminally prosecute any Clorox Venezuela employee suspected of being involved in discontinuing the company's operations and indicated that the Government's actions with Clorox Venezuela should be considered as a warning to other companies considering shutting down their operations.[190]

442. The Venezuelan government's measures with respect to Clorox Venezuela were adopted in an expedited manner and ultimately hindered the possibility of any asset sale. Clorox Venezuela was forced to discontinue operations on Monday, September 22, 2014, and Venezuela subsequently took over Clorox Venezuela. Clorox Spain was unable to sell Clorox Venezuela's assets due to the expropriation of Clorox Venezuela's facilities on September 26, 2014.

*(ii) Venezuela Appointed a Special Administration Board to Control, Manage, Restart and Operate Clorox Venezuela*

443. Claimant indicates that on November 3, 2014, the Government published a Joint Resolution of the Ministry of People's Power for the Social Process of Labor (DM/No. 8936) ("**Ministry of Labor**") and the Ministry of People's Power for Industries (DM/No. 074) ("**Ministry of Industries**").[191] This Joint Resolution affirmed the appointment of the Special Administration Board to control, manage, restart and operate Clorox Venezuela's business. This new special board (the "**New Board**") comprised seven directors, four of which represented governmental entities, originally from the Ministry of Industry, Ministry of Commerce, Ministry of Labor, and SUNDDE. The Government granted the New Board full managerial powers to assume any activity required to guarantee the operation of Clorox Venezuela's

[189] Claimant's First Summation Memorial, ¶ 47.
[190] Claimant's First Summation Memorial, ¶ 48, with reference to *Venezuela gov't occupies plants of U.S. multinational Clorox*, FOX NEWS LATINO, September 26, 2014 (Exhibit **C-22**); *Arreaza y trabajadores reactivan planta Clorox*, Venezolana de Televisión, September 26, 2014, (original Spanish video and English transcript (Exhibit **C-23**).
[191] Claimant's First Summation Memorial, ¶ 49, with reference to the Joint Resolution of the Ministry of People's Power for the Social Process of Labor (DM/No. 8936) and the Ministry of People's Power for Industries (DM/No. 074) dated October 29, 2014, published in the Official Gazette, November 3, 2014 ("Joint Resolution") (Exhibit **C-24**).

facilities.[192] This Joint Resolution was enacted without the consent or participation of Clorox Venezuela or Clorox Spain.[193]

444. On November 5, 2014, the Venezuelan Government announced the reactivation of the Guacara plant with an investment of Bs. 261 million or USD 41 million at the official exchange rate of Bs. 6.3 per USD.[194]

445. Effective as of April 13, 2015, the Ministry of Labor and the Ministry of Industries amended the Joint Resolution[195] to replace the SUNDDE and the Ministry of Commerce representatives on the New Board. The amended Joint Resolution also extended the New Board's term to April 13, 2016 (*i.e.* one year from its appointment on April 13, 2015).[196]

446. Claimant asserts that, to this day, Venezuela continues to use Clorox Venezuela's facilities and produces and sells "*Clorox*" products using an altered version of its logos that includes a heart with the phrase "Hecho en Socialismo" (Made in Socialism).[197]

447. Claimant alleges that the Joint Resolution and its amendment, the Government's operation of Clorox Venezuela's facilities and the misappropriation of Clorox's trademarks, confirm the Government's direct expropriation of Clorox Venezuela.[198]

**(d) <u>Compensation</u>**

448. As a direct result of Respondent's breaches of its obligations under international law, Claimant suffered substantial damages and is entitled to its full reparation in accordance with the Treaty and principles of international law, in the amount of USD 184.6 million (from September 2014), plus interest.[199]

[192] Claimant's First Summation Memorial, ¶ 49.
[193] Claimant's First Summation Memorial, ¶ 50.
[194] Claimant's First Summation Memorial, ¶ 51.
[195] Statement of Claim, ¶ 98, with reference to the Joint Resolution of the Ministry of People's Power for the Social Labor Process (9110) and the Ministry of People's Power for Industries (No. 012) published in the Official Gazette on April 13, 2015 (Exhibit **C-25**).
[196] Claimant's First Summation Memorial, ¶ 52.
[197] Claimant's First Summation Memorial, ¶ 53.
[198] Claimant's First Summation Memorial, ¶ 54.
[199] Reply Memorial, ¶ 212.

1) Claimant Is Entitled to Full Reparation

449. Article V(2) of the Treaty establishes the "*real value*" standard of compensation only for cases of lawful expropriation.[200] Given that Respondent's indirect and direct expropriations of Claimant's investment were unlawful, Claimant is entitled to full reparation.

450. Yet, even if the Tribunal were to determine that the Treaty requires the application of the same standard of compensation for both lawful and unlawful expropriations, in this case, this distinction is merely theoretical. Article V(2) of the Treaty requires compensation at the "*real value*" of the investment, and this is precisely what Compass Lexecon's damages valuation establishes.[201]

451. In sum, whether the Tribunal finds that Venezuela lawfully or unlawfully expropriated Claimant's investment, or whether the Tribunal finds other Treaty breaches but no expropriation, Claimant is entitled to full reparation.[202]

452. Nevertheless, as the expropriation was creeping expropriation, when valuating Clorox Venezuela before the measure that crystallized the expropriation, the cumulative impact of those measures that diminished its value must be excluded because [Respondent] should not benefit from its own wrongdoing.[203]

2) Claimant Has Met Its Burden of Proof Under the Required Standard

453. Respondent would have this Tribunal believe that Claimant has the burden of proving both the existence and qualification of damages "*with certainty*". Neither international law nor common sense supports Respondent's position.

454. Claimant has proven with absolute certainty the existence of its loss and has exceeded its burden of proving the extent of its losses with reasonable certainty. In this case, there can be no doubt that these losses are directly attributable to

[200] Claimant's Second Summation Memorial, ¶ 79.
[201] Reply Memorial, ¶ 217.
[202] Reply Memorial, ¶ 219.
[203] Claimant's Second Summation Memorial, ¶ 80.

Respondent.[204] In any event, any difficulties in specifying the amount of compensation is not a reason for not awarding it.[205]

455. Prior to the measures at issue in this dispute, Clorox Venezuela operated as a going concern with a proven record of profitability. Between 2009 and 2011, Clorox Venezuela's sales fluctuated between USD 88 million and USD 118 million, and its annual operating margin (EBIT) fluctuated between USD 21 million and USD 25 million. But by 2014, Clorox Venezuela declined to being a USD 14.1 million loss-making business. Venezuela has not denied this deterioration. [206]

456. Surprisingly, Respondent seeks to deny the clear causal link between these actions and Claimant's losses. In this regard, Claimant counters that, first, from an economic perspective, comparing the profit margins of the Regulated Products versus the non-regulated products for the period between the adoption of the measures at issue and the closure of Clorox Venezuela in 2014, shows a clear drop in the margins of the Regulated Products, while the margins of the non-regulated products remain comparatively stable.[207]

457. In sum, Respondent has made no reference to any company that allegedly grew under Venezuela's regulatory regime. But even if such a company did exist, no other company's production portfolio was affected by Venezuela's regulations at a rate of 73%, and no other company received exactly the same treatment by the Government. As such, whether another company could have made a profit during this time is irrelevant.

3) Claimant's Damage Calculations Are Sound and Robust

458. Venezuela owes Claimant USD 184,577,364, plus interest. This amount reflects the value of Clorox Venezuela as of the day before the measure that made the illegal takeover of Clorox Venezuela effective (the "**Valuation Date**"), *i.e.*, September 3, 2014. This amount represents the sum of three components.

i. Historical Lost Profits, *i.e.*, cash flows that should have been available to

[204] Reply Memorial, ¶ 224.
[205] Claimant's Second Summation Memorial, ¶ 87.
[206] Reply Memorial, ¶ 224.
[207] Reply Memorial, ¶ 227.

Claimant as a shareholder of Clorox Venezuela in the absence of the Measures (the *but-for* scenario), during the fiscal years 2012-2014;

ii. The *but-for* equity value, *i.e.*, the value of Claimant's 100% equity stake in Clorox, equivalent to 100%, in the absence of the Measures, as of September 3, 2014, valued using the discounted cash flow (DCF) approach; and

iii. VAT credits, *i.e.*, the value that Claimant could have received by using or transferring VAT credits (fiscal years 2012-2014) if Venezuela had timely approved Clorox Venezuela's recovery claims.

459. Regarding the valuation date, the date is September 3, 2014, which is the last day before Venezuela established new price limits that rendered effective the indirect expropriation of Claimant's investment.[208]

460. Mr. Fabián Bello, Respondent's expert, criticizes this Valuation Date, and proposes instead November 22, 2011, the day on which Administrative Order No. 007/2011 was published, which froze the prices of Clorox Venezuela's Regulated Products. Venezuela, however, differs with its own expert and agrees with Claimant that in cases of creeping expropriations the relevant date is the moment in which it can be established that the investment was definitively and irrevocably deprived of its commercial value.[209]

461. On November 22, 2011, Respondent had not yet arbitrarily fixed prices for 73% of Clorox Venezuela's products; had not yet implemented its labor regulations in a manner that deprived Clorox Venezuela of control over its workforce; had not yet implemented arbitrarily and unfairly its foreign exchange regulations; and had not yet left unanswered (repeatedly) each and every one of Clorox Venezuela's requests for refunds of its VAT credits.[210]

[208] Reply Memorial, ¶ 232.
[209] Claimant's First Summation Memorial, ¶ 132.
[210] Reply Memorial, ¶ 234.

462. Secondly, the Valuation Date proposed by Mr. Fabián Bello makes no sense from an economic perspective.

463. As to the exchange rate projections, Compass Lexecon projects exchange rates based on the International Monetary Fund's October 2014 World Economic Outlook.[211]

464. Mr. Fabián Bello criticizes this approach. Mr. Fabián Bello's nominal exchange rate projections, however, are based on two arbitrary and unjustified assumptions. First, Mr. Fabián Bello assumes that the "*equilibrium parity level*" of the real exchange rate in Venezuela applicable in the 2012-2024 period is equal to the average real exchange rate observed between 1970 and 2011. Second, Mr. Fabián Bello assumes that nominal exchange rates should evolve so that the real exchange rate eventually converges with Mr. Fabián Bello's *ad hoc* "*equilibrium level*," and that this convergence would occur linearly and gradually from 2012 to 2024. As explained by Compass Lexecon, this position has no basis in fact or information and is based entirely on unfounded assumptions.[212]

465. As to Clorox Venezuela's profitability in the *but-for* scenario, Compass Lexecon calculated the discounted cash flows that Clorox Venezuela would have generated in the absence of Venezuela's (*but-for*) measures. Mr. Fabián Bello agrees that DCF is the appropriate valuation methodology, but argues that Compass Lexecon's DCF model has certain errors when establishing certain prices and margins, resulting in an overstatement of damages to Claimant in the amount of USD 84.1 million.[213]

466. Claimant objects, contending that the methodology proposed by Mr. Fabián Bello of using the overall operating margins instead of the gross margins of the Regulated Products does not allow for the correct imputation of causation: it does not allow for differentiating between Regulated Products and non-regulated products.

467. In short, Compass Lexecon's use of gross margins is entirely appropriate and superior to the use of operating margins proposed by Mr. Fabián Bello. "*Gross margins are the most direct and appropriate way to measure the profitability of a line*

[211] Reply Memorial, ¶ 237.
[212] Reply Memorial, ¶ 239.
[213] Reply Memorial, ¶ 244.

*of product*" since most costs of goods sold are variable and can be directly allocated to a particular product line.[214] For the valuation, Compass Lexecon projected future cash flows using the operating margins that Clorox Venezuela would have earned but for the challenged measures.[215] These margins range from 13% for the year 2012 to 22% for the year 2024, which is consistent with the margins obtained by the company before the price caps were set.[216] These margins also take into account expected inflation in USD.[217]

468. As for the discount rate, Compass Lexecon applies a discount rate of 12.98% from September 2014. Claimant replies to Respondent who criticizes the use of WACC instead of the cost of equity, stating that practitioners recommend the use of a target optimal leverage ratio (the one that maximizes shareholder's value), which, for private companies such as Clorox Venezuela, can be obtained from a sample of comparable firms. In addition, there is no reason to discount cash flows at the cost of equity instead of the WACC.[218]

469. On the other hand, Claimant explains that Mr. Fabián Bello's suggestion to use the EMBI+ (or sovereign debt approach) to measure the country risk premium is inappropriate.

470. Following standard practice, Compass Lexecon's analysis estimates the terminal value in FY2024 as the value of a perpetuity.

471. Mr. Fabián Bello does not dispute that it is standard practice to apply a growth rate in perpetuity to the last explicitly projected cash flow (here, FY2024), but argues that the appropriate terminal value growth rate should be 0.8% rather than 2%.[219] As Compass Lexecon argues, a terminal growth rate equal to 0.8% is unfounded: a 0.8% growth rate would imply that, starting in 2025 and in perpetuity from that point forward, the real value of Clorox Venezuela's cash flows would actually decline permanently at the rate of U.S. inflation.[220]

[214] Reply Memorial, ¶ 246.
[215] Claimant's Second Summation Memorial, ¶ 95.
[216] Claimant's Second Summation Memorial, ¶ 95.
[217] Claimant's Second Summation Memorial, ¶ 96.
[218] Reply Memorial, ¶ 252.
[219] Claimant's Second Summation Memorial, ¶ 92.
[220] Reply Memorial, ¶ 255.

472. In sum, there is no basis to support Mr. Fabián Bello's position that the terminal growth rate should be 0% instead of 2%.

473. Mr. Fabián Bello argues that Compass Lexecon overstated losses by including in its valuation of damages the cash flows for the full fiscal year 2012, which begins in July 2011. According to Mr. Fabián Bello, Compass Lexecon should have included only cash flows accrued after the date of the first price freeze in November 2011. But, as Compass Lexecon explains, since Clorox Spain "obtained no cash disbursements from Clorox Venezuela" as a result of the measures, cash flows accrued between the months of July and November 2011 should be included in the historical lost profits calculations.[221]

474. While Venezuela argues that interest should be computed from the date of the award, both Mr. Fabián Bello and Compass Lexecon maintain, in agreement with Claimant's position, that interest should be computed from the date of valuation to the date of payment.[222]

475. Finally, Compass Lexecon recommends using a U.S. Prime rate (a commercial rate) of annual compound interest. Mr. Fabián Bello criticizes the interest rate suggested by Compass Lexecon, while Venezuela objects to an award of compound interest.

476. Claimant argues that compound interest reflects economic reality and is consistent with arbitral practice.[223]

#### 4) The Tribunal Should Award Damages in U.S. Dollars, Not in Venezuelan Bolivars

477. Mr. Fabián Bello and Compass Lexecon agree that Claimant's losses should be calculated in U.S. dollars. Respondent, however, contradicts its own expert and insists that any award rendered by the Tribunal should grant damages in its local Venezuelan currency, Bolivars.

[221] Reply Memorial, ¶ 259.
[222] Claimant's First Summation Memorial, ¶ 149.
[223] Reply Memorial, ¶ 263.

478. There is no reason to accept Venezuela's proposal and to do so would contravene the express provisions of the Spain-Venezuela BIT.[224]

**(e) <u>Petitum</u>**

479. Claimant requests from the Tribunal:

> "*(A) A declaration that the Bolivarian Republic of Venezuela has breached the Spain-Venezuela BIT, specifically (1) its obligation under Article III(1) not to impair by arbitrary or discriminatory means the management, maintenance, development, use, enjoyment, extension, sale, or liquidation of Claimant's investment, and to extend to Claimant full protection and security, (2) its obligation under Article V not to expropriate Claimant's investment without payment of prompt, appropriate, and effective compensation, and (3) its obligation under Article IV(1) to extend fair and equitable treatment to Claimant's investment;*
>
> *(B) Damages resulting from Venezuela's breaches of the BIT, in the amount of:*
>
> *i. US$ 19,122,692, as compensation for the historical lost profits resulting from Venezuela's breaches of the Spain-Venezuela BIT;*
>
> *ii. US$ 143,474,507 for the loss in equity value Claimant suffered as a result of Venezuela's Treaty breaches;*
>
> *iii. US$ 21,980,165, as compensation for the value that Claimant would have been able to realize by using or transferring VAT credits, but for Venezuela's breaches of the BIT; and*
>
> *iv. Interest on the amounts specified in subparagraphs (i), (ii), and (iii) above, at the U.S. prime rate, compounded annually, calculated from September 3, 2014 until payment in full);*
>
> *(C) An order requiring Venezuela to immediately cease and desist from continued, unauthorized use of the trademarks "Clorox," "Mistolín," and "Nevex," including the business and company name "Clorox Venezuela";*
>
> *(D) All of Claimant's costs associated with this arbitration, including legal fees; and*

[224] Reply Memorial, ¶ 266.

*(E) Any other relief that the Tribunal may deem appropriate*."[225]

## B. RESPONDENT'S POSITION

480. Respondent's position on the merits of the claims is based on (a) the facts, (b) Venezuelan local law, and (c) the absence of a violation of any obligation under international law, including the Investment Treaty between Venezuela and the Kingdom of Spain invoked in this dispute.

### (a) Factual Background

481. As to the facts, Respondent refers to the following measures: (i) price regulation, (ii) labor rights, (iii) SENIAT and reimbursement of VAT withholdings, and (iv) acquisition of foreign currency.

#### 1) Price Regulation

482. Price controls are by no means a novelty and precede by many years the enactment of the Law on Fair Costs and Prices in 2011.[226] They have been present in Venezuela's regulations at least since 1944.[227] It is impossible, therefore, not to consider them part of the normal economic regulation policy of the Republic and, as such, Clorox could not have a legitimate expectation that its products would not be touched. Claimant has acknowledged that Clorox's products, like those of other companies, have been subject to price controls.[228] Claimant's expert, in turn, acknowledged that price regulation is a legitimate mechanism of state intervention.[229]

483. Specifically, the two products that in Claimant's opinion were the most representative of Clorox's portfolio, Nevex bleach and Mistolín lavender cleaner, were included in a list of 242 products whose price had been regulated since 2003.[230] The list of regulated products was later updated on September 26, 2007 with the issuance of Resolution DM/Nr. 300, raising the regulated prices of Clorox products, which continued to be included in the list of regulated products. That list was in turn

[225] [Claimant's] First Summation Memorial, ¶ 151.
[226] Reply Memorial on Jurisdiction, ¶ 8; Respondent's First Summation Memorial, ¶ 7.
[227] Respondent's First Summation Memorial, ¶ 7.
[228] Respondent's Second Summation Memorial, ¶ 1.
[229] Respondent's Second Summation Memorial, ¶ 2; Hearing Transcript, Day 4, 712:9-12.
[230] Reply Memorial on Jurisdiction, ¶ 9.

updated again, raising the prices of Clorox products, upon the issuance of SUNDECOP Order 53/2012, and then once again upon the issuance of Order 042/2014, which again updated the list and the prices.[231]

484. Claimant had a positive net profit margin until 2013 and that variable only became negative in 2014, the year in which it decided to leave the country after having enjoyed extraordinary profits for many years.[232] Respondent left in September 2014, just when the first price increase was granted for the products marketed by Clorox Venezuela, which was significant since, for example, it allowed for an increase in the price of Nevex bleach of 109% and 152% for the 2- and 3.785-liter containers, respectively.[233]

485. On the other hand, contrary to Claimant's allegations, the way in which prices were set was not arbitrary, but sought to strike a balance between business profit and consumers' access to goods.[234] The criteria used are found in SUNDECOP's Partial Regulations[235] and in Administrative Order No. 3/2014 issued by SUNDDE.[236] This methodology contemplated the values and costs of raw material, packaging material, direct labor, indirect labor, among other variables.[237] Clorox was not subject to any regulation different from other comparable companies in the same sector.[238]

486. Ultimately, Clorox decided to abandon its operations in Venezuela not because of price controls, but for macroeconomic reasons that the Venezuelan State had little or no ability to control.[239] Respondent does not deny that Clorox may have experienced economic difficulties,[240] but its withdrawal is due to its own inability to adopt the necessary commercial measures in a difficult economic context, as did hundreds of other companies that continue to operate in the country.[241]

2) Labor Rights

[231] Reply Memorial on Jurisdiction, ¶ 33.
[232] Respondent's First Summation Memorial, ¶ 9-10.
[233] Respondent's First Summation Memorial, ¶ 11.
[234] Respondent's First Summation Memorial, ¶ 22.
[235] Respondent's First Summation Memorial, ¶ 23.
[236] Respondent's First Summation Memorial, ¶ 24.
[237] Respondent's Second Summation Memorial, ¶ 12.
[238] Respondent's Second Summation Memorial, ¶ 6.
[239] Respondent's Second Summation Memorial, ¶ 4.
[240] Respondent's Second Summation Memorial, ¶ 7.
[241] Respondent's Second Summation Memorial, ¶ 9.

487. Upon leaving the country abruptly, the company massively dismissed all workers without notice.[242] This constitutes a violation of several articles of the Organic Labor Law. [243]

488. The alleged "*settlement*" that Clorox Venezuela allegedly paid the workers is not in fact severance for termination without cause under the Organic Labor Law. The company had legal options if it felt it had to suspend production, other than the untimely abandonment and mass dismissal of its workers. The company, in violation of the specific promise made before the workers and before the enforcement authority of the Organic Labor Law on the matter, decided point blank to abandon the country and leave all its workers out on the street, in breach of all laws that compelled it to conduct itself otherwise.[244]

489. It is untrue that the company was prevented from managing its alleged higher costs with labor layoffs. Claimant submitted no more than a few folders of "*qualifications of misconduct*" brought before the Labor Inspectorate.

490. On July 15, 2014, Clorox filed a request with the Labor Inspectorate to suspend activities for three weeks due to the economic circumstances affecting it.[245]

491. Moreover, misconduct qualifications mean termination for cause, which cannot be considered a measure of economic management of the workforce by reducing personnel, but a dismissal that would take place under any circumstances. Moreover, even if the facts were as Claimant claims—*quod non*—the fact remains that the reduction of a workforce of more than 300 employees through eight layoffs cannot be considered a fundamental economic measure. It is, indeed, a very flimsy argument.[246]

492. On September 18, 2014, Clorox Management informed its workers that no one would have access to the Guacara plant between Friday, September 19 and Monday, September 22.[247] Far from revealing to its employees the real reasons behind the

[242] Respondent's First Summation Memorial, ¶ 40.
[243] Reply Memorial on Jurisdiction, ¶ 44.
[244] Reply Memorial on Jurisdiction, ¶ 60.
[245] Respondent's First Summation Memorial, ¶ 44.
[246] Reply Memorial on Jurisdiction, ¶ 63.
[247] Respondent's First Summation Memorial, ¶ 55.

stoppage of activities, Clorox outlined implausible justifications such as the implementation of a test of a Security Protocol for "Lockdown and Shutdown" intended to be used in fortuitous cases, force majeure events or emergencies.[248]

493. On September 22, 2014, the Union reported the illegal and fraudulent closing of Clorox Venezuela.[249] The following day, a record was drawn up stating what had happened and a file was opened in which the Directorate of the National Inspectorate and Other Collective Labor Matters of the Private Sector intervened.[250] On September 24, 2014, said entity issued Administrative Order No. 2014-021 ordering Clorox Venezuela to restart its productive activities. among other matters.[251]

494. An unsuccessful attempt was made to notify Clorox in person at all its facilities and offices. As such, in strict observance of the rules of due process, posters were posted at those locations. Clorox continued to disobey the orders under Administrative Order No. 2014-021 of September 24, 2014.

