INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceeding between

GAMBRINUS CORPORATION

Claimant

and

THE BOLIVARIAN REPUBLIC OF VENEZUELA

Respondent

ICSID Case No. ARB/11/31

AWARD

Members of the Tribunal
Professor Piero Bernardini, President
The Honorable Marc Lalonde, Arbitrator
Professor Pierre-Marie Dupuy, Arbitrator

Secretary of the Tribunal
Ms. Mairée Uran-Bidegain

Date of dispatch to the Parties: 15 June 2015

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TABLE OF SELECTED ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT or Treaty	1994 Agreement between the Government of Barbados and the Government of the Bolivarian Republic of Venezuela
C – [x]	Claimant's Exhibit
Cl. Response	Claimant's Response to Respondent's New Argument and 16 May 2014 Submission of 21 July 2014.
Cl. Mem.	Claimant's Memorial on Jurisdiction, Merits and Quantum of 30 November 2012
Cl. PHB (I), ¶ [x]	Claimant's First Post Hearing Brief of 29 August 2014
Cl. PHB (II), ¶ [x]	Claimant's Second Post Hearing Brief of 26 September 2014
Cl. Rej.	Claimant's Rejoinder on Jurisdiction of 17 January 2014
Cl. Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction of 30 August 2013
CL – [x]	Claimant's Legal Authority
Hearing	Hearing on Jurisdiction, Merits and Quantum of 10-13 March 2014
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
R – [x]	Respondent's Exhibit
Resp. C-Mem.	Respondent's Counter-Memorial on Jurisdiction, Merits and Quantum of 17 May 2013
Resp. Submission	Respondent's Submission on the Invalidity of the Purported Share Transfer from Polar to Gambrinus of 16 May 2014
Resp. PHB (I), ¶ [x]	Respondent's First Post Hearing Brief of 29 August 2014
Resp. PHB (II), ¶ [x]	Respondent's Second Post Hearing Brief of 26 September 2014

Resp. Rej.	Respondent's Rejoinder on Jurisdiction, Merits and Quantum of 29 November 2013
RL – [x]	Respondent's Legal Authority
RG-[x]	Exhibits to Witness Statement of Mr. Reynaldo Gabaldón submitted by Claimant
Tr. Day [x] [speakers] [page:line]	Transcript of the Hearing on Jurisdiction, Merits and Quantum held on 10-13 March 2014
Tribunal	Arbitral Tribunal constituted as of 21 April 2012

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Government of Barbados and the Government of the Republic of Venezuela for the Promotion and Reciprocal Protection of Investments dated 15 July 1994, which entered into force on 31 October 1995 (the "**BIT**" or "**Treaty**"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966 (the "**ICSID Convention**").

2. Claimant is Gambrinus Corporation and is hereinafter referred to as "**Gambrinus**" or the "**Claimant.**"

3. Claimant is a company incorporated under the laws of Barbados.

4. Respondent is the Bolivarian Republic of Venezuela and is hereinafter referred to as "**Venezuela**" or the "**Respondent.**"

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

II. OVERVIEW OF THE CASE AND PARTIES' REQUEST FOR RELIEF

6. The dispute relates to the alleged expropriation by Respondent of Claimant's ten percent (10%) equity interest in a group of four Venezuelan companies, jointly referred to as Fertinitro,[1] which produces nitrogen fertilizers (ammonia and urea) for export and internal use in Venezuela, through the operation and maintenance of four petrochemical plants.

7. A Joint Investors' Agreement establishing Fertinitro was concluded on 8 April 1998, and the plants commenced commercial operations in 2001.

[1] Fertilizantes Nitrogenados de Oriente, S.A.; Fertilizantes Nitrogenados de Oriente, C.E.C.; Fertilizantes Nitrogenados de Venezuela, SRL; and Fertilizantes Nitrogenados de Venezuela, Fertinitro, C.E.C. (collectively referred to as "**Fertinitro**").

8. Fertinitro's structure included four original shareholders at the top: Petroquímica de Venezuela S.A. ("**Pequiven**") a wholly owned subsidiary of Petróleos de Venezuela S.A. (PDVSA), the state-owned oil company, Polar Uno C.A. ("**Polar**") a company incorporated in Venezuela, Koch Oil S.A. (later denominated Koch Minerals S.à.r.l., ("**Koch**")), a company incorporated in Switzerland, and Snamprogetti B.V. ("**Snamprogetti**"), a company incorporated in the Netherlands. In January 2008, Polar -under a new denomination- namely Inversiones Polar S.A. ("**Inv. Polar**")[2] executed a transaction with the purpose of transferring its interest in Fertinitro to Gambrinus, the Claimant in this arbitration.

9. On 11 October 2010, Expropriation Decree No. 7713 dated 10 October 2010, declaring the compulsory acquisition of the assets of Fertinitro came into effect. The Decree directed Pequiven, a 35% equity-holder in Fertinitro, to act as the "expropriating entity" and carry out "the forced acquisition … of all the real and personal property … belonging or currently in the possession of Fertinitro."[3]

10. To date, Gambrinus has not received compensation from Venezuela for the forced acquisition of its alleged investment in Fertinitro. According to Claimant, Respondent is thus liable for breaches of Venezuela's obligations to Claimant, a protected "Company" under the terms of the BIT.[4]

11. Gambrinus requests that the Arbitral Tribunal issue an Award:

(a) Declaring that Respondent is in breach of its obligations under, among other provisions, Articles 5, 2(2) and 3 of the Treaty, as well as customary international law, and that, by virtue of the violations of the Venezuelan Expropriation Law, Respondent is in further breach of Articles 5, 2(2) and 3 of the Treaty;

(b) Ordering that Respondent pay Claimant full compensation with respect to said breaches of the Treaty and international law, in an amount of USD150,404,359.00 million, to bear interest at a rate no less than the Venezuela sovereign debt rate,

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[2] *See infra* ¶ 46.

[3] Decree Law No. 7,713 of 10 October 2010, Official Gazette No. 39,528 dated 11 October 2010 (the "**Expropriation Decree**") (C-2).

[4] Cl. Mem., ¶ 6.

compounded annually (or monthly LIBOR+8%, compounded monthly, or such other rate as the Tribunal deems fit) until the date of the Award;

(c) Ordering that Respondent pay all costs of and associated with this arbitration, including Claimant's legal fees, experts' fees, disbursements, administrative fees and the fees and expenses of the Arbitral Tribunal;

(d) Ordering that post-Award interest shall continue to run on all sums so awarded at the Venezuela sovereign debt rate, compounded annually (or monthly LIBOR+8%, compounded monthly, or such other rate as the Tribunal deems fit) until the date of payment; and

(e) Granting such other and further relief as the Arbitral Tribunal deems just and proper.[5]

12. For its part, Venezuela contends that Gambrinus is not a foreign investor in Venezuela, it has made no investment, suffered no detriment and has taken no risk. The belated transfer from Inv. Polar to Gambrinus was made in clear breach of the Founding Agreements of Fertinitro such that Gambrinus never received title to shares in Fertinitro, and in all cases the transfer was made at such time as to fabricate jurisdiction.[6]

13. Respondent requests that the Arbitral Tribunal:

(a) decline jurisdiction in the present proceedings;

(b) in the alternative, dismiss all of Claimant's claims in finding that Respondent has not breached its obligations either under the BIT or international law;

(c) in the alternative, if the Tribunal should decide to make an award in favour of Claimant, limit the award to a maximum amount of USD 13.7 million;

(d) order Claimant to pay all costs incurred in connection with these arbitration proceedings, including the costs of the arbitrators and those associated with ICSID, as well as the legal and other expenses incurred by Respondent, including the fees of legal counsel and experts, plus interest; and

(e) order such other relief as the Tribunal, in its discretion, considers appropriate.[7]

[5] *Id.*, ¶ 186; Cl. Reply, ¶ 319, containing an updated damages figure.

[6] Resp. PHB (II), ¶ 6.

[7] Resp. C-Mem., ¶ 623; Resp. PHB (II), ¶ 78.

III. PROCEDURAL HISTORY

A. The Institution of Proceedings and the Constitution of the Tribunal

14. On 9 November 2011, ICSID received a request for arbitration dated 8 November 2011 from Gambrinus Corporation against the Bolivarian Republic of Venezuela (the "**Request**" or "**RfA**"). The Request was supplemented by a letter dated 1 December 2011, answering questions posed by the Centre.

15. On 2 December 2011, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an Arbitral Tribunal as soon as possible in accordance with Rule 7(d) of the Centre's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings.

16. In the absence of an agreement between the Parties on the method of constituting the Tribunal, the Tribunal was constituted in accordance with the formula set forth under Article 37(2)(b) of the ICSID Convention.

17. The Tribunal is composed of Piero Bernardini, a national of Italy, President, appointed by agreement of the Parties, Marc Lalonde a national of Canada, appointed by Claimant, and Pierre-Marie Dupuy, a national of France, appointed by Respondent.

18. The President of the Tribunal accepted his appointment on 24 April 2012, and his co-arbitrators on 8 February 2012, and 15 March 2012, respectively.

19. On 24 April 2012, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "**Arbitration Rules**"), the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Mairée Uran-Bidegain, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

B. The First Session of the Tribunal and the Exchange of Written Pleadings

20. The Tribunal held a first session with the Parties on 12 July 2012. The Parties confirmed that the Members of the Tribunal had been validly appointed. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from 10 April 2006, that both English and Spanish would be the procedural languages of the arbitration and that the place of proceeding would be Paris, France. The Parties agreed on a schedule for the jurisdictional/merits phase of the proceedings. The agreement of the Parties was embodied in Procedural Order No. 1 signed by the President and circulated to the Parties on 23 July 2012, supplemented by letters of 30 July 2012 and 26 September 2012.

21. On 8 June 2012, Respondent submitted a request to address the objections to jurisdiction as a preliminary question (the "**Bifurcation Request**"). This was followed by Claimant's Observations on the Bifurcation Request on 22 June 2012.

22. On 6 July 2012, Respondent submitted a response to Claimant's Observations of 22 June 2012, and on 9 July 2012, Claimant submitted final observations on the Bifurcation Request.

23. On 30 July 2012, the Secretary of the Tribunal informed the Parties of the Tribunal's decision not to bifurcate the proceedings, joining Respondent's objections to jurisdiction to the merits.

24. Following the schedule agreed between the Parties and the Tribunal during the first session, for a non-bifurcated procedure, the Parties filed their written pleadings as follows:

(a) Claimant filed its Memorial on Jurisdiction, Merits, and *Quantum* on 30 November 2012, accompanied by a witness statement of Mr. Reinaldo Gabaldón and an expert report of Mr. Brent Kaczmarek of Navigant;

(b) Respondent filed its "Counter-Memorial on Jurisdiction, Merits, and *Quantum*," on 17 May 2013, accompanied by witness statements of Francisco Toro and Simón Escobar, Legal Opinions by Professors Iribarren and Garcia Montoya, and a valuation report by Dr. Daniel Flores of EconOne;

(c) Claimant filed its Reply on the Merits and its Counter-Memorial on Jurisdiction, on 30 August 2013, accompanied by a second witness statement from Mr. Reinaldo Gabaldón, a legal opinion by Dr. Carlos Ayala Carao, an expert report by Dr. Flessner and a second valuation report by Mr. Kaczmarek;

(d) Respondent filed its "Rejoinder on Jurisdiction, Merits and *Quantum*," on 29 November 2013, accompanied by second witness statements by Messrs. Toro and Escobar, as well as second legal opinions by Messrs. Montoya and Iribarren and a second valuation report by Dr. Daniel Flores;

(e) Claimant filed its Rejoinder on Jurisdiction on 17 January 2014 accompanied by a third witness statement by Mr. Reinaldo Gabaldón and a third valuation report by Mr. Brent Kaczmarek.

C. The Hearing

25. A pre-hearing organizational meeting was held with the Parties by telephone conference on 24 February 2014.

26. A hearing on jurisdiction, merits and *quantum*, took place at the World Bank offices in Paris from 10-13 March 2014 (the "**Hearing**"). In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the hearing were:

For Claimant:

Karyl Naim	Skadden, Arps, Slate, Meagher & Flom LLP
Timothy G. Nelson	Skadden, Arps, Slate, Meagher & Flom LLP
Julie Bédard	Skadden, Arps, Slate, Meagher & Flom LLP
Gunjan Sharma	Skadden, Arps, Slate, Meagher & Flom LLP
Katherine Porter	Skadden, Arps, Slate, Meagher & Flom LLP
Margarita Morales-Diaz	Skadden, Arps, Slate, Meagher & Flom LLP
Charlotte Woodley	Skadden, Arps, Slate, Meagher & Flom LLP

For Respondent:

Luis Bottaro	Hogan Lovells (Caracas)
Gonzalo Rodriguez-Matos	Hogan Lovells (Caracas)
Laurent Gouiffès	Hogan Lovells (Paris)
Carmen Núñez-Lagos	Hogan Lovells (Paris)
Thomas Kendra	Hogan Lovells (Paris)
Melissa Ordoñez	Hogan Lovells (Paris)
Marianna Boza	Hogan Lovells
Carlos Rodriguez	Hogan Lovells
Anna Bonini	Hogan Lovells

27. The following persons were examined:

On behalf of Claimant:

Mr. Reinaldo Gabaldón	Witness
Prof. Carlos Ayala Carao	Expert Witness
Mr. Brent C. Kaczmarek, CFA	Expert Witness, Navigant Consulting

On behalf of Respondent:

Prof. Henrique Iribarren Monteverde	Expert Witness
Dr. Daniel Flores	Expert Witness, Econ One Research

D. The Additional Argument and Post-Hearing Submissions

28. On 18 March 2014, the Tribunal issued Procedural Order No. 2 authorizing Respondent to deal with a particular jurisdictional argument relating to Respondent's allegations that Claimant had failed to comply with the terms of Section 6.7 of the Joint Investors Agreement and therefore failed to obtain valid title to the Fertinitro shares.

29. In accordance with Procedural Order No. 2, on 16 May 2014, Respondent filed a written submission on the Invalidity of the Purported Share Transfer from Inv. Polar to Gambrinus; and on 21 July 2014, Claimant answered Respondent's submission of 16 May 2014.

30. On 29 August 2014, the Parties filed simultaneous post-hearing briefs, and on 26 September 2014, the Parties filed simultaneous Reply post-hearing briefs.

E. Submissions on Cost

31. The Parties filed simultaneous costs submissions on 17 October 2014 and reply costs submissions on 31 October 2014.

F. Closure of Proceedings

32. The proceeding was closed on 21 April 2015.

IV. FACTUAL BACKGROUND

33. The Tribunal summarizes below in chronological order, insofar as relevant to make its determination, the factual background of these proceedings.

A. The Project

34. During the 90s, Venezuela was a net importer of agricultural products and by the end of the decade it imported up to 64% of the internal food consumption.[8] Against this background, Venezuela decided to increase its production of fertilizers.[9]

35. During that time, Pequiven sought private partners to participate in the development of a fertilizer production facility.

36. On 14 October 1997, Pequiven, Polar, Koch, and Snamprogetti, concluded a ***Fertilizer Development Agreement***, setting forth the framework for the creation of a joint venture for the construction and operation of a fertilizer production facility, namely two ammonia and two urea plants, together with the commercialization in both local and export markets, of the

[8] R. Gott, Hugo Chavez and the Bolivarian Revolution in Venezuela, Verso 2011 (R-10), p. 164.

[9] Resp. C-Mem., ¶ 31.

ammonia and urea produced by the plants (the "**Project**").[10] Ammonia and urea are both fertilizers used to increase crop productivity.[11]

37. According to Respondent, the selection of the participants to the Project was made *intuitu personae*: Koch had experience in international and U.S. markets for production and distribution of fertilizers; Pequiven had experience in the fertilizers national market; Snamprogetti had experience in the construction of industrial plants and would serve as the engineering, procurement and construction contractor and become a shareholder; and Polar, one of Venezuela's largest private business, was invited to participate in the project as a domestic partner, in order to inspire confidence in Venezuela's environment and thereby attract external funding.[12]

38. On 8 April 1998, Pequiven, Koch, Snamprogetti and Polar concluded a ***Joint Investors' Agreement*** ("**JIA**"), setting forth the contractual framework for the construction, operation and investment terms of the two ammonia plants, each with a minimum nameplate capacity of 1,800 metric tons of ammonia per day, and of the two urea plants, each with a minimum nameplate capacity of 2,200 metric tons of urea per day.[13] Pursuant to the JIA, the four joint investors (also referred to as "**Owners**" under the terms of the JIA), agreed on the creation of the following Venezuelan companies:

- Fertilizantes Nitrogenados de Oriente S.A.; (the "**Company**")
- Fertilizantes Nitrogenados de Oriente C.E.C.; (the "***Comandita***")
- Fertilizantes Nitrogenados de Venezuela, SRL; and
- Fertilizantes Nitrogenados de Venezuela, Fertinitro C.E.C. (the "**Operating Company**").

[10] Fertilizer Development Agreement dated 14 October 1997 by and among Petroquímica de Venezuela, S.A. (PEQUIVEN), Koch Oil, S.A., Snamprogetti Netherlands B.V. and Polar Uno, C.A. ("**Fertilizer Development Agreement**") (RG-2).

[11] C. J. Overdahl, *et. al*, "Fertilizer Urea," University of Minnesota College of Agriculture, Food, and Environment sciences, Extension Soils Specialist (1991) (R-14), p. 1.

[12] Resp. C-Mem., ¶¶ 34-36; 46.

[13] Joint Investors' Agreement dated 8 April 1998 by and among Petroquímica de Venezuela, S.A. (PEQUIVEN), Koch Oil, S.A., Snamprogetti B.V. and Polar Uno, C.A. (the "**Joint Investors Agreement**" ("**JIA**")) (C-6), Recitals pp.1-4.

39. These four companies are jointly referred to as "**Fertinitro.**" Section 2.1 of JIA, provided for the ownership structure of Fertinitro as follows:

- 35% owned by Pequiven (as holder of Class A shares in the Company, and Class V shares in the *Comandita*);
- 35% owned by Koch (as holder of Class B shares in the Company, and Class W shares in the *Comandita*);
- 20% owned by Snamprogetti (as holder of Class C shares in the Company, and Class X shares in the *Comandita*); and
- 10% owned by Polar (as holder of Class D shares in the Company, and Class Y shares in the *Comandita*).

40. Koch and Polar owned their respective interests in the Project through wholly owned "Special Purposes Subsidiaries" (as defined in the JIA), namely Koch José Cayman Islands Limited ("**Koch José**"), and Polar José Investments Limited, ("**Polar José**") respectively, both companies organized under the laws of Cayman Islands.[14] In accordance with Section 2.4 of the JIA, and the Recitals, Koch and Polar as Owners, remained responsible together with the Special Purpose Subsidiaries for compliance with all the obligations under the JIA. Moreover, the only assets of the Special Purpose Subsidiaries were the shares or debt in the Fertinitro Companies. By 18 February 1998, Koch transferred 28.571% of its interest in Koch José to Latin American Investment Fund ("**LAIF**"). LAIF then became a 10% shareholder of Fertinitro.

41. On or around the same date of the conclusion of the JIA, several agreements related to the construction, maintenance and financing of Fertinitro were also executed. Among others, on 8 April 1998, Koch, Pequiven and International Petrochemical Sales Limited ("**IPSL**") (an affiliate of Pequiven), executed a 20 years ***Offtake Agreement***, pursuant to which both Koch and Pequiven/IPSL, agreed to buy ammonia and urea produced by Fertinitro on a "Take-or-Pay" basis until the loans taken out by Fertinitro to finance the project would be

[14] Joint Investors' Agreement (C-6), Recitals, p. 2, and Section 2.4.

repaid.[15] Neither Polar nor Polar José were parties to the Offtake Agreement and had no role in marketing or selling Fertinitro's output.

42. The sales of fertilizers to the international market were regulated by Article 2.3 of the Offtake Agreement, pursuant to which, Pequiven and IPSL had the right to market and sale output in South and Central America and the Caribbean, including Venezuela, and Koch, had the right to market and sale output in the North American markets.[16]

43. Under the Offtake Agreement, Pequiven's potential sale of fertilizers to the Venezuelan market was limited to 10% of its allocated output. This percentage was increased to 15% three years later, and by 1% per year thereafter.[17] In addition, the Offtake Agreement set a specific formula to determine the price at which Koch and Pequiven were entitled to buy urea and ammonia from Fertinitro for resale or for their own consumption.[18]

44. The project finance structure contained many other service and financing agreements, including an ***Equity Contribution Agreement***, setting forth the obligations of the Owners to fund their capital contributions to the constituent Fertinitro entities, the ***Common Security Agreement***, and the ***Transfer Restrictions Agreement***, setting forth the transfer requirements requested by the Project lenders.[19]

45. In 2001, Snamprogetti completed the construction of the Fertinitro plants and facilities, and commercial production commenced the same year.[20]

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[15] Offtake Agreement dated 8 April 2008 by and among Petroquimica de Venezuela, S.A. (Pequiven), International Petrochemical Sales Limited and Koch Oil, S.A., as buyers and Fertilizantes Nitrogenados de Venezuela, Fertinitro, C.E.C., as Seller (the "**Offtake Agreement**") (RG-6), Art 3.2.

[16] *Ibid.*, Art. 2.3.

[17] *Ibid.*, Art. 2.5.

[18] *Ibid.*, Art. 3.1.

[19] Equity Contribution Agreement dated 21 April 1998 (RG-7); Common Security Agreement dated 21 April 1998 (RG-8); Transfer Restrictions Agreement dated 21 April 1998 (RG-9).

[20] *See* Report of Independent Accountants and Financial Statements dated 31 December 2001 and 2002, n. 1, p. 9 (R-17).

46. On 12 May 1998, Polar Uno C.A., the Venezuelan company that concluded the JIA, changed its name to Inversiones Polar S.A. (Inv. Polar).[21] Three years later, on 6 August 2001, Inv. Polar decided to remove Polar José (the Special Purpose Subsidiary of the Cayman Island),[22] from the Fertinitro investment structure and instead, to own its shares through Inv. Polar, the Parent Company. According to Claimant, this was in response to a change in Venezuela's tax law that established a list of "low tax jurisdictions," which included the Cayman Islands.[23] Consequently, Polar José notified the Fertinitro shareholders and lenders that it was transferring all its interest in Fertinitro, previously owned through Polar José, to be owned directly by Inv. Polar.[24] Polar José completed the transaction without objection from the other shareholders.[25]

47. Fertilizantes Nitrogenados de Oriente S.A., the Company, was at the corporate structure's effective peak.[26] The management of Fertinitro was carried out through a nine-member Board of Directors for each of the four companies mentioned above, with the Board of the Company at its top. Pequiven appointed 3 members, Koch and LAIF appointed 3 members in total, Snamprogetti appointing 2 members and Polar José, appointed one member, to each of the boards. In addition, each shareholder appointed one or more alternate directors.[27] Certain management functions such as, for example, the appointment of the Chairman of the Board, were reserved to Koch and Pequiven, the largest shareholders.[28]

48. Polar José, Inv. Polar and Gambrinus appointed Messrs. Hernan Anzola, and Oscar Grossman as Directors, in different periods, and Mr. Reinaldo Gabaldón as Alternate Director. Mr. Gabaldón is acting as witness in the present proceedings.

