

## CONCURRING STATEMENT, ELLIOT E. POLEBAUM, ARBITRATOR

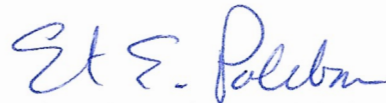
1. While I believe that the quantum of damages to which Claimant is entitled should be higher than the amounts awarded in the Tribunal's Award for several reasons,<sup>1</sup> I nonetheless concur in the Tribunal's award. In two respects, I have the following additional observations:
2. First, I agree that that Venezuela is liable for moral damages and concur in the Tribunal's award on the moral damages claim. However, I consider that the quantum of \$1 Bolivar is far too low in view of the liability findings the Tribunal has made. Venezuela's treatment of Claimant's employees was arbitrary, harsh, degrading, and unacceptable. Moreover, the Tribunal's findings confirm, and the Tribunal notes, that it "rejects in the strongest terms the notion that life experiences like the one faced by Mr. Lugo should be normalized or considered as part of the landscape in any part of Latin America." With respect, damages of \$1 Bolivar do not reflect a "reject[ion] in the strongest terms" of the treatment to which Claimant's employees were subjected. In line with the awards of moral damages determined by other tribunals, an award of moral damages in the amount of 3% of the Award is both on the low side of awards made by other tribunals and more than justified in the circumstances. The Tribunal has a degree of discretion in assessing the quantum of moral damages to be awarded and a precise economic calculation of the type used to value a business, for example, is neither possible nor required.
3. Second, I agree with the Tribunal's decision that Claimant is entitled to recover its costs. Claimant has prevailed on the jurisdictional challenge and on the merits with respect to all claims but one and the one claim on which it did not prevail has no effect on its damages recovery. The Tribunal has awarded Claimant substantial damages, nearly USD 400 million plus interest to run from August 28, 2018, until the award is paid in full. Claimant is the prevailing party in this arbitration and is entitled to its costs. I also concur in the Tribunal's

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<sup>1</sup> On the landholdings claim, I consider that an award of damages at a higher level is justified on the basis that the book value of the landholdings is the preferred starting point for the calculation of damages. Book value is a recognized accounting valuation based on what the owner paid for the asset. This value is then carried forward in the audited financial statements of the company and may be adjusted as warranted. The book value at the time of the taking better estimates the value of what was taken than the newspaper article valuation advocated by Respondent or the reverse engineered DCF valuation proffered by Respondent as a "sanity check" on the newspaper article valuation. I also consider that the preferred actualization rate on the landholdings claim is Claimant's Weighted Average Cost of Capital and that the use of the Smurfit Kappa Group's cost of debt, as advocated by Respondent, does not correspond to the business risks that Claimant's Venezuelan subsidiaries faced.

On the dividend claim, I consider that an award of damages at a higher level is justified. I believe that the exchange rate for the third period (September 2017 to February 2018) should be the rate in effect at the beginning of the suspension, which rate would then be inflation-adjusted over the period of the suspension until the reopening in February 2018. This approach would recognize the accepted correlation between exchange rates and inflation and would not assume, as Respondent's position does, that all of the inflation that had accumulated as of the last day of the suspension period was already in effect five months earlier when the suspension began and that no further inflation occurred after the first day and throughout the entire five-month suspension period.

decision to award costs in the amount of USD 4,535,391.27. However, I believe that Claimant is entitled to a full recovery of its costs. In light of Claimant's successful prosecution of its claims, I believe that the amounts Claimant expended are reasonable. Claimant was fully justified to retain counsel of the highest standing in the field of investment arbitration. Comparing the cost structure of Claimant's counsel to that of Respondent's counsel does not respect the choice that Claimant was entitled to make. Moreover, there has been no showing that Claimant's actions were wasteful or unnecessarily ran up costs. On the contrary, this was a complex case with numerous complicated claims, which Respondent's counsel had the right to contest at every turn and which it did with a high level of skill. In my view, Claimant should be awarded costs at a level commensurate with the effort that was necessary to prevail. In the circumstances, a full award of its costs is, in my opinion, reasonable and justified.



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Mr. Elliot E. Polebaum

Date: 23 August 2024