495. In view of Clorox's refusal to provide explanations and comply with the terms of Administrative Order No. 2014-021, the Minister of the People's Power for the Social Process of Labor issued Resolution 8886/2014, ordering the immediate occupation of the work entity "Corporación Clorox de Venezuela S.A." and its branches, as well as the resumption of production activities, in protection of the social labor process, workers, and their families.[252]

496. Such occupancy measure is temporary, not definitive, as evidenced by the fact that the property has never been transferred to the State—either by expropriation or by any other means—and by the fact that the term of the occupancy measure is renewed annually.[253] Clorox is free to resume its activities in the country: it is its decision alone that precludes it from doing so; it has never come close to resuming its activities nor has it expressed any intention of doing so. In fact, in this arbitration it has confirmed that it has no intention of doing so.[254]

[248] Reply Memorial on Jurisdiction, ¶ 64; Respondent's First Summation Memorial, ¶ 56.
[249] Respondent's First Summation Memorial, ¶ 57.
[250] Respondent's First Summation Memorial, ¶ 59.
[251] Respondent's First Summation Memorial, ¶ 61.
[252] Reply Memorial on Jurisdiction, ¶ 71.
[253] Respondent's First Summation Memorial, ¶ 66.
[254] Reply Memorial on Jurisdiction, ¶ 72.

3) SENIAT and VAT Withholding Refunds

497. Claimant argues that Clorox Venezuela repeatedly filed claims with SENIAT for excess VAT withholdings, but that SENIAT incurred unreasonable delays and failed to even reply to its requests. Both arguments are incorrect.[255]

498. The tax administration did not incur an unreasonable delay. Clorox filed its first claim for the recovery of tax credits in 2011. As a result of this claim, a SENIAT analyst was in charge of preparing a worksheet that involved uploading, in some cases manually, hundreds of thousands of data. The tax administration did not incur an unreasonable delay. The filing of a recovery claim does not stop time. The taxpayer's balance is not blocked when the claim is filed or the verification is made. The taxpayer continues to perform its usual economic activity, which determines that its tax credit may eventually vary.[256] In 99% of the cases, this balance varies. It is therefore unreasonable to argue that the alleged delay on the part of the administration should be computed from the filing of the first claim by the taxpayer.[257]

499. As to the second argument, SENIAT did indeed acknowledge that Clorox had funds available for reimbursement. In fact, it recognized more than 15 million Bolivars more than what Clorox had requested at that time (June 4, 2014).[258] Such tax credits were approved by Mr. Villasmil, whom Claimant did not cross-examine at the Hearing.[259] It was Clorox who failed to take the necessary actions to obtain the recognized funds[260] and indicated for the first time where to allocate its tax credit on June 4, 2014.[261]

4) Foreign Exchange

500. The exchange control regime managed by CADIVI has been in effect since Clorox Corporation made its investment in Venezuela, and—of course—was in effect when Clorox Spain made its alleged investment.[262] Subsequently, other Exchange

[255] Reply Memorial on Jurisdiction, ¶ 73; Respondent's First Summation Memorial, ¶ 67.
[256] Respondent's First Summation Memorial, ¶ 69.
[257] Reply Memorial on Jurisdiction, ¶ 76.
[258] Respondent's First Summation Memorial, ¶ 71.
[259] Respondent's Second Summation Memorial, ¶ 20.
[260] Reply Memorial on Jurisdiction, ¶ 77.
[261] Respondent's Second Summation Memorial, ¶ 23.
[262] Respondent's First Summation Memorial, ¶ 73.

Agreements were signed to supplement the system, including Exchange Agreements 21 and 22, which created the SICAD I system, and Exchange Agreements 25 and 27, which created the SICAD II system.[263]

501. There is nothing cumbersome, secret or improper about either CADIVI or the SICAD system. Each and every one of the Exchange Agreements were duly published in the Official Gazette and on the Venezuelan Central Bank's website.[264]

502. Clorox accessed tens of millions of dollars at preferential rates and, a few months prior to its exit, received almost two million in additional foreign currency.[265]

**(b) Venezuelan Local Law: Claimant Omits Fundamental Issues of Venezuelan Law**

1) Value Added Tax (VAT) Withholdings

503. The tax credit recovery procedure should be understood as a two- (2-) stage procedure, an initial stage and a final stage, in order to understand the internal administrative process of the Tax Administration.

504. In the initial stage, the petitioner files a claim with the Tax Administration stating that it is the holder of tax credits resulting from accumulated and undiscounted withholdings in a specific amount. Once the Tax Administration receives the claim, it does not block the balance indicated by the petitioner, allowing the claims to accumulate over time. In the initial stage, the Tax Administration, specifically the Tax Benefits Management, Tax Credit Recovery Coordination Office, designates an analyst to perform a verification of the documents submitted by the petitioner, and such verification culminates in a worksheet where the coordinator is notified of the balance to be recovered by the petitioner. After this verification, the amount may be equal, higher or lower, since the balances of accumulated and undiscounted withholdings have not been blocked, and the petitioner continues to file their VAT returns in parallel while the procedure lasts.[266]

[263] Reply Memorial on Jurisdiction, ¶ 79.
[264] Reply Memorial on Jurisdiction, ¶ 80; Respondent's First Summation Memorial, ¶ 75.
[265] Respondent's Second Summation Memorial, ¶ 28.
[266] Reply Memorial on Jurisdiction, ¶ 201.

505. Subsequently, the petitioner is notified by telephone or e-mail that they must appear at the Tax Credit Recovery Coordination Office so that once the tax credits are registered in the system, the petitioner may indicate, in accordance with the legal regulations, the allocation of the approved balance, *i.e.* if they wish to (a) offset the balance against their own taxes, indicating the amount and period or, (b) assign it over to a third party, indicating the tax amount and period against which the assigned credit will be imputed. Once the petitioner is notified, they must go to the Tax Administration's headquarters to start the Final Stage, which begins with the registration of the credits in the system by means of the form "*request for recovery of supported and non-discounted VAT withholdings*," in which the amount to be recovered and the signature of both the petitioner and the Tax Administration are evidenced, so that the petitioner may indicate in writing whether they wish to offset or assign the credit. This request will be sent to the relevant Management Department in order to prepare the Administrative Act containing the Order by means of which the offset or assignment of the balance, as the case may be, is authorized.[267]

506. In this case, the Tax Administration proceeded to verify that the amount of the requested withholdings was correct according to the worksheet, which showed an amount even higher than the amount being claimed by Clorox. Although Clorox had filed four (4) tax credit recovery claims with SENIAT amounting to Seventy-Three Million Two Hundred Seventeen Thousand Nine Hundred and Eighty Bolivars and Twenty-Two Cents (Bs. 73,217,980.22), the audit determined on June 4, 2014 that the amount was higher. As such, the company was subsequently notified through its legal representative Julieta Gozalez Urbina, informing her that the company had a credit in its favor of a total amount of withholdings of Ninety-Two Million Four Hundred Seventy-Six Thousand Two Hundred Seventy-Four Bolivars and Ninety Cents (Bs. 92,476,274.90).[268]

507. According to Order SNAT/2013/0030, however, Clorox should have immediately informed the Tax Administration in writing what it wished to do with the recovered

[267] Reply Memorial on Jurisdiction, ¶ 203.
[268] Reply Memorial on Jurisdiction, ¶ 204.

tax credits, so that the Tax Administration could then issue the administrative order reflecting the taxpayer's will.[269]

508. Nevertheless, ignoring the act of which it was notified on June 4, 2014, Clorox decided to file a new tax credit recovery claim on July 9, 2014 in the amount of Sixteen Million Nine Hundred Six Thousand Four Hundred Thirty-Two Bolivars and Twenty-Six Cents (Bs. 16,906.432.93) (sic), that together with its other previously filed claims totaled Ninety Million One Hundred Twenty-Four Thousand Four Hundred Thirteen Bolivars and Fifteen Cents (Bs. 90,124,413.15), dismissing the possibility of immediately taking advantage of its withholdings and of the additional amount recognized by the Tax Administration.[270]

2) The Exercise of Tax-Related Rights

509. Administrative Order SNAT/2013/0030 establishes that, in the absence of a decision from the Tax Administration within the established term, the petitioner may choose to consider its request as rejected and exercise its legal actions against such refusal or wait for a decision to be issued; such options are exclusively at the taxpayer's discretion.

510. Clorox had at least three legal actions through which to enforce its rights in light of the silence on the part of the Tax Administration of which it complains: (a) a Hierarchical Appeal provided for in Article 242 of the Organic Tax Code filed in the Administrative venue; (b) a Tax Contentious Appeal filed in the Judicial venue and provided for in Article 259; and (c) a Tax Constitutional Protection Action provided for in Article 302 et seq. of the same Code.[271]

511. For reasons unknown to us and in any case not attributable to Venezuela, Clorox decided not to exercise the legal actions to guarantee its constitutional and legal rights, and chose to send a number of letters to different officials who has no jurisdiction or responsibility over the matter, encouraging such officials to violate the provisions of Article 70 of the Anti-Corruption Law.[272]

[269] Reply Memorial on Jurisdiction, ¶ 205.
[270] Reply Memorial on Jurisdiction, ¶ 206.
[271] Reply Memorial on Jurisdiction, ¶ 209.
[272] Reply Memorial on Jurisdiction, ¶ 221.

512. Far from being a legal obligation, as Clorox would have this Tribunal believe, the dispatch of those letters could constitute a criminal action for undue influence and, in any event, there was no obligation on the part of authorities who lacked jurisdiction over the claim to intervene in the manner requested by the company.

513. In other words, the letters sent by Clorox seem more related to the intention of preparing the evidence for the claim that is being sought here than a legitimate exercise of the rights provided for in the legislation in force, which were the only ones capable of providing the answers that the company sought.[273]

3) Labor Regime in the Bolivarian Republic of Venezuela

514. For approximately 70 years, the labor stability of workers in the Bolivarian Republic of Venezuela has been established with constitutional rank, instructing lawmakers to progressively legislate on this matter.[274]

515. In Venezuela, at least since the enactment of the 1961 Constitution, the existence of a labor stability regime has been understood as a general rule. This stability system is based on the thesis of guaranteeing workers their jobs provided they do not meet any of the previously established grounds for dismissal.[275]

4) Employment Security in Venezuela

516. Employment security is provided for in Article 94 of the Organic Labor Law.

517. Dismissal, understood as the manifestation of the employer's will to terminate employment, has been subject to the prior processing of the "*Qualification of Misconduct*" or "*Dismissal Authorization*" procedure provided for in Article 453 of the Organic Labor Law (the "**LOTD**"), and in Article 422 of the Organic Labor Law, from April 28, 2002 to date. This does not mean that dismissal without cause has been outlawed, it has simply been limited to the provisions of the aforesaid decrees of employment immobility and security, the LOTD, and the Organic Labor Law.[276]

[273] Reply Memorial on Jurisdiction, ¶ 223.
[274] Reply Memorial on Jurisdiction, ¶ 227.
[275] Reply Memorial on Jurisdiction, ¶ 238.
[276] Reply Memorial on Jurisdiction, ¶ 243.

518. It is therefore untrue, as Claimant asserts, that the entry into force of the Organic Labor Law compelled it to maintain a "*complete labor force*", even when since 2002 there has been express labor stability in Venezuela. And it is no less true that Clorox had, as in the tax-related matters, the ability to exercise its legal administrative or judicial actions to dismiss workers for any justified reason. It is also worth expressly noting that Clorox also had the possibility, through negotiations between the parties (employer and employee), to negotiate the termination of the employment contract, since this is not prohibited by law.

5) Exchange Control Regime

519. Some authors point out that Venezuela has had foreign exchange controls in place since 1936. But it is clear that, since the creation of the Central Bank of Venezuela in 1940 until the mid-1970s, Venezuela has had a constant pattern of foreign exchange controls, different models of controls, but ultimately exchange controls. In the 1980s, specifically in February 1983, a new fixed exchange control system was implemented called the RECADI Differential Exchange Regime, which lasted until 1989.[277]

520. At the beginning of 2013, the Executive created a Complementary Foreign Exchange Administration System SICAD I, in order to supplement CADIVI and to offer an alternative means for individuals or legal entities to offer for sale or purchase foreign currency at a rate different from the official rate. Subsequently, in 2014, the Complementary Foreign Exchange Administration System SICAD II was created, which innovatively had an exchange rate that would be a floating rate according to the supply and demand of the market, with a view to offering greater alternatives to individuals or legal entities that needed to buy or sell foreign currency.[278]

521. It is worth noting that the settlement of foreign currencies depended on the availability of such currencies at the Venezuelan Central Bank, and it is a well-known and public fact that the Venezuelan economy is dependent on the price of oil, as stated in the recitals of the Exchange Agreement Number 1 dating from 2003.[279]

6) Price Control Regime

[277] Reply Memorial on Jurisdiction, ¶ 245.
[278] Reply Memorial on Jurisdiction, ¶ 253.
[279] Reply Memorial on Jurisdiction, ¶ 255.

522. The Price Control Regime has been implemented in Venezuela for more than 70 years, by governments with diverse and different political tendencies, but with one similar characteristic: to regulate the retail sale price to the consumer.[280]

523. In 2008, all previous laws were replaced by the Decree with Rank, Value and Force of Law for the Protection of Persons in the Access to Goods and Services, dated May 27, 2008, which created the Institute for the Defense of Persons in the Access to Goods and Services (INDEPABIS), and condensed all the rules on the matter, which was amended and published in the Official Gazette 39,358 of February 1, 2010.

524. Within the same State policy, subject to the constitutional guarantees of access to goods and services by users, the Decree with Rank, Value and Force of Law on Fair Costs and Prices was enacted, published in the Official Gazette Number 39,715, of July 18, 2011, by way of which SUNDECOP was created, with its Partial Regulations on the National Superintendence of Costs and Prices, as was the National Integrated System of Price Administration and Control, published in the Official Gazette Number 39,802 of November 17, 2011.[281]

525. In 2014, the Decree with Rank, Value and Force of Organic Fair Prices Law was enacted, published in the Official Gazette Number 40,340 of January 23, 2014, by means of which the Decree Law on Fair Costs and Prices of 2011 and the Decree Law for the Protection of Persons in the Access to Goods and Services of 2010 were repealed, and SUNDDE was created.[282]

526. In 2014, the Decree with Rank, Value and Force of Organic Fair Prices Law was enacted, published in the Official Gazette No. 6,156 of November 19, 2014; and ultimately Decree No. 2092 with Rank, Value and Force of Organic Fair Prices Law was also enacted, published in in the Official Gazette No. 6,202 of November 8, 2015, which remains in force at present.

527. To argue that in Venezuela there has not always been a general policy of consumer and user protections rights, with the inception of clear and precise legal rules that have contributed to transparency as a governmental principle, would be a fallacy. Different

[280] Reply Memorial on Jurisdiction, ¶ 256.
[281] Reply Memorial on Jurisdiction, ¶ 263.
[282] Reply Memorial on Jurisdiction, ¶ 265.

governments with different economic policies have always legislated in a similar and consistent manner with respect to consumer protection through the pricing of goods and services.

528. Finally, Decree No. 2,304 of February 5, 2003, issued by President Hugo Chávez, ratified the determination of goods of basic necessity of the above-mentioned products, expanding the list, and confirming the price control policy to be applied to them. This decree also froze the prices marked on the products at the time it entered into force, until such time as they were expressly regulated by the competent agencies. This decree found its factual justification in the exchange control policy decreed by the National Executive. The foregoing means that the regulation and freezing of prices of the products marketed by Clorox Venezuela has been established at least since 1994, and its express ratification took place in 2003.[283]

**(c) The Republic Did Not Violate Any Obligation Under International Law (Including the Investment Treaty Between Venezuela and the Kingdom of Spain Invoked in This Dispute)**

1) Claimant Accepts That the Exercise of the Legitimate Police Power Applies to This Dispute

529. Respondent emphasizes the presumption of the legitimacy of Venezuela's acts, exercised in the context of the rule of law, under which administrative and jurisdictional remedies were always available to Clorox—Clorox not only decided not to use them, but also attempted to use other channels that were at odds with the rule of law.[284]

530. It must also be said that Investment Tribunals have widely embraced the principle of the State's police powers, enshrined in modern administrative law, and have understood that in all cases in which the State acts in the social interest and within its spheres of competence, it enjoys broad regulatory prerogatives.[285]

531. Notwithstanding the foregoing, Respondent asserts that, *out of an abundance of caution*, it replies individually to each of Clorox's arguments.

[283] Reply Memorial on Jurisdiction, ¶ 268.
[284] Reply Memorial on Jurisdiction, ¶ 269.
[285] Reply Memorial on Jurisdiction, ¶ 277.

2) Venezuela Did Not Affect Claimant's Investment Through Arbitrary Measures

532. Claimant's argument with respect to this section is based on the following assumptions:

- Venezuela violated international law by enacting regulations and implementing previously sanctioned legislation that obstructed Clorox Spain's ability to manage, maintain, develop, use, enjoy and dispose of its assets, due to arbitrary and discriminatory conducts by the authorities of the Republic;

- Specifically, Clorox Spain argues that the arbitrary and discriminatory conduct of the Republic in relation to Clorox Spain arises from the (a) enactment of the Fair Prices Law, (b) the regulation of the prices of Clorox Spain's products enforced by SUNDECOP vis-à-vis Clorox Spain in the 2011-2014 period, (c) the enactment of the Organic Fair Prices Law on January 23, 2014,

- Claimant accepts that the defense of the legitimate exercise of police power by the Republic, *i.e.*, its right to regulate for the benefit of the population, is applicable to this dispute, but contends that the Republic has exercised that police power in an abusive manner.

533. Respondent objects to each of these assumptions.

*(i) Venezuela Legitimately Regulated its Internal Market. The Legitimate Exercise of Police Power Defense Applies to this Dispute*

534. The Republic declares that like any sovereign State, it has the right to legitimately regulate its economy and that it has exercised this right in good faith and in accordance with international law.[286]

[286] Reply Memorial on Jurisdiction, ¶¶ 317-318.

535. Clorox Spain accepts that doctrine of the legitimate exercise of the State's police power deprives any reasonable impact that may arise from the referred regulation. The onus is therefore on Clorox to demonstrate that the Republic exercised its police power in an abusive manner. Otherwise, it must be understood that all regulation exercised by the Republic has been in good faith and in accordance with international law.

*(ii) Venezuela Neither Discriminated Against Nor Treated Claimant's Investment Arbitrarily*

536. The threshold for determining the existence of a violation of protection with respect to discriminatory and arbitrary treatment is a high threshold, higher even than any violation of the FET and international minimum standard of treatment.[287]

537. The ICJ's decision in ELSI is clear on the high standard that must be proven to establish that a state measure is arbitrary under international law. It is clear that, as the ICJ explained, arbitrariness is not something that is contrary to a rule in law but something that is contrary to the Rule of Law (supremacy of law).[288]

538. This decision has been cited with approval by the vast majority of Tribunals that have discussed the question of arbitrariness in international investment law, especially when the standard is situated independently and autonomously from the FET standard.

539. As seen, and conversely to what Clorox Spain maintains, the threshold for finding a violation of the standard is a high threshold where there has to be an element of "intentionality" on the part of the State vis-à-vis the company and it has to consist of, more than the violation of a regulation, the violation of the rule of law in order to instill in the person analyzing the situation shock and surprise that affects the fundamental concept of justice.

540. In no way do the facts related by Clorox Spain constitute acts capable of violating this standard. Undoubtedly, each and every one of the laws of which Clorox complains are laws that were adopted in accordance with Venezuelan law and in full

[287] Reply Memorial on Jurisdiction, ¶ 291; Respondent's First Summation Memorial, ¶ 76.
[288] Respondent's First Summation Memorial, ¶ 78.

respect of the rule of law. None of these laws have been constitutionally questioned and their legality is unquestionable. Even those who have been able to question the content of some of its regulations, at no time questioned its legality and legitimacy.[289]

541. Clorox has failed to submit any document that determines that the legislation has been constitutionally questioned, by Clorox or by third parties, and even less still has there been any questioning that has declared the questioned laws as unconstitutional, which would mean they are incompatible with the rule of law in Venezuela. All the measures adopted by Venezuela responded to a reasoned judgment, that is, to the idea of protecting an essential public good for the Republic and implementing effective mechanisms to advance that purpose.[290]

*a. Venezuela Did Not Treat Clorox Arbitrarily in Relation to the Sanction and Implementation of the Laws on Fair Costs and Prices*

542. Clorox Spain argues that the Republic treated its alleged investment in a discriminatory and arbitrary manner through the adoption of the Law on Fair Costs and Prices by freezing the consumer prices in force at the time the law was issued, thus losing its ability to control the sale prices of its own products.[291]

543. The legislation about which Clorox complains is legislation that existed in Venezuela prior to its alleged investment. If Clorox had performed due diligence for the business, it would have found that, at least since 1997, chemical products for cleaning products were subject to price regulations.

544. In this regard, it is especially worth underscoring that [Investment] Tribunals have determined that the investor accepts the law of the host country of the investment as it finds it, and that Investment Treaties do not constitute a condition to demand better or different laws than those in force at the time of the investment.[292]

545. Much like the previously mentioned regulations, the Fair Prices Law was enacted under extraordinary circumstances in which the State understood that the current

[289] Reply Memorial on Jurisdiction, ¶ 296.
[290] Respondent's First Summation Memorial, ¶ 88.
[291] Reply Memorial on Jurisdiction, ¶ 299.
[292] Reply Memorial on Jurisdiction, ¶ 305; Respondent's First Summation Memorial, ¶ 92.

circumstances seriously affected the social fabric, the purchasing power of the population, and the potential of small and medium-sized companies in a monopolistic or oligopolistic context.

546. The law is a complete, detailed law, composed of 88 articles, which specifically establishes who the taxpayers are, what its conditions of application are, the agencies or bodies that will apply its regulations and how they will apply them, and establishing that the price determination will be made following certain economic calculations that consider the companies' cost structures. The law also establishes the legal principles on which it is based.[293] The same considerations can be made with respect to the Organic Labor Law.[294]

547. As to the implementation of the measures under both laws, these did not target Clorox or any specific company, demonstrated by the fact that the respective decree is a general measure.