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[21] *See* Inversiones Polar Name Change, Corporate Registry (*Cambio de denominación social ante Registrador Mercantil Primero de la Circunscripción Judicial*) accompanied by Minutes of the Extraordinary Shareholders Meeting held on 12 May 1998) (RG-1).

[22] *See supra*, ¶ 40.

[23] Cl. Mem., ¶ 32.

[24] Notification of Transfer to Trustees dated 6 August 2001 (RG-18). *See also supra*, ¶ 8, n. 2.

[25] Cl. Mem., ¶ 32.

[26] In accordance with the JIA, the Company was set to be the sole or majority owner of interests in the other companies that constituted the Investment Structure; *see* JIA (C-6), Recitals p. 1 and Investment Structure (Exh. A to the JIA).

[27] JIA (C-6), ¶¶ 5.2.1 and 5.2.2.

[28] *See ibid.* (C-6), ¶ 5.2.4.

49. Pequiven appointed several directors, including Mr. Francisco Toro, as Director and Alternate Director. Mr. Toro submitted two witness statements in these proceedings. Mr. Francisco Toro passed away in February 2014.

B. Renegotiation of Agreements and Potential Buy-Out of Private Shareholders by Pequiven

50. Between 2001 and 2005, LAIF and Pequiven requested at different times an agreement from the Fertinitro Board of Directors to amend the Offtake Agreement. On the one hand, LAIF was concerned that the "off takers" were paying below-market price for urea, to Fertinitro's detriment, and requested that the price be raised.[29] On the other hand, Pequiven requested the right to purchase additional urea at a reduced price (from the price agreed in the Offtake Agreement), for resale in the Venezuela market for the period between 2005 and 2007.[30] From 2005 to 2006 directors and shareholders continued to discuss potential revisions to the Offtake Agreement.[31] However no agreement was ever reached.[32]

51. In 2007, Pequiven initiated talks with Fertinitro's shareholders to gain additional control over Fertinitro's equity and output. Concomitantly, the Board of Directors discussed the potential effects of Venezuela's policies of seeking additional State control over petrochemical activities. For example, on 18 January 2007, Mr. Parra, one of Koch's directors reported that Mr. Toro, Pequiven's appointed alternate director, had informed the board that "time ha[d] run out and Pequiven must take control of the Offtake and business";

[29] In April 2005, at the request of the Fertinitro Board of Directors, Blue, Johnson and Associates, an independent consulting firm issued a report reflecting the results of its review of the Offtake Agreement. The firm had been approached to review the efficiency and implications of the Agreement's pricing mechanism on the revenue being generated to the venture and its investors. It concluded that the Agreement was harming the company's profitability, as it resulted in more benefits for Koch and Pequiven/IPSL, but less revenue for the other shareholders. The off-takers had an economic incentive not to amend the Offtake Agreement. *See* Presentation Report prepared by Blue Johnson & Associates INC dated 5 April 2005 (R-22); Cl. Reply, ¶¶ 25, 26; *see also* Resp. C-Mem., ¶¶ 72-78.

[30] Minutes of Board of Directors Meeting No. 57 held on 21 June 2005, (R-23/ RG-60 with translation), p. 3, stating that Pequiven would only implement the potential agreement in the event that domestic demand would surpass the volume of urea that Pequiven could produce outside of Fertinitro. *See also*, Minutes of Board of Directors Meeting No. 58 held on 21 July 2005 ("**Minutes of Board of Directors Meeting No. 58**") (R-30 / RG-61 with translation).

[31] *See* Minutes of Board of Directors Meeting No. 58 (RG-61), pp. 2-4; *see also*, Minutes of Board of Directors Meeting No. 59 held on 20 September 2005 ("**Minutes of Board of Directors Meeting No. 59**") (R-31 / RG-62 with translation) and Minutes of the 24 August 2005 Fertinitro S.A. Shareholder Meeting (RG-25).

[32] *See* Minutes of Board of Directors Meeting No. 59 (RG-62), pp. 2-4; *see also*, Minutes of the 24 August 2005 Fertinitro S.A. Shareholder Meeting (RG-25), p. 5.

"Fertinitro must be run by the Venezuelan State;" and "all shareholders' rights and agreement will be respected."[33]

52. Less than a month later, on 8 February 2007, Mr. Francisco Toro, reiterated to the Board of Directors a similar statement:

> [G]iven the policies of the Venezuelan State, which were supported by Pequiven, it would be necessary to search for a way and design a process by which control of the production and marketing of Fertinitro's fertilizer could be handed over to Pequiven. Mr. Toro repeated that existing agreements would be honored but that this step was inevitable and would have to be completed within a matter of months. He added that Pequiven would soon be holding individual talks with each shareholder to try to reach an amicable agreement on the matter. [34]

53. The Parties disagree on whether these communications could be considered as a threat of a potential expropriation[35] or a confirmation of Pequiven's desire to buy the other shareholders' interest at a fair and arms-length value.[36]

54. In late 2007, the shareholders negotiated a draft Memorandum of Understanding ("**MOU**") concerning the sale.[37] The MOU was not executed. The Parties differ on the reasons for which the transaction was not completed. [38]

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[33] *See* Email from T. Parra to F. Toro and A. Zavala dated 18 January 2007 (R-88), and Email from T. Parra to R. Gabaldón dated 18 January 2007 (RG-128).

[34] Minutes of Board of Directors Meeting No. 78 held on 8 February 2007 ("**Minutes of Board of Directors Meeting No. 78**") (R-36 / RG-68 with translation), p. 2.

[35] Resp. C-Mem., ¶ 101. Toro (I), ¶ 40.

[36] Cl. Reply, ¶ 31. Mr. Záldivar, Pequiven's external counsel, also is said to have advised Mr. Gabaldón at that same time that the government of Venezuela was not nationalizing Fertinitro; *see* Reinaldo Gabaldón's Personal Notes from December 11, 2007 Meeting with Miguel Zaldivar (Partner, Hogan & Hartson LLP) (RG-114).

[37] Draft Memorandum of Understanding (2007) (RG-36) (Nav. 116). The draft MOU provided by both Parties contains track changes and therefore may not be the latest version.

[38] Claimants state that the lack of financing by Pequiven prevented the deal from going through, as the price was set in agreement by all shareholders including Pequiven (*see* Cl. Mem., ¶¶ 51-52; Cl. Reply, ¶¶ 34-35). According to Respondent, Koch had set a price exceeding the reasonable valuation of the plant and this broke the negotiations (*see* Resp. C-Mem., ¶ 126).

C. The Share-Transfer from Inv. Polar to Claimant and the Additional Capital Contribution Agreement

55. On 21 January 2008, pursuant to Section 6.2.2 of the JIA and Section 12(b) of the articles of incorporation and bylaws of the Company and the *Comandita*, Inv. Polar, as the successor of Polar Uno C.A., notified Pequiven, Koch Oil S.A., Snamprogetti B.V., Fertilizantes Nitrogenados de Oriente C.E.C and Fertilizantes Nitrogenados de Oriente, S.A., of its intention to "transfer all the Polar Interests to Gambrinus Corporation."[39] In that same letter, Inv. Polar, specified that it "desired to consummate the transfer as soon as practicable and no later than 24 January 2008."[40] Inv. Polar then requested from the addressee's-shareholders a "waiver" of the 30 day prior notice requirements contemplated in the JIA for transfers to affiliates.[41]

56. The 21 January 2008 notice was accompanied by an "Assumption Instrument" dated 22 January 2008, to be signed by Inv. Polar and Gambrinus Corporation, "before the consumption of the Transfer, all in compliance with Sections 6.2.2 and 6.7 of the [JIA] and Section 12(b) of the articles of incorporation and bylaws of the *Comandita* and the *Company*."[42] Under the terms of the executed Assumption Instrument:

- Inv. Polar agreed to remain jointly and severally "responsible" with Gambrinus for compliance with all the obligation of Inv. Polar under the JIA;
- Inv. Polar agreed to repurchase its interest in Fertinitro should Gambrinus cease to be an affiliate of Inv. Polar;
- Gambrinus agreed to become a part to the JIA, adopted the JIA and assumed all of the obligations as if it were an original "named party thereto."[43]

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[39] Letter from Inv. Polar to Pequiven, Koch Oil S.A., Snamprogetti B.V., Fertilizantes de Oriente C.E.C and Fertilizantes Nitrogenados de Oriente, S.A. dated 21 January 2008 (C-4, under the title "Assignment Agreement Between Inversiones Polar, S.A. and Gambrinus,Corp" ("**Assignment Agreement**") is a non-executed copy and C-19, submitted under the title "**Transfer Waiver Request and Assumption Instrument**" contains a copy executed by all shareholders), p. 2.

[40] Assignment Agreement (C-4), p. 2.

[41] *Id.*, pp. 2-6.

[42] Transfer Waiver Request and Assumption Instrument (C-19), p. 2.

[43] Annex A – Form of Instrument of Assumption, Transfer Waiver Request and Assumption Instrument, (executed) (C-19) pp. 7-13. *See also,* Email from R. Gabaldón to Fertinitro Shareholder dated 22 January 2008 (sending both the Notice and Assumption Agreement, urging the other shareholders to grant Inv. Polar, the requested waiver) (RG-38).

57. On 22 and 23 January 2008, Pequiven, Koch, Snamprogetti, the Company and the *Comandita*, granted the requested waivers.[44]

58. On 24 January 2008, Gambrinus and Inv. Polar executed a ***Share Purchase Agreement***.[45] Pursuant to clause THREE of this agreement, Gambrinus would pay USD eighty million one hundred (USD 80,000,100.00) for Inv. Polar's 10% equity interest in Fertinitro "at a future date following the granting of this document." On that same date, Simón Guevara, the Secretary of Fertinitro's Board, sent an email to Tony Parra, Koch-appointed Director, stating that the transfer complied with the requirements under the purchase and financing documents, including the JIA Section 6.2.[46]

59. On 15 February 2008, Gambrinus and Inv. Polar subscribed a ***Common Share Subscription Agreement***.[47] In accordance with the terms of this agreement, Gambrinus issued 800,001 (Eight hundred Thousand One) Common shares in itself to Inv. Polar for an amount of USD 80,000,100.00.[48] The Share Subscription Agreement further stipulated that "as a result of the capitalization of the Subscription Amount by [Inv. Polar] in [Gambrinus], the account receivable that [Inv. Polar] has against [Gambrinus] is hereby extinguished."[49] No cash was exchanged between Gambrinus and Inv. Polar for this transaction.[50]

60. In April 2008, after Gambrinus was already incorporated in the project, a USD 70 million dividend payment to all shareholders was approved by Fertinitro. The dividend was paid in dollars to all shareholders, including Pequiven.[51] To allow this dividend, the lenders required the signature of an additional agreement, namely the ***Additional Capital Contribution Agreement***, concluded by Gambrinus, Cervecería Polar, Pequiven, Koch (and its affiliates)

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[44] Transfer Waiver Request and Assumption Instrument (C-19), pp. 3-5.

[45] Shares Purchase Agreement, *Contrato de Compraventa de Acciones*, between Inv, Polar S.A. and Gambrinus Corp. dated 24 January 2008 ("**Share Purchase Agreement**") (RG-37).

[46] *See* Email Exchange between S. Guevara and T. Parra dated 24 January 2008 (RG-40). In accordance with Section 6.2 of the JIA a transfer by an Owner to an Affiliate of such Owner must comply with the series of requirements. See discussion infra Section V. (D).

[47] Common Share Subscription Agreement dated 15 February 2008 (RG-120; RG-117).

[48] Gambrinus Corp. Resolution approving the share issuance dated 15 February 2008 (RG-119).

[49] Common Share Subscription Agreement (RG-120; RG-117), pp.1-2.

[50] Tr. Day 1 [Chairman/Nelson] 74:9-22.

[51] Report of Independent Auditors for FertiNitro Venezuela, C.E.C. dated 31 December 2008 and 2007 (English) (RG-21), p. 24.

and Snamprogretti (and its affiliates) on 29 April 2008. In this agreement the parties, (1) acknowledged the selling requirements to the Venezuelan market imposed by the Urea Decree[52] and, (2) stated that "to support the financial viability of the Project" the shareholders would provide additional capital contributions to Fertinitro, in the event of a "shortfall" in Fertinitro's debt payment to senior Lenders.[53] No contribution was ultimately necessary.[54]

D. Venezuela's Policies and Legislative Actions, and the Forced Acquisition of Fertinitro

61. According to Respondent, from 1999 onwards, restructuring Venezuela's food and agriculture system and achieving "food security" by way of increasing its agriculture productivity, became one of the priorities of the Venezuelan Government.[55]

62. In furtherance of this objective, Venezuela first issued the 2001-2007[56] and subsequently the 2007-2013, national plans for economic and social development of the Nation.[57] Among their objectives, the plans sought to guarantee "food security," and "food sovereignty" by "respecting the right to property and eradicating and penalizing the *latifundios* and the non-use of lands,"[58] and carrying out an " integral rural development"[59] as a means to achieve sustainable economic growth. According to Respondent, the government developed several other plans with the purpose of furthering food self-sufficiency and food security. Ensuring adequate fertilizer supply was one of the elements of these plans.[60] Claimant emphasizes that the Plans contemplated the continued presence of the private sector.[61]

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[52] *See* description of the Urea Decree *infra*, ¶ 68.

[53] Shareholder Additional Equity Contribution Agreement dated 29 April 2008 (R-66), Recitals, Art. 3.

[54] Resp. C-Mem., ¶ 132.

[55] Resp. C-Mem., ¶¶ 81-86; Resp. Rej., ¶¶ 20-22.

[56] Plan for the Economic and Social Development of the Nation, September 2001 (R-25).

[57] National Project Simón Bolivar, First Socialist Plan, Economic and Social Development of the Nation, September 2007 ("**Simón Bolivar Plan**") (R-35).

[58] Plan for the Economic and Social Development of the Nation (R-25), p. 32, ¶ 1.1.3.1.

[59] Simón Bolivar Plan (R-35), p. 22.

[60] Resp. C-Mem., ¶¶ 86, 96-100.

[61] Cl. Reply, ¶ 48.

63. Domestic demand for fertilizers, particularly urea, increased between 1999 and 2005.[62] The majority of Fertinitro's urea production was destined to exports and Pequiven's other fertilizers plants (El Morón and El Tablazo) experienced production problems. In 2004, the domestic urea demand was not satisfied by the domestic production, and Venezuela imported urea.[63]

64. In 2002, Venezuela enacted the Law of Expropriation for Reasons of Public or Social Utility.

65. On 1 December 2005, Venezuela enacted an amendment to the Law to Stimulate Development of the Petrochemical, Carbochemical and Related Activities.[64] According to Article 4 of the amended law, Pequiven and its mixed companies shall guarantee the satisfaction of the domestic market as a priority, at competitive prices. [65]

66. From 2006 and there onwards, Venezuela continued to regulate the food and agriculture sector through various decrees and regulations.

67. On 21 February 2007, Decree-Law 5,197, (the "**Hoarding Law**") came into effect.[66] Article 4 of the Hoarding Law declared all goods necessary for the development of activities related to the production, fabrication and distribution of food or products subject to price control, as being goods of "public utility and social interest" (*de utilidad pública e interés social*). The same provision further declared that for safety reasons and food-sovereignty and without further formality, the government may initiate expropriation proceedings to be carried out by executive decree.

68. On 6 March 2007, Decree No. 5,218 (the "**Urea Decree**") came into effect.[67] Articles 1 and 2 of the Urea Decree declared nitrogen fertilizers "goods of first necessity" (*bienes de*

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[62] *See* Report: Volumetric Impact of Decree 5218 on FertiNitro Operations, Empresas Polar dated July 2007 (RG-86). *See also*, Tr. Day 1 [Gouiffès] 95:2-11.

[63] *See* Minutes of Board of Directors Meeting No. 58 (RG-61), p. 5; *see also* Tr. Day 1 [Gouiffès] 96:2-11.

[64] Amended Law to Stimulate Development of Petrochemical, Carbochemical, and Similar Activities, Official Gazette No. 38, 326 dated 1 December 2005 (HI-4).

[65] *Ibid.*, (HI-4) Art. 4.

[66] Decree Law No. 5, 197 of 16 February 2007, Official Gazette No. 38, 629 dated 21 February 2007 (RL-13).

[67] Decree Law No. 5, 218 of 26 February 2007, Official Gazette No. 38, 638 dated 6 March 2007 (the "**Urea Decree**") (RG-26).

primera necesidad), and imposed on all producers, distributors and exporters, the obligation to meet the domestic demand for nitrogen fertilizers, before exporting the products. In accordance with Articles 3 and 5 of the Urea Decree, the price and production of fertilizers were subject to control and further regulated by a joint resolution of the Ministry of Popular Power for Agriculture and Land, the Ministry for Light Industries and Commerce and the Ministry for Energy and Oil (the "**Urea Resolution**").[68]

69. The Urea Resolution fixed the maximum price at which Pequiven could buy urea from any producer "established" in Venezuela "in order to meet the needs of the Nation."[69] The price fixed by the Urea Resolution was below production price.[70] It further regulated the export of urea, by requiring exporters to previously obtain a "Certificate of Satisfaction of the local market."[71]

70. In April 2007, the Ministry of Energy and Petroleum circulated a draft Petrochemical Organic Law for discussion before the National Assembly.[72] According to news reports, the draft law provided that State-owned entities should hold a majority in all petrochemical companies, and it eliminated the possibility for the State of concluding legal stability agreements originally provided for in the Venezuelan law for the promotion and protection of investments.[73] The draft law further confirmed Venezuela's commitment to the promotion of "social, collective and private property."[74]

71. In July 2007, the Venezuelan National Council for the Promotion of Investments, posted a press release stating that the law was expected to be enacted by the end of 2007 and that the new law would require the State, through Pequiven, to assume the control of the 15 mix

[68] *See* Urea Decree (RG-26); Joint Resolution Nos. 057, 064 and 238 dated 2 May 2007, Official Gazette No. 38,674 ("**Urea Resolution**") (RG-27).

[69] Urea Resolution (RG-27), Art. 10.

[70] Minutes of Board of Directors Meeting No.80 held on 8 May 2007 (R-37), p.3.

[71] Urea Resolution (RG-27), Art. 12.

[72] *See* El Universal, "*Menpet propone empresas mixtas para sector petroquímico*," 25 May 2007 (R-43).

[73] *See* El Universal, "*Privados serán minoritarios en empresas mixtas petroquímicas*," 26 May 2007 (R-44).

[74] *Ibid.*

companies currently functioning in the petrochemical sector, through the acquisition of a 51% ownership interest in those companies.[75]

72. On 31 January 2008, Venezuela's Decree Law 5,835, became effective ("**Decree 5,835**").[76] Article 4 of Decree 5,835, amended Article 4 of the Hoarding Law to include as goods of "public utility and social interest" not only the goods subject to price control or necessary for the production and manufacture of food, but also "any other products that had previously been declared of first necessity."[77] Article 4, last sentence restated that the government may initiate expropriation proceedings through decree for reasons of "food sovereignty and security." [78]

73. Six months later, on 31 July 2008, the Organic Law for Food Security and Sovereignty, LOSSA, further declared in its Article 3, that all goods that ensure the population's access to and availability of food, and also the infrastructure necessary to develop those activities, are goods of "public utility and social interest." Article 3 also ruled that Venezuela's executive could by decree declare the compulsory acquisition of such goods, in exchange of prompt and adequate compensation, when necessary to further the objective of food security.[79]

74. On 18 June 2009, the Organic Law for the Development of Petrochemical Activities, came into effect.[80] Pursuant to Article 5 of the Law:

> The basic and intermediate petrochemical activity is reserved to the State, as well as the works, goods or facilities required for conducting such activity. This reservation will be directly exercised by the National Executive or by companies of its exclusive property. Likewise, the State may do so through

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[75] *See* National Council for the Promotion of Investments (CONAPRI), "*Pequiven asumirá el control de empresas mixtas petroquímicas,*" dated 25 July 2007, (R-47), *see also* National Council for the Promotion of Investments (CONAPRI), "*Ley de petroquímica estará lista antes de finalizar 2007,*" dated 13 July 2007 (R-50).

[76] Decree-Law No. 5,835 of 28 January 2008, Official Gazette of Venezuela No. 38862 dated 31 January 2008 ("**Decree 5,835**") (RG-32).

[77] See Ibid. Art. 4; *See also*, ¶ 68 *supra*.

[78] *See* Decree 5,835, (RG-32), Art. 4.

[79] Decree with force of law, Organic Law for Food Security and Sovereignty No. 6071, Official Gazette No. 5,889 dated 31 July 2008 ("**LOSSA**") (RL-14).

[80] Organic Law for the Development of Petrochemical Activities (C-3 / CL-30 with translation).

> mixed companies in which it has controlling interest and a participation of not less than fifty percent (50%) of the capital stock.
>
> Mixed companies will be subject to prior authorization of the National Assembly (...)

75. On 11 October 2010, Venezuela enacted Decree No. 7,713, which provides, in Article 1, the forced acquisition of Fertinitro as follows (the "**Expropriation Decree**"):

> The forced acquisition is ordered of all the real and personal property, including property improvements, facilities, plants, industrial equipment, office and other assets, required or needed for the production, processing, transport and storage of fertilizers (urea and ammonia), belonging or currently in possession of the corporations Fertilizantes Nitrogenados de Oriente, S.A.; Fertilizantes Nitrogenados de Venezuela, S.R.L; Fertilizantes Nitrogenados de Oriente, C.E.C.; and Fertilizantes Nitrogenados de Venezuela, C.E.C.; or of any other company or related persons, in order to achieve the complete and effective realization of the national plans for sowing and production formulated by the [Executive Branch of the National Government], which are needed to execute the "Socialist Plan for Agro-Alimentary Sovereignty."[81]

76. Under Articles 2, 4-7 of the Expropriation Decree, Pequiven was designated as Fertinitro's "expropriating entity" and was given all necessary powers for the implementation of the expropriation. Finally, all expropriated assets were to be transferred through Pequiven to the Venezuelan government, without liens and limitations, in accordance with Article 3 of the Expropriation Decree. [82]

77. On that same day, Minister Ramirez went to the Fertinitro Plant and gave a press conference stating that the government was taking over the plant.[83] Gambrinus' appointed Directors resigned on 22 November 2010, stating that "from a practical perspective, Pequiven ha[d] assumed full and exclusive operational and managerial control of Fertinitro to the exclusion of any other investors, including Gambrinus Corp."[84]

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[81] Expropriation Decree (C-2).

[82] Expropriation Decree (C-2).