548. On the other hand, there has been no unreasonableness in the setting of fair prices. The measures have been consistently taken in consultation with the specific sectors and taking into account the costs of companies in order to ensure they receive a reasonable return on the sale of their products.[295]

549. Clorox had at all times the opportunity of launching unregulated products on the market, the prices of which it could freely set. Clorox even had the ability, as any other company, to discontinue regulated products that were not profitable.[296]

550. Clorox Spain decided to leave the country in September 2014, namely, after it was granted an increase that exceeded for some of the presentations of the products the previous regulated prices and that, according to its own statements, was what they had requested to SUNDDE.[297]

551. Based on everything described above, it is difficult to conceive in what way the fair pricing laws issued by Venezuela since 2011 to date and how the implementation

[293] Reply Memorial on Jurisdiction, ¶ 307.
[294] Reply Memorial on Jurisdiction, ¶ 308.
[295] Reply Memorial on Jurisdiction, ¶ 311.
[296] Respondent's Second Summation Memorial, ¶ 67.
[297] Reply Memorial on Jurisdiction, ¶ 316.

thereof can constitute arbitrariness in the terms of the *Elettronica Sicula* (ELSI) case in the treatment of Clorox Spain, when the company:

(a) at the time of the alleged investment, knew that the products produced in which it was allegedly investing had historically been products with regulated prices in Venezuela because they were basic necessity products for the population;

(b) at the time of the alleged investment, the prices of the products were effectively being regulated in Venezuela and had been regulated since the very moment Clorox Spain began doing business in Venezuela;

(c) the authorities received Clorox Spain on numerous occasions, either individually or through the business association with which it was associated, ASOQUIM;

(d) at the time of the price freeze, the State allowed Clorox Spain to maintain high profit levels and subsequently granted an average 100% increase in regulated products; and

(e) during all this time the company continued to sell non-regulated products, implementing a sales policy that favored the sale of non-regulated products over regulated products and introducing increases of more than 200% every two months, which defeated any form of inflation.

*b. Venezuela Did Not Treat Clorox Arbitrarily in Connection with the Enactment and Implementation of the Organic Labor Law*

552. Claimant also argues that the enactment and entry into force of the Organic Labor Law in 2012 increased its labor costs and precluded the dismissal of workers, through the principle of labor stability, rendering the company's situation even more complicated. It also argues that the new law established procedures that made it impossible to dismiss employees and thus hindered the management, use, enjoyment and development of Clorox Venezuela.[298]

[298] Reply Memorial on Jurisdiction, ¶ 323.

553. The 2012 Organic Labor Law did not substantially modify the previous regulatory framework and the penalties that are the subject of Clorox's claim were in force in the previous law and reflect international law on the matter.[299]

554. Even more importantly, in the way Clorox Spain raises its claim, it seems that the legislation contained in the Organic Labor Law was directed against the company, when in fact such legislation has been a general legislation that updates the labor law in Venezuela and whose purpose was not to affect the operations of any company, but rather to update and raise it to the standards required by the International Labor Organization, a regulatory framework that had not been updated in Venezuela since 1997.[300]

555. Clorox Spain made use of the Organic Labor Law and even reduced its workforce by means of transactional arrangements with employees. It also made use of the exception regime contained in the law for the company's crisis situations, a procedure under which it subsequently requested the suspension of its operations.[301] In no way did Venezuela intervene in the company's operations and the company, until this dispute arose, had never stated that it had problems with its personnel, who on the contrary made every effort to keep the plants running, even against the wishes of Clorox's own officers.

*c. Dismissal for Cause and Job Stability*

556. Clearly, in matters of dismissal and employment stability, the Organic Labor Law does not introduce elements that can be considered fundamental changes to the conditions that existed prior to its entry into force with respect to dismissals without cause that have been prohibited in Venezuela since 1947. The labor law existing in Venezuela prior to 2012 contained absolutely all the elements about which Clorox Spain complains, and which it reasons as a fundamental change that caused its labor cost to grow.[302]

*d. Overtime and Breaks*

[299] Respondent's First Summation Memorial, ¶ 99.
[300] Reply Memorial on Jurisdiction, ¶ 325.
[301] Respondent's First Summation Memorial, ¶ 101.
[302] Reply Memorial on Jurisdiction, ¶ 336.

557. Clorox Spain also complains that the new law establishes in its Article 178 a maximum of two (2) overtime hours per day, ten (10) per week and one hundred (100) per year and leans on the irony of arguing that this law "*precluded workers from working more hours if they wished to do so*." In relation to this, suffice it to say that the law in force prior to the 2012 Organic Law already established the maximum limit of ten (10) overtime hours per month and one hundred (100) overtime hours per year, based on which this factor cannot be the cause of grievance or higher costs because the law did not change whatsoever in this regard.[303] According to Venezuela, Claimant specifically acknowledges that the purposes of the law are legitimate and proportionate by admitting that "*restrictions on work hours may not itself be arbitrary or objectionable*."[304]

*e. Penalty Regime of the Organic Labor Law*

558. Certainly, prior to the 2012 reform, there was an entire Penalty Regime for labor-related matters. Article 645 *ibidem* also provided for the penalty of arrest in the event that the offender failed to comply with the obligation to pay fines. The same penalty was applied to the offender who did not honor the payment of the fine within the terms provided. Therefore, it is clear that arrest as a penalty measure under the labor regime was not introduced in the Organic Labor Law, but preceded it by more than 15 years.[305]

559. In light of these provisions, coupled with the business attitude in Venezuela, which historically has been characterized by the search for legal subterfuges to evade labor obligations, 2012 lawmakers sought to update the coercive nature of the law in order to safeguard workers' rights, but in no way introduced the repressive regime that Clorox Spain describes in its briefs.

560. Moreover, any criminal sanction that may be provided for in labor laws must be interpreted in the light of the criminal legislation on the matter, which provides for the

[303] Reply Memorial on Jurisdiction, ¶ 337.
[304] Respondent's Second Summation Memorial, ¶ 85.
[305] Reply Memorial on Jurisdiction, ¶ 339.

type of offenses contained in the Organic Labor Law the possibility of substituting a criminal sentence of this nature with social work.[306]

561. In any event, as mentioned above, despite the serious misconduct committed by Clorox's officers, no sanctions have been imposed on them.

*f. Downsizing in the Event of a Company Crisis*

562. Finally, with respect to the ability of reducing personnel in company crisis situations, since the entry into force of the 1974 Law Against Dismissals Without Cause, lawmakers have provided legal schemes for the protection of workers subject to a reduction in the number of employees in work entities for economic and technological reasons.[307]

563. As to the procedure for suspending the company's operations due to crisis, this was invoked by Clorox Spain, albeit it ultimately decided to withdraw its request, so clearly if the procedure had been injurious, as they claim, they would never have initiated it.

564. With respect to the issue of employment termination, at least nine (9) cases have been identified in which, under the excuse of voluntary resignation, Clorox Spain terminated the employment of nine (9) workers, disintermediating them through the payment of severance.[308]

565. Again, by applying the standard proposed by the International Court of Justice in the *ELSI* case, we note that there has been no arbitrariness in the wording of the law nor arbitrariness in its application by the State authorities, who at all times participated in the proceedings held by the company and allowed its full participation. Finally, it was the company itself that requested the proceedings only to unexpectedly leave the country a few days later.[309] As the Authority of the Labor Inspectorate maintains, the

[306] Reply Memorial on Jurisdiction, ¶ 341.
[307] Reply Memorial on Jurisdiction, ¶ 343.
[308] Reply Memorial on Jurisdiction, ¶ 349.
[309] Reply Memorial on Jurisdiction, ¶ 350.

occupation of the plants is temporary and for the sole purpose of preserving the source of work.[310]

*g. Venezuela Did Not Treat Clorox Arbitrarily in Relation to the Application of Foreign Exchange Laws*

566. Clorox also argues that the Republic sanctioned a series of exchange control regulations that hindered the management, use, enjoyment and development of Clorox Venezuela.[311]

567. CADIVI has been in place since 2003 and offers foreign currency at preferential rates, precisely to mobilize and help the domestic market. Clorox has made an intense use of CADIVI throughout all these years, having received millions of dollars in foreign currency at preferential rates, namely, at a lower rate than that offered internally in Venezuela if the user were to purchase the currency in the unofficial market. The exchange regime does not distinguish between nationals and foreigners and all users in the country who wish to access foreign currency have to use these mechanisms.[312]

568. Clorox alleges that there have been delays, but has failed to demonstrate that these delays were unwarranted, since there are several reasons why delays may occur, including the lack of foreign currency, the expiration of the deadline to submit purchase orders, a change in the port of destination of the goods, the company's lack of labor solvency, among other reasons that may hinder foreign exchange processing.[313]

569. SICAD, as its name implies, is a complementary system to CADIVI. While CADIVI has always been available for normal transactions for all those who meet its requirements, SICAD I and SICAD II were introduced to render the foreign exchange market even more operative, without replacing CADIVI, but complementing it.

570. While SICAD II also specifically established the sectors to which it would apply and, contrary to what Clorox states—as explained below—at the time the system

[310] Respondent's First Summation Memorial, ¶ 103.
[311] Respondent's First Summation Memorial, ¶ 104.
[312] Respondent's First Summation Memorial, ¶ 106.
[313] Reply Memorial on Jurisdiction, ¶ 360.

became effective it did not require the positive payment of income tax (a requirement that was only included with the Circular of September 9, 2014, *i.e.* on the same date that Clorox left Venezuela), only the contribution to the public coffers according to the taxpayer's economic capacity.[314]

571. The operating conditions of SICAD I and SICAD II have been entirely transparent, and their regulations were published in the Official Gazette.[315]

572. In short, Venezuela did not refuse Claimant's access to foreign currency, but rather granted it millions of dollars, based on its availability and to the extent that the terms allowed it.[316]

*h. Venezuela Did Not Treat Clorox Arbitrarily With Respect to VAT Refunds*

573. Clorox also argues that the Tax Administration Service's delay in returning the VAT credits constitutes arbitrary treatment of the company. This is untrue.

574. Two different administrative orders were applicable to the accumulated and undiscounted withholdings requested by Clorox Venezuela, based on their validity at the time. In the case of the recovery claims dated October 20, 2011 and March 20, 2013, these were made under the current Administrative Order SNAT/2005/0056, while the claims filed on October 31, 2013, February 14, 2014 and July 9, 2014 were requested under the current Administrative Order SNAT/2013/0030.[317]

575. Such claims, especially the one filed on October 20, 2011, included periods corresponding to five years of antiquity, including periods in which there were no computer backups. It was Clorox who decided to wait five years to submit the first recovery claim.[318] This delay by Clorox in submitting a reimbursement request entailing five years of return filings was the reason why the reimbursement process took longer.

[314] Reply Memorial on Jurisdiction, ¶ 363.
[315] Respondent's First Summation Memorial, ¶ 108.
[316] Respondent's First Summation Memorial, ¶ 109.
[317] Reply Memorial on Jurisdiction, ¶ 369.
[318] Reply Memorial on Jurisdiction, ¶ 370.

576. Moreover, each time a taxpayer submits a new recovery request, SENIAT must again work off of the worksheet prepared from the first filed recovery claim and making new calculations. As such, the delay should not be calculated from the date of the first claim filed.[319]

577. SENIAT later recognized that Clorox Venezuela had funds available for reimbursement, so it was Clorox Venezuela that failed to obtain the recognized funds.[320]

578. Clorox had administrative remedies available to it, but did not pursue them.[321] International investment tribunals have widely affirmed the principle that the investor's failure to use remedies that were available under local law to remedy the administrative acts inexorably leads to the loss of the right to compensation.[322]

3) Venezuela Did Not Expropriate Clorox Investment

579. Clorox Spain also argues that Venezuela has directly and indirectly expropriated its investment (creeping expropriation) and includes among the *allegedly* expropriated assets not only movable and immovable property but also intangible assets such as rights and intellectual property. It is Claimant that has the burden of proving that the challenged measures have had an expropriatory effect.[323]

580. First, because as Clorox expressly acknowledges, and the decisions of the Tribunals have confirmed, the standard for an indirect expropriation to occur is a high one. Not just any impact on the right to property constitutes a substantial deprivation. Moreover, it is recognized that the State has considerable leeway to dictate regulatory measures of a general nature, even if this has a negative impact on business.[324]

581. In this case, as explained above, the Venezuelan State has not seized the property Clorox Spain's alleged investment, but has given continuity to the company through an innominate precautionary measure requested by the workers of the plants in view

[319] Respondent's First Summation Memorial, ¶¶ 113-114.
[320] Respondent's First Summation Memorial, ¶ 114.
[321] Respondent's First Summation Memorial, ¶ 115.
[322] Reply Memorial on Jurisdiction, ¶ 376.
[323] Respondent's Second Summation Memorial, ¶ 106.
[324] Reply Memorial on Jurisdiction, ¶ 380; Respondent's Second Summation Memorial, ¶ 106.

of the untimely abandonment of the company by Clorox, giving way to a temporary intervention of the company as a precautionary measure, but which in no way affects the property's attributes that Clorox continues to exercise over the investment.[325] For the record, Clorox is free to resume its activities in the country.[326]

582. Clorox claims a substantial deprivation of property which it voluntarily abandoned and which it has made no effort to recover despite the temporary nature of the intervention and all the assertions to that effect made by Respondent, even in these proceedings.[327]

583. Nevertheless, Clorox has not suffered any substantial deprivation of its property given that: (a) the company Clorox Venezuela continues to be fully owned by Clorox Corporation and Venezuela has no interference in how the directors of the company are appointed or removed; (b) the land on which the company is located continues to be exclusively owned by Clorox and is registered in its name; and (c) the intellectual property rights over the products continue to be held by Clorox and no one has claimed the acquisition of such rights. The use of the trademark is temporary as is the intervention, and concrete actions by Clorox would be sufficient to claim this right.[328]

584. Nor is it true that there has been an indirect expropriation in the terms of a creeping expropriation, *i.e.*, through successive actions by the administration that have led to the expropriation of the company, as Clorox argues.

585. The onus is on Clorox to prove that each of the four measures it argues, independently or cumulatively, constitute an expropriation.[329] It must also demonstrate that there was coordination by the government to achieve that objective.[330] On the contrary, Venezuela demonstrated unequivocal signs of willingness to cooperate with Claimant.[331] The Republic has also demonstrated that the foreign exchange regime, in addition to being a general and duly justified policy,

[325] Reply Memorial on Jurisdiction, ¶ 385; Respondent's First Summation Memorial, ¶¶ 119-120.
[326] Respondent's First Summation Memorial, ¶ 127.
[327] Reply Memorial on Jurisdiction, ¶ 390.
[328] Reply Memorial on Jurisdiction, ¶ 391.
[329] Respondent's First Summation Memorial, ¶ 131.
[330] Reply Memorial on Jurisdiction, ¶ 394.
[331] Respondent's First Summation Memorial, ¶ 128.

has been in place since 2003, *i.e.*, even before Clorox Corporation made its investment in Venezuela.

586. Finally, with respect to the VAT refund, it has also been demonstrated that Clorox is responsible for having filed its refund request five years after the right to these refunds had arisen.

587. It is a long-recognized principle in international law that local law is an important element in judging the conduct of the parties in the light of their international responsibility.[332]

588. Clorox, however, in order to create this case under international law, simulated the expropriation of the investment through the fraudulent abandonment of the company and the applicable regulation—in addition to the judicial practice present since the application of the LOTD—obliged the Inspectorate to act in the search for the preservation of the source of work and the company continuity's.

589. Nor can Clorox claim that Venezuela pressured it to leave the country; on the contrary, the State gave unequivocal signs of wanting to collaborate with the company.[333]

590. In view of the foregoing, Venezuela did not directly or indirectly expropriate the investment of Clorox and Clorox Spain.[334]

4) Venezuela Did Not Violate the Treaty's Fair and Equitable Treatment Standard

591. Undoubtedly, the wording of the Treaty, when referring to the standard under international law, leaves no doubt that the standard of treatment is that contained in the International Minimum Treatment, reflected in the *Neer* case and its progeny,[335] which includes *Cargill v. Mexico* and *Flughafen v. Venezuela* cases, among others.[336]

[332] Reply Memorial on Jurisdiction, ¶ 410.
[333] Respondent's Second Summation Memorial, ¶ 112.
[334] Reply Memorial on Jurisdiction, ¶ 414.
[335] Reply Memorial on Jurisdiction, ¶ 415.
[336] Respondent's First Summation Memorial, ¶¶ 138-148.

But even if it were an autonomous standard, international law recognizes a high degree of deference to local authorities to regulate matters within their territory. [337]

592. This means that, for legitimate expectations to be protected, they must exist at the time the investment is made, arise from specific commitments to the investor, and there must be no recourse available.[338]

593. The existence of a recourse and appropriate judicial remedies is not a minor issue in matters of international law. On the contrary. The existence of remedies, which have also proven to be useful for other investors, is precisely a reflection of due process and the rule of law that exists in a given country, in this case Venezuela. In this respect, Respondent again reiterates some of the determinations made by other investment tribunals. [339]

594. Clorox also complains of a lack of transparency and due process. However, with respect to each of the actions about which Clorox complains, there was a procedural remedy it could have used to force the government to reconsider its conduct.[340]

595. As for each measure, the administration issued rules that were transparent, published in the Official Gazette, and available on each agency's website. Not only were the general laws and regulations issued in this way, but also those that implemented the respective mechanisms for each measure, such as resolutions and circulars. In no way has there been a lack of transparency or due process in the actions on the part of the administration.[341]

596. Clorox individually through its officers, as well as Clorox represented by the business chamber that represented it, was received on numerous occasions by SUNDECOP, SUNDDE, CADIVI, SENIAT, and the Labor Inspectorate.[342]

[337] Respondent's Second Summation Memorial, ¶ 48.
[338] Respondent's First Summation Memorial, ¶¶ 149-151.
[339] Reply Memorial on Jurisdiction, ¶ 417.
[340] Respondent's First Summation Memorial, ¶ 152.
[341] Reply Memorial on Jurisdiction, ¶ 421.
[342] Reply Memorial on Jurisdiction, ¶ 422.

597. Regarding the violation of Clorox's legitimate expectations, the decisions of the Tribunals are clear, requiring that for legitimate expectations to be violated, there must be specific commitments by the State.[343]

598. Clorox did not have any specific commitments from the State at any time, because the only commitments that have weight for applying the theory of legitimate expectations are those made prior to the investment, *i.e.* in 2003 (when Clorox Corporation made its investment in Venezuela, an investment not protected under the Spain-Venezuela BIT) or in 2011 (when Clorox Spain allegedly made its alleged investment).

5) Venezuela Offered Clorox Full Protection and Security At All Times

599. Clorox also argues that Venezuela violated the Full Protection and Security standard because (a) it did not grant legal protection to Corporación Clorox de Venezuela, (b) because it did not grant physical protection to the Clorox company. Both considerations are erroneous.

600. Most Tribunals clearly state that the standard applies only to the physical protection of the investor's property and not to the so-called legal or juridical protection.[344]

601. In any event, for the sole purpose of providing a response to Clorox, as has been argued in discussing the other standards of treatment, Venezuela has offered all due process to the company and has published and applied its legislation with full transparency. Much more than is the case in other jurisdictions, public officials repeatedly received the company's representatives and all their requests were fulfilled, to the extent of the circumstances and within the mandates of the legal system in force.[345]

602. As to physical security, according to Clorox, the Republic allegedly violated this standard through the temporary intervention of the company. This assertion is surprising when Clorox escaped behind the scenes from Venezuela leaving more than

[343] Reply Memorial on Jurisdiction, ¶ 423.
[344] Respondent's First Summation Memorial, ¶ 155.
[345] Reply Memorial on Jurisdiction, ¶ 430.

three hundred (300) workers and their families in total abandonment, without work, without management, in towns that depend exclusively on the existence and survival of the company's operation. Venezuela not only exercised due diligence not to damage Claimant's investment that the latter voluntarily abandoned, but took active measures to keep it in operation during the abandonment.[346]

603. For all of the above, the Republic did not violate the full security and protection standard.[347]

**(d) Quantum**

1) Compensation Standard

604. The Treaty provides that *"[t]he compensation paid in respect of the measures referred to in paragraph 1 [i.e. for an expropriation] shall be equal to the real value of the investment immediately before the measure in question was taken or before it was announced or published, if such announcement or publication took place earlier*." This would be the compensation applicable in the case of expropriation.

605. This is confirmed, *inter alia*, by the concept of indirect or creeping expropriation, provided for in Article V(1) of the Treaty. This includes, among the measures subject to compensation for "real value", "*any other measure of a similar type or having similar effects*."[348]

606. With respect to the other provisions of the Treaty, what the Republic argues is that the relevant compensation must comply with the principle of proportionality.[349] This means, among other things, that it may never exceed the compensation provided for in the Treaty in the case of an expropriation[350] given that the measures challenged by Claimant only partially affected Clorox, but did not affect its capacity to generate new

[346] Respondent's Second Summation Memorial, ¶ 103.
[347] Reply Memorial on Jurisdiction, ¶ 433.
[348] Reply Memorial on Jurisdiction, ¶ 437; Respondent's First Summation Memorial, ¶ 161.
[349] Respondent's First Summation Memorial, ¶ 162.
[350] Reply Memorial on Jurisdiction, ¶ 437.

products, nor other non-regulated products in its portfolio, nor the control or ownership of the factories in Venezuela.[351]

2) Proof, Causation and Double Recovery

607. The burden is on Claimant to prove that the damage that Clorox Spain may have suffered was the result of the State's measures in violation of the Treaty.[352] The claim for damages in this case includes the full value of the company; however, there was no expropriation measure in this case. The price control measures challenged by Clorox Spain came into force in April 2012. Clorox Spain left the country on September 22, 2014.[353]

608. In this case, there is an absolute lack of causal link between the challenged measures and the claimed damages, so that even if a violation were found, it would not give rise to compensation.[354] For example, Claimant has never offered concrete proof of the damage potentially caused by the application of the labor law in force.[355]

609. The lack of certainty is relevant both in respect of the "*historical*" damages (lost profits) claimed by Clorox Spain and in the "*future*" damages.[356]

610. Of course, BITs are not guarantees of returns on investment and it cannot be argued that Clorox had a guarantee of maintaining the return on the regulated products it produced. Therefore, the proof required of Clorox Spain is even greater since it must demonstrate, without speculation, that it could have maintained a certain degree of profitability on its production, which it was unable to maintain for some reason attributable to Venezuela as a results of a breach of Venezuela's obligations under the Treaty.[357]

611. The risk of double recovery in these circumstances is significant, given the manifest duplication between Claimant's alleged continuing ownership in this case and its claim. Moreover, Venezuela never intended to expropriate, nor did it

[351] Respondent's First Summation Memorial, ¶ 167.
[352] Respondent's First Summation Memorial, ¶ 164.
[353] Reply Memorial on Jurisdiction, ¶ 446.
[354] Respondent's First Summation Memorial, ¶ 117.
[355] Respondent's First Summation Memorial, ¶ 169.
[356] Respondent's First Summation Memorial, ¶ 168.
[357] Rejoinder Memorial, ¶ 451.

expropriate, Clorox's business in Venezuela, which is an additional reason why compensation for its value must be ruled out.[358] Furthermore, in assessing damages, Claimant fails to distinguish between those caused by an alleged expropriation and those resulting from a breach of the FET standard.[359]

3) Temporality

612. Clorox Spain seeks that this Tribunal find against the Republic for a period of time that far exceeds what could be considered the relevant period of time in this case in relation to the challenged measures.[360]

613. First, Compass Lexecon begins its damages calculation on July 1, 2011, when the date on which the challenged measures begin to take effect was April 1, 2012.[361]

614. Second, Compass Lexecon attempts to justify a claim *ad infinitum* for the value of the factories when, as stated above, Clorox Spain made a voluntary decision to abandon its alleged investment.[362] Errors in the calculations.[363]

615. The valuation date chosen by Compass Lexecon artificially increases the amount of damages claimed, among other things, because Compass "updates" the "historical lost profits" amounts using the WACC rate rather than a risk-free rate.[364]

616. The exchange rate projected by Compass Lexecon, for the entire period over which it is projected, is overvalued and this artificially magnifies the damages.[365]

617. Compass Lexecon's projected gross margins are not based on Clorox's historical operating margins and do not consider the impact of inflation. In addition, it draws from unaudited data as a basis for its analysis, rather than the financial statements.[366]

[358] Reply Memorial on Jurisdiction, ¶ 455.
[359] Respondent's Second Summation Memorial, ¶ 120.
[360] Respondent's Second Summation Memorial, ¶ 128.
[361] Respondent's First Summation Memorial, ¶ 172.
[362] Respondent's First Summation Memorial, ¶ 172.
[363] Reply Memorial on Jurisdiction, ¶ 462.
[364] Respondent's First Summation Memorial, ¶ 174.
[365] Respondent's First Summation Memorial, ¶ 175.
[366] Respondent's First Summation Memorial, ¶ 176.