[83] Transcript of Video of Minister Ramírez (Venezolana de Television) dated 11 October 2010, 12:28 PM (with translation) (C-24A) and Video of Minister Ramírez (Venezolana de Television) 11 October 2010, 12:28 PM (C-24B) (video / electronic exhibit).

[84] Resignation of Gambrinus Directors dated 22 November 2010 (RG-48).

E. The Events Following the Expropriation Decree

78. According to Respondent, thereafter, Fertinitro cancelled its debt towards its lenders by having Pequiven repurchase, from the lenders and bondholders, their loans.[85] Claimant agrees that Fertinitro's debt has been paid and suggest that Pequiven's bond repurchase was financed through the almost "half billion dollars in cash" that Fertinitro generated between 2011 and 2012.[86]

79. Pequiven also commenced negotiations with the other Fertinitro shareholders to establish the value of the compensation due for the expropriation. Negotiations were held with the private shareholders of Fertinitro on 16 February 2011 in New York, and subsequently on 6 April, and 24, 25 May 2011 in Caracas.[87] The letter summarizing the first meeting specified that Mr. Oscar Grossman would represent "Empresas Polar" in this "consultation and amicable settlement" phase.[88] Accordingly, that and subsequent letters summarizing the points discussed during those negotiations were addressed to Empresas Polar, Koch Minerals, Snamprogetti Limited and Magna Capital.[89] These letters made no mention of Gambrinus Corp.

80. On 19 May 2011, Pequiven's appointed director, circulated a valuation report of Fertinitro prepared by Advantis.[90] This report was an update on the valuation that the consulting firm had carried out in 2007. The report valuated Fertinitro at USD 398 million.[91]

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[85] Resp. C-Mem., ¶ 148.

[86] Cl. PHB (I), ¶ 63.

[87] *See* Letter from Pequiven to Fertinitro's shareholders dated 28 February 2011 and e-mail attaching said letter (**"Pequiven's 28 February 2011 Letter"**) (R-73); Letter from Pequiven to Fertinitro's shareholders dated 14 April 2011 and e-mail attaching said letter (R-74); E-mail from Oscar Grossmann (Polar) to Fertinitro's shareholders dated 24 May 2011 (R-77); E-mail from Francisco García (Pequiven) to Fertinitro's shareholders dated 19 July 2011, attaching Advantis' revised valuation of Fertinitro (R-78).

[88] Pequiven's 28 February 2011 Letter (R-73), p. 3 (stating that "Empresas Polar ratificó que el Sr. Oscar Grossmann representará a Empresas Polar en la etapa de arreglo amigable y consultas.")

[89] *See* Pequiven's 28 February 2011 Letter (R-73); Letter from Pequiven to Fertinitro's shareholders of 14 April 2011 and e-mail attaching said letter (R-74).

[90] Email from Francisco García (Pequiven) to Fertinitro's shareholders of 19 May 2011 attaching the Advantis September 2010 valuation (R-75).

[91] Advantis, *Valoración de Fertinitro*, Reporte Ejecutivo, dated September 2010 (R-75), p. 10., slide 9.

81. On 28 June 2011, Koch filed a request for arbitration against Venezuela before ICSID, which was registered by the ICSID Secretary General on 19 July 2011.[92] The Fertinitro shareholders, however, continued negotiations.

82. At the request of the shareholders, and following their comments, Advantis prepared a revised valuation report that was circulated to the shareholders on 19 July 2011. The revised updated report valuated Fertinitro at between USD 452 million and USD 561million.[93]

83. On 26 July 2011, Pequiven initiated judicial expropriation proceedings before the Court of First Instance of the Judicial Circuit of Anzoátegui of Venezuela. Subsequently, the court appointed an administrator to carry out the expropriation.[94]

84. On 1 September 2011, the shareholders met for the last time in Miami, Florida.[95]

85. Pequiven reached an agreement with LAIF on 18 January 2012 pursuant to which LAIF received USD55 million for its 10% interest in Fertinitro. Respondent also alleges that Snamprogetti reached a tentative settlement with Pequiven.[96]

86. Gambrinus filed its Request for Arbitration against Venezuela before ICSID on 8 November 2011.

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[92] Resp. C-Mem., ¶ 156 and 'Procedural Details" of *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/11/19, available at https://icsid.worldbank.org.

[93] Advantis, Valoración de Fertinitro, Reporte Ejecutivo, dated September 2010 (R-78), p. 3, slide. 2. The report indicates on p. 4, that if certain additional variables would be applied, the value of Fertinitro could increase to USD 561 million (*see* slide 4).

[94] *See* Petition for Expropriation dated 26 July 2001 (R-81); Decision of First Instance Court of 9 August 2011 (R-82).

[95] E-mail from Mr Contestabili (Snamprogetti) to Fertinitro's shareholders dated 11 August 2011 and answer from Mr Francisco García (Pequiven), dated 12 August 2011 (R-79); *see also* Resp. C-Mem., ¶ 158.

[96] Settlement Agreement, *Contrato de transaccion y Finiquito*, between Pequiven and Magna Capital / Puerto Asis / Latin American Infrastucture Fund / LAIF, dated 18 January 2012 (R-80), Art. II ("Compensation"); Resp. C-Mem., ¶ 158.

V. JURISDICTION

A. Introduction

87. Respondent objects to the jurisdiction of the Tribunal *ratione personae, ratione temporis* and *ratione materiae*, under Article 25 of the ICSID Convention and the BIT, alleging *inter alia* that (A) Gambrinus is not a protected foreign investor and Polar's use of Gambrinus's legal personality is an abuse of corporate personality; (B) the dispute pre-dates the "interposition" of Gambrinus in the corporate structure and/or was reasonably foreseeable at that time; and (C) Gambrinus made no investment, as it has not proved title to the Fertinitro shares and its purported interest is not an "investment" for purposes of the ICSID Convention and the BIT.

88. At the outset, the Tribunal notes that jurisdiction in the present case is subject to a dual test, meaning that it must exist both under the ICSID Convention and the applicable investment protection treaty, the Agreement between the Government of Barbados and the Government of the Republic of Venezuela dated 15 July 1994 and in force on 31 October 1995.

89. ICSID jurisdiction and the competence of this Tribunal derive from Article 25 of the ICSID Convention, which states in relevant part:

> (1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State… and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.
>
> (2) 'National of another Contracting State' means:
>
> ....
>
> (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purpose of this Convention".

90. Article 1(a) of the BIT defines "investment" as "every kind of assets invested by nationals or companies of one Contracting Party in the territory of the other Contracting Party [...]." Article 1(d) defines "companies" as meaning, "in respect of each Contracting Party, corporations, firms and associations incorporated or constituted under the law in force in that Contracting Party. For the purpose of the Convention referred to in Article 8 [ICSID Convention] 'Company' shall include any company incorporated or constituted under the law in force in one Contracting Party which is owned or effectively controlled by nationals or companies of the other Contracting Party."

91. Article 8 of the BIT sets forth the disputes that may be submitted to arbitration according to the BIT and the ICSID Convention:

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

92. The jurisdiction of the Centre depends first and foremost on the consent of the parties.[97] Tribunals shall exercise jurisdiction over all disputes that fall within the scope of the parties' consent as long as the dispute satisfies the objective requirements set forth in Article 25 of the ICSID Convention. In the words of Professor Aaron Broches, the purpose of Article 25(2)(b) is to

> ... indicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto. Therefore the parties should be given the widest possible

[97] Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Dispute between States and National of Other States, 1 ICSID Reports 28, stating that "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre" (¶ 23).

> latitude to agree on the meaning of "nationality" and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion should be accepted.[98]

93. Regarding the "outer limits within which disputes may be submitted to conciliation and arbitration," Broches points specifically to a situation where it should not be permitted to the parties "to use the Convention for purposes for which it was clearly not intended."[99]

94. Based on Article 25 of the Convention and the BIT this Tribunal has jurisdiction over the present dispute if the following requirements are met: (1) Claimant is a "national or company" of a Contracting Party to the BIT and a "national of another Contracting State" to the ICSID Convention; (2) Claimant has an "investment" in the territory of the other Contracting Party and in accordance with the ICSID Convention; (3) the legal dispute arises directly from the investment; and (4) the parties to the dispute have consented to ICSID jurisdiction over it.

95. Bearing in mind the principles that have just been recalled, the Tribunal shall now examine Respondent's arguments that there is no jurisdiction *ratione personae, ratione temporis* and *ratione materiae*.

B. The Tribunal's Jurisdiction *Ratione Personae*

(1) <u>The Parties' Positions</u>

96. According to Respondent, Gambrinus is not a foreign investor in Venezuela: the only true investor is Polar, a Venezuelan corporation, and the mere incorporation of Gambrinus in Barbados is not sufficient for Gambrinus to qualify as an "investor" for purposes of the BIT and the ICSID Convention.[100] Claimant, in turn, argues that Gambrinus is a purposeful investor under the BIT, since it is incorporated in Barbados and there are no reasons to disregard Claimant's Barbadian citizenship. Moreover, it is established practice that any agreement on nationality included in the BIT, also satisfies the definition of "national of

[98] A. Broches, "The Convention on the Settlement of Investment Disputes between States and Nationals of Other States," 136 Recueil des Cours, 331, p. 361 (1972-II).

[99] A. Broches, *cit.*, *ibid.*

[100] Resp. C-Mem., ¶¶ 164-236; Resp. PHB (I), ¶¶ 43-48.

another contracting state" for purposes of the ICSID Convention, and thus this Tribunal has jurisdiction *ratione personae* over Claimant.

a. *Respondent's Position*

97. Respondent alleges that Gambrinus does not qualify as an "investor" under the BIT and a "national of another contracting State" under the ICSID Convention, on the basis of the following arguments:

i. First, Gambrinus is an empty off-shore entity with no operations. It is owned, controlled and run by Polar, a Venezuelan company, in Venezuela. In accordance with the text of the BIT and the purpose of the ICSID Convention, the Tribunal should look at Gambrinus' economic reality to determine whether it can be considered a foreign investor under the BIT, instead of stopping its analysis at the place of incorporation. [101]

ii. Second, even if the Tribunal would consider that only the incorporation criterion should be followed under both, the BIT and the ICSID Convention, Gambrinus corporate veil should be pierced, on the basis of an occurrence of abuse of process and *fraude de ley*. [102]

(i) *Gambrinus' status as an "investor" for purposes of the BIT and the ICSID Convention*

98. According to Respondent, Gambrinus does not exist as an economic entity in its own right. Gambrinus is undistinguishable from Inv. Polar as it has no business or economic activities of its own and lacks any meaningful link with Barbados.[103] It is registered in Barbados as an "International Business Company," a qualification typically given to shell companies, and its registered addresses correspond to secretarial service providers.[104] Instead, it is entirely

[101] Resp. C- Mem., ¶ 165.

[102] *Ibid.*, ¶¶ 220-236.

[103] *Ibid.*, ¶¶ 203-207.

[104] Tr. Day 1, [Gouiffès] 112:16-25 and 113:1-5 citing Certificate of Incorporation of Gambrinus Corp dated 1 September 2004 (RG-34) and notices of change of address dated 28 Feb 2011 and 22 November 2012 (R-84), Excerpts from secretarial providers, Chancery Chambers and Cidel's Corporate website (*see* R-7, R-8, respectively*). See also*, Resp. C-Mem., ¶ 202; Resp. Rej., ¶ 93.

owned by Inv. Polar, without any true identity and no independent decision-making powers, controlled by the same high ranking executives of Inv. Polar based in Caracas,[105] as well as managed by the same directors previously appointed by Inv. Polar, Mr. Grossman and Mr. Gabaldón.[106] Moreover, Polar became involved in Fertinitro for its characteristics as a Venezuelan company and not as a foreign investor[107] and it was Inv. Polar, and not Gambrinus, which participated in the settlement negotiations with Pequiven. As such, even after the Share Transfer, Inv. Polar and not Gambrinus continued to be treated as the actual shareholder in Fertinitro.[108] Mr. Gabaldón's continued to receive his salary from Polar, and Mr. Sucre, the director of the board, approved both, the sale by Inv. Polar, and the purported purchase by Gambrinus.[109] All these factors, according to Respondent, prove that Gambrinus is not a foreign investor under the BIT and the ICSID Convention.

The BIT

99. Respondent explains that the reference in Art. 1(d) of the BIT, second sentence, to "effective control" reflects Barbados and Venezuela's intention that economic realities and the economic substance of the entity, be considered when determining the nationality of an investor.[110] It further adds that "an investor incorporated in Barbados but void of any independent economic substance and effectively controlled by a Venezuelan company does not satisfy the nationality requirement."[111]

100. In addition, as a matter of international law, the place of incorporation criterion is not sufficient to determine a company's nationality. Contrary to Claimant's recount of the *Barcelona Traction* holding, in that case the Court found that, in addition to the place of incorporation, there was a need for some "permanent and close connection" between the

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[105] Resp. C-Mem., ¶¶ 22-28; Resp. Rej.¶ 93.

[106] Resp. C-Mem., ¶¶ 208-213.

[107] Resp. PHB (I), ¶ 12.

[108] Resp. PHB (I), ¶ 32; *see also* Tr. Day 1, [Gouiffès] 119:9-11 citing email from S. Guevara of 29 June 2010 (RG-127); Fertinitro's 2009 Financial Statements (RG-21); and Letter from Pequiven concerning compensation negotiations (RG-74).

[109] Resp. PHB (I), ¶ 31, citing Tr. Day 2, [Gabaldón] 137:24-25 and 138:1-4.

[110] Resp. C-Mem., ¶ 171; *see also infra* ¶¶ 136-138.

[111] Resp. C-Mem., ¶ 175.

State of purported nationality and the corporation.[112] Moreover, according to Respondent, "the need for a permanent and close connection has also been recognized by Article 9 of the International Law Commission's Draft Articles on Diplomatic Protection, which reflects customary international law."[113]

101. Furthermore, Respondent suggests that Claimants' reliance on the *Yukos, Saluka, ADC, and Tokios Tokelès* cases to have the Tribunal rely solely on the place of incorporation is misplaced, as those treaties "contained no control criterion at all" or in the case of *Tokios, Tokelès* the "applicable provision concerned entities incorporated in third states and its purpose was to extend the scope of protection" to those states.[114]

The ICSID Convention

102. Respondent rejects Claimant's argument that the definition of investor included in the BIT, instrument of consent, should always be a determining factor over any potential objective definition arising from the Convention. Instead, according to Respondent, such definition should be disregarded in special cases where it proves to be "unreasonable in light of the ICSID Convention's object and purpose."[115]

103. Venezuela posits that by considering Gambrinus as a protected investor, the Tribunal would be permitting Inv. Polar, a Venezuelan corporation, to submit a purely domestic dispute to an ICSID Tribunal, which would be contrary to the ICSID Convention's object and purpose.[116]

104. Venezuela considers that Claimant's reliance on the *Aucoven*, *Tokios Tokelès* and *Rompetrol* tribunals to establish jurisdiction *ratione personae* under the Convention is misplaced. First,

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[112] Resp. Rej., ¶ 113, citing *Barcelona Traction Barcelona Traction Light and Power Company, Limited*, I.C.J. Reports 1970, 5 February 1970 ("**Barcelona Traction**") (RL-20), ¶ 71.

[113] Resp. Rej., ¶¶ 114-115.

[114] Resp. PHB (I), ¶ 48; *see also infra* ¶ 135.

[115] Resp. Rej., ¶ 121.

[116] Resp. Rej., ¶¶ 124-125; Tr. Day 1, [Gouiffès] 134:16-25 and 135:1-16 relying on Schreuer (RL-6) ¶¶ 268, 296, 760 (RL-95).

the *Aucoven* Tribunal agreed, citing Mr. Broches, that the Parties' discretion to determine the nationality of companies-investor is limited by the purpose of the Convention.

105. Second, the *Tokios Tokelès* majority recognized that the dispute must satisfy objective requirements of the Convention to fall under the jurisdiction of the tribunal.[117] Moreover, in *Tokios Tokelès*, the claimant had a real business activity in Lithunia, and the "test of the siege social" used in that case would lead to the conclusion that Gambrinus is not an investor.[118]

106. Third, in *Rompetrol*, the claimant was only partially owned by a Romanian national, not entirely owned and the BIT provided for more than only ICSID Arbitration. Therefore, no parallels can be drawn from both cases.[119]

107. Furthermore, Respondent argues that its proposition is further supported by the *intuitu personae* nature of the contractual arrangements underlying the Fertinitro Project, pursuant to which transfers were subject to restrictive conditions, as the original investors would remain liable for all obligations under the contracts.[120] It alleges that "Polar was chosen to participate in Fertinitro because of its Venezuelan identity"[121] and it was Polar Uno C.A., which signed the JIA and the By-Laws of Fertinitro, subscribed to the original shares, and became one of the Owners of Fertinitro.[122] Inv. Polar, as the transferor of its rights under the JIA, bore the risks of Gambrinus' participation in Fertinitro, and as the guarantor to Gambrinus, Inv. Polar remained jointly and severally liable for all obligations relating to the Project.[123] It also retained control over the Claimant.[124]

108. Additionally, Respondent rejects Claimant's arguments that the investment was done through a non-Venezuelan entity from the inception, *i.e.* Polar José, the entity from the

[117] Resp. C-Mem., ¶¶ 179-183.
[118] *Ibid.*, ¶¶ 215-216.
[119] *Ibid.*, ¶ 217.
[120] *Ibid.*, ¶¶ 191-197.
[121] Resp. PHB (I), ¶ 13.
[122] Resp. PHB (I), ¶ 14.
[123] *Ibid.*
[124] Resp. C-Mem., ¶¶ 198-200.

Cayman Islands, alleging that Polar José was introduced for tax reasons as a "Special Purpose Subsidiary" but not as an Owner or investor under the JIA.[125]

(ii) *Veil-Piercing, Abuse of Process and Fraude a la ley or Fraude de ley*

109. In any case, even if the Tribunal would consider that the incorporation criterion should be followed under both the BIT and the ICSID Convention, Respondent submits that Gambrinus' corporate veil should be pierced and Gambrinus legal personality should be considered indistinguishable from that of its shareholder, Inv. Polar, a Venezuelan company.

110. Respondent states that "the factors considered by arbitral tribunals in piercing the corporate veil are based on the notion of abuse (and in some cases, fraud) and seek to ascertain whether or not abusive corporate structuring or treaty fraud is established. Accordingly, ... if there has been a misuse of the legal personality, the corporate veil of the company must be pierced."[126] Contrary to Claimant's allegations, "tribunals have a discretionary power to decide whether it is appropriate to apply this equitable doctrine in cases submitted to their scrutiny."[127]

111. Respondent contends that the present case merits piercing the corporate veil because Gambrinus is "an empty vehicle with no genuine connection to Barbados"[128] and Inv. Polar is using its legal personality as "an opportunistic shield" to gain access to ICSID jurisdiction.[129] Venezuela submits that "the Share Transfer was a purely artificial transaction. Gambrinus did not disburse a single dollar when it received Fertinitro's shares from Polar, nor did it suffer any economic detrimental impact as a result of the acquisition."[130] Moreover, Claimant failed to submit any evidence to support its statement that Gambrinus is a "corporation of substance."[131]

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[125] Resp. PHB (I), ¶ 15.
[126] Resp. C-Mem., ¶ 223.
[127] Resp. Rej., ¶ 135.
[128] Resp. PHB (II), ¶ 24.
[129] Resp. C-Mem., ¶¶ 227 – 230.
[130] Resp. Rej., ¶ 138.
[131] Resp. PHB (II), ¶ 24.

112. Respondent further contends that the takeover of Fertinitro was predictable and imminent. By 2008, date of the transfer to Gambrinus, Inv. Polar knew that Venezuela would soon take control of Fertinitro. It was at that point, according to Respondent, that Inv. Polar executed the "hasty reorganization to transfer, on a purely technical level, its holding to Gambrinus," [132] which was completed for the sole purpose of obtaining a nationality of convenience and gain access to ICSID arbitration by committing an abuse of process and legal personality.[133]

113. Moreover, by doing so, Gambrinus also incurred a "*fraude de ley*" under Venezuelan law. As explained by Professor Iribarren, the *fraude de ley* or "fraud of law" principle "is based on the notion that "an entity may be [a] party to legal dealings which are an indirect breach of the law, in the sense that they achieve a result contrary to the legal framework, although technically complying with the letter of the law."[134]

114. Gambrinus intended to evade (through the share transfer, an otherwise legal means) the jurisdiction of Venezuelan courts over the present dispute, and thereby purposefully elude mandatory rules that dictate the submission of expropriation claims to the Venezuelan courts, as a matter of public policy. These elements are sufficient to conclude that the share transfer constituted a *fraude de ley*. [135]

115. Respondent concludes that the present circumstances justify piercing the corporate veil and that the Tribunal must decline jurisdiction *ratione personae* to prevent the investment treaty arbitration system to be abused.[136]

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[132] Resp. C-Mem., ¶ 232.

[133] *Ibid.* ¶¶ 230-232; Resp. Rej., ¶¶ 137-140.

[134] Resp. C-Mem., ¶¶ 233-234, citing Iribarren (I), ¶¶ 34-57. *See also*, *infra*, ¶ 221 (5).

[135] Resp. C-Mem., ¶¶ 233–234; Resp. Rej., ¶¶ 139, 205-210.

[136] Resp. Rej., ¶ 148.

b. *Claimant's Position*

(i) *Gambrinus' status as an "investor" for purposes of the BIT and the ICSID Convention*

116. Numerous investor-state tribunals have accepted that when incorporation in a state is the sole condition for corporate nationality, no further requirements should be imposed.[137] The nationality definition in the BIT applicable to these proceedings is satisfied by reasons of simple incorporation in a contracting state. Since Claimant is incorporated in Barbados, Claimant satisfies the BIT's corporate nationality definition.[138] In addition, as admitted by Respondent, the widely accepted established practice is to find that any agreement on nationality of the BIT satisfies the first prong of Article 25(2)(b) of the ICSID Convention.[139]

<u>The BIT</u>

117. Claimant rejects Respondent's reading and interpretation of Article 1(d) of the BIT, including its second paragraph. It alleges that Article 1(d) looks solely to "incorporation" as the criterion of nationality. The second paragraph of Article 1(d) does not dictate the Tribunal to inquire into the nationality of the claimant's ultimate shareholders, which Claimant considers to be irrelevant.[140] Under the second paragraph, a Venezuelan company will qualify as a Barbadian national if owned or controlled by a Barbadian citizen or a Barbadian company.[141]

[137] Cl. PHB (II), ¶ 5 n. 6 citing *Tokios Tokelės v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 (*"**Tokios Tokelės Decision**"*) (CL-32) ¶ 40; *Yukos Universal Ltd. v. Russia*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility (UNCITRAL), 30 November 2009 ("***Yukos***") (CL-43) ¶ 416; *Saluka Invs. B.V. (The Netherlands) v. Czech Republic*, Partial Award (UNCITRAL), 17 March 2006 (*"**Saluka**"*) (CL-45) ¶ 241; *Rompetrol Grp. N.V. v. Romania*, ICSID Case No. ARB/06/3, Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility, 18 April 2008 ("***Rompetrol***") (CL-37) ¶ 101; *RosInvestCo UK Ltd. v. Russia*, SCC No. 079/2005, Final Award, 12 September 2010 ("***RosInvestCo***") (RL-126) ¶¶ 322-23; *Rumeli Telekom A.S. v. Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 ("***Rumeli***") (CL-94) ¶ 326; *Bureau Veritas, Inspection, Valuation, Assessment & Control, BIVAC B.V. v. Paraguay*, ICSID Case No. ARB/07/9, First Decision on Jurisdiction, 29 May 2009 ("***Bivac***")(CL-42) ¶ 53(5); *ADC Affiliate Ltd. v. Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006) ("***ADC***") (CL-44), ¶ 357.