618. The discount rates calculated by Compass Lexecon are deliberately undervalued by (i) not taking into account Venezuela's country risk in its valuation, and (ii) considering that Clorox had debt, when the company never had any,[367] for the sole purpose of trying to reduce the discount rate and maximize the company's value.

619. The terminal value calculated by Compass Lexecon is overestimated because it projects a long-term growth rate impossible to foresee for Clorox, which would require significant structural investments—which are not contemplated—and which is totally inconsistent with the company's historical growth in Venezuela.[368]

620. Finally, in relation to the VAT issue, although Mr. Fabián Bello has not commented on its characterization, he has corrected the calculation made by Compass Lexecon. In this regard, and in line with the other corrections that have been made to the Compass Lexecon report, it is inapposite to use the exchange rate of each year to make the VAT calculation, or to update those amounts to a WACC rate.[369] The amount claimed by Clorox, in its own notes—sent to officials whose functions did not answer to SENIAT—is approximately Bs. 94 million. In any event, if the Tribunal were to consider this claim to be a breach of the Treaty, and having proven causation with respect to any standard under the Treaty, in no event could damages different from those claimed by Clorox locally as of the valuation date be considered.

4) Currency of Valuation

621. Notwithstanding the foregoing in relation to the exchange rate projected and used by Compass Lexecon in its valuation, the currency used for the valuation is unfounded. The Treaty provides that in case of compensation for expropriation the currency shall be paid "*in convertible currency*"—the Bolivar is a convertible currency and, moreover, the currency of the country that allegedly received the investment. There is no reason to disregard the use of the Bolivar over the U.S. dollar to determine compensation in this case.[370]

[367] Respondent's First Summation Memorial, ¶ 177.
[368] Respondent's First Summation Memorial, ¶ 178.
[369] Respondent's First Summation Memorial, ¶ 179.
[370] Respondent's First Summation Memorial, ¶ 180.

622. Moreover, Claimant's projections wrongly perpetuate the overvaluation of the Bolivar, which cannot be maintained indefinitely.[371]

5) Interests

623. Respondent postulates that interest should be calculated as of the time of the award and that a risk-free rate, calculated in a simple manner, should be applied.[372]

### (e) Petitum

624. Respondent requests the Tribunal:

> "*to reject in its entirety the claim of Clorox Spain, declaring that all its claims are meritless, and in all events not awarding any compensation to Claimant, who shall bear all the costs of these proceedings*."[373]

## IV. THE TRIBUNAL'S ANALYSIS OF THE MERITS OF THE DISPUTE

625. The Tribunal shall first analyze the breaches of the BIT alleged by Claimant (A) and, should it find that one or more of such breaches have been established, the claims for compensation Claimant submits (B), as well as the request for cessation of the use of the business and company name "*Clorox Venezuela*" and certain trademarks (C).

## A. ALLEGED VIOLATIONS OF THE BIT

626. Claimant requests the Tribunal to declare a breach of three of Respondent's obligations under the BIT: the breach of its obligation under Article III(1) not to impair through arbitrary or discriminatory measures the management, maintenance, development, use, enjoyment, extension, sale or liquidation of Claimant's investment, and to provide full protection and security; the breach of [Respondent's] obligation under Article V not to expropriate Claimant's investment without paying prompt,

[371] Respondent's Second Summation Memorial, ¶ 135.
[372] Respondent's Second Summation Memorial, ¶ 138.
[373] Respondent's Second Summation Memorial, ¶ 139.

adequate and effective compensation; and the breach of [Respondent's] obligation under Article IV(1) to accord fair and equitable treatment to Claimant's investment.[374]

627. According to Claimant, each of these alleged violations results from the effect of:

- A price regulation regime adopted by Respondent and the application thereof that deprived Clorox Venezuela of the freedom to set prices for its own products;[375]

- A labor regulatory regime adopted by Respondent that required Clorox Venezuela to maintain a full workforce, despite operating at a significant loss as a result of Venezuela's regulatory restrictions on Clorox Venezuela's business operations;[376]

- A foreign exchange regulation regime adopted by Respondent that accelerated Clorox Venezuela's financial deterioration and contributed to further depriving Clorox Venezuela of control over its business by hindering its access to imports of necessary raw materials, and completely blocking the repatriation of investment earnings;[377] and

- Respondent's refusal to reimburse Clorox Venezuela for its VAT credits owed to Clorox Venezuela, in violation of Venezuela's own tax regulations, which deprived Clorox Venezuela of the ability to use its cash to operate and support its business.[378]

628. Respondent denies that the laws it adopted and the practices it followed had the effects and consequences on Clorox Venezuela that the latter alleges. According to Respondent, Clorox decided to abandon its operations in Venezuela for economic reasons of its own. Venezuela stresses that [Clorox] is free to resume its activities in

[374] Respondent's First Summation Memorial, ¶ 181.
[375] Claimant's First Summation Memorial, ¶¶ 64-65.
[376] Claimant's First Summation Memorial, ¶ 69.
[377] Claimant's First Summation Memorial, ¶¶ 67-68.
[378] Claimant's First Summation Memorial, ¶ 66.

the country and that it is only Clorox's decision alone that precludes it from doing so.[379]

629. The Tribunal shall examine the reality of the facts alleged and their effects on Claimant's business in Venezuela (a) before questioning whether they constituted one or more breaches of the Treaty (b).

**(a) The Alleged Facts**

630. As already indicated, Claimant asserts that the alleged violations of the Treaty arise from the price regulation regime adopted by Respondent (1), the labor regulation regime adopted by Respondent (2), the foreign exchange regulation regime adopted by Respondent (3), Respondent's alleged refusal to reimburse Clorox Venezuela for its VAT credits (4) and the seizure of Clorox Venezuela's factories and the use of the latter's trademarks (5).

1) The Price Regulation Regime

631. On July 18, 2011, the Venezuelan Government enacted the Law on Fair Costs and Prices, which entered into force on November 22, 2011.[380] Such law granted broad powers to SUNDECOP to review the cost structure of goods and services and establish the PMVP for certain goods and services.[381]

632. On November 22, 2011, SUNDECOP published Administrative Order No. 007/2011, whose Article 5 froze the price of Clorox Venezuela's products until the PMVP for those products were fixed.[382]

633. On February 27, 2012, SUNDECOP issued Administrative Order No. 53, which entered into force on April 1, 2012, setting maximum prices for Clorox Venezuela's regulated products.[383]

[379] Respondent's First Summation Memorial, ¶ 66; Respondent's Second Summation Memorial, ¶ 4.
[380] Law on Costs and Fair Prices, Decree No. 8331, published in the Official Gazette, July 18, 2011 (Exhibit **C-04**).
[381] Law on Fair Costs and Prices, Article 31 (Exhibit **C-04**).
[382] Administrative Order No. 007 of 11/22/2011, (Exhibit **C-34**).
[383] Administrative Order No. 053 of 02/27/2012 (Exhibit **C-05**)

634. On March 29, 2012, SUNDECOP issued Administrative Order No. 59, replacing Administrative Order No. 53, confirming in its entirety the maximum mandatory prices set forth in Administrative Order No. 53, which came into effect on April 1, 2012.[384]

635. On January 23, 2014, President Maduro enacted the Organic Law on Fair Prices which replaced the 2011 Law on Fair Costs and Prices and authorized the Government to fix prices of goods and services and to limit profit margins, with the objective of "*achieving the consolidation of the socialist economic order consecrated in the Nation's Plan*" and "*favoring the national production of goods and services*."[385] SUNDDE replaced SUNDECOP as the supervising agency.

636. The maximum prices set on April 1, 2012 by Administrative Order No. 53, however, remained frozen until September 4 and 10, 2014, when SUNDDE issued Administrative Orders No. 042/2014 and No. 045/2014 establishing new maximum prices.[386]

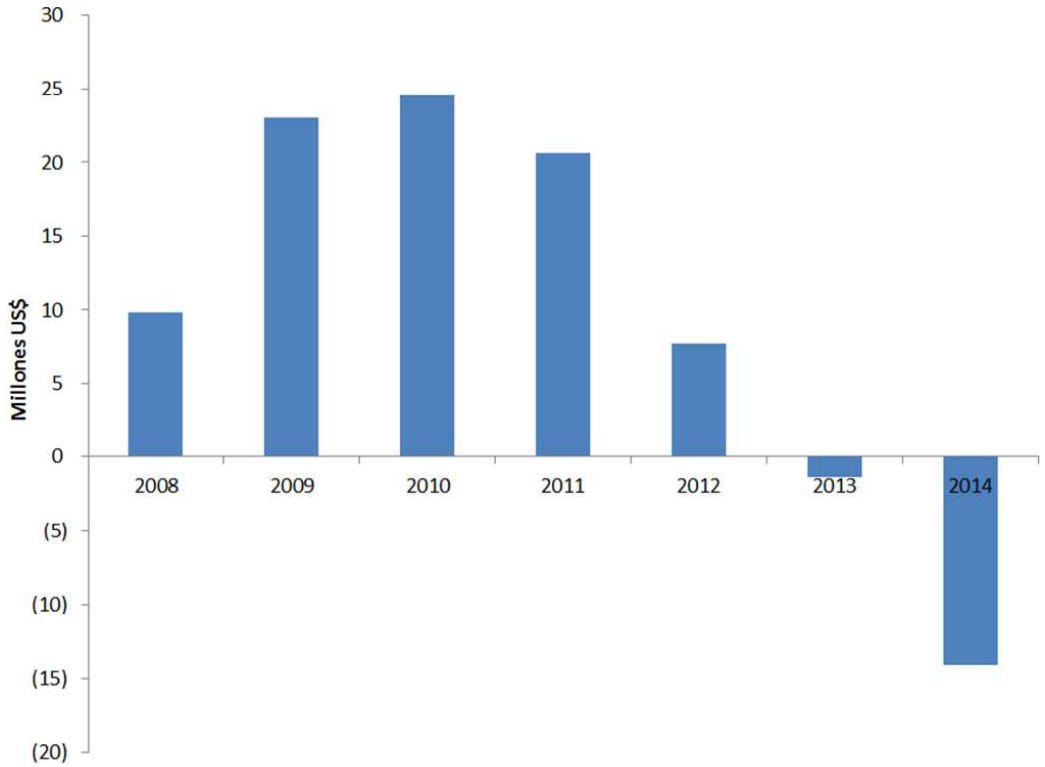
637. On September 22, 2014, Clorox Venezuela discontinued its commercial activities.[387]

638. Claimant has convincingly established that the implementation of the price control regulations destroyed Clorox Venezuela's profitability. Neither Respondent nor its economic expert, Mr. Fabián Bello,[388] contested the fact that while the prices of at least 70% of Clorox Venezuela's products[389] were frozen from November 22, 2011 to April 1, 2012 and set at a level below production costs from the latter date until at least September 2014, inflation was 165% from April 1, 2012 to September

[384] Administrative Order No. 059 of 03/29/2012 (Exhibit **C-06**)
[385] Decree with Rank, Value and Force of the Organic Law on Fair Prices, January 23, 2014, (Exhibit **C-09**), see Articles 3(1) and 3(6).
[386] Presentation of Respondent's expert, Mr. Fabián Bello, in his presentation at the Hearing, p.3.
[387] Claimant's First Summation Memorial, ¶ 44; Presentation of Mr. Fabián Bello, in his presentation at the Hearing, p. 3.
[388] Mr. Fabián Bello stated at the Hearing that he did not correct Compass Lexecon's conclusion that price controls had rendered Clorox Venezuela unviable and that he did not make any such findings, Day 3, p. 533.
[389] Compass Lexecon's First Expert Report submitted by Claimant refers to 73%, Clorox Venezuela's audited accounts refer to 70% (par 2013) and 72% (par 2014) (Exhibit **REX- 11**).

2014.[390] During the same period, the prices of raw materials, local or imported, were not regulated and rose with inflation: the consequence was that Clorox Venezuela's production costs jumped from 57% of net sales in FY 2011 to 95% in FY 2014.[391]

639. Under such circumstances, it is not surprising that Clorox Venezuela's operating profits—positive for many years—for the first time were negative in 2013 and fell to -USD 14,000,000 in 2014, as indicated in the figure below prepared by Compass Lexecon from reports prepared for the U.S. Securities and Exchange Commission (SEC).[392] Respondent claims that Clorox Venezuela's profit margin was not negative prior to 2014, however such claim runs counter to the company's audited accounts provided by its expert, Mr. Fabián Bello, which indicate an operating loss of Bs. 51,339,126 for FY 2013.[393]




**Clorox Venezuela's operating profit (FY2008 to FY2014)**

[390] Statement of Claimant's expert, Mr. Manuel Abdala, from Compass Lexecon, Day 3, p. 365. Mr. Fabián Bello, Respondent's expert confirmed at the Hearing that he used the same inflation value as Compass Lexecon, Day 3, pp. 536-537.
[391] Clorox Venezuela US GAAP Financial Statements, FY 2007-FY 2015 (Exhibit **CLEX-005**).
[392] Clorox Venezuela US GAAP Financial Statements, FY 2007-FY 2015 (Exhibit **CLEX-005**).
[393] EECC 2012 AND 2013 (Exhibit **REX-11**).

640. As explained by Claimant's expert in their first report:

> *"From an economic perspective, the imposition of price controls is a key element resulting in a reduction of the volumes that Clorox Venezuela produced and sold, particularly in FY 2014, mainly due to Clorox Venezuela being unable to absorb the higher prices of raw materials and other production costs. Clorox Venezuela's suppliers at the time (none of which were subject to price regulation) continuously raised prices of raw materials. It became increasingly difficult for Clorox Venezuela to absorb such raises when its own prices were frozen.*
>
> [...]
>
> *As shown in Figure III below, the average gross margin (defined as revenues net of costs of goods sold) of products subject to price regulation decreased from 38.0% in FY 2011 to 32% in FY 2012, 16% in FY 2013, and ultimately became negative, at -24% in FY 2014. Thus, by FY 2014, the price that Clorox Venezuela received on its regulated products was not enough to cover the direct costs of production.*"[394]

641. The Venezuelan authorities were perfectly aware of the situation as confirmed by the numerous emails sent by Clorox Venezuela to inform them of the dire situation it was facing, urging them to implement price increases that were consistent with inflation and the increase in Clorox Venezuela's production costs, and requesting hearings to be able to explain itself.[395] It was only on September 4, 2014, through Administrative Order No. 42/2014 issued by SUNDDE[396] that, after 25 months of price freezes, new maximum prices for bleach and disinfectant cleaners were set, and, on the 10th of the same month, that Administrative Order No. 45/2014 issued by SUNDDE[397] set new maximum prices for floor waxes.

[394] Compass Lexecon First Expert Report, ¶¶ 40, 43 (Exhibit **CER-1**).
[395] See *inter alia*, Letter dated February 26, 2013 to SUNDECOP (Exhibit **C-037**); Letter dated May 7, 2013 to SUNDECOP (Exhibit **C-039**); Letter dated June 7, 2013 to the Deputy Minister of Commerce (Exhibit **C-40**); Letter dated October 25, 2013 to the Deputy Minister of Industries (Exhibit **C-41**); Letter dated November 27, 2013 to the Director of the Superior Agency for the People's Defense (Exhibit **C-42**); Letter to the Deputy Minister of Industries of the People's Ministry of Industries dated December 6, 2013 (Exhibit **C-43**); Letter dated December 6, 2013 to the Deputy Minister of Industries (Exhibit **C-44**); Letter dated January 10, 2014 to the Director of the Superior Agency for the People's Defense (Exhibit **C-47**).
[396] Administrative Order No. 42/2014 issued by SUNDDE, September 4, 2014 (Exhibit **C-19**).
[397] Administrative Order No. 42/2014 issued by SUNDDE, September 4, 2014 (Exhibit **C-19**).

642. Nevertheless, as explained by Compass Lexecon,[398] and without being convincingly discredited by Respondent,[399] those new September 2014 prices gave way to weighted average increases of 52% and 26% at the producer and distributor level, compared to the maximum prices that had been in effect since April 1, 2012. Considering that, during the same period, retail inflation in Venezuela was 165%, with a 63% rate projection for 2015, Clorox Venezuela's business had already become unviable when it discontinued its activities in September 2014, despite the increase in maximum prices. In the words of Claimant's expert:

> *"As a result of the sharp decline of unitary gross margins due to price controls and the consequent reduction of volumes sold of regulated products, coupled with the Company's limited ability to reduce production costs, Clorox Venezuela's operating profit (EBIT) fell from US$ 21 million in FY 2011 to US$ -1.3 million in FY 2013 and to US$ -14.1 million in FY 2014 (See Figure IV).[49] In both FYs 2013 and 2014, the internal cash flow generation of the Company was insufficient to cover the required capital investments, working capital needs, taxes, debt repayments and a return to shareholders.* […] *We find that under this test, Clorox Venezuela would still generate a negative gross margin of -15.5% on regulated products in FY 2015.* […] *After generating operating losses for two fiscal years as a result of price controls (see Figure IV above), Clorox Venezuela faced a new maximum price list that was insufficient to allow it to generate any operating profits going forward.* […] *The combination of these factors shattered any expectation that a reasonable investor may have had of the business eventually returning to profitability*." [400]

643. Moreover, the Tribunal notes that the price regulations were applied with great rigor and unfairly. When Clorox Venezuela requested authorization in 2013 to manufacture a new product that would be outside the scope of the products indicated in Administrative Order No. 059 of March 29, 2012, SUNDECOP rejected Clorox Venezuela's proposal and insisted that the new product would also be regulated.[401]

644. The Tribunal's conclusion is that, as a result of its implementation of the price regulations, Respondent consciously and rigorously forced Clorox Venezuela to sell

[398] Compass Lexecon First Expert Report, ¶¶ 49-55 (Exhibit **CER-1**).
[399] Respondent notes that the price of some products was increased significantly: + 152.02% for Bleach 3,785, + 108.9% for Bleach 2lt, but these rates are lower than the inflation rate, and, above all, are not representative of the average increase.
[400] Compass Lexecon First Expert Report, ¶¶ 45, 51, 55, 58 (Exhibit **CER-1**).
[401] See Exhibits **C-54** and **C-55**.

at least 70% of its products at prices below its production costs, as of April 1, 2012, which generated losses that progressively rendered Clorox Venezuela's business unviable.

2) The Labor Regulations Regime

645. On May 7, 2012, Venezuela adopted the Organic Labor Law,[402] imposing new employee protection measures. For example, Article 178 of the new law limited the number of overtime hours to two per day, ten per week and 100 per year, and its Article 182 required prior authorization from the labor inspectorate. Article 173 granted employees at least two consecutive days off in any calendar week. Article 86 of the Organic Labor Law granted employees a guarantee of labor stability and prohibited dismissals without just cause, obligating the employer to reinstate any employee who had been dismissed without just cause. According to Article 2 of Presidential Decree No. 9322 of December 27, 2012, employers could not dismiss any employee without prior authorization from the labor authorities.[403]

646. The Tribunal considers that these measures are not extraordinary in nature and correspond to the level of employee protection guaranteed by many modern rights. There is, however, no doubt that implementing them increased labor costs, as highlighted in a March 2013 study.[404] Clorox Venezuela's inability to pass on this additional production cost necessarily contributed to rendering its business unviable. Even so, the Tribunal notes that the labor costs are integrated into the production costs to which Claimant refers to demonstrate that the regulated prices were insufficient,[405] which does not allow for finding in the new labor regime an independent factor of such unviability.

3) The Foreign Exchange Regulations Regime

647. When Claimant acquired Clorox Venezuela in April 2011, CADIVI was, since February 2003, the only entity responsible for authorizing the purchase of foreign

[402] Organic Law on Labor, Workers, April 30, 2012, published in the Official Gazette on May 7, 2012 (Exhibit **C-7**).
[403] Presidential Decree No. 9322 of December 27, 2012 (Exhibit **C-90**).
[404] *It is calculated that the Lott increased labor costs in 39.2% 39.2%*, EL UNIVERSAL, May 10, 2013 (Exhibit **C-89**).
[405] Compass Lexecon First Expert Report, ¶ 44 (Exhibit **CER-1**).

currency.[406] On November 29, 2013, the National Center for Foreign Trade was entrusted with supervising CADIVI.[407]

648. On February 9, 2013, the official exchange rate of the Venezuelan Bolivar increased from Bs. 4.3 per USD to Bs. 6.3 per USD, with several exceptions.[408] On March 22, 2013, the Venezuelan Government established SICAD I, in order to supplement CADIVI and offer, through an auction mechanism, foreign currencies from oil revenues intended to cover imports. The exchange rate could differ from the official rate, but could not be lower.[409] On January 23, 2014, the Venezuelan Government published Exchange Agreement No. 25, which established that the exchange rate resulting from the last SICAD auction would be applied to different transactions carried out through CADIVI. It covered, among other transactions, international investments and the payment of royalties, use and exploitation of patents, trademarks, licenses and technical services.[410]

649. On March 24, 2014, SICAD II was created. It was established that the Central Bank of Venezuela would publish the reference exchange rate, referring to the weighted average exchange rate of the operations transacted during each day. The exchange rate, however, could not be lower than the official rate.[411]

650. It is a proven fact that CADIVI significantly delayed payments of foreign currencies that had been authorized. This was acknowledged by the Venezuelan Government itself which, in May 2013, had committed itself to "*creating working tables by sectors with the companies that are more than 250 days in default and have debts of more than 3 million dollars, as soon as possible*."[412] This confirms the existence of a problem regularly reported by ASOQUIM which, in September 2013, complained about the "*lack of imported inputs caused, among other factors, by the*

[406] Decree No. 2,302 published in the Official Gazette of Venezuela on February 5, 2003 (Exhibit **C-107**).
[407] Decree No. 601, November 29, 2013 (Exhibit **C-108**).
[408] Exchange Agreement No. 14 between the Ministry of Finance and the Central Bank of Venezuela, February 8, 2013 (Exhibit **C-123**).
[409] Exchange Agreement No. 21 between the Ministry of Finance and the Central Bank of Venezuela, March 22, 2013 (Exhibit **C-10**).
[410] Exchange Agreement No. 25 between the People's Ministry of Economy, Finance and Public Banking and the Central Bank of Venezuela, January 22, 2014 (Exhibit **C-11**).
[411] Exchange Agreement No. 27 between the Ministry of Finance and the Central Bank of Venezuela, March 10, 2014 (Exhibit **C-13**).
[412] El *Poder Ejecutivo apunta a esquemas de pago para el "mediano plazo",* El Universal, May 17, 2013 (Exhibit **C-146**).

*lack of liquidation of foreign currency to pay international suppliers*."[413] ASOQUIM itself indicated in March 2014 a delay of 288 days in the approval of the payment of foreign currencies that had been authorized in 2013.[414] ASOQUIM indicated in June 2014 that the difficult access to foreign currencies decreased production[415] and a survey of August 2014 revealed that 89.3% of those consulted held this opinion.[416]

651. Under such circumstances, the assertion by Claimant that, with respect to Clorox Venezuela, payment delays by CADIVI went from 100 days in May 2012 to more than 250 days in May 2013, with debts greater than USD 3,000,000,[417] limited Clorox Venezuela's import capacity, is credible because such delays reflected the situation of the industrial sector.

652. Respondent alleges that Clorox Venezuela accessed tens of millions of dollars at preferential rates and that, a few months prior to its departure, it received almost two million in additional foreign currency.[418] Respondent relies on a September 24, 2014 press article indicating that Clorox Venezuela had received foreign currency authorizations from the foreign exchange authorities amounting to more than 21 million dollars since 2004.[419] This, however, fails to address the problem of the endemic delay in accessing foreign currencies that manifested itself very significantly as of 2013 and which limited the regularity of imports by Clorox Venezuela of the inputs necessary for its production. Respondent also refers to a letter from Clorox Venezuela dated March 13, 2014[420] in which Clorox Venezuela acknowledges having received authorization for the liquidation of pending foreign currencies, but which does not state the term for executing such authorizations.

653. Moreover, the supplementary SICAD I system did not allow for accessing foreign currencies on a regular basis either. The Tribunal notes the random nature of the

[413] *El diálogo es la clave para solventar la situación de nuestro sector*, 450 ASOQUIM NEWSLETTER (Exhibit **C-116**).
[414] *La crisis de nuestro sector afectará a los consumidores*, 455 CHEMISTRY TODAY (Exhibit **C-115**).
[415] *Resultados de la Encuesta de Coyuntura III Trimestre 2014*, 458 CHEMISTRY TODAY (Exhibit **C-120**).
[416] *Producción y ventas de sectores químico y petroquímico continúan en baja*, 460 CHEMICAL TODAY (Exhibit **C-121**).
[417] Exhibits **C-144** and **C-145.**
[418] Respondent's Second Summation Memorial, ¶ 28.
[419] Correo del Orinoco, September 24, 2014 (Exhibit **R-07**).
[420] Respondent's Second Summation Memorial, ¶ 28, with reference to Exhibit **C-60**.

auctions that were not organized systematically, as illustrated by the statement of the Minister of Finance in May 2013 in which he did not specify at the time whether the auctions would be repeated,[421] and by the fact that participating in the auctions did not guarantee access to foreign currencies.[422]

654. As for SICAD II, it is possible that this system would have improved the situation, but it seems that its implementation encountered practical difficulties given that on July 23, 2014, four months after its creation, new conditions for using it were published.[423] Be that as it may, SICAD II came at a time when Clorox Venezuela's economic situation was very precarious.

655. The Tribunal's conclusion is that the devaluation of the Bolivar in February 2013, the shortage of foreign currencies, and the implementation of foreign exchange regulations limited Clorox Venezuela's ability to import the necessary inputs for the production of its products.

4) VAT Tax Credits

656. According to Article 11 of the Law Establishing Value Added Tax of February 26, 2007[424] and Administrative Order SNAT/2013/0030 (Articles 9 and 10),[425] if the withheld VAT declared by a taxpayer in a given month is not fully offset against the tax due in that month or within the following three consecutive months, the taxpayer has the right to recover the excess VAT withholdings from SENIAT. SENIAT must issue a decision on a recovery claim within 30 days.

657. Clorox Venezuela requested for the first time the recovery of its VAT credits on October 20, 2011, for the period from November 2006 to June 2011, in the amount of Bs. 21,303,755.24. It subsequently filed between March 20, 2013 and July 9, 2014

[421] El *Poder Ejecutivo apunta a esquemas de pago para el "mediano plazo",* El Universal, May 17, 2013 (Exhibit **C-146**).
[422] See Purchase Order filed on November 27, 2013 with the Central Bank of Venezuela, whereby Clorox Venezuela unsuccessfully submitted a bid for Auction No. 10-2013 (Exhibit **C- 127**); Purchase Order filed on December 5, 2013 with the Central Bank of Venezuela, whereby Clorox Venezuela unsuccessfully submitted a bid for Auction No. 11-2013 (Exhibit **C- 128**).
[423] Resolution of the Central Bank of Venezuela, July 23, 2014 (Exhibit **C-132**).
[424] Law that Establishes Value Added Tax, published in Official Gazette 38.632, February 26, 2007 (Exhibit **CLEX-37**).
[425] Administrative Order SNAT/2013/0030.

five recovery claims.[426] On June 4, 2014, the SENIAT recognized that Clorox Venezuela had a total tax credit of Bs. 92. 476,274,274.90.[427]

658. Although it denies in its Rejoinder that it did not respond to Clorox Venezuela's various requests,[428] Respondent submits no evidence in this regard other than the Final Result Record, dated June 4, 2014.[429] Moreover, each recovery claim filed by Clorox Venezuela makes reference to the preceding requests for recovery with no mention of any response received from SENIAT.[430] In any event, the existence as of June 4, 2014 of a tax credit recognized by SENIAT covering all the claims submitted by Clorox Venezuela since October 20, 2011 confirms that no decision was issued regarding those claims within the 30-day period provided for in Article 10 of Administrative Order SNAT/2013/0030.[431]

659. Respondent underscores that the tax administration did not incur an unreasonable delay because Clorox Venezuela filed its first recovery claim for tax credits in 2011, for a period consisting of almost six years, and that verifying thousands of data requires a substantial amount of time. Respondent adds that the taxpayer's balance is not blocked when the request or verification is made because the taxpayer continues to perform its usual economic activity, which determines that its tax credit may eventually vary and thus complicates the verification.[432] The Tribunal does not doubt that the delay by Clorox Venezuela in requesting for the first time the VAT recoveries justifies [SENIAT's] inability of respecting the 30-day term of Article 10 of Administrative Order SNAT/2013/0030. Notwithstanding the foregoing, such delay cannot justify the silence on the part of the tax administration or a delay of more than two years. As for the permanent evolution of the taxpayers' tax credits, these cannot justify the delays in meeting subsequent requests because such changes are a general

[426] Recovery Claim filed by Clorox Venezuela with SENIAT, October 20, 2011 (Exhibit **C-100**); Recovery Claim filed by Clorox Venezuela with SENIAT, March 20, 2013 (Exhibit **C-102**); Recovery Claim filed by Clorox Venezuela with SENIAT, December 4, 2013 (Exhibit **C-103**); Recovery Claim filed by Clorox Venezuela with SENIAT, October 4, 2013 (Exhibit **C-104**); Recovery Claim filed by Clorox Venezuela with SENIAT, February 14, 2014 (Exhibit **C-105**); Recovery Claim filed by Clorox Venezuela with SENIAT, July 9, 2014 (Exhibit **C-106**).
[427] Result Record, dated June 4, 2014 (Exhibit **R-138**).
[428] Respondent's Rejoinder, ¶ 73.
[429] Final Result Record (Exhibit **R-138**).
[430] *See* the last one dated July 9, 2014 (Exhibit **C-106**).
[431] Administrative Order SNAT/2013/0030.
[432] Respondent's First Summation Memorial, ¶ 69.

fact that was not unknown when the 30-day term of Article 10 of Administrative Order SNAT/2013/0030 was set.

660. The Venezuelan Government had been alerted by Clorox Venezuela as to this situation. In a letter dated December 20, 2013, Clorox indicated to the Minister for the People's Power for Industry that the "*Issuance of certificates for Bs. 75MM arising from withheld VAT withholdings was, inter alia, one of the decisions necessary for Clorox Venezuela to achieve profit margins*."[433]

661. The Tribunal's conclusion is that it is established that Respondent, for more than two years, did not allow Clorox Venezuela to recover VAT credits that were indisputably due, as SENIAT acknowledged on June 4, 2014, aggravating Clorox Venezuela's precarious economic situation and affecting the viability of its business.

5) The Alleged Takeover of Clorox Venezuela

662. On September 22, 2014, The Clorox Company announced that Clorox Venezuela was discontinuing its operations with immediate effect and that it was seeking to sell its assets.[434] On September 25, 2014, the Minister of Labor resolved by way of administrative resolution No. 8886/2014 (i) to immediately occupy Clorox Venezuela, its production facilities and offices, and (ii) to constitute a Special Administration Board composed of two representatives of the workers, one representative of the Labor Entity, one representative of the Ministry of the People's Power for Industries, one representative of the Ministry of the People's Power for Commerce, one representative of SUNDDE, and one representative of the Ministry of the People's Power for the Social Process of Labor, for a term of one year, which could be extended. The mission of the Special Administration Board was to control, manage, restart and operate Clorox Venezuela's business.[435]

[433] Letter from Clorox Venezuela to the Minister for the People's Power for Industries dated December 2à, 2013 (Exhibit **C-46**).
[434] *Clorox Announces Exit from Venezuela and Confirms Forecasts for Sales and EPS from Continuing Operations*, September 22, 2014 (Exhibit **C-20**).
[435] Joint Resolution of the Ministry of People's Power for the Social Process of Labor (DM/No. 8936) and the Ministry of Industries (DM/No. 074) dated October 29, 2014, with reference to Resolution No. 8886/2014 issued by the Minister of People's Power for the Social Process of Labor dated September 25, 2014 (Exhibit **C-24**).

663. On November 5, 2014, the Venezuelan Government announced the reactivation of a Clorox Venezuela plant with an investment of Bs. 261,000,000, namely, USD 41,428,571 million at the official exchange rate of Bs. 6.3 per USD.[436]

664. As Respondent explains,[437] these decisions to occupy and reactivate Clorox Venezuela's production units were taken in application of Article 149 of the Organic Labor Law of May 7, 2012,[438] which authorizes decisions of occupation in the event of an illegal closure and that are extended every year.[439]

665. The Tribunal's conclusion is that, since September 25, 2014, in having occupied and reactivated Clorox Venezuela's production units, Respondent was exercising full control over Claimant's investment in Venezuela, and doing so independently of the potential legality of this takeover under Venezuelan or international law.

### (b) The Alleged Violations of the Treaty

666. Claimant explains that it was the cumulative impact of price regulations, labor regulations, foreign exchange regulations, and Respondent's decision to deny Clorox Venezuela's legitimate claim for the recovery of VAT credits that rendered Clorox Venezuela an unsustainable operation.[440] The consequence of those measures was, according to Claimant, "*an indirect, creeping expropriation of Clorox Venezuela between late 2011 and September 2014 by impeding Clorox Venezuela's ability to manage its business and destroying the company's value*."[441]

667. Claimant also explains that:

> *"Under the Treaty, interpreted in accordance with international law, Claimant is entitled to full compensation for the losses that it has suffered as a direct result of Respondent's measures. In other words, Claimant is entitled to a remedy that will "wipe out" the consequences of Respondent's illegal acts and omissions. The same standard applies*

[436] *Reactivada empresa CLOROX por trabajadores y Gobierno Bolivariano*, DIARIO OJO PELAO, November 6, 2014 (Exhibit, **C-27**).
[437] Respondent's Counter-Memorial, ¶ 135.
[438] Organic Law on Labor, Workers, April 30, 2012, published in the Official Gazette on May 7, 2012 (Exhibit **C-7**).
[439] Respondent's Second Summation Memorial, ¶ 114; see also Exhibit **R-139**.
[440] Claimant's First Summation Memorial, ¶ 43.
[441] Claimant's First Summation Memorial, ¶ 109.

> *whether the Tribunal finds that Venezuela expropriated Claimant's investment, breached the FET or full protection and security standard, or impaired Claimant's investment through arbitrary measures*."[442]

668. Nevertheless, Claimant's arguments and its experts' calculations as to the requested compensation only refer to the hypothesis that the measures implemented by Respondent resulted in an expropriation.[443] The expert report submitted by Respondent and its expert, Mr. Fabián Bello, maintain the same hypothesis.[444] In particular, Respondent notes that compensation for the violation of other Treaty provisions could never exceed the amount of compensation provided for in the Treaty in the case of an expropriation,[445] since the measures challenged by Claimant only partially affected Clorox, but did not affect its ability to generate new products, nor other non-regulated products in its portfolio, nor the control or ownership of the factories in Venezuela.[446]

669. The Tribunal, therefore, will first rule on Claimant's claim of expropriation (1) before examining, if necessary, the other claims of Respondent's violation of the Treaty (2).

1) <u>The Alleged Expropriation</u>

670. Article V(1) of the Treaty provides:

> *"Investments made in the territory of one Contracting Party by investors of the other Contracting Party shall not be subject to nationalization, expropriation or any other measure of a similar type or having similar effects except when such a measure is taken exclusively for reasons of the public interest, in accordance with the law and in a non-discriminatory manner, and is accompanied by payment to the investor or his assignee of prompt, appropriate and effective compensation*." [447]

671. According to Claimant, Respondent breached the Treaty by indirectly expropriating its investment without compensation by depriving Clorox Venezuela of the ability to exercise control over its day-to-day operations and destroying its value;

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[442] Claimant's First Summation Memorial, ¶ 131.
[443] See *supra*, ¶¶ 449-452; Compass Lexecon First Expert Report, ¶171, note no. 78; ¶ 74, note no. 80 (Exhibit **CER-1**); Compass Lexecon Second Expert Report, ¶¶ 16-17 (Exhibit **CER-2**).
[444] See *supra*, ¶¶ 604-606; First Expert Report of Mr. Fabián Bello, ¶ 46.
[445] Reply Memorial on Jurisdiction, ¶ 437.
[446] Respondent's First Summation Memorial, ¶ 167.
[447] Spain-Venezuela BIT, Article V(1).

and directly by taking control of Clorox Venezuela's factories and using an altered version of its trademark.[448]

672. Respondent denies that there has been an indirect expropriation. It stresses that Claimant failed to prove that each of the four measures it alleges (price controls, labor regulations, foreign exchange regulations, and implementation of VAT recoveries), independently or cumulatively, constitute an expropriation.[449] Respondent further adds that Claimant has to demonstrate that there was a coordinated action by the government to achieve that objective.[450] On the contrary, Respondent argues that Venezuela demonstrated unequivocal signs of willingness to cooperate with Claimant.[451] Respondent also emphasizes that the price control, labor regime and exchange control have been in place since before Clorox Spain made its investment in Venezuela.[452] As to the VAT refund, Respondent considers that the delay is attributable to Clorox Venezuela for having filed its refund request five years after the right to such refunds had arisen.[453]

673. Respondent points out that not every impairment of the right to property constitutes a substantial deprivation and that it is recognized that the State has considerable leeway to enact general regulatory measures, even if this has a negative impact on business.[454]

674. In sum, Respondent adds that:

> *"Nor does Claimant admit that a direct expropriation has taken place in this case. It is undisputed that there has been no forcible transfer of title to Clorox de Venezuela's property. Claimant does not deny that it continues to own the company's shares. It is puzzling that Clorox posits a direct expropriation that is not only subsequent to the alleged indirect expropriation measures, but is also not a direct expropriation involving the transfer of property rights*." [455]

[448] Claimant's First Summation Memorial, ¶¶ 105-121.
[449] Respondent's First Summation Memorial, ¶ 131.
[450] Reply Memorial on Jurisdiction, ¶ 394.
[451] Respondent's First Summation Memorial, ¶ 128.
[452] Respondent's First Summation Memorial, ¶¶ 132-134.
[453] Respondent's First Summation Memorial, ¶ 135.
[454] Reply Memorial on Jurisdiction, ¶ 380; Respondent's Second Summation Memorial, ¶ 106.
[455] Respondent's Second Summation Memorial, ¶ 113.

675. Respondent also argues that it has not confiscated the property of Claimant's investment, but rather, in application of its labor legislation, it gave continuity to the company through a precautionary measure requested by the workers of the plants themselves. Respondent explains that the occupation of the plants derived from a specific legal provision of the Organic Labor Law, which is temporary and not definitive, as evidenced by the annual extensions of the occupation measure that the Republic annually carries out. [456]

676. In light of the Parties' explanations, the Tribunal shall rule on the claim of indirect expropriation (i), before considering the claim of direct expropriation (ii).

*(i) Alleged Indirect Expropriation*

677. It is undisputed between the Parties that Clorox Venezuela lost control of its business.[457] The Parties, however, disagree as to the cause of this situation: for Claimant, it is the consequence of Respondent's actions and omissions;[458] for Respondent, it is because Clorox Venezuela voluntarily and unlawfully discontinued production.[459]

678. The Tribunal has established the following facts:

- By implementing the pricing regulations, Respondent knowingly and rigorously forced Clorox Venezuela to sell at least 70% of its products at prices below its production costs, starting April 1, 2012, which generated losses that eventually rendered Clorox Venezuela's business unviable.[460]

- The Organic Labor Law of May 7, 2012 increased labor costs, but this does not allow for establishing the new labor regime as an independent factor for the unviability of Clorox Venezuela's business. [461]

- The devaluation of the Bolivar on February 9, 2013, the shortage of

[456] Respondent's Second Summation Memorial, ¶ 114.
[457] Claimant's First Summation Memorial, ¶ 105; Respondent's Counter-Memorial, ¶ 135.
[458] Claimant's First Summation Memorial, ¶ 109.
[459] Respondent's Counter-Memorial, ¶ 135.
[460] See *supra*, ¶ 644.
[461] See *supra*, ¶ 646.

foreign currency, and the implementation of the exchange rate regulations limited Clorox Venezuela's ability to import the necessary inputs for the production of its products, which necessarily compounded the unviability of its business as a result of the implementation of the price control regime.[462]

- Respondent, for more than two years, did not allow Clorox Venezuela to recover VAT credits that were indisputably due, as acknowledged by SENIAT on June 4, 2014, during a time in which price regulations rendered Clorox Venezuela's business unviable, compounding such unviability.[463]

679. In light of these facts, the Tribunal concludes that Claimant suffered a progressive loss of control and loss of value of its investment that eventually culminated in a near total loss of the value of its investment, at which point the indirect expropriation materialized, as will be explained below.

680. The Parties agree that the definition of expropriation requires a substantial deprivation of the use of the investment.[464] As stated by Respondent: "*Tribunals generally recognize that a substantial deprivation of the use of the investment is necessary for a claim of expropriation under a BIT to succeed*."[465]

681. Expropriation may be direct or indirect. It is direct where there is a State measure that deliberately deprives the investor of its rights over the investment.[466] It is indirect in the case of measures that interfere with the use of the property, with the effect of totally or significantly depriving the investor of the use or reasonably expected profits of its investment, even if the expropriation does not necessarily take place for the

[462] See *supra*, ¶ 655.
[463] See *supra*, ¶ 661.
[464] Statement of Claim, ¶¶ 155-157; Counter-Memorial, ¶ 142.
[465] Counter-Memorial, ¶ 136.
[466] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. (AF)/97/1, Award of August 30, 2000, ¶ 103 (referring to an "*open, deliberate and acknowledged takings of property, such as outright seizure or formal or compulsory transfer of title in favor of the host State*" (Exhibit **CLA-68**).

State's benefit.[467] Indirect expropriation was perfectly described in the *Starrett Housing* case:[468]

> *"[I]t is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner*."

682. An indirect expropriation can be creeping expropriation. Creeping expropriation has been defined as:

> "*a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property*." [469]

683. It is common ground between the Parties that Claimant continues to own 100% of the shares in Clorox Venezuela.[470] Nevertheless, the measures adopted by the Venezuelan Government and, in particular, the implementation thereof, progressively reduced, as of April 1, 2011, Clorox Venezuela's autonomy in the day-to-day management of its business, to the point of substantially depriving Claimant of the use of its investment and of the profits it could legitimately expect. Certainly, as Claimant's expert stated in the excerpt cited in paragraph 642 above and elsewhere,[471] by that time (September 4, 2014) the business had already become "*unviable*", and any reasonable expectation that the business would ever be viable again had been destroyed. On September 4, 2014, after experiencing substantial operating losses in FY 2013 and FY 2014, Claimant learned that it would continue to experience losses going forward. At this point of no return, a substantial deprivation of the value of Claimant's investment materialized. The Tribunal cannot but conclude that, by that

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[467] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. (AF)/97/1, Award of August 30, 2000, ¶ 103 (referring to "*incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State*") (Exhibit **CLA-68**).
[468] *Starrett Housing Corp. v. Islamic Republic of Iran*, 4 Iran-United States Claims Tribunal 122, 23 I.L.M. 1090, 1115-18 (1984) (Exhibit **CLA-37**).
[469] *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003 (Exhibit **CLA-58**).
[470] Counter-Memorial, ¶ 135; Claimant's Reply Memorial, ¶ 105.
[471] Compass Lexecon First Expert Report, ¶¶ 58 (Exhibit **CER-1**).

time, Claimant's investment had almost completely lost its value as a productive asset. Any underlying value that existed at that time was merely marginal. These facts found by the Tribunal establish that Claimant's investment in Venezuela was subject to an indirect creeping expropriation.

684. Respondent objects, maintaining that Claimant failed to demonstrate that "*each of the four measures that* [Claimant] *argues independently constitute an expropriation*".[472] Respondent rests on the Award of the *EDF (Services) Limited* Tribunal, which stated:

> *"According to Claimant, the present instance is one of creeping expropriation, the adverse measures having been taken in a series of steps 'to be considered not in isolation but with their aggregate effect.' The measures that Claimant has in mind, the aggregate effect of which would have brought about the creeping expropriation of its investment, have been individually examined by the Tribunal, which has reached for each of them a conclusion adverse to Claimant's claim. The only possible takings in the instant case were the sanctions of the Financial Guard, for which there was a judicial recourse, which was a non-compensable police power measure. In the Tribunal's view, the measures in question, also taken in their aggregate effect, do not constitute a creeping expropriation, in addition to which there was no evidence of a coordinated pattern adopted by the State for their implementation*." [473]

685. Contrary to Respondent's assertion, the *EDF (Services) Limited* Award does not require, in order for there to be a "creeping expropriation", that each of the measures that contributed to the expropriation of an investment be an expropriatory measure. Such a proposition would be meaningless because it would be sufficient to establish that one measure was expropriatory to establish expropriation and ignore the others. A careful reading of the *EDF (Services) Limited* Award reveals that, after having rejected claims of Treaty provision violations other than the expropriation claim, the Tribunal underscores those decisions that applied to each of the measures invoked, this time jointly, by the claimant to allege a creeping expropriation, before also rejecting this new claim without such decision being conditioned by the preceding ones.