[138] Cl. PHB (II), ¶ 5.

[139] Cl. Rej., ¶ 5, citing Resp. Rej., ¶ 121.

[140] Cl. Reply, ¶ 86; Cl. PHB (II), ¶ 10.

[141] Cl. Reply, ¶ 75.

118. Claimant relies on the *Oostergetel, Saluka* and *Yukos and Rompetrol* tribunals and the *Tokios Tokelès* Majority for the proposition that where agreed upon definitions appear in a treaty, a Tribunal should not unilaterally alter it and that the BITs' definitions of nationality should govern the nationality requirement.[142]

119. Claimant also contends that the application of the express terms of the BIT (i) conforms with the principles of treaty interpretation of Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**"), and (ii) comports with the object and purpose of the BIT, including Barbados' intention of protecting all its juridical entities regardless of the nationality of the shareholders.[143]

120. Gambrinus further challenges Respondent's factual allegations on its so-called "economic realities" highlighting that it failed to cite cases in support of such test and insists that tribunals have consistently refused to insert additional jurisdictional criteria to replace those chosen by the Parties.[144] Furthermore, it alleges that whether Claimant is a shell company or not, this has no impact on jurisdiction,[145] and in any event, Venezuela has failed to refute the evidence showing that Gambrinus, which was incorporated in 2004,[146] had investment activities and was "a corporation of substance."[147] Claimant became the direct shareholder in Fertinitro and directly assumed contractual obligations to the other shareholders, pursuant to the JIA and the 2008 Additional Capital Contribution Agreement.

121. According to Claimant, Article 1(d) second paragraph of the BIT is intended to "expand" ICSID jurisdiction, by covering also locally-incorporated entities under foreign control and thereby triggering the second limb of Article 25(2)(b) of the ICSID Convention. It cannot be

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142 Cl. Reply, ¶¶ 2, 77-80 citing *Oostergetel v. Slovak Republic*, Decision on Jurisdiction, 30 April 2010 (CL-54), ¶ 130; *Saluka* (CL-45), ¶ 229; and *Yukos* (CL-43), ¶¶ 415-416; Cl. Rej., ¶ 33, citing *Tokios Tokelès Decision* (CL-32) ¶ 40; and *Rompetrol* (CL-37), ¶ 85; *see also* Cl. PHB (I), ¶ 16.

143 Cl. Rej., ¶ 34, citing *Why Barbados?, Invest Barbados* (C-26); Cl. PHB (I), ¶ 16.

144 Cl. Reply, ¶¶ 89-90.

145 *Ibid.*, ¶¶ 91-94; Cl. PHB (II), n. 10, quoting *Rumeli* (CL-94), ¶ 326 and *Saluka* (CL-45), ¶ 240-241 for the proposition that "an allegation that a corporation is a 'shell company' is irrelevant when the treaty only looks to the place of incorporation to determine nationality."

146 Cl. PHB (II), ¶ 5; Certificate of incorporation of Gambrinus, Corp. dated 1 September 2004 (RG-34).

147 Cl. PHB (I), ¶ 18; Cl. Rej., ¶¶ 71-72.

construed as diminishing the BIT's provision defining nationality.[148] Since this is not a case brought against Venezuela by a Venezuelan-incorporated company that claims to be controlled by "Barbadian nationals," Article 1(d) second sentence does not come into play.[149]

The ICSID Convention

122. Claimant sees no grounds for the Tribunal to look further into an objective separate definition in the ICSID Convention. According to Claimant, the test of incorporation, based on the definition of the BIT, is wholly reasonable and consistent with the object and purpose of the Convention, especially where, as Broches notes, parties have been given "the widest possible latitude to agree on the meaning of 'nationality' [under Article 25(2)(b) of the ICSID Convention] and any stipulation of nationality made in connection with ... a[n] arbitration clause which is based on a reasonable criterion, should be accepted."[150] Therefore, the nationality requirement of Article 25 of the ICSID Convention is also satisfied.[151]

123. Similarly, Claimant's reliance on the ILC Draft Articles on Diplomatic Protection is unavailing since the Draft Articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments, as found by various prior tribunal, including *Rompetrol.*[152]

(ii) *Veil-Piercing, Abuse of process and Fraude a la ley or Fraude de Ley*

124. Claimant notes that when a party makes a "veil-piercing" plea, this virtually concedes that a *prima-facie* showing of the corporate nationality has been made. Claimant also rejects Respondent's position that Gambrinus corporate veil should be pierced.

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[148] Cl. Reply, ¶¶ 71-72; Cl. Rej., ¶ 40; Cl. PHB (I), ¶ 16; Cl. PHB (II), ¶ 7, n. 9, citing *Tokios Tokelės Decision* (CL-32) and *Wena Hotel Ltd. v. Egypt,* ICSID Case No. ARB/98/4, Decision on Jurisdiction, 29 June 1999 (CL-47).

[149] Cl. Rej., ¶ 41.

[150] Id., ¶ 35, citing A. Broches, The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 136 Recueil des Cours (1972) (CL-34), pp. 337, 361.

[151] Cl. Reply, ¶¶ 83-85.

[152] Cl. Rej., ¶¶ 42-43.

125. Past tribunals, including the ICJ in *Barcelona Traction*, have held that veil-piercing is reserved for exceptional cases involving injustice or fraudulent use of corporate form, none of which exist in this case.[153] Here, Claimant submits, there are no *exceptional factual bases* for claiming that Gambrinus was incorporated for "fraudulent purposes," "abuse of legal personality," "malfeasance" or "evasion of legal requirements or of obligations."[154] Instead, Gambrinus was formed in 2004, several years after the investment and four years before acquiring the Fertinitro shares, and was engaged in other business activities, such as acquiring shares in Metanol de Oriente S.A. ("**Metor**").[155] Claimant acquired the Fertinitro shares, through a real issuance of equity shares in exchange of Fertinitro shares; it is not an artificial transaction and it was completed at the suggestion of Pequiven, in anticipation of a potential sale of the shares to Pequiven, at a time when no expropriation was made.[156]

126. Claimant also underlines that from the outset the JIA and Offtake Agreement permitted off-shore affiliates to hold Fertinitro shares. Gambrinus' Fertinitro shares were originally held by Polar José, another foreign entity from Cayman Islands and Pequiven itself used a BVI entity in the Offtake Agreement.[157] The Transfer of Fertinitro shares to Claimant from Inv. Polar "merely restored the status *quo ante*." [158]

127. The mere fact that Inv. Polar agreed to "remain responsible with the transferee Affiliate" for compliance with the JIA, does not change the separate, independent legal obligations assumed by Gambrinus, as an "original named party" to the JIA, according to Claimant.[159] Moreover, as explained by Mr. Kaczmarek, the January 2008 acquisition was "not a 'cost-free' transaction, but a common method of acquiring another company."[160]

[153] Cl. Reply, ¶ 2; Cl. Rej., ¶ 48, citing *Barcelona Traction* (RL-20) ¶ 58, *ADC* (CL-44) ¶ 358; and *Rumeli* (CL-94) ¶ 328.
[154] Cl. Rej., ¶ 49.
[155] Cl. PHB (II), ¶ 9; Cl. PHB (I) ¶ 18 & n.43 (citing Gabaldón (I) ¶ 53; Gabaldón (II) ¶¶ 70-72; Cl. Rej. ¶¶ 7(d), 36).
[156] Cl. Rej., ¶ 36.
[157] Cl. PHB (II), ¶ 12; Cl. PHB (I), ¶ 17.
[158] Cl. Rej., ¶ 37.
[159] *Ibid.*, ¶ 38.
[160] Cl. Rej., ¶ 39 citing Kaczmarek (III), ¶ 13.

128. Accordingly, there are no legal bases to conclude that the 2008 transfer from Inv. Polar was improper. In any case, as already recognized by the *Tidewater* tribunal, even if the transfer to Claimant was purely motivated by the desire to obtain future treaty benefits, this would not prevent the Tribunal from finding that Gambrinus is a Barbadian company and that it has jurisdiction *ratione personae.*[161] Citing also to the *Mobil* tribunal, as well as Prof. Schreuer, Claimant alleges that the weight of authority holds that it is a perfectly legitimate goal to restructure investments with investment treaty protection in mind.[162]

129. Similarly, Respondent's *fraude a la ley* objection shall be dismissed because it requires the subjective intent to evade a norm of public policy. However, these elements are absent in this case. First, the transfer of shares occurred to address currency exchange concerns and therefore no "subjective intent" can be shown, and, second, the BIT is a fully "implemented" treaty in Venezuela, and therefore reliance on the BIT cannot be an evasion of "a mandatory norm."[163] As explained by Professor Ayala, "the option exercised by Gambrinus, that is, one of the two equally valid and effective alternatives under Venezuelan law [namely recourse to the BIT, or to the Venezuelan courts] and which protect investors, cannot be understood to be a violation of Venezuelan public order."[164]

130. For all these reasons, Claimant alleges that there are no exceptional circumstances that would allow the Tribunal to ignore Claimant's status under the laws of Barbados and pierce the corporate veil. Accordingly, the conditions for jurisdiction *ratione personae* are met in this case.

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[161] Cl. Reply, ¶¶ 90-94 citing *Tidewater, Inc. v. Venezuela*, ICSID Case No ARB/10/5, Decision on Jurisdiction, 8 February 2013, ("***Tidewater***") (CL-132), ¶ 146.

[162] Cl. Reply, ¶ 2 citing *Mobil Corp. v. Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010 ("***Mobil***") (CL-68), ¶ 204. *See also*, Cl. PHB (II), ¶ 12, n. 16, citing *Schreuer's Guide to Nationality Planning*, Global Arb. Rev. 11 May 2012 (CL-156).

[163] Cl. PHB (I), ¶ 59.

[164] Cl. Rej., ¶ 33, citing Ayala, ¶ 202.

(2) **The Tribunal's Analysis**

131. Jurisdiction *ratione personae* depends on how "nationality" is defined in the ICSID Convention and the BIT, this definition setting the limits to the rights protected which may only be those belonging to a qualifying investor.

132. As it has been noted, Contracting States enjoy broad discretion to define corporate nationality under the ICSID Convention. "[D]efinitions of corporate nationality in national legislation or in treaties providing for ICSID's jurisdiction are directly relevant to the determination of whether the nationality requirements of Article 25(2)(b) have been met" and "[a]ny reasonable determination of the nationality of juridical persons contained in national legislation or in a treaty should be accepted by an ICSID commission or tribunal."[165]

133. As mentioned by other ICSID tribunals, the drafters of the ICSID Convention, in reliance on its consensual nature, preferred giving the Contracting Parties a greater latitude to define themselves such terms as "legal dispute," "investment," "nationality" and "foreign control."[166] Thus, it has been held that "the jurisdiction of the Centre depends first and foremost on the consent of the Contracting Parties, who enjoy broad discretion to choose the disputes that they will submit to ICSID."[167]

134. Considering the freedom thus left to the Contracting Parties to identify specific criteria to determine the nationality of a juridical person, one may turn to the applicable investment protection treaty to find which are these criteria. According to the BIT, incorporation in Barbados is sufficient to establish nationality of a company.[168] Therefore Gambrinus is a "national of another Contracting State" and a "national" or "company" meeting the nationality requirement of the BIT and the ICSID Convention. This is Claimant's position.

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[165] Christoph H. Schreuer *et al.*, *The ICSID Convention. A Commentary*, (2d ed., 2011) (CL-214), p. 287, ¶ 723.

[166] *Autopista Concessionada de Venezuela, C.A. v. Venezuela*, No. ARB/00/5, Decision on Jurisdiction, 27 September 2001 ("***Aucoven***") (CL-33), ¶ 97.

[167] *Tokios Tokelės* Decision (CL-32), ¶ 19.

[168] *See supra*, ¶ 90.

135. As previously explained, Respondent contends in opposition that the freedom left by the ICSID Convention to the Contracting Parties is not absolute since it cannot supersede the very purpose of the Convention, which is to promote "foreign private international investment" as stated by the Preamble. It adds that Gambrinus is a shell company with no activity whatsoever either in Barbados or in Venezuela, the purpose of the transfer of interest by Inv. Polar in 2008 being to get the benefit of the BIT Barbados-Venezuela.

136. In support of its position, Respondent argues that the BIT expressly applies a control criterion to determine corporate nationality in cases where the company is incorporated in one Contracting Party but "owned or effectively controlled by nationals or companies, of the other Contracting Party."[169] It relies on Article 1(d), second sentence, of the BIT, according to which

> For the purposes of the Convention referred to in Article 8 "Company" shall include any company incorporated or constituted under the law in force in one Contracting Party which is owned or effectively controlled by nationals or companies of the other Contracting Party.[170]

137. According to Respondent, this provision necessarily has a double effect: first, extending jurisdiction to companies incorporated in the Host State but controlled by nationals of the other Contracting Party; second, preventing companies incorporated in one Contracting party but controlled by nationals of the Host State from suing the Host State.[171] According to Respondent, the reference to "effective control" in the second sentence of Article 1(d) reflects Barbados and Venezuela's intent for economic realities to be taken into account.[172]

138. Always according to Respondent, the provision would apply also to the present case with the effect of excluding that Gambrinus, being owned or effectively controlled by a Venezuelan entity, is eligible as a "Company" for purposes of the ICSID Convention under Article 8 of the BIT. Respondent relies on the treaty interpretation criteria codified in the VCLT, specifically Article 31(1) according to which the treaty provision should be

[169] Resp. PHB (II), ¶ 22.

[170] *Supra*, ¶ 90.

[171] Resp. PHB (I), ¶ 48. Resp. PHB (II), ¶¶ 22 -23.

[172] Resp. C.-Mem., ¶ 171.

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.*"[173] In this respect, an analysis of the purpose and object of the BIT, as described in the preamble confirms that the Tribunal should look at economic realities, since the BIT aims to provide protections to foreign and not to domestic investors.[174]

139. The Tribunal does not share Respondent's interpretation of the second sentence of Article 1(d) of the BIT. It considers that this provision mirrors Article 25(2)(b), second part, of the ICSID Convention according to which the nationality requirement is satisfied also in case of a company incorporated in the Contracting State party to the dispute if such company is subject to foreign control. As indicated by the wording used for the definition of "Company" under Article 1(d), second sentence, of the BIT, the intent of the Contracting Parties was to expand such definition to include "any company incorporated or constituted under the law in force in one Contracting Party which is owned or effectively controlled by nationals or companies of the other Contracting Party." The "expansive" effect of Article 1(d), second sentence, is the same as it is provided by Article 25(2)(b), second part, of the ICSID Convention.

140. Respondent's interpretation is at odds with the "*ordinary meaning of the terms of the treaty in their context*" under the VCLT and with the Contracting Parties' intention to give an expansive effect to this provision, as made manifest by the wording adopted. According to this interpretation, the provision "includes" the situation that Respondent seeks instead to exclude. When applied to the case of Gambrinus, the effect of the provision would not be to "exclude" Gambrinus, from the scope of Article 8 of the BIT, but rather to consider that Gambrinus, being a company incorporated or constituted under the law in force in one Contracting Party, namely Barbados, would be eligible for dispute settlement purposes to bring a claim against Barbados under the BIT as a company "owned or effectively controlled by nationals or companies of the other Contracting Party," *i.e.* controlled by Inv. Polar, a Venezuelan company.

[173] *Ibid.*, ¶¶ 168-171; Resp. Rej.¶¶ 98-102.
[174] Resp. C-Mem., ¶¶ 173-74.; Resp. Rej. ¶ 101.

141. Respondent further contends that failing application of the above provision to exclude that Gambrinus meet the nationality requirement under the ICSID Convention and the BIT, Gambrinus' corporate veil should be pierced since "Polar's use of Gambrinus' legal personality is a prime example of abuse of personality."[175] Respondent relies on the ICJ's *Barcelona Traction* case as recognising that the act of piercing the corporate veil is part of the international customary law "to prevent the misuse of the privilege of legal personality."[176]

142. The Tribunal notes initially that *Barcelona Traction*'s ruling concerns diplomatic protection, a context which is not the one of investment protection regulated by the ICSID Convention and the BIT. It notes further that piercing the corporate veil may only apply in exceptional circumstances, in case where "fraud" or "malfeasance" is clearly established, this being the type of conduct considered by *Barcelona Traction* as justifying a veil-piercing. Respondent has not shown that Claimant has used its status as a Barbadian entity, known to and accepted by Respondent, to perpetrate fraud or engage in malfeasance. As it has been noted, there is nothing wrong for a prudent investor "to organise its investment in a way that affords maximum protection under existing treaties, usually by establishing a company in a State that… accepts incorporation as a basis for corporate nationality."[177]

143. There is also no basis for Respondent's claim that by entering into the Share Transfer Agreement with Inv. Polar, Claimant committed a "*fraude a la ley*" under Venezuelan law since the aim of the transaction was to avoid the application of mandatory Venezuelan laws, specifically the expropriation law, and to evade the exclusive jurisdiction of Venezuelan courts. As it has been correctly mentioned, the option to make recourse to the BIT protection was equally valid under Venezuelan law, the BIT being part of this law, so that its choice cannot be understood as a violation of Venezuelan public order.[178] The only basis for establishing jurisdiction *ratione personae* in this case is the conformity of Claimant's claim

[175] Respondent C-Mem., ¶ 220.
[176] *Ibid.*,¶ 221.
[177] Schreuer's *Guide to Nationality Planning*, Global Arbitration Review, May 11, 2012, p. 1 (CL-156).
[178] *Supra*, ¶ 129.

with the requirements of the ICSID Convention and the BIT, not with mandatory rules of the local law.

144. In the exercise of its functions the Tribunal is guided by the terms in which the Contracting Parties to the BIT have agreed to establish its jurisdiction. According to the Tribunal's interpretation, the BIT only requires that Claimant be constituted under the laws of one of the Contracting Parties. As a company incorporated or constituted in Barbados, one of the BIT's Contracting Parties, Gambrinus satisfies the jurisdiction *ratione personae*.

145. The Tribunal's finding of jurisdiction *ratione personae* under the BIT is not dispositive of all issues of jurisdiction. It leaves open the question whether in the particular case the ICSID Convention is used for a purpose for which clearly it was not intended by permitting that a purely domestic dispute be internationalized into a treaty investment dispute in violation of the "outer limits" of that Convention.[179]

146. Contrary to Claimant's suggestion that only the BIT is relevant for the purposes of determining jurisdiction *ratione paersonae*, cases on which it relies confirm the need to consider in addition whether jurisdiction in the particular case is consistent with the very purpose of the ICSID Convention. Thus, the tribunal in *Aucoven*, referring to the discretion left to the parties by the framers of the Convention in defining nationality, held:

> it goes without saying, however [...] that this discretion is not unlimited and cannot be exercised to the point of being clearly inconsistent with the purposes of the Convention.[180]

Likewise, the majority of the tribunal in the *Tokios Tokelès* case held:

> Tribunals shall exercise jurisdiction over all disputes that fall within the scope of the Contracting Parties' consent as long as the dispute satisfies the objective requirements set forth in Article 25 of the Convention.[181]

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[179] *Supra*, ¶ 93. To use the words of another tribunal, "[t]he tribunal has to ensure that the ICSID mechanism does not protect investments that it was not designed for to protect, because they are in essence domestic investments disguised as international investments for the sole purpose of access to this mechanism." *Phoenix Action, Ltd v. Czech Republic*, Award, 15 April 2009 ("***Phoenix*** ") (RL-11), ¶ 144.

[180] *Aucoven* (CL-33), ¶ 98.

[181] *Tokios Tokelès* Decision (CL-32), ¶ 19.

147. Unless jurisdiction is to be excluded on any other ground, it shall therefore be necessary to examine in the context of jurisdiction *ratione materiae* whether Gambrinus owns an "investment" in Venezuela according to the ICSID Convention and the BIT and, if so, whether Gambrinus is a shell company having made no contribution, as alleged by Respondent.

C. The Tribunal's Jurisdiction *Ratione Temporis*

(1) <u>The Parties' Positions</u>

148. According to Respondent, the Tribunal lacks jurisdiction *ratione temporis* because Inv. Polar transferred it shares to Gambrinus with the purpose of gaining access to ICSID "at a time when the dispute had already arisen, or was at the very least reasonably foreseeable."[182] Claimant answers, in turn, that the Share-Transfer responded to business considerations and that Respondent's challenge to the 2008 Share Transfer as an abuse of rights is factually unsupported. [183]

a. *Respondent's Position*

149. A change of nationality which enables an investor to access international arbitration when the dispute between the parties (defined as "a disagreement on a point of law or fact, a conflict of legal views or of interest between two persons") had already arisen or was reasonably foreseeable should lead to a lack of jurisdiction.[184] This has been established by numerous tribunal including *Mobil, Phoenix Action* and *Pac Rim.* [185]

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[182] Resp. C-Mem., ¶¶ 237-248; Resp. Rej., ¶¶ 149-158.

[183] Cl. Reply, ¶¶ 36-52; Cl. Rej., ¶¶ 6-20.

[184] Resp. PHB (I), ¶ 34. *See also*, Resp. PHB (II), ¶ 9.

[185] Resp. PHB (II), ¶ 9 citing generally *Mobil* (CL-68) and Resp. C-Mem., ¶ 238 citing *Phoenix* (RL-11), ¶ 95 and *Pac Rim Cayman LLC v. El Salvador,* Decision on the Respondent's Jurisdictional Objections, 1 June 2012 ("***Pac Rim***") (RL-25), ¶ 2.99. *See also infra*, ¶ 176.

150. Respondent submits that Pequiven's stated aim for Fertinitro to be run in line with "the philosophies of the Venezuelan government and its laws," conflicted with the interest of Fertinitro's private shareholders years before the Expropriation Decree was enacted.[186]

151. According to Respondent, the dispute arose, at the latest, in early 2007 with the adoption of the Urea Decree and the Urea Resolution. At the time of the 2008 Share Transfer, Fertinitro had already been affected by these and other regulatory measures which reflected the government's increased control over food security industries.[187]

152. In particular, the Urea Decree and Urea Resolution significantly impacted Fertinitro's revenues;[188] prompted Fitch to downgrade Fertinitro's rating from B to CCC;[189] prompted the Fertinitro Board to declare an "Event of Force Majeure" under the Offtake Agreement;[190] and were regarded by Koch, another Fertinitro shareholder who initiated a separate arbitration proceeding, as a "creeping expropriation."[191] All of these events demonstrate the existence of a dispute.

153. Venezuela also submits that, unlike what Claimant alleges, whether Gambrinus decided or not to bring a positive legal claim on the basis of the Urea Decree is irrelevant to determine

[186] Resp. PHB (II), ¶ 12, relying on Toro (II), ¶¶ 26-28; Minutes of Board of Directors Meeting No. 58 (RG-61); Minutes of the Board of Directors Meeting No. 80 (R-37).

[187] Resp. C-Mem., ¶¶ 96-109, 239.

[188] Resp. Rej., ¶ 152 citing EconOne Report (II), p. 58 (figure 10 ¶ 55) stating that Fertinitro's EBITDA's margin would have been higher in 2007 and 2008. *See also,* Resp. PHB (II), ¶ 12.

[189] Resp. Rej., ¶ 152, citing Fitch Ratings, 'Fitch Downgrades Fertinitro Finance to 'CCC' — Rating Watch Negative" dated 16 May 2007 (R-40).

[190] Resp. Rej., ¶ 152, citing Minutes of the Board of Directors Meeting No.82 held on 14 June 2007 citing Memorandum from Davis Polk (R-39), pp. 2-3. The Fertinitro Board declared that the Urea Decree and Resolution created a "Force Majeure Event" under the Offtake and Financing Agreements relying on external legal counsel's declaration that the Urea Decree and Resolution resulted in an "Event of Default" under the Agreements.

[191] Resp. PHB (II), ¶ 12, quoting Wikileaks Cable from US Embassy in Caracas to Washington, RE: New Petrochemicals Law, 27 August 2009 (R-94). As a matter of fact, the quote from the cable puts it differently:

> ... Pequiven began diverting a higher percentage of FertiNitro's production to the domestic market in 2006. This was followed by a 2007 government regulation mandating that urea be supplied first to the domestic market. Since then Pequiven has run the Jose facility itself; Koch pulled its own people out in 2007. (C) Koch has received verbal assurances from Pequiven that the project would not be affected by the new petrochemical legislation. In the event of nationalization, however, Koch has prepared by registering its FertiNitro affiliate in Switzerland to give it access to the Swiss Bilateral Investment Treaty. A Koch representative added that Pequiven's management of the facility could be termed a "creeping expropriation" given that it no longer consults with the FertiNitro Board or abides by other contract provisions.

if there is a dispute. For a dispute to exist, the applicable test is whether at the time of the purported transfer "a conflict of legal views or interests existed." [192]

154. Accordingly, the purported 2008 Share Transfer was made after the dispute had arisen, and there can be no jurisdiction over Gambrinus.

155. Relying on the *Pac Rim* and *Tidewater* cases, Respondent further submits that, in any case, an abuse of rights can also occur when the dispute, albeit not yet in existence, was reasonably foreseeable.[193] Venezuela contends that the escalation of regulatory and legislative measures in 2007, as well as repeated public and private warnings at the time of the purported 2008 Share Transfer, made the expropriation obvious and inevitable (at the very least), and therefore beyond the reasonably foreseeable standard, for the following reasons:

156. First, the 2007 legal climate unequivocally pointed to Fertinitro's nationalisation:

- With Venezuela's National Development Plan to "take control" of strategic production activities and related measures in the background, it was "imminent and foreseeable" that, as part of the government policy, Venezuela would take control of Fertinitro's assets.[194]

- The framework for Fertinitro's expropriation had already been established.[195] Relying on Dr. Irribaren's Opinion, Respondent alleges that in Venezuela all expropriation process have three distinct phases: the first phase begins when the legislative body enacts a legal act declaring that the assets and activities are of "public interest," a second administrative phase follows in which the executive body declares the expropriation; and third, a judicial phase consisting of the payment of compensation to the affected parties and the transfer of title of the assets. [196]

  In this instance, the pre-expropriatory phase began in February 2007 with the enactment of the Hoarding Law. This law declared that all products necessary for the production and manufacturing of food were public and of social interest. It continued with the issuance of the Urea Decree and Decree 5835 and the enactment of the Draft Petrochemical Organic Law, that would require Fetinitro's acquisition of at least 51% of the shares, as well as other measures in the field of food security followed during the first quarter of 2007. Subsequent to this, Inv. Polar transferred its interest to Gambrinus in 2008.

[192] Resp. PHB (II), ¶¶ 9-11.

[193] Resp. Rej., ¶ 153, citing *Tidewater* (CL-132), ¶¶ 51-61,145,148 and *Pac Rim* (RL-25), ¶¶ 2.96, 2.99, 2.109; *see also,* Resp. PHB (II), ¶ 14.

[194] Resp. C-Mem., ¶ 164.

[195] *Ibid.*, ¶ 240. *See also*, Resp. PHB (I), ¶¶ 24 - 29.

[196] Resp. C-Mem., ¶ 240, citing Iribarren ¶ 67.

- Claimant could not ignore the Orinoco Belt nationalisations, where the state was acquiring a majority interest.

157. Second, Inv. Polar was aware of the impending nationalisation. In particular, Mr. Toro alerted the Fertinitro board of directors of the inevitability of the takeover throughout 2007,[197] there had been public warnings by the President of Pequiven, and by President Chavez,[198] and finally, Mr. Gabaldón acknowledged that Inv. Polar was aware of the potential effect of the Petrochemical draft law on Fertinitro.[199]

158. Third, Inv. Polar expressed its fear regarding the nationalisation. This lead to an article by Mr. Gabaldón recommending limitations on the draft Petrochemical Law.[200] In addition, the alleged assurances that there would be no nationalization arguably provided by Pequiven's external legal counsel, evidenced on a hand written note, further confirm that this was a real concern and a point of discussion.[201]

159. According to Respondent, Claimant's allegations that the use of an off-shore entity was motivated by Pequiven's advice are unsupported by the documents on which Claimant relies, among others, because they relate to another transaction (*i.e.* Metor)[202] and there was no legal impediment for Inv. Polar as a Venezuelan company to receive the dividends of the proceeds of a potential buy-out in U.S. dollars.[203]

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[197] Resp. Rej., ¶¶ 50-51 citing Minutes of the Board of Directors' Meeting No. 78 (RG-68) and Email from T. Parra to F. Toro and A. Zavala dated 18 January 2007 (R-88). *See also*, Resp. C-Mem., ¶¶ 101, 244; Resp. PHB (I), ¶ 28 and Toro (I), ¶¶ 45-46; Toro (II), ¶¶ 42, 45; Resp. PHB (II), ¶ 20.

[198] Resp. PHB (II), ¶ 20, citing to National Council for the Promotion of Investments (CONAPRI) "*Pequiven asumirá el control de empresas mixtas petroquímicas.*" (R-47); Resp. Rej., ¶ 23, citing to President Chavez' televised speeches under R-91, R-92 and R-93.

[199] Resp. PHB (I), ¶ 40 citing Tr. Day 2, [Goiffés/Gabaldón] 107: 14-19 and 108:19-24. *See also, "Menpet propone empresas mixtas para sector petroquímico*, dated 25 May 2007 (R-43).

[200] Resp. PHB (II), ¶ 21, citing R. Gabaldón & S. Guevara, *La Industria Química y Petroquímica en Venezuela*, Part 1, Petroleo YV (R-45 / RG-101 with translation); R. Gabaldón & S. Guevara, *La Industria Química y Petroquímica en Venezuela*, Part 2, Petroleo YV (R-48 / RG-102 with translation).

[201] Resp. PHB (II), ¶ 21, referring to Reinaldo Gabaldón's Personal Notes from 11 December 2007 Meeting with Miguel Zaldivar (Partner, Hogan & Hartson LLP) (RG-114); *supra*, n. 36.

[202] Resp. PHB (II), ¶ 16, referring to R. Gabaldón's Personal Notes from 8 October and 17 October 2007 Meetings with Pequiven (RG-118) and Email Correspondence Regarding the Sale of Inv. Polar's Interest in Metor to Pequiven and the Need to Transfer, 8 October – 9 November 2007 (RG-95).

[203] Resp. PHB (II), ¶ 15. *See* Tr. Day 2, [Chairman/Gabaldón] 89:14-18, and Letter from Metor to JP Morgan requesting the transfer of funds in USD to Inv. Polar dated 30 April 2007 (R-62).

160. Thus, the objective of the purported share transfer and subsequent change of nationality of the Inv. Polar equity interest was to enable Gambrinus to access international arbitration by bringing a pre-existing or reasonably foreseeable dispute as an international dispute under the BIT. This should lead the Tribunal to decline jurisdiction over the present proceedings.

b. *Claimant's Position*

161. According to Claimant, Respondent's assertion that the transfer of Fertinitro shares to Claimant was motivated by an imminent expropriation is unfounded. Instead, Claimant asserts, it was based on business considerations for currency-related reasons to receive U.S. dollars in anticipation of Pequiven's purchase of Inv. Polar's interests in Fertinitro.[204] Moreover, Pequiven's own lawyer, Mr. Simon Guevara, was of the opinion that there was a reasonable risk that a dividend to be paid to a shareholder located in Venezuela could be subject to currency restrictions.[205]

162. Relying on Mr. Gabaldón's statement and documentary evidence, Claimant contends that the initial buy-out negotiations coincided with discussions between Inv.Polar and Pequiven for the sale to Pequiven of Inv. Polar's interests in another mixed company, Metor.[206] In reliance of its witness, Mr. Gabaldón, Claimant stated that during those negotiations:

> Mr. Garcia [a Pequíven representative] suggested that the best way for Inv. Polar to receive U.S. dollars for its shares was for Inv. Polar to transfer its interest in Metor to an 'off-shore' entity, because such a transfer would obviate the need for Pequiven to obtain approval of the Central Bank of Venezuela and Ministry of the Popular Power for Energy and Oil to make foreign currency payments to a domestic corporation.
>
> Based on this suggestion, Inv. Polar transferred its interest in Metor to Claimant. Inv. Polar then also followed the same practice when it transferred its Fertinitro shares to Claimant, in anticipation of another acquisition by Pequiven.[207]

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[204] Cl. Reply, ¶¶ 36-38.

[205] Cl. PHB (I), ¶ 58; Cl. PHB (II), ¶ 38, (citing Emails among Simón Guevara, Robert Goga and Reinaldo Gabaldón, Feb. 12-26, 2001, with attachments (RG-130))

[206] Cl. Rej., ¶¶ 8-11 citing to R. Gabaldón's Personal Notes from 8 October and 17 October 2007 Meetings with Pequiven (RG-118) and Email correspondence Regarding the Sale of Inv. Polar's Interest in Metor to Pequiven and the Need to Transfer, 8 October-9 November 2007 (RG-95); Gabaldón II, ¶ 70 and Gabaldón III, ¶ 31. *See also*, Reply, ¶¶ 36-37. Cl. PHB (I), ¶ 53.

[207] Cl. Reply, ¶¶ 36-37.

163. Claimant denies that the buy-out negotiations ended in late 2007, as alleged by Respondent. According to Claimant, in December 2007, Pequiven's counsel stated that the buy-out was on a "fast track" set for "early next year (1st Qtr)[208] and Pequiven was ostensibly still working with the lenders at that time toward the completion of the transaction. "Thus, Fertinitro was also still considering dollar-denominated dividend payments in January 2008, which provided an additional impetus for Inv. Polar to transfer its shares to Gambrinus."[209]

164. According to Claimant, there is no basis to suggest that there was a crystalized expropriation claim, much less a dispute between Inv. Polar and Venezuela at the time of the January 2008 acquisition. Claimant denies that the Urea Decree and Resolution triggered a dispute between the Parties. [210] Since Fertinitro had no choice but to comply with the Urea Decree, there was no dispute over its application: "it was accepted and complied with."[211]

165. In any case, Respondent mischaracterizes the case law on this question, as neither *Phoenix, Tidewater* nor *Mobil* suggested that "any" regulatory measure affecting the investor could trigger an "abuse of right" claim. Instead, the notion of "pre-existing dispute" must be "tied to the specific measures that form the Claimant's cause of action in the arbitration."[212] Neither Inv. Polar nor Gambrinus made a legal claim concerning the implementation of the Urea Decree and Resolution, which would be necessary for a dispute to exist.[213] Claimant's claim rests on the October 2010 Expropriation Decree alone not the Urea Decree or Resolution. [214]

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[208] Cl. PHB (II), ¶ 37, Cl. Rej. ¶ 12, citing Notes from 11 December 2007 Meeting (RG-114) (acquisition contemplated to be completed by first quarter of 2008).

[209] Cl. Rej., ¶ 12.

[210] Cl. PHB (II), ¶ 30, and n. 58, relying on *Teinver S.A. v. Argentina*, No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 (CL-210) ¶ 110; *PacRim* (RL-25) ¶ 2.100; *Emilio Agustìn Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Jurisdiction, 25 January 2000 ("***Maffezini***") (CL-158) ¶ 96; *AES Corp. v. Argentina*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005 ("***AES***") (CL-199), ¶ 43(b).

[211] Cl. PHB (II), ¶ 30.

[212] Cl. Rej., ¶¶ 18-19.

[213] Cl. PHB (I), ¶¶ 30 -35.

[214] Cl. Rej., ¶ 18.

166. Even if the Tribunal would be willing to accept that a prior measure which caused damage could be a "pre-existing dispute," "the evidence… demonstrates that 'damages' caused by the Urea Decree and Resolution were mitigated by events."[215] Relying on Mr. Gabaldón's statement, Claimant asserts that only 15% of Fertinitro's output was subject to the Urea Decree[216] and it did not constitute an Event of Default under the offtake agreement.[217]

167. Moreover, Gambrinus rejects the allegation that the expropriation of Fertinitro was actually foreseeable or imminent, and argues that even a transfer of interests made in anticipation of a potential adverse measure is not an "abuse of right." Even under *Pac Rim*, the standard is an exacting and high one: Respondent must show that Claimant "fore[saw] a specific future dispute as a very high probability and not merely as a possible controversy."[218]

168. Relying on Mr. Gabaldón's statement and Prof. Ayala's Opinion, Claimant asserts that Respondent failed to meet this standard. Claimant argues that the Government measures cited by Respondent to argue that the expropriation was "imminent" and "foreseeable" to a "high degree of probability" were not understood by Inv. Polar as creating a "real threat of nationalization."[219]

169. For example, the Urea Decree "was an assurance against expropriation"[220] as it expressly contemplated the participation of private investors in the fertilizers industry provided the government be satisfied that the domestic demand for nitrogenous fertilizers was met at the specified price.[221] Moreover, at the time, the Ministry of Oil and Energy made assurances that the Urea Decree would not negatively impact Fertinitro's Operations.[222]

170. Similarly, neither the Hording Law nor the Decree 5,835 of January 2008 amending the law, or the subsequent regulations indicated that an expropriation was looming; the 2001-2007

[215] *Ibid.*, ¶ 20.

[216] Cl. Reply ¶ 44; Cl. PHB (I), ¶ 32, citing Gabaldón II, ¶ 90; *See also,* Cl. Rej,. ¶ 20.

[217] Cl. PHB (I), ¶¶ 40, 47; Cl. PHB (II), ¶ 30.

[218] Cl. PHB (II), ¶ 31, citing *Pac Rim,* ¶ 2.99 (RL-25). *See also*, Cl. Rej., ¶ 23.

[219] Cl. Reply, ¶¶ 39-40.

[220] Cl. PHB (I), ¶ 40, citing Gabaldón II, ¶ 76.

[221] Cl. Reply, ¶ 43.

[222] Cl. PHB (II), ¶ 30, Cl. PHB, ¶ 32 citing Gabaldón II, ¶ 90 and Toro (I), ¶ 18.

and the 2007-2013 National Development Plans, as well as the 2005 National Sowing Plan, did not contemplate a 100% takeover by the Government and expressly contemplated the existence, participation and continuation of private investors in private-public partnerships like Fertinitro.[223]

171. Claimant further denies that Mr. Toro informed Inv. Polar of a potential take-over of Fertinitro's interest. Instead, according to Claimants, Respondent expressly disclaimed any intention to expropriate Fertinitro. First, Mr. Toro provided assurances that shareholders' rights would be respected and that the Urea Decree would not negatively impact Fertinitro's operations.[224] Second, Respondent informed Claimant and the other shareholders of Fertinitro's interest in a buy-out through a negotiated process and in a December 2007 meeting, Mr. Miguel Zaldivar, Pequiven's counsel, expressly told the investors that "the Government of Venezuela was not nationalizing Fertinitro."[225] Third, correspondence from a Koch representative shows that, sometime in January 2007, Mr Toro stated that "all shareholders rights and agreements will be respected."[226] Thus, at least on three occasions, January, February and December 2007, Respondent represented that there would be no expropriation.[227] Finally, the 2008 acquisition occurred in an atmosphere of continued negotiations between Fertinitro and the private shareholders for an amicable buy-out.[228]

172. As to the other measures alleged by Respondent, including the 2009 Petrochemical Organic Law, they had little effect on Fertinitro and they were passed after Claimant's acquisition of the Fertinitro shares. Therefore, they could not have suggested to Claimant that an expropriation was foreseeable, nor could they motivate the transaction.[229]

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[223] Cl. Rej., ¶ 28, Cl. PHB (I), ¶ 46; CL. PHB (II), ¶ 33.

[224] Cl. Reply, ¶¶ 44-48; Cl. PHB (I), ¶ 32, 39 citing to Minutes of Board of Directors No. 78, held on 8 February 2007 (RG-68). Gabaldón II, ¶¶ 86-89, Gabaldón III, ¶ 20; Cl. PHB (II), ¶ 32; Cl. Rej., ¶¶ 26-27.

[225] Cl. Rej. 24, citing Miguel A. Zaldivar, Jr., Our People, HoganLovells.com (viewed 12 January 2014) (C-29); *see also* PHB (I),¶ 42*; see also* PHB (II), ¶ 32.

[226] Cl. Rej., ¶ 26, citing Email from T. Parra to F. Toro and A. Zavala dated 18 January 2007 (R-88).

[227] Cl. Rej., ¶ 27.

[228] Cl. PHB (I), ¶ 44, Tr. Day 4, [Rodriguez-Matos], 4:6 – 12:21.

[229] Cl. Reply, ¶¶ 49, 52; Cl. PHB (I), ¶ 48.

173. Moreover the Petrochemical Organic Law did not apply to pre-existing mixed companies, such as Fertinitro; it required that Venezuela have a majority shareholding in new mixed companies to take control of them, and thus did not require expropriation.[230] In addition, in 2009 Pequiven's counsel, represented by Hogan & Hartson's Caracas Office, provided a Memorandum concluding that the law "did not result in the nationalization or expropriation of Fertinitro's shares."[231]

174. Therefore, according to Claimant, these measures do not prove a pre-existing dispute or an imminent or highly probable expropriation and Venezuela has failed to carry its burden of demonstrating "to a high threshold" that there was an abuse of right, depriving this tribunal of jurisdiction.

(2) **The Tribunal's Analysis**

175. According to Respondent, since the dispute predates Gambrinus' acquisition of an interest in Fertinitro there is no jurisdiction *ratione temporis*.[232]

176. Respondent relies on *Phoenix* holding that an investor cannot modify downstream the protection granted to its investment by the host State "once acts which the investor considers are causing damages to its investment have already been committed."[233] Respondent refers also to *Tidewater* holding that a dispute may be considered to have arisen when it "could reasonably have been foreseen"[234], and to *Pac Rim* which considers that a dividing line is passed, with resulting "abuse of process," when "the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy."[235]

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[230] Cl. PHB (I), ¶ 48; Cl. Reply, ¶¶ 49-50.

[231] Cl. PHB (I), ¶ 48, citing Email of Merari Useche dated 31 July 2009, with attached 7 July 2009 Hogan & Hartson (Caracas) Memorandum (RG-131); *see also* Cl. PHB (II), ¶ 34.

[232] Resp. Rej., ¶¶ 149-158.

[233] Resp. C-Mem., ¶ 238; Resp. Rej., ¶ 151.

[234] Resp. Rej., ¶ 154.

[235] *Ibid.*, ¶ 155.

177. Respondent lists a series of facts that in its opinion indicate that the conditions for a dispute to have arisen existed in January 2008, when Inv. Polar transferred to Gambrinus its interest in Fertinitro.[236] According to Respondent, the transfer to Gambrinus was made after the dispute had started for the purpose of resolving the same through an international regime that would not have been available to Inv. Polar.[237]

178. The Tribunal notes that *Phoenix*, on which Respondent relies, accepts that investors are free to "structure their investments… in a manner that best fits their need for international protection,"[238] adding that they could not modify their investment after the reasons for a dispute have already arisen.[239] Also *Mobil* has accepted that restructuring an investment is "a perfectly legitimate goal as far as it concerned future disputes."[240]

179. In view of Respondent's position, the question for the Tribunal is therefore whether in the present case the dispute relating to an expropriation or a reasonably foreseeable expropriation predated Inv. Polar's transfer of its interest in Fertinitro to Gambrinus, a Barbadian company, or if in any case the dispute was foreseeable thereby enabling Claimant to have access to this Tribunal by an abuse of process.

180. In order to substantiate the position that the dispute pre-dated the transfer of interest from Inv. Polar to Gambrinus, Respondent refers to a series of legislative and regulatory measures reflecting Venezuela's policy to ensure stable domestic food production and food security.[241] Among such measures, the National Development Plan for the Economic and Social Development of the National for the period 2007-2013 were announced in January 2007, declaring the State's maintenance of "full control of production activities which are of strategic value for the development of the country."[242]

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[236] *Ibid.*, ¶ 156.

[237] Resp. C-Mem., ¶ 247.

[238] *Phoenix*, (RL-11), ¶ 94.

[239] *Ibid.*, ¶¶ 138, 142.

[240] *Mobil*, (CL-168) ¶¶ 204-205.

[241] *See also* description of selective legislative measures *supra* Section IV. D.

[242] Resp. C-Mem., ¶¶ 96-97.

181. A few days later, on 21 February 2007, the Hoarding Law was published, declaring the public utility and social interest of goods needed for food production activities and allowing the Government to initiate expropriatory actions for reasons of food security and sovereignty.[243] The Urea Decree followed on 26 February 2007, stating that food production is "an essential element of national security and sovereignty" and declaring nitrogenous fertilizers and products required for their production to be primarily for the local market and that their prices would be regulated by ministerial resolutions. Such resolution was issued on 2 May 2007 (the Urea Resolution), fixing the price at which Pequiven was entitled to buy urea in order to meet domestic demand from any domestic producers, including Fertinitro.[244]

182. Other legislative measures were contemplated regarding the petrochemical industry. A draft of Petrochemical Organic Law was circulated around April 2007 providing that Pequiven would have to hold a majority equity participation in all mixed petrochemical companies (including Fertinitro),[245] the intent being to pass the Law before the end of 2007.[246] On 23 September 2007, the new Socialist Petrochemical Revolutionary Plan was released declaring the objective of turning Venezuela into a world petrochemical power.