[472] Respondent's Rejoinder Memorial, ¶ 426.
[473] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award of October 8, 2009, ¶ 308 (Exhibit **RLA-138**).

686. Notwithstanding the foregoing, it is well established in international arbitral case law that a creeping expropriation may result from a series of measures that, considered individually, are not expropriatory. The Tribunal shares the view of the *Siemens v. Argentina* Tribunal when it stated:

> *"By definition, creeping expropriation refers to a process, to steps that eventually have the effect of an expropriation. If the process stops before it reaches that point, then expropriation would not occur. This does not necessarily mean that no adverse effects would have occurred. Obviously, each step must have an adverse effect but by itself may not be significant or considered an illegal act. The last step in a creeping expropriation that tilts the balance is similar to the straw that breaks the camel's back. The preceding straws may not have had a perceptible effect but are part of the process that led to the break*".[474]

687. In this particular case, the Tribunal considers that SUNDECOP's Administrative Orders No. 53 and No. 59, respectively of February 27, 2012[475] and March 29, 2012,[476] by way of which maximum prices were set for at least 70% of Clorox Venezuela's products without concern for Clorox Venezuela's production costs, inevitably led over time to the expropriation of Clorox Venezuela which, without the ability to adapt its prices to its production costs, saw its profits progressively reduced. The non-viability of Clorox Venezuela's business for an indefinite period of time was consummated through Administrative Order No. 42/2014 of September 4, 2014 issued by SUNDDE,[477] which set new maximum prices that did not allow for Clorox Venezuela to cover its costs.

688. The other measures and SENIAT's failure to allow Clorox Venezuela to recover VAT credits that were indisputably due to it, compounded Clorox Venezuela's economic situation and accelerated the expropriation. The ability of passing on in its prices the consequences of the entry into force of the Organic Labor Law of May 7, 2012 on its costs, in addition to a fluid access to the foreign currency necessary to

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[474] *Siemens A.G., v. The Argentine Republic*, ICSID Case No. ARB/02/08, Award of February 6, 2007, ¶ 263 (Exhibit **CLA-1**). *See also*, *Compañía del Desarrollo de Santa Elena S.A. v. The Republic of Costa Rica,* ICSID Case No. Arb/96/1, Award of February 17, 2000 (*"It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title.*") (Exhibit **RLA-65**).
[475] Administrative Order No. 053 of 02/27/2012 (Exhibit **C-5**).
[476] Administrative Order No. 059 of 03/29/2012 (Exhibit **C-6**).
[477] Administrative Order No. 42/2014 issued by SUNDDE, September 4, 2014 (Exhibit **C-19**).

acquire indispensable inputs for production, would have rendered it possible to postpone the moment in which the accumulation of losses forced Clorox Venezuela to close its factories. But, even without these measures which, *per se*, were not expropriatory, expropriation was inevitable in the medium term without a significant relaxation of price controls.

689. The very strict application of price controls, extended to products that because they were new could not be considered basic necessities, and the weighted average increases of 52% and 26% of regulated prices at the producer and distributor level in September 2014, when retail inflation in Venezuela was 165%, with a projected rate of 63% for 2015, did not allow for foreseeing such a relaxation.[478]

690. Respondent also rests on the *EDF (Services) Limited* Tribunal's Award to argue that it was incumbent upon Claimant to "*demonstrate that there was coordination of management to achieve that objective* [the expropriation]."[479] This observation, however, is inconsistent with the precise terms of the Treaty which, in its Article V(I) refers to "*...expropriations, or any other measure of a similar type or having similar effects...* ." The Treaty does not provide for the State's intention to expropriate, but rather the effects of the State's measures, which means that the existence or otherwise of a coordination on the part of the government to achieve that objective is irrelevant.

691. Arbitral case law confirms that the intent of the State is irrelevant in deciding whether or not there was an expropriation. As indicated by the *Tippetts* Tribunal: "*The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact*."[480] This is merely the application to the subject of expropriation of the general principle referred to in the commentary to Article 2 of

[478] See *supra*, ¶¶ 642-643.
[479] Respondent's Rejoinder Memorial, ¶ 426.
[480] *Tippetts, Abbett, McCarthy, McCarthy, Stratton and TAMS-AFFA Consulting Engineers of Iran v. Islamic Republic of Iran*, 6 Iran-United States Claims Tribunal Rep. 219, 225 (1984), p. 5 (Exhibit **CLA-38**). See also *Phillips Petroleum Co. v. Iran*, Case No. 39, Award No. 425-9-2, June 29, 1989, 2 Iran-United States Claims Tribunal Rep, ¶ 98 (highlighting "a *government's liability to compensate for expropriation of alien property does not depend on proof that the expropriation was intentional*.") (Exhibit **CLA-46**); *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, September 13, 2001 (Exhibit **CLA-11**); *Metalclad Corporation v. The United Mexican States*, ICSID Case No. (AF)/97/1, Award of August 30, 2000, ¶ 111 (Exhibit **CLA-68**).

the Draft Articles of the International Law Commission when it states that "*...it is only the act of a State that matters, independently of any intention*."[481]

692. Another argument of Respondent to deny the existence of an expropriation is that Claimant voluntarily and illegally abandoned the company, which justified Respondent's temporary intervention.[482] The Tribunal considers this argument irrelevant. Respondent's occupation and reactivation of Clorox Venezuela's production units is a consequence of the indirect expropriation, not a constituent element thereof. Clorox Venezuela's business had already been expropriated prior.

693. According to Claimant, it was the new price caps, set by Administrative Order No. 42/2014 issued by SUNDDE on September 4, 2014[483] that materialized the indirect expropriation. In light of Article V(2) of the Treaty, which indicates that compensation for expropriation must be equivalent to the value of the investment immediately before the expropriatory measures were taken, Respondent and its expert, Mr. Fabián Bello, maintain November 22, 2011 as the valuation date.[484] Notwithstanding the necessary identification of the correct valuation date, which the Tribunal will determine when examining Claimant's claim for compensation, no one purports that the indirect expropriation took place after Clorox Venezuela decided to close its business. The expropriation had materialized prior and the legality of such a decision and its implementation modalities has no impact on the existence of the expropriation. This is an irrelevant debate for this Tribunal as is whether or not the occupation and reactivation by the authorities of Clorox Venezuela's factories were of a temporary nature. When they occurred, the expropriation was already consummated.

694. The fact that price, exchange and labor regulations were already in place when Claimant made its investment is also irrelevant.[485] What matters are the changes that impacted those regulations afterwards.

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[481] International Law Commission, Commentary to Article 2, ¶ 10 (Exhibit **CLA-18**). The Tribunal wishes to emphasize that it is not confusing intent, which is not necessary for an expropriation to exist, and motivation, which presupposes intent, and may allow for a distinction between a legitimate expropriation and an illegitimate expropriation.
[482] Respondent's Rejoinder Memorial, ¶ 417.
[483] Administrative Order No. 42/2014 issued by SUNDDE, September 4, 2014 (Exhibit **C-19**).
[484] Respondent's Counter-Memorial, ¶ 276; First Report of Mr. Fabián Bello, p. 9.
[485] Respondent's Counter-Memorial, ¶¶ 427-433.

695. As Claimant notes without any contrary evidence having been put forward by Respondent, prior to the 2011 regulatory change, price controls were part of the general consumer protection regulations and set maximum prices exclusively for basic necessities, impacting only a minimal percentage of Clorox Venezuela's total sales (0.4% in 2003).[486] The 2011 measures impacted at least 70% of Clorox Venezuela's production,[487] having very different economic consequences. Similarly, while an exchange control system was already in place when Claimant made its investment, it did not have the consequences on the import of inputs that Clorox Venezuela experienced as of the Bolivar devaluation of February 9, 2013: the delay in payments went from 100 days in May 2012 to 250 days in May 2013.[488] As for labor legislation, although it is not disputed that these laws have existed in Venezuela since July 23, 1928, the explanatory memorandum of the Organic Labor Law itself of May 7, 2012 emphasizes that it was adopted in compliance with transitory provision 4(3) of the Constitution of the Bolivarian Republic of Venezuela. Said provision mandates that: "*the labor legislation establishes provisions that regulate the labor legislation and fosters the progressive decrease [in work hours]*."[489] Whether or not such decrease in hours worked is justified or not, it entails a change in labor law that cannot fail to impact production costs.

696. Finally, the Tribunal has no doubt that Respondent,[490] like any sovereign State, has the legitimate right to regulate its economy. Nonetheless, the Tribunal shares the view of the *Tecmed* tribunal which, after emphasizing that a State may cause economic damage without obligation to compensate within its sovereign police powers—which includes regulations of an economic nature—explained that for this to be the case, there must be a relationship of proportionality between the burden imposed on the foreign investor and what the measures seek to achieve.[491]

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[486] Claimant's Second Summation Memorial, ¶ 8.
[487] Compass Lexecon's First Expert Report submitted by Claimant refers to 73%, Clorox Venezuela's audited accounts refer to 70% (par 2013) and 72% (par 2014) (Exhibit **REX- 11**).
[488] *El Poder Ejecutivo apunta a esquemas de pago para el "mediano plazo",* El Universal, May 17, 2013 (Exhibit **C-146**).
[489] Organic Labor and Workers Law, April 30, 2012, published in the Official Gazette on May 7, 2012, Explanatory Memorandum (Exhibit **C-7**).
[490] Reply Memorial on Jurisdiction, ¶¶ 317-318.
[491] *Técnicas Medioambientales Tecmed S.A. v. United Mexican States,* ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, ¶ 119 ("*The principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as*

697. In this case, this relationship of proportionality did not exist. The Tribunal recognizes the sovereign right of a State to endow itself with economic law with objectives such as those described in the explanatory memorandum of the Law on Fair Prices:

> *"The flagrant abuses of monopolistic power in many sectors of the economy have caused the base of capital accumulation to materialize in the high profit margins, leading to the constant raising of prices for no other reason than the direct and indirect exploitation of the people. [...]*
>
> *Monopolistic or monopsonistic power and cartelization have become the policy applied by businessmen to dominate the market, as they set prices and commercial conditions, which do not correspond to international benchmarks, nor do they obey a justifiable cost structure. [...]*
>
> *Therefore, a Law on Fair Costs and Prices is necessary to support the actions of the National Executive in the implementation of policies to democratize access to goods and services for all Venezuelans, in an equitable manner... .*"

698. However, the required proportionality between the burden imposed on the foreign investor and the objectives of a law that seeks to impose that prices obey a justifiable cost structure is not respected when prices are set at a level lower than the production costs.[492]

699. For all the reasons that have been set out above, the Tribunal concludes that Claimant's investment was progressively expropriated by the cumulative impact of Respondent's implementation of the Law on Fair Costs and Prices, which entered into force on November 22, 2011, of the exchange control regulations as of the devaluation of the Bolivar on February 9, 2013, and of SENIAT's failure to allow Clorox Venezuela to recover VAT credits. As mentioned above, such indirect expropriation was consummated on September 4, 2014 through the issuance of Administrative Order No. 42/2014.

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*administrator without entitling them to any compensation whatsoever is undisputable*."), ¶ 122 ("*There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.*") (Exhibits **CLA-04**, **RLA 072**).

[492] See *supra,* ¶ 638.

700. Accordingly, the Tribunal finds that Respondent breached Article V(1) of the Treaty by indirectly expropriating Respondent's [sic] investment.

*(ii) The Alleged Direct Expropriation*

701. Claimant alleges that the indirect expropriation left it with nothing but its physical assets and that these were directly expropriated by Respondent through the occupation of its factories on September 25, 2014 and the reactivation thereof on November 5, 2014.[493] Respondent objects, maintaining that it has not confiscated the property of Claimant's investment; rather by application of its labor law it is giving continuity to the company through a temporary measure that is renewable on an annual basis and that Clorox Venezuela can resume its activities again.[494]

702. It is common ground between the Parties that Claimant continues to own 100% of the shares in Clorox Venezuela.[495] These securities, however, comprise shares of a company, Clorox Venezuela S.A., which is confused with Claimant's investment in Venezuela, which investment has been indirectly expropriated by Respondent before the measures that would constitute the alleged direct expropriation were taken. As mentioned above, by that time Claimant had already suffered a substantial deprivation of the value of its investment, and any underlying value that existed was only marginal. The same investment cannot be expropriated twice, once indirectly and once directly.

703. The Tribunal considers that there is a contradiction in Claimant's position that seeks to make a distinction between the business and the company's physical assets. The physical assets are part of the investment as indispensable elements of its profitability and the indirect expropriation of the investment necessarily extends thereto. In fact, in its request for compensation, Claimant makes no distinction between the economic consequences of the indirect expropriation and the alleged direct expropriation by setting the compensation valuation date as of September 4, 2014, *i.e.*, days before Respondent's decision to occupy Clorox Venezuela's factories.

[493] Statement of Claim, ¶¶ 181-182.
[494] Respondent's First Summation Memorial, ¶¶ 120, 127.
[495] Counter-Memorial, ¶ 135; Claimant's Reply Memorial, ¶ 105.

704. The occupation and reactivation of Clorox Venezuela's plants did not constitute a direct expropriation. They were decisions taken by the Venezuelan authorities after the investor had been deprived of its investment by the effects of the indirect expropriation.

705. Therefore, the Tribunal will limit itself to declaring the indirect expropriation of Claimant's investment in Venezuela.

2) The Other Alleged Violations of the Treaty

706. In addition to requesting the Tribunal to declare that Respondent breached its obligation under Article V not to expropriate Claimant's investment without paying prompt compensation, Claimant also requests that the Tribunal declare that Respondent breached its obligation under Article III(1) not to impair by way of arbitrary or discriminatory measures the management, maintenance, development, use, enjoyment, extension, sale or liquidation of Claimant's investment and its obligation under Article IV(1) to accord fair and equitable treatment to Claimant's investment.

707. Having decided that Respondent breached Article V(1) of the Treaty by indirectly expropriating Respondent's investment, the Tribunal found a breach of the Treaty entitling Claimant to full compensation for its damages. The finding of the other Treaty breaches invoked by Claimant, based on the same measures that resulted in the indirect expropriation, did not confer additional rights upon Claimant. Accordingly, the Tribunal is not required to rule on the other Treaty breaches invoked by Claimant.

## B. COMPENSATION FOR DAMAGES

708. Claimant seeks damages of USD 184,577,364 plus interest from September 3, 2014 for damages caused by Respondent's breaches of the Treaty.[496]

[496] Reply Memorial, ¶ 212; Claimant's First Summation Memorial, ¶¶ 56-61.

709. Claimant bases the assessment of the requested compensation on the reports of its Compass Lexecon experts.[497]

710. Compass Lexecon details its calculations as follows:[498]

| Concept | Nominal US$ MM | US$ Million as of Sept. 3, 2014 |
|---|---|---|
| **Historical Lost Profits** | **17.0** | **19.1** |
| FCF FY 2012 | 2.3 | 3.0 |
| FCF FY 2013 | 2.8 | 3.3 |
| FCF FY 2014 | 10.0 | 10.9 |
| FCF July 1 - Sept. 3, 2014 | 1.9 | 1.9 |
| **But-For Equity Value** | | **143.5** |
| FCF Sept. 4, 2014 - FY 2024 | | 83.9 |
| Terminal Value | | 59.6 |
| **VAT Credit** | **17.6** | **22.0** |
| **Total Damages to Claimant** | | **184.6** |

711. In opposing Claimant's assessment of its alleged damages, Respondent relies on the reports of its expert, Mr. Fabián Bello.[499] Applying corrections to Compass Lexecon's calculations, Mr. Fabián Bello reduces, as indicated below, the total amount of compensation Claimant determined to USD 41,757,695:[500]

[497] Compass Lexecon First and Second Expert Reports (Exhibits **CER-1** and **CER-2**).
[498] Compass Lexecon First Expert Report, ¶ 10, Table 1 (Exhibit **CER-1**).
[499] First and Second Expert Report of Mr. Fabián Bello.
[500] Second Expert Report of Mr. Fabián Bello, Table 1.

| (USD) | Contrafáctico C.L. | Contrafáctico Corregido | Impacto de Corrección |
|---|---|---|---|
| **Daño Historico** | | | |
| **Flujos de Caja** | **19.122.692** | **0** | **-19.122.692** |
| **Valor Futuro** | | | |
| Flujos de Caja | 83.859.917 | **21.675.564** | -62.184.353 |
| (+) Valor Terminal | 59.614.590 | **6.210.958** | -53.403.632 |
| **Valor Empresa** | **143.474.507** | **27.886.523** | **-115.587.985** |
| **Crédito IVA** | **21.980.165** | **13.871.172** | **-8.108.993** |
| **Daño Total** | **184.577.364** | **41.757.695** | **-142.819.670** |

712. As indicated in the table in paragraph 710 *supra*, the compensation calculated by Compass Lexecon is the sum of three components:

- Historical lost profits, *i.e.*, the cash flows that would have been available to Claimant as a shareholder of Clorox Venezuela in the absence of the challenged measures (the "*but-for*" scenario), during FY2012-FY2014;

- The *but-for* equity value, *i.e.*, the value that Claimant's 100% equity stake in Clorox Venezuela would have had in the absence of the challenged measures, as of September 3, 2014, valued using the discounted cash flow (DCF) approach.[501]

- VAT credits, *i.e.* the value, as of the valuation date, that could have been realized by Claimant by using or transferring VAT-related fiscal credits between 2012 and 2014, had Venezuela timely approved Clorox Venezuela's requests.[502]

713. Thus, leaving aside the VAT credits which are a special component, Compass Lexecon distinguishes between what Claimant qualifies as *loss of profits* (the

[501] Compass Lexecon First Expert Report, ¶ 9 (Exhibit **CER-1**).
[502] Compass Lexecon First Expert Report, ¶ 9 (Exhibit **CER-1**).

historical damages)[503] prior to the date on which Claimant was deprived of its investment, set at September 4, 2014 and the value of this investment, calculated according to the DCF method.

714. Mr. Fabián Bello, as indicated in the Table *supra* in paragraph 711 has a different approach. He maintains November 22, 2011 as the valuation date,[504] the date of the entry into force of the Law on Fair Costs and Prices,[505] and, with the exception of the VAT credits, excludes any compensation other than the value of the investment. This conclusion is based on Respondent's instructions that compensation could never exceed the compensation provided for in the Treaty in the case of an expropriation.[506]

715. Article V(2) of the Treaty provides that:

> *"[t]he compensation paid in respect of the measures referred to in paragraph 1 [an expropriation] shall be equal to the real value of the investment immediately before the measure in question was taken or before it was announced or published, if such announcement or publication took place earlier... .*"

716. In light of this article of the Treaty, the opposing positions of the Parties and their experts raise two different issues. The first is determining the valuation date of the expropriated investment (a); the second, once the valuation date is determined, is deciding on whether Article V(2) of the Treaty limits Claimant's compensation to the value of the investment and to draw the consequences of this decision (b). Only thereafter can the Tribunal assess compensation (c).

### (a) The Valuation Date

717. It is undisputed that the valuation date of an investment that was indirectly expropriated is the date on which the expropriation is consummated. Respondent admits this and provides arbitral case law that establishes this.[507] Respondent indicates that "*arbitration practice in investment matters does not allow for the*

[503] Claimant's First Summation Memorial, ¶ 137.
[504] First Report of Mr. Fabián Bello, p. 9.
[505] Law on Fair Costs and Prices, Decree No. 8331, published in the Official Gazette, July 18, 2011 (Exhibit **C-04**).
[506] Respondent's First Summation Memorial, ¶ 162.
[507] Respondent's Counter-Memorial, ¶¶ 259-273.

*capricious setting of a valuation date for the company, rather, conversely, it requires that it be tied, in cases of alleged 'creeping expropriation', to the moment in which it can be established that the investment was definitively and irrevocably deprived of its commercial value, leaving no room for doubt in this regard*."[508]

718. The Tribunal agrees with Claimant and its experts that the correct date to valuate the expropriated investment is September 3, 2014, the day preceding the adoption by SUNDDE of Administrative Order No. 42/2014,[509] which, by setting new maximum prices disjointed from production costs, confirmed the irremediable nature in a measurable future of Clorox Venezuela's economic non-viability. The Tribunal refers to its findings on the date on which the indirect expropriation was consummated, as identified in paragraphs 638-642, 678, 683, 687, and 699 above.

719. By November 22, 2011, the valuation date adopted by Respondent and Mr. Fabián Bello, certain measures that cumulatively deprived Claimant of its investment had not yet been adopted. For example, Respondent had not yet set maximum prices for 73% of Clorox Venezuela's products without concern for its production costs; nor had it yet implemented its foreign exchange regulations arbitrarily. Indeed, on November 22, 2011, the expropriatory effect of the various measures that progressively rendered Clorox Venezuela an economically unviable business had not crystallized.

720. As stated by the Tribunal in *ADC Affiliate Limited, et al. v. The Republic of Hungary*, "*investment arbitration practice does not permit the capricious fixing of a date of valuation of the undertaking, but, on the contrary, requires that it be tied, in cases of alleged 'creeping expropriation', to the time at which it can be established that the investment was definitively and irrevocably deprived of its commercial value, leaving no room for doubt in this respect*."[510]

721. Finally, and notwithstanding as to whether or not it may apply to an unlawful expropriation, Article V(2) of the Treaty is a significant indication in favor of a valuation date that is "*immediately prior*" to the crystallization of the expropriation.

[508] Respondent's Counter-Memorial, ¶ 273.
[509] Administrative Order No. 42/2014 issued by SUNDDE, September 4, 2014 (Exhibit **C-19**).
[510] *ADC Affiliate Limited, et. al., v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, October 2, 2006 (Exhibit **CLA-91**).

722. Accordingly, the Tribunal maintains September 3, 2014 as the date of valuation of the value of the expropriated investment.

### (b) The Scope of Article V(2) of the Treaty and the Consequences Thereof

723. Claimant considers that Article V(2) of the Treaty applies only to lawful expropriations and not to those carried out in violation of Article V(1).[511] On the contrary, Respondent submits that Article V(1) of the Treaty also covers indirect or creeping expropriations, designated in the text by the reference to "*any other measure of a similar type or having similar effects*."[512] As such, the Tribunal considers that Claimant cannot seek compensation in excess of the compensation provided for in the Treaty in the case of an expropriation,[513] *i.e.*, the value of the company, should the Tribunal decide that it was expropriated.