183. On 28 January 2008, Decree 5835 was issued "declaring numerous products including ammonia and urea, to be of a public utility" and stating that "for safety reasons and food sovereignty and without further formality... the government might initiate expropriation proceedings."[247]

184. Respondent provided in its Opening Statement at the hearing of 10 March 2014, a summary of the measures that could be considered potential signals of expropriation[248]:

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[243] *Ibid.*, ¶¶ 102-103.

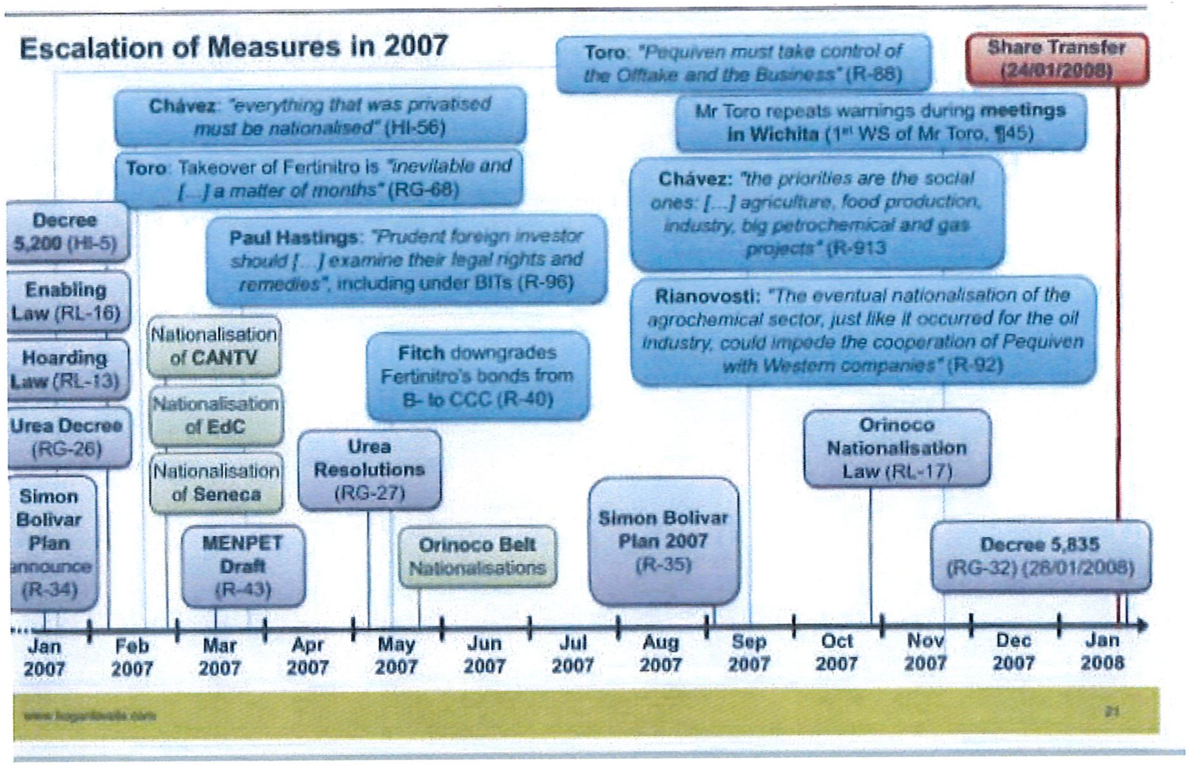
[244] Resp. C-Mem., ¶¶ 105-107.

[245] *Ibid.*, ¶¶ 114-115.

[246] *Ibid.*, ¶ 119.

[247] *Ibid.*, ¶ 122, referring to Gabaldón (I), ¶ 50.

[248] Respondent's Opening Statement, Hearing of 10 March 2014, para. 2.3.5 "Overview of measures pointing to expropriation of Fertinitro."



185. According to Respondent, this escalation of regulatory and legislative interventions throughout 2007 could not but make a sophisticated and prudent business actor as the Polar Group realise "that the expropriation of Fertinitro was inevitable"[249] and that the dispute in that regard, if not already in existence, was reasonably foreseeable at the time of the purported Share Transfer.[250] The more so since, according to Respondent, under Venezuelan expropriation law the first step in the expropriatory process is the declaration of "various products, including fertilizers, to be of public and social interest," such declaration having intervened in February 2007 with the Hoarding Law.[251]

186. It is undeniable that the series of measures enacted by Venezuela during 2007, directed as they were to guarantee food security and sovereignty in various sectors of activity, would have impacted also on Fertinitro's production operations. However, the available evidence

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[249] Resp. Rej., ¶ 36.

[250] Resp. PHB (I), ¶¶ 38-39.

[251] Resp. Rej., ¶ 156.

does not point to just one direction, namely the serious threat of imminent expropriation of Fertinitro, as contended by Respondent.

187. Some of these measures, such as the Urea Decree and Regulation, had limited effects on Fertinitro's business activity,[252] the latter remaining "capable of servicing its debt obligations and generating profits."[253] The Urea Decree did not even lead to a declaration of default by Fertinitro under the financing documentation only 15% of its output being estimated to be required to comply with that Decree.[254]As stated by Claimant, after studying the effect of the Urea Decree for a year, on 15 October 2008 "Fitch Ratings upgraded Fertinitro's credit rating."[255] The valuation so given of Fertinitro's business activity by a prominent ratings agency may be hardly reconciled with the imminent threat of an expropriation.

188. Additional circumstances show that the situation prevailing in 2007 was far from suggesting the imminence of Fertinitro's expropriation. In a communication of 18 January 2007, Mr. Parra, one of Fertinitro Directors, advised Mr. Gabaldón regarding comments made by Mr. Toro in a previous Board Meeting on plans and intentions for Fertinitro's future. The essence and key points of Mr. Toro's communication were:

- Time has run out and Pequiven must take control of the Offtake and the Business;
- FertiNitro must be run by the Venezuela State;
- Fertilizer is vital to the country's needs;
- All this is in line with the philosophies of the Venezuelan government and its law;
- Pequiven will be bringing specific proposals for the consideration of all the shareholders;
- The discussions will be open, but time is limited;
- Pequiven recognizes that the debt must be paid off-it is internally studying the process to achieve this end;
- Pequiven would like to have all shareholders continue to participate-nevertheless, one shareholder has already offered its shares for sale, and this knowledge will be made public shortly;

[252] As explained by Mr. Gabaldón (II), ¶¶ 74, 93-94, 104, 105 and recognized by Mr. Toro, Pequiven's representative and the Company's President, at Fertinitro Board Meeting of May 24, 2007: "based on estimates of urea consumption, Pequiven's own production, and the fact that Pequiven's new fertilizer plant should be ready within three years, the effect on Fertinitro of the requirement [to supply] urea at regulated price[s] should be very reasonable." (RG-70, p. 2).

[253] Resp. C-Mem., ¶ 109.

[254] Cl. Reply, ¶ 44-45.

[255] *Ibid.*, ¶ 45 (RG-107).

- All shareholders' rights and agreements will be respected.[256]

189. In a subsequent board meeting of Fertinitro, on 8 February 2007, Mr. Toro stated that, given the government's policies supported by Pequiven,

> it would be necessary to search for a way and design a process by which control of the production and marketing of Fertinitro's fertilizer could be handed over to Pequiven.

According to Mr. Toro, existing agreements would be honored but this step was inevitable and would have to be completed within a matter of months. He added that Pequiven would soon be holding individual talks with the shareholders to try to reach an amicable agreement on the matter.[257]

190. Following Fertinitro's management favourable consideration, since October 2006 Pequiven had started negotiating the purchase of one or more of the other shareholders' interest in Fertinitro.[258] Therefore, despite the legislative measures contemplated or already enacted that, according to Respondent, had an impact on Fertinitro's future business prospects, in February 2007 there was no threat of expropriation but rather a negotiation program in order for Pequiven to acquire the control of Fertinitro based on "an amicable agreement" in the pursuance of which "existing agreements" would be honored.[259]

191. According to Respondent, the shareholders other than Pequiven, including Inv. Polar, showed interest in Pequiven's proposal to buy their shares in Fertinitro.[260] As reminded by Mr. Toro, at that time, Polar had sold to Pequiven its interest in another mixed company with the latter, Metor.[261] Negotiations followed for the buy-out of Fertinitro.

192. In November 2007, a draft MOU was circulated setting forth the general terms of a transaction pursuant to which each of Koch, LAIF, Snamprogetti and Polar would have

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[256] E-mail for T. Parra to R. Gabaldón dated 18 January 2007 (RG-128); *see also, supra*, ¶ 51.

[257] Minutes of Board of Directors Meetings No. 78 (RG-68); *see also, supra* ¶ 52.

[258] Board of Directors of Fertinitro dated 17 October 2006 (R-55), p. 5)

[259] Minutes of the Board of Directors Meetings No. 78 (RG-68).

[260] Resp. C-Mem., ¶ 125.

[261] Toro (I), ¶ 39. Reference to the Metor's sale is in Cl. Rej., ¶ 7(d); Cl. PHB (I), ¶ 18 and n. 43; Cl. PHB (II), ¶ 9.

transferred their respective shares in Fertinitro to Pequiven for an aggregate purchase price indicated by the draft of USD 1,210,000,000.00 "less the outstanding balance of principal and accrued interest on Fertinitro's existing bank and bond financing as of the Closing Date... plus the Excess Cash."[262]

193. The Parties disagree on the reasons for the failure to reach a final agreement on the buy-out of Fertinitro's shares by Pequiven. According to Respondent, the price indicated in the draft MOU was "far exceeding a reasonable valuation of the plant" and therefore, the negotiations were interrupted.[263] According to Mr. Gabaldón, a sale of shares to Pequiven remained a real possibility throughout much of 2008, Pequiven "seeking to raise the necessary funds to complete the buyout," which became too difficult for it "due to the worldwide economic crisis that began in September 2008."[264]

194. By an e-mail of 30 September 2008 Mr. Miguel Zaldivar, counsel for Pequiven at Hogan & Hartson, sent the following message to the representatives of Fertinitro's shareholders:

> At the request of some of the shareholders, the Citibank-Hogan & Hartson team working with Pequiven invite you to participate in a meeting in Miami (at noon in our offices, address is below) on Monday October 6 at which we will make a presentation of a proposed plan involving the transfer of your interest in FertiNitro and related financing issues. Essentially, some of the shareholders want to know the details of the finance plan, a step by step analysis of how it will be implemented, attendant legal and financial risks, etc. Please confirm whether you will be in attendance. Thanks and best regards, Miguel.[265]

195. The same document refers in its body to previous communications among the parties to the proposed transaction confirming Claimant's position that after December 2007 "Pequiven was ostensibly still working toward the completion of the transaction."[266] Evidence in the file shows that on 6 October 2008, following the above invitation, Mr. Grossmann, a director

[262] Gabaldón (I), ¶ 54; Draft Memorandum of Understanding (2007) (RG-36).

[263] Resp. C-Mem., ¶ 126. According to Mr. Toro, as a result "Pequiven decided to suspend the idea of acquiring the Fertinitro shares," Toro (I), ¶ 42.

[264] Gabaldón (I), ¶¶ 66-67; Gabaldón (II), ¶¶ 79-81.

[265] Email Exchange among Miguel Zaldivar, Jr. (Partner, Hogan & Hartson LLP) and the Fertinitro Shareholders discussing the potential sale of Fertinitro shares in Pequiven, 2 September – 20 September 2008 (RG-115).

[266] Cl. Rej., ¶ 12.

of Inv. Polar, attended a meeting with Hogan & Hartson, counsel for Pequiven, and Citibank in Miami "to finalize issues related to the financing of the transaction."[267]

196. Based on the foregoing, it is the Tribunal's view that at the time of the purported Share Transfer to Gambrinus, "expropriation" of Fertinitro was not only far from being in existence but neither "reasonably foreseeable" or "highly probable," as alleged by Respondent.[268] There would have been no need for Pequiven to continue to negotiate the terms of a complex transaction as the one related to the Fertinitro's buy-out, if Respondent had plans of expropriating Fertinitro in January 2008.

197. More may be said on the subject. Respondent's claim -relying on the *Phoenix* holding- that the Urea Decree and Regulation had "cause[d] damages to" Fertinitro so that a "dispute... had already arisen" in January 2008 making Gambrinus' acquisition an "abuse of right,"[269] is to be rejected. As previously mentioned and as recognized also by Pequiven, the effects on Fertinitro's business of the Urea Decree and Regulation were minimal, Fitch having upgraded again Fertinitro's rating in October 2008.[270]. Even accepting the holding of other tribunals according to which to consider that a dispute exists it is sufficient that it be "reasonably foreseeable"[271] or "highly probable,"[272] it is a fact that in January 2008 there was no "dispute" which might have had a negative impact on Fertinitro's business activities in the near future.

198. Under general international law, a dispute means "a disagreement on a point of law or fact, a conflict of legal views or interests between parties."[273] ICSID tribunals have adopted similar description of a dispute, holding that in order for a dispute to exist it must be susceptible of being stated in terms of a concrete claim.[274] No such "disagreement" or

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[267] Gabaldón (II), ¶ 80.

[268] It is to be noted that Pequiven had excluded on various occasions that Fertinitro was under threat of expropriation. *See* Cl. Rej.,¶ 24.

[269] Resp. Rej., ¶¶ 151-152.

[270] *Supra*, ¶ 187.

[271] *Tidewater*, *supra*, ¶ 155.

[272] *Pac Rim*, *ibid.*

[273] *Mavrommatis Palestine Concessions (Greece v. U.K)*, Judgment No. 2, 1924, PCIJ Series A, No. 2, p. 11.

[274] *Maffezini* (CL-158), ¶¶ 93, 94; *Tokios Tokèles* Decision (CL-32), ¶¶ 106, 107; *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 159; *Empresas Lucchetti, S.A. and Lucchetti Peru,*

"conflict of legal opinions or of interests" had emerged in January 2008, even if only potentially, regarding Fertinitro and its expropriation.

199. Based on the foregoing analysis and evidence in the file, the Tribunal concludes that Respondent's objection to jurisdiction *ratione temporis* is to be dismissed. Except to the extent relevant for other aspects of the case, this determination dispenses the Tribunal with inquiring into the reasons underlying the Share Transfer of January 2008, a subject on which the Parties disagree.[275]

D. The Tribunal's Jurisdiction *Ratione Materiae*

(1) The Parties' positions

200. According to Respondent, Claimant cannot be considered to have made an investment under the objective criteria of the ICSID Convention Article 25.[276] In addition, the applicable BIT definition is not met "because Gambrinus never made an active contribution, nor did it ever commit any resources for the Fertinitro shares it purportedly acquired."[277] Moreover, since Gambrinus alleged "investment" was made in violation of Venezuelan laws, the dispute arising from it falls outside the Tribunal's jurisdiction.[278] Claimant, in turn, rebuts Respondent's allegation, stating that Gambrinus held at all material times 10% of the outstanding shares in Fertinitro, which is sufficient to satisfy the terms of the BIT and the ICSID Convention. The *Salini* test, including the criteria for contribution and risk, does not establish jurisdictional requirements, which are, in any event, met in this case.[279]

S.A. v.Republic of Peru, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶ 48; *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, ¶¶ 302, 303; *AES*, Decision on Jurisdiction, 26 April 2005 (CL-199), ¶ 61; *Suez, Sociedad General de Aguas de Barcelona S.A. and InterAguas Servicios Integrales del Agua S.A. v. the Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16 May 2006, ¶ 29; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, ¶ 63.

[275] *See supra*, ¶¶ 159-163.

[276] Resp. PHB (II), ¶ 33.

[277] *Ibid.*, ¶ 31.

[278] Resp. Submission, ¶¶ 55-59.

[279] Cl. Rej., ¶ 55, and Cl. PHB (I), ¶ 22.

a. ***Respondent's Position***

201. Respondent rejects Claimant's contention that the burden of proof lies solely on Respondent to prove that Claimant did not have title to its investment, and states that pursuant to international law "it is for the claimant that wishes to bring a claim to demonstrate that it held an investment."[280] It further argues that, in any case, to the extent that it falls on Respondent, Venezuela has fully satisfied this burden.[281]

(i) *The validity of the Share Transfer from Inv. Polar to Gambrinus*

202. According to Respondent, the Share Transfer from Inv. Polar to Gambrinus involved "a technical arrangement involving a share issue and the creation and then cancellation of a hypothetical debt with no detriment to Gambrinus."[282] Such transfer was not in accordance with the terms of the transfer restrictions of the Fertinitro Founding Agreements and therefore Gambrinus has no standing before this Tribunal because it never received title to the shares in Fertinitro.

1. The modalities of the Share Transfer and alleged applicable restrictions under the Founding Agreements

203. In recognition of the *intuitu personae* nature of the JIA and the Fertinitro Companies By-laws, these documents contained detailed restrictions on the transfer of their interests.

204. Sections 6(2) and 6(7) of the JIA contain the required conditions for the disposition of interests in Fertinitro. Section 6.2 included two different set of regimes. One for share-transfer to third parties (*i.e.* any party that is not an Owner or an affiliate of an Owner as defined in the JIA) and another one for transfer "by an Owner to an Affiliate of such Owner."

205. In accordance with Section 6(2) for transfers to an Affiliate, an Owner would have to comply with *inter alia* the following: (i) provide 30 day written notice of the transfer to Fertinitro and the other Owners; (ii) repurchase the shares transferred to the affiliate if the

[280] Resp. PHB (II), ¶¶ 25-26.

[281] *Ibid.*, ¶ 27.

[282] Resp. PHB (I), ¶ 7.

affiliate ceases to be an affiliate of the Owner; (iii) ensure that the transferring Owner remains responsible with the transferee Affiliate for compliance with all the obligations of the transferring Owner under the Agreement; and (iv) comply with the conditions of 6(7), which were applicable to any type of transfer.[283]

206. In accordance with Section 6(7), all transfers of participating interest in Fertinitro shall be made "exclusively for cash or cash equivalent."

207. Respondent argues that these transfer requirements –as the other provisions of the JIA– were specifically chosen among sophisticated commercial entities, with extensive knowledge and experience of concluding commercial contracts of this type and complexity.[284]

208. In addition, Articles 11 to 15 of the By-Laws of Fertinitro Oriente S.A. contain a mirror validity requirement that all transfers be made "in cash or cash equivalent to the exclusion of any other forms of consideration," and that any non-compliant disposition of interests would be null and void.[285]

209. According to Respondent, it is undisputed that Gambrinus did not make a payment in "cash or cash equivalent." Instead, Inv. Polar and Gambrinus devised a "share for share transaction."[286]

210. This was accomplished first, through the 21 January 2008 notice, by which Inv. Polar informed the other Owners of the purported Share-Transfer and "urgently" requested that they waive the 30-day notice period required under Section 6.2.2(a) of the JIA and 12(b) of the By-Laws.[287] Respondent alleges that Claimant failed to explain the urgency of the request.[288]

[283] Resp. Submission, ¶ 12.
[284] *Ibid.*, ¶ 9.
[285] By-Laws of Fertinitro Oriente S.A. (RG-11), Art. 14; *See* Resp. Submission, ¶ 14.
[286] Resp. Submission, ¶¶ 23-25; 32-33.
[287] *Ibid.*, ¶¶ 19-20.
[288] *Ibid.*, ¶ 20, referring to Tr. Day 2, [Goiffes/Gabaldón] 130:21-25.

211. The second step was the execution of the 24 January 2008 Share Purchase Agreement pursuant to which Gambrinus would pay Inv. Polar's USD eighty million one hundred (USD 80,000,100.00) for Inv. Polar's 10% equity interest in Fertinitro.[289] The one and half page was not circulated to the other Owners.[290] "[W]hile the shares were stated to have already been transferred, payment would only take place at an undetermined future date," following the "granting" of the document.[291]

212. Third, on 15 February 2008, Gambrinus and Inv. Polar subscribed a Common Share Subscription Agreement.[292] Under this agreement, Gambrinus issued further shares in itself to Inv. Polar for USD eighty million one hundred (USD 80,000,100.00). The amount owed by Inv. Polar to Gambrinus for the subscription of those new shares was set off against the identical sum that Gambrinus owed to Inv. Polar under the Share Purchase Agreement. [293]

213. Respondent further alleges that under this arrangement, no funds were transferred from Gambrinus to Inv. Polar. Similarly, the issuance of new shares could not be considered as a payment in cash or having been made through a "cash equivalent." This was expressly recognized by Claimant during the hearing.[294] Respondent asserts that:

> [I]t is generally accepted that a cash equivalent is a fully liquid asset, that is one of that is readily convertible into cash on a short-term basis... Gambrinus is not traded publicly, and as such there is no market for the trade of its shares and no way in which their value can be quickly and precisely defined. Shares in Gambrinus could therefore not constitute a cash equivalent as they are not an immediately realizable liquid asset.[295]

[289] *Ibid.*, ¶ 22, referring to the Share Purchase Agreement, *Contrato de Compraventa de Acciones*, between Inv. Polar S.A. and Gambrinus Corp, dated 24 January 2014 (RG-37), Clause Three.

[290] *Ibid.*

[291] *Ibid.*, referencing the Share Purchase Agreement (RG-37), ¶ 5.

[292] *Ibid.*, ¶ 23, referencing the Share Subscription Agreement dated 15 February 2008 (RG-120).

[293] *Ibid.*, ¶ 23, referencing Gambrinus Corp Resolution dated 15 February 2008 (RG-119).

[294] *Ibid.*, ¶¶ 24, 34-35, citing Tr. Day 1, [Chairman/Nelson] 74:9-19.

[295] *Ibid.*, ¶ 36. Respondent further relies "[b]y way of illustration" on "the International Financial Reporting Standard (IFRS) 7, a global accounting standard adopted by Venezuela, which considers in detail the meaning of the term "cash equivalents." : *ibid.*,¶ 37. This is highly contested by Claimant (*see infra*, n. 330)).

214. Respondent claims that it did not realize the share-for-share nature of this transaction until it read Claimant's Rejoinder on Jurisdiction.[296]

2. Gambrinus' alleged acquisition of the Fertinitro shares

215. Pursuant to Section 6.1. of the JIA, all transfers that did not comply with all required conditions, would be null and void, and have no force or effect.[297] On this basis, the consequence of Inv. Polar's non-compliance with the terms of the JIA and By-laws is that the purported transfer is *ipso iure* null and void, which pursuant to Venezuelan law, has the same effect as non-existence.[298]

216. Respondent also rejects Claimant's allegations that the aforementioned transfer restrictions do not apply to inter-affiliate transactions, as is the case between Inv. Polar and Gambrinus. A transfer to an Affiliate constitutes a "Permitted Disposition" under Section 6.2 of JIA, which expressly requires that Section 6.7 be complied with. Respondent further contends that the heading of Section 6.7 unequivocally states that it applies to all transfers. The same reasoning applies to Art. 14 of the By-Laws.[299]

217. Accordingly, the Share Transfer never materialized; Gambrinus never acquired ownership of the shares in Fertinitro and it never became an Owner under the terms of the JIA, as further confirmed by Dr. García Montoya, Respondent's appointed legal-expert. As a result, it made no protected investment under the BIT and cannot be subject to the Tribunal's jurisdiction.[300]

(ii) *Gambrinus' alleged investment under the ICSID Convention and the BIT*

218. According to Respondent, in this case there is no investment either under the ICSID Convention, or under Article 1(a) of the BIT.