724. The Tribunal notes that Article V(2) of the Treaty expressly applies to *"the measures described in paragraph 1*", *i.e.*, to lawful nationalizations or expropriations under this paragraph. While it is true that Article V(1) establishes measures "*of a similar type or having similar effects [to those of nationalizations or expropriations]*", such reference to "*[measures] having similar effects*" cannot contemplate measures that do not respect the requirements applicable to nationalizations or expropriations. As the Tribunal emphasized in *Crystallex Venezuela*, the standard of compensation contained in the expropriation article of a treaty is not the appropriate standard of compensation in cases of a breach of that article.[514]

725. The Tribunal has determined that the expropriation of Claimant's investment was unlawful.[515] Therefore, Article V(2) of the Treaty is not applicable to the calculation of Claimant's compensation.

[511] Claimant's Second Summation Memorial, ¶ 78.
[512] Reply Memorial on Jurisdiction, ¶ 437; Respondent's First Summation Memorial, ¶ 161.
[513] Reply Memorial on Jurisdiction, ¶ 437.
[514] *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 846 (Exhibit **CLA-131**).
[515] See *supra*, ¶ 700.

726. In such circumstances, the principle is that of full reparation, as follows from the *Chorzów Factory* decision which established it as an essential principle of international law:

> *"The essential principle contained in the actual notion of an illegal act-a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals-is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed*."[516]

727. The Tribunal finds that the principle of full reparation justifies that Claimant is entitled to compensation for damages caused prior to the date on which the expropriation was consummated due to the effect of the measures questioned in this arbitration and which progressively and cumulatively caused the expropriation. Indeed, if established, these damages were not caused by the expropriation because they predate it and would not be compensated by compensation equivalent to the value of the investment.

### (c) Compensation Evaluation

728. Claimant seeks damages of USD 184,577,364 million plus interest from September 3, 2014, apportioned as follows:

- Historical lost profits in the amount of USD 19,122,692, *i.e.*, cash flows that would have been available to Claimant as a shareholder of Clorox Venezuela in the absence of the challenged measures (the "*but-for*" scenario), during FY2012 - FY2014;

- The *but-for* value of Clorox Venezuela's value as of September 3, 2014, in the absence of the challenged measures, assessed at USD 143,474,507 using the discounted cash flow (DCF) approach;[517] and

- VAT credits, in the amount of USD 21,980,165.

[516] *Case Concerning Certain German Interests in Polish Upper Silesia* (*Chorzów Factory*) (Germany v. Poland), Judgment (Permanent Court of International Justice), 25 May 1926, PCIJ SERIES A, NO. 7 (1927) (Exhibit **CLA-3**).
[517] Compass Lexecon First Expert Report, ¶ 9 (Exhibit **CER-1**).

729. Respondent objects, maintaining that there is an absolute lack of a causal link between the measures challenged by Claimant and the damages claimed; even if a breach were found to have occurred, it would not give rise to compensation.[518] The Tribunal has no doubt that, under international law, compensation for breach of a treaty requires a causal link between the breach and the damages suffered by the claimant.[519]

730. However, in this case there is a very close relationship between the existence of the breach of the Treaty and the damage caused by it, because it is the harmful impact of the challenged measures on Claimant's investment that renders it possible to establish the breach. If this harmful impact is established, proof of an additional causal link is unnecessary. What is incumbent upon Claimant is proving the extent of the damages it alleges.

731. In this regard, the Tribunal agrees with the *Lemire v. Ukraine* Tribunal[520] when it refers to a reasonable security standard:

> "*it is a commonly accepted standard for awarding forward looking compensation that damages must not be speculative or uncertain, but proved with reasonable certainty; the level of certainty is unlikely, however, to be the same with respect to the conclusion that damages have been caused, and the precise quantification of such damages. Once causation has been established, and it has been proven that the in bonis party has indeed suffered a loss, less certainty is required in proof of the actual amount of damages; for this latter determination Claimant only needs to provide a basis upon which the Tribunal can, with reasonable confidence, estimate the extent of the loss*."

732. The Tribunal will apply these criteria successively to the three categories of damages requested by Claimant; the *but-for* value of Clorox Venezuela (1), the historical lost profits (2), and the VAT credits (3). The Tribunal will then rule on the currency of payment of damages (4) and the interest requested by Claimant (5).

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[518] Respondent's First Summation Memorial, ¶ 117.
[519] *Crystallex International Corp. v. Bolivarian Republic of Venezuela*, Case No. ARB(AF)/11/2, Award, April 4, 2016, ¶ 860 (Exhibit **CLA-131**); *Biwater Gauff (Tanzania) v. Tanzania*, ICSID Case No. ARB/05/22, Award of July 24, 2008, ¶ 779 (Exhibit **RLA-011**).
[520] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award of March 28, 2011, ¶ 246 (Exhibit **CLA-117**).

1) The *But-For* Value of Clorox Venezuela

733. Claimant seeks the amount of the *but-for* equity value of the value of Clorox Venezuela as of September 3, 2014 in the absence of the challenged measures, assessed by its experts Compass Lexecon at USD 143,474,507 for the 2014-2024 period, using the discounted cash flow (DCF) approach.[521]

734. Respondent, in light of the conclusions of its expert, Mr. Fabián Bello, accepts the use of the DCF approach for the calculation.[522] However, its valuation of the company is USD 27,886,253.[523] In addition to questioning the valuation date, September 3, 2014, already accepted by the Tribunal,[524] Mr. Fabián Bello questions Compass Lexecon's calculation methodology as to the following 4 parameters: exchange rate (i), profitability margins (ii), discount rate (iii) and terminal value (iv).[525]

*(i) Exchange Rate*

735. Mr. Fabián Bello's basic reproach regarding the exchange rate used by Compass Lexecon is that the Bolivar was overvalued in relation to the USD.[526]

736. Mr. Fabián Bello proposes his own calculation, based essentially on the assumption that the real exchange rate in Venezuela applicable to the period from 2012 to 2024 would be equal to the average real exchange rate between 1970 and 2011. By applying his calculation to Compass Lexecon's model, the *but-for* equity value of Clorox Venezuela is reduced to USD 105,060,693.[527]

737. To perform its calculation, Compass Lexecon projected from 2015 to 2019 the exchange rate between the Bolivar and the USD based on the projections made by the International Monetary Fund ("**IMF**") in its October 2014 World Economic Outlook publication. Compass Lexecon explains that, with no IMF projections beyond 2019, for the period from 2020 to 2024, it considered a domestic inflation of 1% per month

[521] Compass Lexecon First Expert Report, ¶ 9 (Exhibit **CER-1**).
[522] Hearing Transcript, Day 3, p. 422.
[523] Second Expert Report of Mr. Fabián Bello, Executive Summary, Table 1.
[524] See, *supra*, ¶ 722.
[525] Second Expert Report of Mr. Fabián Bello, Executive Summary, ¶ 6.
[526] Second Expert Report of Mr. Fabián Bello, ¶¶ 1.2 (20), 1.2.2 (28).
[527] Second Expert Report of Mr. Fabián Bello, ¶ 1.2.2 (41).

(12.7% per annum) and that the exchange rate would follow the same growth pattern as Venezuelan inflation relative to inflation in the United States, to maintain the same real exchange rate value according to the most recent IMF projection in 2019.[528]

738. The Tribunal considers that Compass Lexecon's calculation is based on more objective data than the methodology implemented by Mr. Fabián Bello and thus does not accept Mr. Fabián Bello's deduction.

*(ii) Profitability Margins*

739. Mr. Fabián Bello explains that the Compass Lexecon DCF model is flawed in its pricing and margins and proposes an alternative methodology. By applying his methodology to the Compass Lexecon model, the *but-for* value of Clorox Venezuela is reduced to USD 73,099,949.[529]

740. The essential difference between the respective methodologies of Compass Lexecon and Mr. Fabián Bello is that the latter's is based on Clorox Venezuela's operating margins using cost and revenue data from Clorox Venezuela's audited inflation-adjusted financial statements for the FY 2007 - FY 2011 period, prior to the challenged measures, whereas Compass Lexecon's is based on gross margins on *but-for* prices, deducting operating costs to arrive at operating margins, based on unaudited data presented in accordance with US GAAP.[530]

741. Mr. Fabián Bello notes that the average historical operating margin arising from the analysis of Clorox's audited Financial Statements for the 2007-2011 period was 12%.[531] The *but-for* revenue levels used by Mr. Fabián Bello are those proposed by Compass Lexecon and to determine the operating margins until 2024, Mr. Fabián Bello multiplies them by 12%.[532]

742. Compass Lexecon acknowledges that the information on which it based its analysis, presented in CLEX-017 and CLEX-005, is not signed or presented in an

[528] Compass Lexecon Second Expert Report, ¶ 26 and footnote 20 (Exhibit **CER-2**).
[529] Second Expert Report of Mr. Fabián Bello, ¶ 1.3.2 (63), Table 4.
[530] Second Expert Report of Compass Lexecon, ¶¶ 50-86 (Exhibit **CER-2**); Second Expert Report of Mr. Fabián Bello, ¶¶ 1.3 (42-63).
[531] Second Expert Report of Mr. Fabián Bello, ¶ 2 (106).
[532] Compass Lexecon Second Expert Report, ¶ 53 (Exhibit **CER-2**).

audited financial statement format, but emphasizes that this fact does not render it unreliable or make Clorox Venezuela's audited financial statements more appropriate.[533] Compass Lexecon explains that Clorox Venezuela's financial statements presented in CLEX-005 comply with US GAAP[534] and that, by following those accounting practices, Clorox Venezuela's average operating margins for the 2007-2011 period is 19.61%.[535]

743. Compass Lexecon further adds that, in its DCF model, revenues and costs are expressed in nominal terms, whereas Mr. Fabián Bello relies on revenues and costs in constant currency, *i.e.* adjusted for inflation.[536]

744. The Tribunal notes that Compass Lexecon does not deny that, in light of Clorox Venezuela's financial statements for the 2007-2011 period, the operating margins were 12% and that Mr. Fabián Bello applied this percentage to the *but-for* revenue levels determined by them. This methodology appears objective and reasonable to the Tribunal, which is not convinced by the recourse to U.S. accounting practices to value a Venezuelan company. Furthermore, the fact that Mr. Fabián Bello relies on revenues and costs in constant currency and not on revenues and costs in nominal terms, cannot significantly affect a percentage between those revenues and costs to calculate operating margins, since both are subject to inflation.

745. Consequently, the Tribunal accepts the correction made by Mr. Fabián Bello based on a more realistic assessment of profitability margins than that proposed by Compass Lexecon. Accordingly, the *but-for* value of Clorox Venezuela is reduced from USD 143,474,507 to USD 73,099,949.[537]

*(iii) The Discount Rate*

746. Compass Lexecon estimates Clorox Venezuela's weighted average capital (WACC) at 12.98% as of September 3, 2014.[538]

[533] Compass Lexecon Second Expert Report, ¶ 76 (Exhibit **CER-2**).
[534] Compass Lexecon Second Expert Report, ¶ 78 (Exhibit **CER-2**).
[535] Compass Lexecon Second Expert Report, ¶ 84 (Exhibit **CER-2**).
[536] Compass Lexecon Second Expert Report, ¶ 83 (Exhibit **CER-2**).
[537] Second Expert Report of Mr. Fabián Bello, ¶ 1.3.2 (63), Table 4.
[538] Compass Lexecon Second Expert Report, ¶ 87 (Exhibit **CER-2**).

747. Mr. Fabián Bello concludes that the discount rate used by Compass Lexecon is underestimated for two main reasons:

(i) Compass Lexecon determines WACC rates that include financial debt as a proportion of the company's total financing;[539]

(ii) From the analysis of the evolution of Venezuela's Emerging Market Bond Index (EMBI+), it follows that the country risk premiums applied by Compass Lexecon, based on the value assigned by Prof. Damodaran in his database for sovereign bonds rated "*Caa1*", are lower than the additional yield required to invest in the RBV as at the valuation date.[540]

748. Applying his observations to Compass Lexecon's model, the *but-for* value of Clorox Venezuela would be reduced by an additional USD 36.7 million.[541]

749. The Tribunal is not convinced by Mr. Fabián Bello's conclusions.

750. As Compass Lexecon notes, when an investor buys a company's shares, he determines the value of the asset according to the leverage that is desirable to him and not from the actual practice of the company's owner.[542] Mr. Fabián Bello admits that it is "*obvious that those who run a company try to structure their financing using reasonable levels of financial debt*."[543] From this observation it follows that a potential buyer will be prepared to consider the target value of the company with financing corresponding to general practice because he is not buying the company's financing structure, but the company itself that he will finance in order to increase its value.

751. As for country risk premiums, the Tribunal is persuaded by Compass Lexecon's observation highlighting that Venezuela's EMBI+ is not an appropriate measure of the country risk premium that an investor would use to value Clorox Venezuela as of September 2014 because Venezuela's EMBI's spreads, averaging 10.9%, reflected

[539] Second Expert Report of Mr. Fabián Bello, ¶ 1.4 (1).
[540] Second Expert Report of Mr. Fabián Bello, ¶ 1.4 (2).
[541] Second Expert Report of Mr. Fabián Bello, ¶ 1.4.2 (93).
[542] Compass Lexecon Second Expert Report, ¶ 92 (Exhibit **CER-2**).
[543] Second Expert Report of Mr. Fabián Bello, ¶ 1.4.2 (78).

the market perception of a particular sovereign default or near default situation, which is not suitable for a long-term investment.[544] More appropriate is Prof. Damodaran's database which assigns Venezuela's sovereign bonds a "*Caa1*" rating with a spread of 750 basis points (7.5%) in 2014, which corresponds to the credit rating of Caa1, which Moody's assigned in 2014 to obligations that are "*considered speculative, poorly positioned and subject to very high credit risk*."[545]

752. Therefore, the Tribunal does not accept Mr. Fabián Bello's correction regarding the discount rate.

*(iv) The Terminal Value*

753. Compass Lexecon estimates the terminal value of Clorox Venezuela in 2024 based on a 2% terminal value growth rate in perpetuity.[546]

754. Considering, in light of the information in Prof. Damodaran's database, that the industry in which Clorox Venezuela operates had not grown during the 2000-2010 decade, Mr. Fabián Bello, in his First Expert Report, estimated that Compass Lexecon should have used an annual perpetual growth rate equal to zero in its model.[547]

755. In his Second Expert Report, however, Mr. Fabián Bello accepted a criticism by Compass Lexecon that if all available data as of September 3, 2014 were used, *i.e.*, if the 1998-2013 average were calculated, Mr. Fabián Bello's approach would result in an average annual growth rate of 1.48%.[548] Mr. Fabián Bello incorporated the 1998 and 1999 growth rates to obtain an average growth rate of 0.84%.

756. Applying this growth rate to Compass Lexecon's model, the *but-for* value of Clorox Venezuela would be reduced by an additional USD 6.3 million.[549]

[544] Compass Lexecon Second Expert Report, ¶¶ 96, 99 (Exhibit **CER-2**).
[545] Moody's Investors Service. Rating Symbols and Definitions, October 2016, p. 5 (Exhibit **CLEX-102**).
[546] Compass Second Lexecon Expert Report, ¶¶ 101-102 (Exhibit **CER-2**).
[547] First Expert Report of Mr. Fabián Bello, ¶ 143; Second Expert Report of Mr. Fabián Bello,¶ 1.5 (94).
[548] Compass Lexecon Second Expert Report, ¶ 105 (Exhibit **CER-2**).
[549] Second Expert Report of Mr. Fabián Bello, ¶ 1.5.2 (100).

757. Mr. Fabián Bello does not explain why he excludes the growth rates from 2011 to 2013 from the data provided by Prof. Demoran's database with which an average of 1.48% is obtained.[550] Be that as it may, those data do not correspond to the growth rates determined by several industry analysts ranging between 1.5% and 3% during 2011-2014, a period more relevant than the 1998-2010 period.[551]

758. Accordingly, the Tribunal considers that the growth rate used by Compass Lexecon is a reasonable rate and does not accept Mr. Fabián Bello's correction.

759. The Tribunal has accepted the correction made to Compass Lexecon's calculations as to profitability margins and has rejected all others. Accordingly, the Tribunal sets the value of Claimant's expropriated shareholding interest in Clorox Venezuela at USD 73,099,949.

2) Historical Lost Profits

760. Claimant seeks an amount of USD 19,122,692 as "*loss of profits*" which entails, "the sum of the historical lost profits, measured as lost cash flows to Claimant prior to September 3, 2014."[552] Its expert, Compass Lexecon, using the DCF approach, calculates the difference between the cash flows between 2012 and 2014 that would have been available to Claimant as a shareholder of Clorox Venezuela in the absence of the Measures ("*but-for* scenario") and those received under the existence of the Measures ("actual scenario"). [553]

761. The breakdown by fiscal year is as follows:[554]

[550] Damodaran - Fundamental Growth Rate in EBIT by Industry (Exhibit **CLEX-105**).
[551] Investment Banking Reports Terminal Growth Rates, 2011 - 2014 (Exhibit **CLEX-106**).
[552] Compass Lexecon First Expert Report, ¶ 67 (Exhibit **CER-1**).
[553] Compass Lexecon First Expert Report, ¶ 9(a) (Exhibit **CER-1**).
[554] Compass Lexecon First Expert Report, ¶ 114 (Exhibit **CER-1**).

| | US$ Millones Nominales | Factor de Actualización | US$ Millones al 3 de Sept. 2014 |
|---|---|---|---|
| FCF AF 2012 | 2,3 | *1,30* | 3,0 |
| FCF AF 2013 | 2,8 | *1,19* | 3,3 |
| FCF AF 2014 | 10,0 | *1,09* | 10,9 |
| FCF AF 2015 (Jul-Sep 2014) | 1,9 | *1,01* | 1,9 |
| **Total Daños Históricos** | **17,0** | | **19,1** |

762. Mr. Fabián Bello argues that Compass Lexecon overstated losses by including in its damages assessment the cash flows for the entire fiscal year 2012, which begins in July 2011.[555] He argues that Compass Lexecon should have included only cash flows accrued after the date of the first price freeze in November 2011. But, as Compass Lexecon explains, because Clorox Spain "*did not obtain cash disbursements from Clorox Venezuela*" as a result of the measures, the cash flows accrued between July and November 2011 should be included in the historical lost profits calculations.[556] It also clarifies that they only assumed that the prices in the *but-for* scenario would be higher than the actual prices (taking into account the freeze) as of January 2012.[557]

763. In addition, Mr. Fabián Bello assesses the damage suffered by Claimant between 2012 to 2014 due to the challenged measures at 9.4 million.

764. The Tribunal is not convinced by Mr. Fabián Bello's valuation. Mr. Fabián Bello explains that in order to perform the valuation he could not use the information included in Clorox Venezuela's audited financial statements, as it does not contain an opening of revenues and costs between the various regulated and non-regulated products, and that in order to perform the valuation he had no alternative but to use the information included in Exhibit CLEX-017 prepared by Compass Lexecon.[558]

[555] It is undisputed that Clorox Venezuela's fiscal years run from July 1 to June 30 of the following calendar year. Accordingly, FY 2012 includes accounting and company information for the 12 months between July 1, 2011 and June 30, 2012. *See* Compass Lexecon First Expert Report, footnote 3 (Exhibit **CER-1**).
[556] Reply Memorial, ¶ 259.
[557] Compass Lexecon Second Expert Report, ¶ 110 (Exhibit **CER-2**).
[558] Second Expert Report of Mr. Fabián Bello, ¶¶ 2 (106-107).

However, while he did keep the Compass Lexecon volumes, he introduced new prices based on assumptions, as he admitted at the Hearing.[559] Furthermore, he acknowledged at the Hearing that for FY 2014 he had mentioned a gross margin of 10,834,000 for regulated products when, in reality, the margin is negative.[560] Therefore, the Tribunal considers Compass Lexecon's calculations more reliable as to historical lost profits, explained by the fact that Mr. Fabián Bello failed to valuate historical lost profits in his First Report and did so only in his Second Report, at the express request of Respondent's counsel. [561]

765. The Tribunal, however, agrees with Respondent that BITs are not guarantees of investment returns.[562] The Tribunal has indicated that, under international law, compensation for breach of a treaty requires a causal link between the breach and the damages suffered by the claimant.[563] It has explained that for this causal link to exist in this case, a harmful impact of the challenged measures on Claimant's investment is necessary. [564]

766. Respondent has asserted that there is a lack of causal link between the measures challenged by Claimant and the damages claimed.[565] The majority of the Tribunal considers that this objection of Respondent is partially justified as to the historical lost profits claimed by Claimant.

767. The Tribunal has determined that, within its sovereign police powers, which include regulations of an economic nature, a State may cause economic damage without any obligation to compensate, provided that there is a relationship of proportionality between the burden imposed on the foreign investor and the objectives that the measures seek to achieve.[566]

768. The Tribunal notes that Compass Lexecon indicates that "*...the average gross margin (defined as revenues net of costs of goods sold) of products subject to price regulation decreased from 38% in FY 2011 to 32% in FY 2012, to 16% in FY 2013*

[559] Hearing Transcript, Day 3, p. 532.
[560] Hearing Transcript, Day 3, p. 560.
[561] Second Expert Report of Mr. Fabián Bello, ¶¶ 2 (106-107).
[562] Rejoinder Memorial, ¶ 451.
[563] See *supra*, ¶ 729.
[564] See *supra*, ¶ 730.
[565] Respondent's First Summation Memorial, ¶ 117.
[566] See *supra*, ¶ 696.

*and ultimately became negative, at -24% in FY 2014*."[567] The majority of the Tribunal considers that this 6% decrease in the gross margin of the products subject to price regulation between FY 2011 and FY 2012 cannot be considered as a burden for the investor with no relation of proportionality with the objectives that the price regulations seek to realize. It is the continuance of the regulated prices applicable from April 1, 2012 until the beginning of September 2014, without taking into account both inflation and the increase in suppliers' prices and disregarding Clorox Venezuela's warnings and proposals that eliminated any relationship of proportionality. In Clorox Venezuela's FY 2012, which ends on June 30, the impact of price regulations on its profitability was still marginal.[568]

769. As for the exchange regulations, the Tribunal concluded that the devaluation of the Bolivar in February 2013, the shortage of foreign currencies, and the implementation of the exchange regulations limited Clorox Venezuela's ability to import the necessary inputs for the production of its products.[569] FY 2012 was not impacted.

770. Finally, Claimant does not include the consequences of the non-refund of the VAT credits within the Historical Lost Profits.

771. In addition, Compass Lexecon's valuation of USD 3,000,000 is necessarily excessive because it starts its *but-for* scenario from January 2012 and not from April 1 of the same year.[570]

772. Therefore, the Tribunal decides that an amount of USD 3,000,000 corresponding to FY 2012 in Compass Lexecon's valuation[571] should be deducted from the USD 19,122,692 requested by Claimant and that it should therefore be awarded USD 16,122,692 in compensation for historical lost profits.

[567] Compass Lexecon First Expert Report, ¶ 43 (Exhibit **CER-1**).
[568] On the contrary, the minority of the Tribunal considers that the proportionality relationship was lost as of April 1, 2012, and, therefore, Claimant is entitled to compensation for historical lost profits corresponding to FY 2012, from April 1 to June 30, 2012.
[569] See *supra*, ¶ 655.
[570] Compass Lexecon Second Expert Report, ¶ 110 (Exhibit **CER-2**).
[571] Compass Lexecon First Expert Report, ¶ 114 (Exhibit **CER-1**).