219. Respondent rejects Claimant's contention that satisfying the requirements of the BIT is sufficient to satisfy Article 25 of the ICSID Convention.[301] Citing for support to several

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[296] Resp. Submission, ¶¶ 28, 51.

[297] JIA (C-6).

[298] Resp. Submission, ¶¶ 30-31, 44 citing Legal Opinion of Dr. G. Montoya, ¶ 59.

[299] *Ibid.*, ¶¶ 46-49.

[300] *Ibid.*, ¶ 62.

[301] Resp. C-Mem., ¶¶ 251-263.

ICSID decisions and commentators, Respondent asserts that an investment must pass a "dual jurisdictional test."[302]

220. Respondent posits that the existence of objective criteria for purposes of determining if there is an "investment" under the Convention, and the use of the "*Salini* criteria," have been widely accepted by ICSID tribunals and cannot be simply dismissed, as Claimant's attempt to suggest.[303] Recent cases such as *Caratube, Quiborax, KT Asia* and *Malicorp* have recognized that the mere holding of shares is "insufficient" for an investment to be found to exist.[304]

221. First, considering the *Salini* criteria, as expanded by subsequent case law, Claimant's alleged investment does not meet the jurisdictional requirement under the ICSID Convention because:

1. *There is no substantial contribution in money or other assets, i.e. "a commitment of resources" from Gambrinus.* An investment must involve from the outset a substantial trans-border flow of capital from the purported investor to the host state (*i.e.* the contribution).[305] Gambrinus' involvement was nothing more than 'an accounting exercise' between affiliates of the same group.[306] Therefore, any alleged contribution done by the Fertinitro shareholders, including Inv. Polar, prior to Gambrinus' involvement in the project is irrelevant.[307]

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[302] *Ibid.*, ¶ 253 and cases cited in n. 291.

[303] Resp. Rej., ¶¶ 159-160; *see also*, Resp. C-Mem., ¶¶ 264-269; Resp. PHB (II), ¶ 32.

[304] Resp. PHB (II), ¶ 32; *see also*, Resp. C-Mem., ¶¶ 251-263; Resp. Rej., ¶¶ 169-179.

[305] *See* Resp. C-Mem., ¶¶ 274-275, quoting *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, ¶ 84 (RL-30) (the investor must be responsible for the financial nature of the contribution itself "using its own financial means and at its own financial risk.") Resp. PHB (I), ¶ 93, quoting *KT Asia Investment Group B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013 (*"**KT Asia**"*) (RL-83) (the investor must be responsible for the financial nature of the contribution by making "an injection of capital or any other subsequent contribution during or after the acquisition of the shares."); *see also*, Resp. Rej., ¶ 164.

[306] Resp. PHB (II), ¶¶ 36-37; *see also,* Resp. C-Mem.¶¶ 281-284; Resp. Rej., ¶¶ 168-179; Resp. PHB (I), ¶¶ 7, 9, 96

[307] Resp. C-Mem., ¶ 280; Resp. PHB (II), ¶ 41.

- The 2008 Capital Contribution Agreement, constitutes a "hypothetical call for funds, entirely guaranteed by Polar and limited to a minor proportion of the sums gained by way of dividends."[308]

- Similarly, the know-how that Mr. Grossman and Gabaldón as Directors could have brought to the Fertinitro Board was minimal an in any case cannot suffice as a "contribution" for purposes of the ICSID Convention, as it has been recognized by prior ICSID Tribunals.[309]

- Finally, Gambrinus cannot attempt to differentiate itself from Inv. Polar for purposes of establishing the nationality of the investors, while at the same time trying to treat the two entities as just one for purposes of contribution.[310]

2. *The transfer from Inv. Polar to Gambrinus did not involve any risk.* Under the alleged Share Transfer, Inv. Polar remained liable for the obligations and Project risks,[311] and in any case, since Gambrinus did not make any initial capital contributions or commitments, it was not in a position to risk a potential loss.[312]

3. *Gambrinus alleged investment did not contribute to the economic development of Venezuela*, in the sense of contributing to the public interest and the transferring of know now.[313]

4. *Gambrinus investment was not made in good faith.* Claimant is indistinguishable from Inv. Polar being therefore a Venezuelan based company suing its own State. The purported Share Transfer was done in violation of the Founding Agreements to

[308] Resp. PHB (II), 38.

[309] Resp. PHB (II), ¶ 40 citing *Caratube International Oil Company LLP v. Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Award, 5 June 2012, ("***Caratube***") (RL-98), ¶ 451 and *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 ("***Quiborax***") (CL-63); Resp. Rej., ¶¶ 69-73, 180-182.

[310] Resp. PHB (II), ¶ 42.

[311] Resp. C-Mem., ¶¶ 332-338; Resp. PHB (II), ¶ 44.

[312] Resp. PHB (I), ¶ 97, Resp. PHB (II), ¶ 44, citing *KT Asia* (RL-83), ¶ 219; *Phoenix* (RL-11), ¶ 127; *Quiborax* (CL-63), ¶¶ 232-233.

[313] Resp. C-Mem., ¶¶ 338-345.

gain ICSID jurisdiction and escape the expropriatory proceedings under Venezuelan law.[314]

5. *Gambrinus investment was made fraudulently in breach of domestic law.* Citing to the *Phoenix* tribunal for support, it asserts that "States cannot be deemed to offer access to the ICSID dispute settlement mechanism to investments made in violation of their laws."[315] Respondent argues that the Share Transfer constituted a fraudulent bid to bypass fundamental principles of domestic law and Claimant incurred a *fraude de ley.*

222. Second, Gambrinus did not make an investment under the BIT. Under Article 1(a) of the Venezuela-Barbados BIT, an investment is defined as "every kind of asset *invested by* nationals or companies of one Contracting Party in the territory of the other Contracting Party..." (emphasis added).

223. According to Respondent, the words "invested by," was intentionally included and signifies that for a valid investment to exist, an active contribution is required from the investor, in contrast to a passive participation of mere ownership or control.[316] "This sets a higher threshold than other BITs to which Venezuela is a party, such as [the BIT] with Canada, which only require that an investment consist of assets 'owned' or 'controlled' by the investor.[317]

224. In addition, Article 2(1) of the BIT specifically requires that every prospective investment must comply with Venezuelan law and that the inclusion of such "in accordance with law" clause in the BIT requires compliance with the Host States laws as a jurisdictional

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[314] *See generally*, Resp. C-Mem., ¶¶ 287- 321, citing *inter alia*, *Inceysa, Fraport, Plama* and *Phoenix* (see Resp. C-Mem., n. 336 et seq).

[315] Resp. PHB (II), ¶ 47, citing *Phoenix* (RL-11) ¶ 101.

[316] *Ibid.*, ¶ 31.

[317] Resp. PHB (I), ¶ 90.

prerequisite.[318] Respondent alleges that Gambrinus failed to comply with local law, for reasons specified in paragraph 221.5 above.

b. *Claimant's Position*

225. Respondent, as the party putting forward an affirmative defense, such as its objection to the validity of Gambrinus' title, bears the burden of substantiating its position through evidence. The principle that the party who asserts must prove has been recognized by several ICSID tribunals.[319]

226. Claimant also argues that there is no basis, either in the text of the JIA, or the Fertinitro By-Laws (nor under Venezuelan or international law), for challenging the 24 January 2008 transfer of Fertinitro shares from Inv. Polar to Gambrinus. The transfer was made in good faith, fully disclosed to all shareholders and accompanied by cash/cash equivalent consideration –namely, the obligation, assumed by Gambrinus at the time of the transfer, to pay Inv. Polar the sum of USD 80,000,100.[320]

(i) *The validity of the Share Transfer from Inv. Polar to Gambrinus*

1. The modalities of the Share Transfer and alleged applicable restrictions under the Founding Agreements

227. Respondent's "new argument" that the January 2008 acquisition did not satisfy a "cash equivalent" requirement of the JIA and Fertinitro By-Laws is meritless.

228. "Cash equivalent" encompasses "monetary obligations" and payments of a money obligation, as articulated by both Parties' legal experts, Mr. Rodner and Dr. García.[321] The cash equivalent criterion in Section 6.7(i) of the JIA and Article 14 of the By-Laws is satisfied by payment in "money equivalent."[322]

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[318] Resp. Submission, ¶¶ 55-58. Art. 2(1) of the BIT reads: "Each Contracting Party shall encourage and create favorable conditions for nationals or companies of the Other Contracting Party to invest capital in its territory, and subject to its right to exercise powers conferred by its laws, shall admit such capital."

[319] CL. PHB (I) ¶¶ 10-11.

[320] Cl. Response, ¶ 1.

[321] Cl. PHB (II), ¶ 15, citing García III, ¶ 65 and Rodner Opinion ¶¶ 61-62.

[322] *Ibid.*, ¶ 14.

229. In January 2008, "to acquire the Fertinitro shares, Gambrinus undertook 'an obligation to pay [a] creditor a certain sum of money,' *i.e.* a 'money obligation'"[323] "for 'money equivalent' which is also 'cash equivalent.'"[324]

230. Claimant agrees with Respondent that the January acquisition was a "set off" in which Gambrinus incurred debt to Inv. Polar in exchange of Fertinitro shares, and on 15 February 2008, Inv. Polar incurred debt to Gambrinus, in exchange of Gambrinus shares of the same value. Relying on Mr. Rodner, Claimant further states that these debts were "set off" against each other; the transfer was thus conducted for "set off" of money, *i.e.* two matching cash equivalent obligations, satisfying cash equivalency.[325] This "set off" of two mutual cash obligations was contemplated and authorized by the Venezuelan Civil Code.[326]

231. In any case, the cash equivalency transfer requirement of the JIA and the Fertinitro Companies' By-laws, does not apply to inter-affiliate transfers.[327] According to Claimant, "Venezuelan law eschews interpretation of a contract which are at odds with the intention of the parties, ignores the contract as a whole, and ... would have absurd consequences."[328]

232. Claimant also alleges that "there is no reason in law or logic, why inter-affiliate transfers need to be subject to a 'cash equivalency' requirement, particularly given that the sole commercial rationale for that requirement is to [give] effect [to] the right of [first] refusal provisions in Sections 6.3 through 6.5."[329]

233. Claimant further rebuts the reasons provided by Respondent for the "cash equivalent" requirements as follows: First, it cannot be to provide solvency assurances of any new owner and economic standing to participate in the Project, because the JIA mandates that prior

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[323] Cl. Response, ¶ 11.

[324] Cl. PHB (II), ¶ 16, citing Rodner Opinion, ¶ 61.

[325] Cl. PHB (II), ¶ 16, Rodner Opinion, ¶¶ 32, 59-62; Cl. Response, ¶ 12. With regard to International Accounting Standard, Claimant asserts that it was not included as an exhibit in this arbitration and is not in the record, nor did Dr. García rely on it in his expert report. In any case, IAS7 was an accounting standard adopted by Venezuela in 2008 and therefore cannot inform the interpretation of "cash equivalency" as drafted in the 1998 JIA and Fertinitro Bylaws. In any case, the cash equivalents in this transaction were offsetting cash obligations, not shares. Cl. PHB (II), ¶ 17.

[326] Cl. Response, ¶ 12.

[327] *Ibid*, ¶ 3.

[328] Ibid.

[329] Cl. Response, ¶ 21; *see also*, ¶¶ 32-36.

shareholders guarantee the obligations of the new affiliate.[330] Second, members of the same group do not engage in protracted ownership struggles, and therefore there is no reason to include a "cash equivalent" restriction to "limit potential disputes over ownership rights," as claimed by Respondent. [331]

234. According to Claimant, further proof of the parties' intent lies in the fact that the range of "Permitted Dispositions" in Section 6.2 include numerous scenarios in which it is literally impossible to supply cash or cash equivalent payment of the kind urged by Venezuela and still be fully compliant with Section 6.7. Such is the case, for example, of the share for share exchanges between Pequiven and Venezuela's state-owned investment fund or "VIE" contemplated by Sections 6.2.1 and 2.1.1.[332]

235. With regard to the alleged restrictions applicable under the By-Laws, Claimant answers that the By-laws contain mirror requirements to the JIA and argues that Respondent fails to mention relevant language of Articles 11 and 12 of the By-Laws.

236. This is further reinforced, according to Claimant, by the fact that neither the JIA, nor the By-Laws require that the price set out for an inter-affiliate transfer be disclosed, nor is there a requirement to disclose the kind or extent of the payment.[333] This is in contrast to third-party transfers under Section 6.4 of the JIA.[334]

237. The absence of a disclosure of price requirement is the reason why Claimant and Inv. Polar did not give information on the modality or the amount of the transfer price contained in the Share Transfer Agreement. No bad faith or misrepresentation can be concluded from this.[335]

238. Moreover, the 24 January 2008 email from Mr. Simón Guevara, Secretary of the Board of Fertinitro, to each of the Owners, including Pequiven, confirmed that "after reviewing the By-Laws and the pertinent Sections of the Joint Investors Agreement... we are of the opinion

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[330] *Ibid.*, ¶ 37.

[331] Cl. Response, ¶ 37.

[332] Cl. Response, ¶¶ 23-24.

[333] *Ibid.*, ¶ 22.

[334] Ibid.

[335] Cl. Response, ¶¶ 32-34, 42, 43.

that Inv. Polar ha[d] complied with all requirements to proceed to transfer its shares." [336] The email contains no mention of cash equivalency, nor of any other Owner, including Pequiven, asking about cash equivalency since none of the parties expected or required, that cash equivalent consideration be furnished. [337]

2. Gambrinus' alleged acquisition of the Fertinitro shares

239. Claimant contends that Venezuela cannot dispute Gambrinus' titles to the shares. Relying on Mr. Rodner, Claimant asserts that, regardless of whether cash equivalence was applied or satisfied, Claimant would retain its substantial shareholding," as "failure to satisfy cash equivalency does not, under Venezuelan law, lead to absolute nullity."[338]

240. In any case, Venezuela's new argument cannot divest the Tribunal of jurisdiction under the Treaty. According to Claimant, all of Respondent's cited authorities involved objectively grievous and knowing frauds, such as the "knowing and intentional breach" of criminal laws or falsity in documents.[339] Citing to the *Metalpar* tribunal, Claimant alleges that "divestment of jurisdiction is an excessive sanction for even a mere technical legal error, if one existed."[340] According to Claimant, "the present dispute, concern(s) a highly technical contractual provision raised at the eleventh hour, and then only to distort it" therefore it cannot be compared to the authorities cited by Respondent.

241. Relying on Mr. Rodner, Gambrinus asserts that "no fundamental principle of morality," "public policy" or "illegality" is implicated here.[341]

(ii) *Gambrinus' alleged investment under the ICSID Convention and the BIT*

242. According to Claimant, it remains unrebutted by Venezuela that this Project satisfies the definition of investment included in Article 1(a) of the BIT, which defines investment broadly, to include "shares and stock and debentures of a company." Gambrinus held at all

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336 *Ibid*, ¶¶ 43, 44, referring to Email Exchange between S. Guevara and T. Parra, 24 January 2008 (RG-40).

337 Cl. Response, ¶ 45.

338 Cl. PHB (II), ¶ 22, Rodner Opinion, ¶¶ 74-83.

339 Cl. Response, ¶ 47.

340 Ibid.

341 *Ibid.*, ¶ 47.

material times, 10% of the outstanding shares in Fertinitro Oriente S.A. and Fertinitro Oriente C.E.C. Therefore, Claimant's equity ownership in an industrial facility, is a "clear-cut investment."[342]

243. Respondent' belated argument that the term "invested by" incorporated in the BIT's definition of investment suggests that an "active contribution" is necessary, was raised for the first time at the Hearing. In any case, it is without merits and has already been rejected by the *Mytilineos* tribunal in connection with the Greece-Serbia BIT.[343]

244. Claimant argues that by holding a "shareholding in a large industrial concern" Gambrinus held a "classic form of an investment" and therefore recourse to the *Salini* criteria "are not required."[344] In any case, the *Salini* criteria are met, because:

1. *Claimant made a contribution* to acquire Fertinitro shares through the January 2008 Share Purchase Agreement,[345] as well as know-how, managerial experience through Mr. Gabaldón and Mr. Grossman. [346] Moreover, Claimant contributed "by signing the 2008 Shareholder Additional Contribution Agreement, under which it committed to provide certain *pro rata* capital infusions, to bolster Fertinitro's bond ratings."[347] In addition, Gambrinus corporate predecessors and affiliates made substantial contributions, which Claimant inherited.[348]

2. *Claimant assumed risk* because it directly assumed all rights and obligations of the JIA, and entered into the 2008 Capital Contribution Agreement, obligating Gambrinus to make fresh injections if the project under-performed and allowing it to receive dividends.[349] "The mere fact that these contractual risks were subject to guarantees made by Inv. Polar and Cervecería Polar, does not diminish Gambrinus' separate and

[342] Cl. PHB (II), ¶ 23.

[343] Cl. PHB (I), ¶ 21; Cl. PHB (II),¶ 23

[344] Cl. Rej.,¶ 58.

[345] Cl. PHB (II), ¶ 25, stating that the transaction was not "nominal" and the shares were exchanged "for a substantial consideration."

[346] Cl. Rej.,¶¶ 64-66.

[347] Cl. PHB (I), ¶ 27; *see also*, Cl. Rej., ¶ 67; Cl. PHB (II), ¶ 24; Cl. Response, ¶ 46.

[348] Cl. PHB (I), ¶ 27; Cl. PHB (II), ¶ 24; Cl. Rej., ¶¶ 68-70 citing *Caratube* ¶ 355 and *Quiborax* ¶ 229.

[349] Cl. PHB (II), ¶ 26; Cl. PHB (I), 27; Cl. Rej., ¶ 72.

independent legal and financial risks," as Claimant remained the primary contractual obligor.[350]

3. *The contribution to the host state's development* is not an independent factor in the *Salini* analysis, as conceded by Respondent, but in any case, Fertinitro's contribution "is obvious and incontestable."[351]

(2) **<u>The Tribunal's Analysis</u>**

245. In order for jurisdiction to exist under Article 25 of the ICSID Convention and the BIT Claimant must own an "investment" to be entitled to bring a claim against the host State. Since this requirement is preliminary to any other conditions for jurisdiction *ratione materiae*, it shall be examined first.

246. According to Respondent, Claimant failed to comply with the Joint Investors' Agreement and the Fertinitro By-Laws[352] (jointly referred to by it as the "Founding Agreements") when the purported transfer of shares was made in January 2008, the transfer being consequently "*null, void and of no force and effect.*"[353]as it breached "essential restrictions agreed from the outset" in the referenced Founding Agreements. Since Gambrinus never acquired ownership of Fertinitro's shares,[354] in Respondent's view it has no standing before the Tribunal and jurisdiction should be declined on this basis.[355]

247. Article VI of the JIA, regulating the transfer of Fertinitro's shares, is applicable. It provides as follows in Sections 6.1. and 6.2:

> 6.1. <u>Restriction on Transfer</u>. No Owner shall give, sell, assign, transfer, pledge, hypothecate, mortgage, grant a security interest in, or otherwise dispose of and/or encumber any of its interests or any interest therein ("Disposition")

[350] Cl. Rej., ¶ 73.

[351] *Ibid.*, ¶ 76.

[352] Respondent refers specifically to the By-Laws of Fertinitro Oriente S.A. and Fertinitro Oriente C.E.C, the shares of which were directly owned by the shareholders of the Project and which were, among others, the object of the Share Transfer Agreement between Gambrinus and Inv. Polar in January 2008. According to Respondent, both By-Laws had been registered on 27 March 1998 with the Commercial Registry of the State of Miranda. Resp. Submission, ¶ 8.

[353] Resp. PHB (II), ¶ 28.

[354] Resp. Submission, ¶ 45.

[355] Resp. PHB (II), ¶ 30.

other than a Disposition permitted under Section 6.2 unless such Owner complies with the provisions of this Article VI. Any Disposition attempted or made without full compliance with this Article VI in its entirety shall be null, void and of no force or effect.

6.2 Permitted Dispositions. The following Dispositions shall be permitted without compliance with any other provision of this Article VI other than Section 6.7:

6.2.1 by Pequiven to VIE as contemplated in Section 2.1.1;

6.2.2 by an Owner to an Affiliate of such Owner (including any Special Purpose Subsidiary) if: (a) such Owner has provided at least thirty (30) days written notice of such Disposition to the Company, Comandita and each of the other Owners; [...] (d) the transferring Owner agrees, pursuant to instruments in form and substance reasonably satisfactory to the non-transferring Owners, to remain responsible with the transferee Affiliate for compliance with all the obligations of the transferring Owner under this Agreement, including execution of a Parent Performance Agreement by any Parent Company of the transferee, if applicable; and (e) the transferee Affiliate becomes a party to this Agreement pursuant to the instruments in form and substance reasonably satisfactory to the non-transferring Owners. [...]

248. According to Section 6.2, any Disposition is subject to the additional conditions of Section 6.7, which provides as follows:

6.7. Additional Interest Transfer Requirements. Any Disposition of Interests is subject to the satisfaction of each of the following conditions:

(i) Any Disposition shall be made exclusively for cash or cash equivalents to the exclusion of any other consideration;

(ii) Any Disposition must be for a Proportionate number of Shares and Comandita Passive Shares;

....

(v) Any transferee of Interests, including an Affiliate of the transferor, shall, by a written instrument executed and delivered to the Company and the Remaining Owners before the Disposition is agreed to or concluded, (a) authorize, approve and adopt this Agreement and assume all of the obligations of an Owner hereunder as if it were an original, named, party hereto, including execution of a Parent Performance Agreement by any Parent Company, if applicable, (b) make representations and warranties substantially equivalent to those made by Pequiven, Koch, Snamprogetti and Polar in Article III, and (c) provide an address and facsimile number to the Company and the Owners for purposes of Section 13.14.

249. Respondent refers to the By-Laws of Fertinitro Oriente S.A. assuming that the same replicates the provisions of the JIA regarding share transfer restrictions.[356] Under the Founding Agreements any share transfer, including to Affiliates, in order to be valid would have to be made "*exclusively for cash or cash equivalents to the exclusion of any other consideration.*" Contrary to this provision, according to Respondent the parties devised a "share-for-share transaction" by which Gambrinus, instead of paying in cash or cash equivalent for the shares in Fertinitro, issued further shares in itself to Inv. Polar in exchange for the shares in Fertinitro,[357] this share-for-share being recognised by Claimant as having occurred.[358]

250. According to Respondent, the detailed restrictions of the JIA regarding share transfers were the result of careful drafting and analysis given the importance of the partners and their identity, each of whom had been carefully selected to participate in the Fertinitro Project, because they offered "strategic advantages."[359] Any attempted transfer in violation of the restrictions of Article VI would be null, void and legally ineffective.[360] These restrictions equally applied to a transfer of shares to an affiliate. Although a Permitted Disposition under Section 6.2, a transfer to an affiliate would also be subject in any case to satisfaction of each of the conditions of Section 6.7, including the requirement that "any Disposition shall be made exclusively for cash or cash equivalents to the exclusion of any other considerations." According to Respondent, this condition would have assisted in ensuring, among other things, the solvency and economic standing of the transferee, the transparency as to the value of the disposition and the genuine character of the operation.[361]

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[356] *Ibid.*, ¶ 14 and n. 19.