3) VAT Credits

773. Claimant requests an amount of USD 21,980,165 as compensation for the failure to timely reimburse VAT credits.

774. According to Compass Lexecon, this amount is the value that, as of the valuation date, would have been realized by Claimant by using or transferring the VAT-related tax credits between 2012 and 2014, if Venezuela had timely approved Clorox Venezuela's requests. Compass Lexecon explains that it took into consideration any interactions in the calculation of the historical lost profits and the *but-for* equity value, thus avoiding any double counting.[572]

775. Respondent criticizes Compass Lexecon's calculations for having used each year's exchange rate and for having updated the amounts with a WACC rate.[573]

776. Mr. Fabián Bello's position on the VAT credits is ambiguous. In his First Expert Report he indicated that Respondent's counsel had asked him to exclude them from his work.[574] He confirmed this at the Hearing.[575] However, he did put forward calculations that reduce the amount of damages relating to the VAT credits determined by Compass Lexecon.[576]

777. These reductions stem essentially from his use of a valuation date, of exchange rates and of a discount rate different from those used by Compass Lexecon[577] and considered appropriate by the Tribunal, as Compass Lexecon, for each fiscal year, converts the VAT credit at the exchange rate it considers applicable for this year.[578]

778. The following Table presented by Compass Lexecon at the Hearing[579] is representative of their disagreements with Mr. Fabián Bello:

[572] Compass Lexecon First Expert Report, ¶ 9 (c) (Exhibit **CER-1**).
[573] Respondent's First Summation Memorial, ¶ 179.
[574] First Expert Report of Mr. Fabián Bello, ¶ 9.
[575] Presentation of Mr. Fabián Bello at the Hearing, ¶ Slide 8.
[576] First Expert Report of Mr. Fabián Bello, ¶¶ 56, 99, 128.
[577] See *supra*, ¶¶ 722, 738 and 752.
[578] Hearing Transcript, Day 3, p. 551.
[579] Compass Lexecon's Presentation at the Hearing, Slide 25.

| VAT Credit | Abdala-Nakhle | | | | |
|---|---|---|---|---|---|
| | Up to FY 2011 | FY 2012 | FY 2013 | FY 2014 | Total |
| **Nominal Credit (Bs. Million)** | 21.3 | 14.3 | 24.6 | 38.5 | **98.7** |
| *FX Rates (Bs./USD)* | *4.3* | *4.3* | *5.1* | *8.5* | |
| **Nominal Credit (US$ Million)** | 5.0 | 3.3 | 4.8 | 4.5 | 17.6 |
| Interest | 2.1 | 1.0 | 0.9 | 0.4 | |
| **As of Sept 2014 (US$ Million)** | 7.1 | 4.3 | 5.7 | 4.9 | 22.0 |

| VAT Credit | Bello | | | | |
|---|---|---|---|---|---|
| | Up to FY 2011 | FY 2012 | FY 2013 | FY 2014 | Total |
| **Nominal Credit (Bs. Million)** | 21.3 | 14.3 | 24.6 | 38.5 | **98.7** |
| *FX Rates (Bs./USD)* | *4.3* | *5.3* | *7.1* | *11.0* | |
| **Nominal Credit (US$ Million)** | 5.0 | 2.7 | 3.5 | 3.5 | 14.6 |
| Interest/Discount | 0.8 | -0.0 | -0.5 | -1.0 | |
| **As of Nov 2011 (US$ Million)** | 5.7 | 2.6 | 3.0 | 2.5 | 13.9 |

Given the limited nature of Mr. Fabián Bello's criticisms, which are based on criteria that the Tribunal rejected, the Tribunal accepts Compass Lexecon's methodology and calculations.

779. Nevertheless, the Tribunal has indicated that, under international law, compensation for breach of a treaty requires a causal link between the breach and the damages suffered by the claimant.[580] It has explained that for such a causal link to exist in this case, a harmful impact of the challenged measures on Claimant's investment is necessary.[581]

780. Respondent has objected to the existence of a causal link between the measures challenged by Claimant and the damages claimed.[582] The Tribunal considers that this objection of Respondent is partially justified as to the damages claimed by Claimant for the non-refund of the VAT credits.

781. The table prepared by Compass Lexecon mentioned in paragraph 779 reveals that within the USD 21,980,165 claimed by Claimant there is an amount of USD 7,100,000 for the period prior to FY 2012 (up to and including FY 2011).

[580] See *supra*, ¶ 729.
[581] See *supra*, ¶ 730.
[582] Respondent's First Summation Memorial, ¶ 117.

782. The Tribunal recalls that it is only on October 20, 2011, when FY 2011 had already closed,[583] that Clorox Venezuela requested for the first time the recovery of its VAT fiscal credits for the period from November 2006 to June 2011, in the amount of Bs. 21,303,755.24.[584] As it had not filed its claim before the end of FY 2011, the Venezuelan tax authorities could not evaluate a refund request and reimburse what was due. The claimed damages of USD 7,100,000 for this period prior to FY 2012 cannot have been caused by a breach of the Treaty by Respondent.

783. This consideration does not apply to FY 2012. Certainly, the required long verifications caused by this delay of almost six years on the part of Clorox Venezuela in requesting the VAT credit refund prior to FY 2011 may justify the practical impossibility of respecting the 30-day term provided in Article 10 of Administrative Order SNAT/2013/0030. Notwithstanding the foregoing, such a delay does not justify the long-lasting silence on the part of the Venezuelan tax authorities for more than two years, which is more indicative of a willingness not to reimburse than of practical difficulties.

784. Therefore, the Tribunal decides that an amount of USD 7,100,000 should be deducted from the amount of USD 21,980,165 requested by Claimant as compensation for the failure to timely reimburse the VAT credits. The Tribunal therefore decides to award Claimant the sum of USD 14,880,165 for such VAT credits.

785. Accordingly, as follows from the Tribunal's decisions regarding Clorox Venezuela's *but-for* value, the Historical Lost Profits and the VAT credits, the Tribunal determines that the amount of compensation due by Respondent to Claimant as of September 3, 2014 is USD 104,102,806 (USD 73,099,949 + USD 16,122,692 + USD 14,880,165).

### (d) The Currency

[583] Clorox Venezuela's fiscal years run from July 1 to June 30 of the following calendar year.
[584] See *supra*, ¶ 657.

786. Respondent argues that the Treaty provides that in case of compensation for expropriation the currency shall be paid "*in convertible currency*". The Bolivar is a convertible currency and, moreover, the currency of the country that received the investment. Therefore, Respondent considers that there is no reason to disregard the use of the Bolivar, in favor of the U.S. dollar, in determining compensation in this case.[585]

787. Claimant alleges that using the Bolivar would violate the express provisions of the Treaty.[586]

788. The Tribunal notes that the Treaty does not contain any indication as to the currency to be used to determine the compensation due to an investor. It only provides for the transfer of compensation.

789. The Tribunal notes that Article VII of the Treaty guarantees the investor "*the unrestricted transfer of payments in connection with* [investments] *and in particular, but not exclusively, the following payments*". Paragraphs (b) and (c) refer expressly to the indemnifications and compensations respectively provided for in Articles V and VI of the Treaty. Since the Treaty specifies that these indications are not exclusive, it follows that the provisions of Article VII are applicable to any compensation or damages.

790. Article VII(3) of the Treaty adds that, "*The transfers referred to in this Agreement shall be made without delay in the convertible currency chosen by the investor and at the exchange rate applicable on the day of the transfer*."

791. Claimant, its experts and Respondent's expert have assessed compensation in USD. The Tribunal considers that it follows from the Treaty that it is a general principle that compensation or damages should be paid promptly, in the convertible currency decided by the investor. In this case, the investor wishes to be compensated in USD and Respondent has failed to present convincing arguments for the compensation to be assessed in another currency.

[585] Respondent's First Summation Memorial, ¶ 180.
[586] Reply Memorial, ¶ 266.

792. In these circumstances, Respondent's request that damages be calculated and paid in Bolivars is rejected.

### (e) Interest

793. Claimant seeks interest at the U.S. prime rate, compounded annually, calculated from September 3, 2014 until payment in full.[587]

794. According to Respondent, interest should be calculated from the time of the award and a simple, risk-free interest rate should be applied.[588]

795. The Tribunal notes that the Parties disagree on three parameters: the interest computation date (1), the interest rate (2), and compound interest (3).

796. The Tribunal considers that determining the parameters for calculating interest must be made in the light of the principle of full reparation already mentioned in this Award.[589]

#### 1) The Interest Computation Date

797. The Tribunal agrees with Mr. Fabián Bello, Respondent's expert, when he emphasizes that: "*In the event that the Tribunal were to find damages, the injured party would be entitled to receive an amount of money that not only correctly reflects the damage caused, but would also be entitled to be compensated for the time between the moment the damage occurred and the moment of actual payment... .*"[590] Otherwise, the principle of full reparation would not be respected because the injured party would continue to suffer the consequences of the breach of the Treaty between the date of the damage and the date of actual payment of compensation.

798. Therefore, the Tribunal decides that interest will be computed as of September 3, 2014.

[587] Claimant's First Summation Memorial, ¶ 151.
[588] Respondent's Second Summation Memorial, ¶ 138.
[589] See *supra*, ¶¶ 726-727.
[590] First Expert Report of Mr. Fabián Bello, ¶ 152.

2) Interest Rate

799. Respondent considers that a risk-free interest rate should be applied and its expert Mr. Fabián Bello explains that *"*[...] *a risk-free interest rate should be used to update a damage* [...] *for the simple reason that an amount determined as damage represents an amount of money that will not be invested in a risky activity during the period between the date of the claim and the date of payment*."[591]

800. Compass Lexecon accepts that, as of September 22, 2014 when Clorox Venezuela ceased its activities, Claimant was no longer exposed to commercial risks. Compass Lexecon proposes either a risk-free interest rate—the 10-year U.S. bond rate—or a commercial rate such as the U.S. prime rate.[592]

801. Mr. Fabián Bello acknowledges that the 10-year U.S. bond rate is risk-free, but considers it too high and proposes the one-year U.S. T-Bill rate.[593] He stresses that the US prime rate is not risk-free.[594]

802. The Tribunal notes that the Parties' experts agree that almost immediately after the interest computation date, Claimant ceased to be exposed to commercial risks. Therefore, the Tribunal decides that a risk-free interest rate should be applied.

803. Compass Lexecon explains that "*The yield on long-term bonds such as the 10-year U.S. Treasury bonds represents a reference risk-free rate for a longer-term perspective, in line with the long-term business of the target asset*."[595] The Tribunal considers that compensation for expropriation, due since 2014, requires an interest rate that remunerates a long-term debt.

804. Therefore, the Tribunal decides that the applicable interest rate is the yield rate on ten-year U.S. bonds.

3) Compound Interest

[591] First Expert Report of Mr. Fabián Bello, ¶ 161.
[592] Compass Lexecon First Expert Report, ¶ 12 (Exhibit **CER-1**).
[593] First Expert Report of Mr. Fabián Bello, ¶ 161.
[594] First Expert Report of Mr. Fabián Bello, ¶ 150.
[595] Compass Lexecon Second Expert Report, ¶ 8 (Exhibit **CER-2**).

805. Claimant requests interest compounded on an annual basis.[596] According to Respondent, a simple interest rate should be applied.[597]

806. The principle of full reparation requires that interest be compounded annually. As explained by the Tribunal in *OI European Group v. Venezuela*, "*Indeed, the purpose of interest is to compensate for the external financial cost that Claimant would hypothetically incur to cover the loss caused by the delay in the payment of damages*."[598] If Claimant had obtained a bank loan to substitute the unpaid damages, the terms of the loan would provide for compound interest.

807. In conclusion, the Tribunal decides that Respondent shall pay interest compounded annually at the yield rate of the 10-year U.S. bonds from September 3, 2014 until the date of full payment.

## C. THE TRADEMARKS

808. Claimant requests, "*An order requiring Venezuela to immediately cease and desist from continued, unauthorized use of the trademarks 'Clorox®', 'Mistolín®' and 'Nevex®', including the business and company name 'Clorox Venezuela*'."[599]

809. Respondent does not directly address this request, because it apparently considers that "*Clorox is free to resume its activities in the country at any time, as it is the owner of the plants and trademarks*."[600] This position is based on the assumption that Clorox Venezuela was not expropriated and that the reactivation of Clorox Venezuela's production units, decided in application of Article 149 of the Organic Labor Law of May 7, 2012,[601] is temporary.

810. This fiction dissipates with this Tribunal's decision finding that Clorox Venezuela was wrongfully expropriated by Respondent. The operation of Clorox Venezuela's

[596] Claimant's First Summation Memorial, ¶ 150.
[597] Respondent's Second Summation Memorial, ¶ 138.
[598] *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award, March 10, 2015, ¶ 950 (Exhibit **CLA-155**).
[599] Claimant's First Summation Memorial, ¶ 151.
[600] Respondent's Second Summation Memorial, ¶ 46. *See also*, Respondent's Rejoinder Memorial, ¶¶ 72, 352 and 455.
[601] Exhibit **C-7**.

production units is not carried out on behalf of Claimant, and Respondent has no right to use Claimant's trademarks, directly or indirectly.

811. Accordingly, the Tribunal decides to order Respondent to immediately cease the use of the trademarks "*Clorox*®", "*Mistolín*®" and "*Nevex*®", including the business and company name "*Clorox Venezuela*".

## V. COSTS

812. The Tribunal shall fix the costs of the proceedings (A) before deciding on the allocation between the Parties (B).

### A. COSTS AND EXPENSES OF THE PROCEEDINGS

813. According to Article 40(2) of the UNCITRAL Rules, costs include:

> *"a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;*
>
> *b) The reasonable travel and other expenses incurred by the arbitrators;*
>
> *c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;*
>
> *d) The reasonable travel and other expenses of witnesses, to the extent such expenses are approved by the arbitral tribunal;*
>
> *e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;*
>
> *f) Any fees and expenses of the appointing authority, as well as the fees and expenses of the Secretary General of the PCA*."

814. The costs of the proceedings, including the fees (calculated on the basis of the rate agreed in paragraph 12.1 of the Terms of Reference) and expenses of the Tribunal, the PCA's administrative fees, and direct expenses are as follows:

| | |
|---|---|
| Mr. Yves Derains | EUR 399,250.00 |
| Dr. Bernard Hanotiau | EUR 213.200,00 |

| | |
|---|---|
| Dr. Raul E. Vinuesa | EUR 241,500.00 |
| PCA administrative fees | EUR 74,033.29 |
| Direct expenses[602] | EUR 172,016.71 and GBP 80,000.00 |

**Total: EUR 1,100,00.00 [sic] and GBP 80,000.00**

815. This exhausts the amount of the deposits made by Claimant, on its own behalf and in substitution for Respondent.

816. The costs incurred by each Party for the submission of its case are USD 7,364,435.46 for Claimant[603] and USD 6,166,965 for Respondent.[604]

## B. ALLOCATION OF COSTS

### (a) Claimant's Position

817. Clorox Spain claims reimbursement of all costs, fees and expenses related to its representation in this arbitration, which it claims amounted to USD 7,364,435.46[605] plus interest at a reasonable rate, compounded annually until the date of full payment by Respondent.[606] Pursuant to Procedural Order No. 1, the expenses claimed by Claimant do not include translation costs and do not include fees and expenses in connection with the intervention of the forensic expert, Dr. Castell, pursuant to Procedural Order No. 11.[607] The amounts claimed include USD 1,189,975.30 for the deposit paid to the Permanent Court of Arbitration on behalf of both Parties and Swiss attorneys' fees of USD 254,636.34, plus expenses of the latter amounting to USD

[602] This amount includes expenses related to hearings, meetings, stenographic services, translation services, bank charges, VAT on arbitrators' fees, courier, printing, and telecommunications, among others. It also includes GBP 80,000 incurred in connection with the expert proceedings relating to Exhibit C-190.
[603] Claimant's March 14, 2022 Submission on Costs, ¶ 10.
[604] Respondent's May 26, 2018 Submission on Costs, p. 2; Respondent's February 21, 2022 Submission on Costs, p. 1.
[605] Claimant's March 14, 2022 Submission on Costs, ¶ 10.
[606] Claimant's February 21, 2022 Submission on Costs, ¶ 39.
[607] Claimant's February 21, 2022 Submission on Costs ¶¶ 37-38.

24,471.58 in connection with the proceedings brought before the Swiss Federal Court.[608]

818. Claimant points out that Article 42 of the UNCITRAL Arbitration Rules establishes that, in principle, the unsuccessful party shall bear the costs of the arbitration and that Respondent is the unsuccessful party.[609]

819. Claimant's counsel confirms that Clorox Spain's costs were necessary for the proper submission of its case and are reasonable given the complex circumstances of the case, its nearly seven-year duration and the amount of damages.[610]

820. Claimant notes that a claimant's legal costs are usually higher than those of the respondents given that it has the burden of proof. In this case, however, Claimant's legal costs are significantly lower than Respondent's, which confirms their reasonableness.[611]

821. On the other hand, Claimant argues that Respondent's costs are unreasonable because, with respect to these two rounds of submissions on costs alone, they amount to almost double Claimant's costs.[612]

822. Claimant recalls that the Tribunal has discretionary power to apportion costs and must use that discretion to place all arbitration and legal costs on Respondent.[613] Venezuela raised every possible objection to the Tribunal's jurisdiction and refused to pay the Tribunal's costs in violation of the treaty and the UNCITRAL Rules. Claimant further submits that Respondent also failed to act in good faith during the arbitration by only presenting its full case at the end of the pleadings.[614]

**(b) <u>Respondent's Position</u>**

[608] Claimant's February 21, 2022 Submission on Costs ¶ 36.
[609] Claimant's February 21, 2022 Submission on Costs, ¶ 5.
[610] Claimant's February 21, 2022 Submission on Costs, ¶¶ 14-15.
[611] Claimant's February 21, 2022 Submission on Costs, ¶ 17.
[612] Claimant's March 14, 2022 Submission on Costs, ¶ 4.
[613] Claimant's February 21, 2022 Submission on Costs ¶ 7.
[614] Claimant's February 21, 2022 Submission on Costs, ¶ 16.

823. Respondent claims to have incurred USD 4,661,965[615] plus USD 1,505,000 with its two Summation Memorials,[616] totaling USD 6,166,965.

824. Invoking Article 40 of the UNCITRAL Rules, Respondent leaves the determination of the reasonableness of the costs in the hands of the Tribunal.[617]

825. Claimant [sic] submits that the Tribunal should order Claimant to pay costs for having initiated the arbitration recklessly and for having introduced a document into the record, falsified according to Respondent, on the last day of the hearing.[618]

826. In the alternative, even if the arbitration claim were to be upheld, Respondent should not be ordered to pay costs because it has appeared before the Tribunal voluntarily and in good faith. Moreover, Respondent has conducted itself with probity and honesty throughout the proceedings.[619]

**(c) <u>Tribunal's Analysis</u>**

827. Article 42(1) of the UNCITRAL Arbitration Rules provides:

> "*The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. 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*."

828. The Arbitral Tribunal considers that the costs claimed by Claimant are reasonable, with the exception of the Swiss counsel's fees and expenses, which are not part of the costs of this arbitration. The costs of the proceedings brought before the Swiss Federal Court are determined and awarded by the Federal Court itself and this Arbitral Tribunal does not have to intervene in this respect.

829. After deducting the Swiss counsel's fees and expenses, Claimant's costs are USD 7,085,327.54, (USD 7,364,435.46 - USD 254,636.34 - USD 24,471.58). If the USD

[615] Respondent's March 14, 2022 Submission on Costs, p. 2.
[616] Respondent's February 21, 2022 Submission on Costs, p. 1.
[617] Respondent's March 14, 2022 Submission on Costs, p. 3.
[618] Respondent's March 14, 2022 Submission on Costs, p. 3.
[619] Respondent's March 14, 2022 Submission on Costs, p. 3.

1,189,975.30 paid to the Permanent Court of Arbitration by Claimant on behalf of both parties is also deducted, Claimant's own costs amount to USD 5,895,352.24. The difference with Respondent's costs of USD 6,166,965 is insignificant, leading to the conclusion that the costs of each party are reasonable.

830. In these arbitral proceedings, all of Respondent's jurisdictional objections were rejected and the Tribunal concluded that Respondent had breached the Treaty. As to compensation for damages, the Tribunal reduced the amount claimed by Claimant from USD 184,577,364 to USD 104,102,806.

831. Therefore, the Tribunal deems it reasonable, in light of the provisions of Article 42(1) of the UNCITRAL Arbitration Rules, to decide that Respondent shall reimburse Claimant 70% of the USD 1,189,975.30 paid to the Permanent Court of Arbitration, *i.e.*, USD 1,189,975.30 x 70% = USD 832,982.71, as well as 70% of Claimant's own costs, *i.e.*, USD 5,895,352.24 x 70% = USD 4,126,746.56.

832. Consequently, Respondent owes Claimant USD 4,126,746.56 + USD 832,982.71 = USD 4,959,729.27.

833. In application of the principle of full reparation, the Tribunal grants Claimant's request to apply interest at a reasonable rate on the costs due, compounded annually until the date of full payment by Respondent.

834. The Tribunal shall order Respondent to pay Claimant USD 4,959,729.27 plus compound interest at the ten-year U.S bond yield rate from the date of this Award to the date of full payment.

## VI. DECISION

835. For the foregoing reasons, the Tribunal declares that the Bolivarian Republic of Venezuela breached the Spain-Venezuela BIT and, more specifically, its obligation under Article V not to expropriate Claimant's investment without paying prompt, adequate and effective compensation.

836. Consequently, the Arbitral Tribunal orders the Bolivarian Republic of Venezuela to pay Clorox Spain S.L compensation of USD 104,102,806 plus interest at the

interest yield rate on ten-year U.S. bonds compounded annually, calculated from September 3, 2014 until full payment.

837. The Tribunal decides not to rule on Clorox Spain S.L.'s claim that the Bolivarian Republic of Venezuela breached its obligations under Article III(1) and Article IV(1) of the Spain-Venezuela BIT.

838. The Arbitral Tribunal orders the Bolivarian Republic of Venezuela to immediately cease the continued and unauthorized use of the trademarks "*Clorox*®", "*Mistolín*®" and "*Nevex*®", including the business and company name "*Clorox Venezuela*".

839. The Arbitral Tribunal orders the Bolivarian Republic of Venezuela to pay Clorox Spain S.L. USD 4,959,729.27 plus compound interest at the yield rate of ten-year U.S. bonds from the date of this award until the date of full payment, as costs.

840. Any other claim or petition of the Parties is dismissed.

Place of arbitration: Geneva, Switzerland

Date: August 9, 2023

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Dr. Bernard Hanotiau

Arbitrator

[illegible signature]

Dr. Raúl E. Vinuesa

Arbitrator

[illegible signature]

Mr. Yves Derains

Presiding Arbitrator