[357] *Ibid.*,¶ 23.

[358] Cl. Rej.,¶ 60.

[359] Relying on Mr. Gabaldón, Respondent states that Polar was selected "because the presence of a private investor with experience in the Venezuelan market would provide confidence to banks and foreign lenders in relation to the financing of the project." Resp. Submission, ¶¶ 4,7,8, citing Gabaldón (I), ¶ 10 and Tr. Day 2, 132:1-3; *see also,* Draft Rating Agency Presentation for the Jose Fertilizer Project Prepared by Citicorp, 17 January 1998 (RG-104), p. 21.

[360] *Ibid.*, ¶¶ 9-11.

[361] *Ibid.*, ¶ 13; Resp. PHB (I), ¶ 59.

251. Claimant replies that there is no basis under the JIA or the Fertinitro By-Laws or international law for challenging the January 24, 2008 transfer of shares from Inv. Polar to Gambrinus.[362] Claimant relies on the legal opinion of Mr. James Otis Rodner (the "**Rodner Opinion**") according to which the JIA cash requirement does not apply in case of inter-affiliate transfers, the purpose of the requirement that the transfer be for cash or cash equivalents being to facilitate the "right of first refusal regime" requiring a departing shareholder to offer its interest to the other shareholders prior to sales to unaffiliated third parties.[363] This right requires for its exercise that the price at which the shares to be transferred are offered for sale be stated in money and payable only in money. Since no such "right of first refusal," arises with respect to inter-affiliate transfers, there is no reason why the cash equivalency requirement shall be applicable.[364]

252. According to the Rodner Opinion, to apply the cash equivalency requirement to any transfers between affiliates would lead to the absurd result of disallowing various "Permitted Dispositions" under Section 6.2, specifically inter-affiliate transfers pursuant to liquidation or merger under Section 6.2.2 or a share-for-share transfer under Section 6.2.1 since these Dispositions cannot be made "exclusively" for "cash equivalent consideration" as expressed by Section 6.7(i).[365]

253. Claimant contends that Fertinitro By-Laws, far from being identical to the JIA as asserted by Respondent,[366] actually state that inter-affiliate transfers may be made without complying with "cash equivalents" requirement.[367] According to Claimant, under the 24 January 2008 Share Purchase Agreement, Gambrinus assumed the "obligation to pay the money sum of USD 80,000,100.00 as payment for the shares in question" [368] and the cash nature of this

[362] Cl. Response, ¶ 1.

[363] Cl. Response, ¶ 3. The right of first refusal is provided by Section 6.3-6.6 of the JIA (C-6) and Article 13 of the By-Laws of both Fertinitro de Oriente S.A. (RG-11) and Fertinitro C.E.C. (R-109).

[364] Cl. Response, ¶¶ 3-4. *See also,* Rodner Opinion, ¶ 29.

[365] Rodner Opinion, ¶ 28.

[366] Respondent's Closing Presentation, slide 25; Resp. Submission, ¶ 14.

[367] Cl. Response, ¶ 7.

[368] Share Purchase Agreement (RG-37).

obligation is not altered by it being later offset by matching a cash obligation assumed by Inv. Polar under the 15 February 2008 Common Share Subscription Agreement.[369]

254. According to the Rodner Opinion, under the Fertinitro By-Laws the cash equivalent requirement under Article 14 for a shareholder's sale of its shares, applies with the express exclusion of the transactions mentioned in Article 12 regarding inter-affiliate transfers, such as the transfer made from Inv. Polar to Gambrinus. According to the Rodner Opinion, Article 12 provides that "the shareholders can sell … transfer … without the obligation of compliance with the provisions of this Chapter (the reference is to Chapter III of the Charter) ... in case of… transfer by a shareholder in favor of an Affiliate."[370]

255. The Rodner Opinion reminds that contracts in Venezuela, as in many civil law countries, are interpreted taking into account the real intentions of the parties, avoiding absurd results and looking at the contract as a whole, meaning by that that one must not read individual provisions without relating them to the parties' intentions when entering into the contract and to the remaining clauses in the contract. Under civil law systems, this is a systemic interpretation ("*interpretación sistemática*") where each clause in the contract, being a logical part of an integrated system, is given meaning that is coherent with the contract as a whole.[371]

256. The Rodner Opinion adds that in civil law, including Venezuelan law, when the same parties enter into several contracts that deal with the same subject, if there is a contradiction in the terms used in both contracts, the language in the later contract prevails over the language in the earlier contract. The later document in this case is the Fertinitro C.E.C. Charter, which has a higher standing, the JIA having been entered into on 8 April 1998 while that Charter was registered in the Mercantile Registry on 21 May 1998, after the date of the JIA. According to the principle that the latest expression of the parties should be given prevailing consideration, if, in relation to a particular requirement under both agreements, the terms of

[369] Common Share Subscription Agreement dated 15 February 2008 (RG-120); Cl. Response, ¶¶ 11-12.
[370] Rodner Opinion, ¶ 27.
[371] *Ibid.*, ¶ 25.

the Fertinitro Charter differ from the terms in the JIA, the terms in the Fertinitro Charter prevail over the terms in the JIA.[372]

257. Respondent contends on its side that any provisions which are the product of the will of the parties to a contract and which are not contrary to public order or good moral standards, shall be deemed valid and of full force and effect between them, this being the case of the "cash or cash equivalent" requirement. It adds that in light of the prevalence of the principle of party autonomy, statutory provisions have merely a supplementary nature in relation to contractual provisions.[373] Had the parties wished to exclude inter-affiliate transfers from the "cash or cash equivalent" requirement, they could easily have done so, tribunals being not supposed to rewrite the parties' agreement by resorting to rules of interpretation that are applicable in case of obscurity, ambiguities or deficiencies in the parties' intention, which is not the present case.[374]

258. Respondent contends further that the Fertinitro By-Laws may only give effect to the will of the parties as reflected in the JIA which, as provided by Section 13.12, "may not be altered, modified, amended or changed in any manner... except pursuant to a written agreement executed and delivered by all of the Owners." In any case, the By-Laws confirm that the requirement of consideration in cash or cash equivalent applies "s*in perjuicio de cualesquiera otras previsiones*" and applies to "*cualquier transferencia o enajenación de acciones de la Sociedad.*"[375] No evidence is given by Claimant as to why the cash equivalent clause should be excluded in case of inter-affiliate transfers, Section 6.7 not dealing with pre-emption rights so that situations of pre-emption cannot have been the reason for including the cash or cash equivalent requirement.[376] Claimant failed to make any payment of cash or cash equivalent consideration as required, the share-for-share set off being not a "*payment in any manner of representing money*" according to the Rodner Opinion's

[372] *Ibid.*, ¶ 26.
[373] Resp. PHB (I), ¶ 62.
[374] *Ibid.*, ¶¶ 63-69.
[375] *Ibid.*, ¶¶ 70-71.
[376] *Ibid.*, ¶¶ 72-73.

interpretation, falling rather within "any other consideration," which is specifically excluded by the Founding Agreements.[377]

259. It is Claimant's position that the parties' real intention regarding the precise scope of the condition under Section 6.7(i) of the JIA that "[a]ny Disposition of Interest shall be made exclusively for cash or cash equivalents to the exclusion of any other consideration" is made uncertain by at least two reasons:

- The difference in the formulation of Article VI of the JIA and Chapter III of the Fertinitro By-Laws regarding the applicability of the same condition to the transfer of shares to Affiliates;[378]
- The fact that the application of this condition to any "Disposition of Interest" will lead to the absurd result of disallowing various of the Permitted Dispositions under Section 6.2.[379]

260. Regarding the first of Claimant's remarks, the Tribunal is asked to interpret the provisions regulating the transfer of Fertinitro's shares contained in an agreement governed by Venezuelan law[380] in relation to the corresponding provisions of Fertinitro By-Laws adopting a different formulation.

261. It should initially be mentioned that there is no prevalence of the Fertinitro By-Laws over the text of the JIA. According to Section 2.1 of the JIA, "[t]he Owners acknowledge and agree that each of the Charter / By-Laws, the *Comandita* Charter / By-Laws, the S.R.L. Charter/ By-Laws and Operating Company Charter / By-Laws have been registered and shall be modified, if necessary, to reflect the provisions of this Agreement." Thus, it is rather for the By-Laws of Fertinitro to reflect the terms of the JIA, not the contrary. To the extent the terms of the By-Laws depart or conflict with the terms of the JIA, the terms of the latter prevail.

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[377] *Ibid.*, ¶¶ 78-82.

[378] *Supra*, ¶ 253.

[379] *Supra*, ¶ 254.

[380] JIA, Section 13.7 "Applicable Law. This Agreement shall be governed by, construed under and enforced in accordance with the laws of the Republic of Venezuela without regard to the conflicts-of-law provisions thereof."

262. The Tribunal notes that differently from Section 6.2 of the JIA which makes any Disposition of shares, not excluding transfers to Affiliates, subject to the condition of a "cash or cash equivalents" consideration under Section 6.7(i), no similar condition is apparently prescribed by the Fertinitro By-Laws regarding transfers to Affiliates.[381] Under Article 12 of the By-Laws (entitled "Exception to the Restriction on Disposal and Encumbrance of Company Shares"), the shareholders may transfer or confer rights on their shares without being obliged to comply with the provisions of Chapter III (inclusive of Articles 11 to 15), "except where provided for under paragraph three of clause thirteen," in case (under B) of disposal of shares to Affiliates. Paragraph three of Article 13, dealing with "Transfers to Third Parties," is no exception to the unconditioned disposal of shares to Affiliates under Article 12, considering that transfers to Affiliates are not transfers to Third Parties.

263. Under Article 14 of the Fertinitro By-Laws, any transfer or disposal of shares in the Company, to be valid, must meet the condition that "[t]he only compensation to be received by the assignor-shareholder.... shall be funds in cash (or an equivalent in foreign currency), to the exclusion of all other compensation." The reference made at the beginning of Article 14 to "any transfer or disposal of Company shares" includes, due to its generality, transfers to Affiliates. This would be in conflict with the exemption of transfer to Affiliates from the condition of payment in cash or cash equivalent under Article 12. However, the conflict is removed by the starting language of Article 14, making its provisions applicable "[n]otwithstanding any other provision contained in these Articles of Incorporation/ By-Laws," the reference to any other provision including Article 12.

264. The prevalence of Article 14 over the exemption of transfer to Affiliates under Article 12 is confirmed by the last part of the same Article 14, providing (under B) that "[a]ny disposal or transfer of Company shares must be carried out pursuant to the provisions contained in the Agreement," where "Agreement" cannot but refer to the JIA. Also under the By-Laws,

[381] In examining the By-Laws the Tribunal shall follow the English translation provided by Claimant on 23 July 2014, accepted by its decision of February 4, 2015. Respondent has declared not to accept Claimant's translation of the By-Laws in its communication of 11 February 2015: however, its translation of Article 14, used by Resp. Submission (ns. 22 and 23), conforms substantially to Claimant's translation.

therefore, transfers of shares to Affiliates are subject for their validity to the condition of payment being made in cash or cash equivalents, as provided by Section 6.7(i) of the JIA.

265. Both Parties and their legal experts have made reference to the rules of contract interpretation of Venezuelan law reaching however different conclusions.[382] The Tribunal notes that according to Article 12 of the Venezuelan Code of Civil Procedure,

> *En la interpretación de contratos o actos que presenten oscuridad, ambigüedad o deficiencia, los jueces se atendrán al propósito y a la intención de las partes o de los otorgantes, teniendo en mira las exigencias de la Ley, de la verdad y de la buena fe.*[383]

It does not believe that the situation confronting the Parties in the present case is characterized by "*oscuridad, ambigüedad o deficiencia,*" as required by Article 12 of the Venezuelan Code to allow for the real intention of the parties to take precedence over the contract language.

266. There is no "obscurity, ambiguity or deficiency" in the provisions of the JIA regulating the transfer of shares, including with regard to the condition under Section 6.7(i) that any transfer, not excluding transfers to Affiliates, "be made for cash or cash equivalents." The Tribunal is not supposed to modify the Parties' agreement merely because one might believe that requiring the application of this condition also in case of inter-affiliate transfers would serve no useful purpose, particularly none of the purposes assigned by Respondent to this condition,[384] since any such transfer is subject in any case to the transferor's guarantee to the other shareholders for the transferee's obligations.

267. Likewise, the Tribunal is not supposed to interpret the parties' agreement under the JIA so as to exclude that the condition of payment in cash or cash equivalent under Section 6.7(i) apply to intra-affiliate transfers only because it is reasonable to think that the real purpose of that condition is to permit the exercise of the right of first refusal of the other shareholders. By the same token, the Tribunal should not rewrite the parties' agreement because otherwise the condition of a "cash or cash equivalent" consideration under Section 6.7(i) would not

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[382] Claimant, *supra*, ¶¶ 255-256; Respondent, *supra*, ¶ 257.

[383] Mélich Orsini, *La interpretación del contrato en Venezuela*, in "Tratado de Interpretación del contrato en America Latina," Volume II, Lima (2007) (JR-10) p. 2280.

[384] *Supra*, ¶ 250.

permit implementing some of the Permitted Dispositions under Section 6.2 of the JIA. The Tribunal's appreciation of the real impact of that condition in those different cases is no substitute for the parties' free determination in that regard.

268. The condition that payment for the transfer of Fertinitro shares be made in cash or cash equivalents applies therefore also to the transfer of shares to Gambrinus as an Affiliate of Inv. Polar. The payment of the price for such transfer was agreed in the Share Purchase Agreement in the sum of USD 80.000.100.00 which, as stated therein, "will be paid to THE SELLER by THE BUYER at a future date following the granting of this document." [385] It formally conformed to the condition prescribed by the JIA for such payment, leading to believe that Claimant was aware that this condition had to be complied with also for the transfer to an Affiliate. The Tribunal is further comforted in its conclusion by the clear statement of Inv. Polar itself in its letter of 21 January 2008 to the other investors stating that the transfer of all its Fertinitro shares to Gambrinus would take place, "all in compliance with Sections 6.2.2 and 6.7 of the Joint Investors' Agreement and Section 12(b) of the articles of incorporation and bylaws of the *Commandita* and the Company."[386]

269. Before such payment would be made, however, the parties agreed under the Common Share Subscription Agreement of 15 February 2008 to convert it into a share-for-share payment, Gambrinus issuing shares in itself to Inv. Polar, the amount due by the latter for the newly issued shares being set off against the same amount due by Gambrinus to Inv. Polar for the transfer of Fertinitro's shares.[387] The Tribunal agrees with Respondent that shares in Gambrinus are not a cash equivalent as they are not "an immediately realizable liquid asset," Gambrinus not being traded publicly.[388]

270. Respondent contends that it learnt of the share-for-share transfer to Gambrinus only during the proceedings, Claimant having repeatedly represented that there had been a valid share transfer to then admit, only in its Rejoinder of 17 January 2014, the nature of the transfer.[389]

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[385] Shares Purchase Agreement (RG-37), Clause THREE.

[386] Assignment Agreement (C-4).

[387] Gambrinus Corp. Resolution, 15 February 2008 (RG-119).

[388] Resp. Submission, ¶ 36.

[389] *Ibid.*, ¶¶ 26-27.

It adds that the purported share transfer was made in breach of the general principle under Venezuela law of good faith, so that even if Gambrinus had actually acquired the ownership of Fertinitro shares the transfer cannot be opposed against the other Owners or third parties, Claimant being not entitled to claim the BIT protection due to its lack of good faith.[390]

271. Claimant denies having breached the good faith principle or made any misleading representations or having concealed the true nature of the transaction, Gambrinus and Inv. Polar having complied with Section 6.7 of the JIA considering how it was interpreted.[391] It explains that the reference to a "December 12, 2007" share agreement in the Common Share Subscription Agreement was the result of a clerical error so that it does not suggest that the transfer was made in breach of good faith before consent was given by the other shareholders on 22-23 January 2008.[392]

272. The Tribunal is of the view that the condition under Section 6.7(i) that any transfer of shares be made for cash or cash equivalents was considered by the parties to the JIA to be an essential element of the contract.[393] This is evidenced by the seriousness of the sanction that had been agreed in case of breach of such condition, the "nullity" and the "no force or effect" of the purported transfer.

273. The transfer of shares between Gambrinus and Inv. Polar made on 24 January 2008 under the Share Purchase Agreement may not be given effect in the present case in view of the breach of the agreed essential condition that the transfer be made for cash or cash equivalents, the share-for-share consideration agreed in the Common Share Subscription Agreement of 15 February 2008 being not equivalent to cash.

274. This conclusion dispenses the Tribunal from dealing with Respondent's subordinate claim whereby, since the investment was not made in good faith, it should in any case be denied protection. For what may be of relevance in the present case, the Tribunal is of the view that Claimant did not act in breach of the good faith, its conduct being rather motivated by an

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[390] *Ibid.*, ¶¶ 53, 64.

[391] Cl. Response, ¶ 47; Rodner Opinion, ¶¶ 67-70.

[392] *Ibid.*, ¶ 73.

[393] Resp. Submission, ¶ 44; Montoya Opinion, ¶ 54.

erroneous interpretation of the relevant provisions of the JIA and the By-Laws. For that reasons, there was no bad faith representation by Claimant to the other shareholders that the transfer would comply with Sections 6.2.2 and 6.7 of the JIA.[394]

275. As confirmed by a recent ICSID award, "a tribunal's jurisdiction is limited to a dispute between the host State and a national or company which has acquired its protected investment before the alleged breach occurred."[395] This holding, which follows a long series of consistent investment treaty decisions,[396] is based on the principle whereby "the substantive protections of the BIT apply to the State conduct that occurred after these protections became applicable to the eligible investment." [397]

276. Claimant's claim in this arbitration is founded on Respondent's expropriation of its investment on October 10, 2010 in breach of Article 5 of the BIT[398] as well as on the breach of the fair and equitable treatment of its investment under Article 2(2) of the BIT due to Respondent's expropriatory actions.[399] Claimant owned no investment at the time of the alleged expropriation of Fertinitro shares on 10 October 2010, due to the Share Purchase Agreement with Inv. Polar being of no force and effect.[400] Having made no investment which may fall within the BIT protection, Claimant's claim is not subject to the Tribunal's jurisdiction which, accordingly, must be declined.

277. At the end of the analysis of jurisdiction *ratione personae,* the Tribunal indicated that it would examine in the context of jurisdiction *ratione materiae* whether Gambrinus owns an investment in Venezuela and, if so, whether it is a shell company having made no contribution, as alleged by Respondent.[401] Having reached the conclusion that Claimant did not own an investment in Venezuela at the time of the alleged BIT breaches, the Tribunal

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[394] *Supra*, ¶ 268.

[395] *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/10/17, Award, 9 January 2015, ¶ 146.

[396] *Ibid.*, n. 171.

[397] *Ibid.*, ¶ 147.

[398] Cl. Mem., ¶ 155.

[399] *Ibid.*, ¶ 132.

[400] *Supra*, ¶ 273.

[401] *Supra*, ¶ 147.

has declined jurisdiction. Accordingly, there shall be no further analysis of the present case by the Tribunal.

VI. THE COSTS OF THE PROCEEDING

278. The Parties filed simultaneous submissions on costs on 17 October 2014 and simultaneous reply submissions on 31 October 2014.

279. In its submission Claimant contends that it should be awarded the totality of its arbitration costs, including legal fees, experts' fees, and other disbursements associated with this arbitration, as well as its share of the costs of the Tribunal and the Centre, in the amount of USD 7,817,562.63.

280. In its submissions Respondent argues that regardless of the outcome of this case Claimant's behaviour throughout this arbitration justifies its bearing all costs incurred in these proceedings, *i.e.* its own costs as well as Respondent's costs for a total amount of USD 7,607,586.24 (the share of ICSID costs, equal to USD 350,000, being provisional). According to Respondent, the arbitration was unnecessary since negotiations with Pequiven on compensation should have been maintained until their conclusion. Had Claimant disclosed from the outset that the purported share transfer had been done in breach of the relevant agreements Respondent would have been in a position to object initially to the Tribunal's jurisdiction.

281. The fees and expenses of the Tribunal and ICSID's administrative fees and expenses amount to USD 731,432.65, divided as follows (in USD):[402]

Arbitrators' fees and expenses:

Prof. Piero Bernardini	USD 182,932.56
The Hon. Marc Lalonde	USD 151,942.80
Professor Pierre-Marie Dupuy	USD 170,613.69

[402] The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account as soon as all invoices are received and the account is final.

ICSID's administrative fees:	US$ 128,000.00
ICSID's expenses(estimated):[403]	US$ 101,881.10

282. The Tribunal's fees and expenses as well as ICSID's administrative fees and expenses are paid out of the advances made by the Parties. As a result, each Party's share of the costs of arbitration amounts to USD 365,716.32.[404]

283. The Tribunal has the power to order costs under Article 61(2) of the ICSID Convention, which provides:

> In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

It is recognized that in awarding costs the Tribunal enjoys broad discretion, subject to the exercise of discretion being explained, as required by Article 48(3) of the ICSID Convention providing that "[t]he award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based."[405]

284. The outcome of the case has been to some extent in each Party's favour, the Tribunal having rejected Respondent's jurisdictional objections *ratione personae* and *ratione temporis* but having accepted to decline jurisdiction, as requested by Respondent, due to Claimant's lack of title to an investment in Venezuela.

285. In view of the outcome of the case, the Tribunal considers appropriate that each Party bear in full its own legal fees and costs and that the Parties equally share the fees and expenses of the Tribunal and the costs of the ICSID facilities.

[403] The amount includes estimated charges (courier, printing and copying) in respect of the dispatch of this Award.

[404] The remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

[405] Schreuer, The ICSID Convention – A Commentary, 2nd edition 2009, p. 1235, ¶¶ 42-43.

VII. THE TRIBUNAL'S DECISION

286. For the reasons set forth above, the Tribunal decides as follows:

1. The Centre has no jurisdiction and the Tribunal has no competence to hear Claimant's claims.

2. Each Party shall bear in full all legal fees and costs it has incurred and shall equally share the fees and expenses of the Tribunal and the costs for the use of the facilities of the Centre.

Marc Lalonde
Arbitrator

Date: 14 May 2015

Pierre-Marie Dupuy
Arbitrator

Date: 7 May 2015

Piero Bernardini
President

Date: 28-04-2015